REGISTRATION OF TITLE TO LAND IN THE FORMER SPECIAL AREAS OF KENYA

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ABSTRACT

In 1956 the colonial government of Kenya embarked upon a programme of land consolidation and registration in the Native Lands, subsequently known as the Special Areas. Although the programme initially made little headway outside the Kikuyu Land Unit, it has, since Kenya became independent in 1963, been presented with great vigour and now covers all but the most thinly populated areas of the country. From the outset the objectives of the programme have been various, political, social and economic, and although it has not been warmly welcomed in all areas of Kenya, it is generally considered to have been a success.

It is the aim of this thesis to examine the operation of the programme and to assess its success in terms of its proclaimed objectives. While the thesis is written by a lawyer and necessarily relies to a considerable extent on traditional legal materials, the subject demands an inter disciplinary approach; it is impossible wholly to divorce legal issues from those of a political, social or economic nature. Indeed, at its most general, this is a study of the interaction of law and society, and the land consolidation and registration programme can be seen as an ambitious piece of social engineering.

After an introductory chapter the process of land adjudication is examined as it was seen to operate in two areas of Kenya, one (chapter II) where individual titles were registered and one (chapter III) where group titles were registered. Chapters IV, V and VI deal with the consequences of land registration, the problems to which it has given rise and the successes which it has achieved. Finally chapter VIII looks at the land control system in Kenya, a system which is designed to further official land policies and could profoundly affect the working of the land registration programme.

The law is stated as at December 31st, 1974.

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TABLE OF CONTENTS

	PAGE
ABSTRACT	2
ACKNOWLEDGEMENTS	3
TABLE OF CASES	7
TABLE OF STATUTES	11
TABLE OF RULES & REGULATIONS	20
LIST OF TABLES	21
MAPS	22
CHAPTER I. INTRODUCTION	24
1. Historical background to the research	24
2. Research objectives	34
3. Research methods and materials	37
CHAPTER II. LAND ADJUDICATION: INDIVIDUAL TITLE	42
1. Introduction	42
(i) Land tenure on the Nyabondo plateau before land adjudication	42
(ii) The early history of land adjudication on the Nyabondo plateau	49
2. The adjudication procedure	56
(i) Introduction	56
(ii) The Committee	58
(iii) The preparation of the register	61
(a) General	61
(b) Customary rights	63
(c) Absentees	77
(iv) The settlement of disputes	79
(a) General	79
(b) Procedure	81
(c) Analysis of disputes	84
(d) Complaints, objections and appeals	97
(e) Critique	112
3. Conclusions	118
CHAPTER III. LAND ADJUDICATION: GROUP TITLE	123
1. Introduction	123
2. The purpose of the Land (Group Representatives) Act 1968	126

PAGE

(i) The history of the Act 126
(ii) The provisions of the Act 131
3. The Working of the Land (Group Representatives) Act 1968 133
(i) Introduction 133
(ii) The establishment of group ranches 136
(iii) Socio-economic developments in group ranches 150
4. Conclusions 154

CHAPTER IV. THE CHALLENGE OF FIRST REGISTRATION 159
1. Introduction 159
2. Rectification of the register 163
3. Proceedings against public officers 168
4. Declarations of trusts 175
5. Rights of occupation 190
(i) Introduction 190
(ii) Rights of occupation under customary law recorded in the adjudication register 193
(iii) Rights of occupation under customary law not recorded in the adjudication register 195
(iv) Rights of occupation under the Registered Land Act 1963 196
(v) Conclusions: Methods of protecting rights of occupation under customary law 204
6. Conclusions 210

CHAPTER V. THE EFFECTIVENESS OF THE REGISTER 213
1. Introduction 213
2. Dispositions of registered land 215
3. Successions to registered land 221
(i) Unregistered successions 221
(ii) Succession under the Registered Land Act 1963 223
(iii) Succession under the Law of Succession Act 1972 .. 228
(iv) Testate succession 250
4. Conclusions 261

CHAPTER VI. THE ECONOMIC CONSEQUENCES OF THE LAND REFORM PROGRAMME 270
1. Introduction 270
2. The development of holdings: the role of credit 274

PAGE

(i) General 274
(ii) Agricultural Finance Corporation loans 278
(iii) Bank loans 284
(iv) The nature of the security required 287
(v) Summary 292

3. The pattern of holdings: the role of the land market 296
(i) General 296
(ii) Fragmentation 297
(iii) Parcellation 304

4. Socio-economic change in rural society 317
(i) General 317
(ii) Exploitation of economic opportunities 318
(iii) Changes in the social structure 326
(iv) Some case studies 331

CHAPTER VII. LAND CONTROL - A POSSIBLE SOLUTION 337
1. Introduction 337
2. The land control system today 345
(i) Introduction 345
(ii) Composition of the boards 347
(iii) Procedure of the boards 350
(iv) The decisions of the boards 353
3. The avoidance of land control 368
4. Conclusion 391

CHAPTER VIII. GENERAL CONCLUSIONS 394

SELECTED BIBLIOGRAPHY 407

TABLE OF CASES

PAGE

I. ENGLAND

Ashby v. White (1703), 2 Ld. Raym. 938, 92 E.R. 126 169

Biss, Re, [1903] 2 Ch. 40 188

Chowood Ltd. v. Lyall (2), [1930] 1 Ch. 426, affd. [1930] 2 Ch. 156 201

Dillwyn v. Llewellyn (1862), 4 De G.F. & J. 517 198

Hodgson v. Marks, [1971] Ch. 892 204

Hussey v. Palmer, [1972] 3 All E.R. 744 (C.A.) 182

Inwards v. Baker, [1965] 2 Q.B. 29 ..... 96, 197

Ives(E.R.) Investment Ltd. v. High, [1967] 2 Q.B. 379 197

Leigh v. Jack (1879), 5 Ex.D. 264 202

Plimmer v. Wellington Corporation (1884), 9 App.Cas. 699 197

R v. Hanley Revising Barrister, [1912] 3 K.B. 518 165

Ranaweera v. Ramachandran, [1970] A.C. 962 (P.C.) 173

Rawlinson v. Ames, [1925] Ch. 96 372

Steadman v. Steadman, [1974] 2 All E.R. 977 372

Valentini v. Canali (1889), 24 Q.B.D. 166 389

Wallis's Cayton Bay Holiday Camp Ltd. v. Shell Mex & B.P. Ltd., [1975] Q.B. 94 202

Walsh v. Lonsdale (1882), 21 Ch.D. 9 374

Wray v. Steele (1814), 2 V. & B. 388 185

II. KENYA

1. Reported Cases

John Abuom v. Ogwayo Okelo (1955), 3 C.R.R.1 94

Marie Ayoub and others v. Standard Bank of South Africa Ltd. and another, [1963] E.A. 619 (P.C.) 189

Chemelil Sisal Estate Ltd. v. Makongi Ltd., [1967] E.A. 166 (C.A.) 387,388,389

K.T. Clarke trading as Shipping General Services v. Sondhi Ltd., [1963] E.A. 107 (C.A.) 375

District Commissioner, Kiambu v. R. and others, Ex Parte Ethan Njau, [1960] E.A. 109 (C.A.) 164,165,168

Esiroyo v. Esiroyo and another, [1973] E.A. 388 ..... 192,196,205, 209

Githuchi Farmers Co. Ltd. v. Gichamba and another, [1973] E.A. 8 179,180,181

PAGE

Hosea v. Njiru and others, [1974] E.A. 526 199,200,202

Kiboko v. Assistant Land Registrar and others, [1973] E.A. 290.. 255

Saulo Khaemba v. Wakhina Khwatenge (1953), 1 C.R.R.3 91

Kimani v. Attorney-General, [1969] E.A. 29 and [1969] E.A. 502 (C.A.) 168,169,170, 174

Ernest Kinyanjui Kimani v. Muiru Gikanga and another, [1965] E.A. 735 (C.A.) 184,190

Simeon Munyae and another v. Mangoka Kilili and another, (1962), 10 C.R.R. 5 91

Ogare Obiero v. Obwoyo Amolo (1954), 2 C.R.R. 10 91

Obiero v. Opiyo and others, [1972] E.A. 227 ..... 191,192,195, 196,202,205, 206,

Odhiambo v. Odenyo and another, [1973] E.A. 416 171,172,174

Odhiambo v. Otieno and another, [1974] E.A. 116

Ondiba Omwamba v. Osoro Omwamba (1960), 8 C.R.R. 1 91

Russell v. Principal Registrar of Titles, [1972] E.A. 249 (C.A.) 358

Wambua v. Wathome and another, [1968] E.A. 40 351

2. Unreported Cases

Erasto Angieno v. Sospiter Achieng et al., High Court (Kisumu), Appeal Case No.67 of 1968 94

Kamanza Chiwaya v. Manza Tsuma, High Court (Mombasa), Civil Appeal No.6 of 1970 398

Njenga Gathama v. Karera Njuguna, High Court (Nairobi), Civil Case No. 1544 of 1971 385

Joseph Gathogo Gathagu v. Njuguna Gathagu, High Court (Nairobi), Civil Appeal No.35 of 1973 184

Kinyanjui s/o Kabue v. Geoffrey Gichini Nyoro, High Court (Nairobi), Civil Case No.504 of 1973 385

Ikonya Kanjuki v. Ikonya Mwai, High Court (Nairobi), Civil Case No. 2100 of 1973 186

Rev. David Mwangi Kigo v. Charles Kiarie Ngugi, High Court (Nairobi), Civil Case No.1588 of 1970 384

Kiharu District Magistrate's Court (formerly Kiharu African Court)

Succession Cases No. 13 of 1965 253

No. 6 of 1963 253

No. 30 of 1966 238

No. 1 of 1969 254

No. 35 of 1970 239

No. 12 of 1971 239

PAGE

Kiona Kihumba and others v. R. Kireri, Resident Magistrate's Court (Muranga), Civil Case No.50 of 1971 189

Njachi Kingathia v. Kingathia Wanjau, High Court (Nyeri), Civil Case No.55 of 1968 175

Jakumu Kinoe v. Gathogo s/o Jakumu Kinoe, High Court (Nyeri), Civil Case No.55 of 1972 176

Joseph Kamau Kinuthia v. John Senewa Kaurai, High Court (Nairobi), Civil Case No.404 of 1970 383

Jesii Bitsushe Maruti v. J.A. Mudiambia and the Attorney-General, High Court (Kisumu), Kakamega Civil Case No.10 of 1973 ..... 107, 110

Muchunu Mbaria v. Michael Ithebu Mbaria, Resident Magistrate's Court (Muranga), Civil Case No.19 of 1970 183,184

Gathekia s/o Mbote v. Muiruru s/o Mbote, High Court (Nairobi), Civil Appeal No.52 of 1972 184

Cyprian Muinde Mbuve v. Maingi Nzula, High Court (Nairobi), Civil Case No.26 of 1972 386

Mungai Mukiri v. James Njoroge and Samuel Mukiri Mukono, High Court (Nairobi), Civil Case No.248 of 1971 380,376,377

Kamau Mukono v. Julius Kamau Nganga, High Court (Nairobi), Civil Case No.1762 of 1973 184

Njoroge Mumira v. Njoroge Ngumi, High Court (Nairobi), Civil Appeal No.121 of 1970 383,385

Hoseah Muraya Muthee v. James Meitamei ole Mutii, High Court (Nairobi), Civil Case No.15 of 1973 382

Justin Mwago v. Kariuki Kariraga, High Court (Nairobi), Civil Case No.1343 of 1971 384

James N. Njaga v. Kahungu Kimamu, High Court (Nairobi), Civil Case No.1472 of 1971 184

Josphat Gitungo Njau v. Mrs. Wairimu Kairu, High Court (Nairobi), Civil Case No.953 of 1970 380,381

Cornel Nyambuo v. Henry Onyango, Resident Magistrate's Court (Kisumu), Land Appeal Case No.51 of 1970 94

Nyachero s/o Odigo v. Nelson Ongudu, High Court (Kisumu), Civil Appeal No.60 of 1968 91

Michael Ojode and another v. Dickson Opiyo, High Court (Kisii), Civil Appeal No.1 of 1971 90

Ongudi Ojow and Bengo Ochume v. Amwom Atito, Resident Magistrate's Court (Kisumu), Land Appeal Case No.4 of 1967. 94

John Oloo v. Erasto Oduor, High Court (Kisumu), Misc. Civil Application No.37 of 1972 84

Ondoyi Oyugi v. Okwanyo Owako, Resident Magistrate's Court (Kisumu), Land Appeal Case No.32 of 1969 93

Kabugu Solomon v. Mwangi Solomon, High Court (Nyeri), Civil Appeal No.3 of 1969 175

Kariuki Thuku v. Adriano Ngure, High Court (Nyeri), Civil Case No.35 of 1968 185

PAGE

Uasin Gishu Land Control Board v. Kipwalei Molosoi, Court of Appeal for East Africa, Civil Appeal No.22 of 1974 365

Mungora Wamathai v. Muroti Mugweru, High Court (Nyeri), Civil Case No.56 of 1972 182,183

Rungoyo Wanyoya and two others v. Samuel Gichango and another, High Court (Nyeri), Civil Case No.747 of 1971 177

Kahunyo Waweru v. Mwangi Waweru, High Court (Nairobi), Civil Appeal No.140 of 1972 256

Atieno Wayumbe and Ogala Atieno v. Pitalis Mbiji, High Court (Kisumu), Appeal Case No.67 of 1968 94

III. UGANDA

Souza Figueiredo and Co. Ltd., v. Moorings Hotel Co. Ltd., [1960] E.A. 926 (C.A.) 374,375

Fazel Visram Muman v. MR. Lalani, [1963] E.A. 425 388

TABLE OF STATUTES

I. AUSTRALIA: STATE OF VICTORIA

	PAGE
Transfer of Land Act 1958, No.6399	
s.43	378

II. KENYA

1. Acts

Note: Chapter numbers refer to the 1962 Revised Edition of the Laws of Kenya, unless otherwise stated.

African Courts (Suspension of Land Suits) Ordinance 1956, No.1. of 1957	
s.4(1)	29
Africans' Wills Act 1961, Cap.169	251,252,256, 257,258,259, 260,262,264, 398
s.3	251
s.4(a)	251
(c)	251
(e)	256
Sched.2	251
Agricultural Credit Act 1931 (formerly known as the Land and Agricultural Bank Ordinance), Cap.323	278
Agricultural Credit (Amendment) Act 1963, No.27 of 1963	
s.4	278
Agricultural Finance Corporation Act 1969, Cap.323 (1970).....	278
s.19(1)	290
Births and Deaths Registration Act 1928, Cap.149 (1967)	
s.15(2)	224
Chattels Transfer Act 1930, Cap.28	290
Constitution of Kenya (Amendment) Act 1965, No.14 of 1965	
s.6(7)	343
Constitution of Kenya (Amendment) Act 1966, No.16 of 1966	
s.4	343
Sched.2.	343
Fatal Accidents Act 1946, Cap.32	248
Government Lands Act 1915 (formerly known as the Crown Lands Ordinance), Cap.280 (1970)	32
Part VI (Cap. 155, 1948)	24

PAGE

Government Proceedings Act 1956, Cap.40 (1970)

s.4(4) 170,171

(5) 172,174

(6) 174

Judicature Act 1967, Cap.8 (1968)

s.3(1) 91

(2) 83,91,239

Land Adjudication Act 1968, Cap.284 (1970) 32,57,81,105, 121,131,154, 162,173,194 244

s.2 155

s.6(1) 59

s.7(1) 97

s.8(1) 114

(2) 97

s.10(1) 99

(2) 70

s.11(c) 70,79,99

s.12(2) 172

s.15(a) 160

(b) 60

s.19(2) 60

s.20(a) 60,81

(b) 60

(c) 70,79

(d) 70

(e) 60

s.21(3) 97

(4) 97

s.22 97

s.23(2)(a) 62

(b) 120,130

(d) 87,120

(e) 63,70,73, 193,196,210

(3)(c) 74,193

(5)(a) 131

(c) 131

s.24 62,98

s.25(b) 98

(c) 99

	PAGE
s.26(1)	99,100
(2)	99
s.27(1)	99
(3)(b)	106
(c)	106
s.28	107,109
s.29(1)	105
s.30(1)	84
(2)	84
s.34	170,171
Land Consolidation Act 1963 (formerly known as the Land Adjudication Act), Cap.283 (1964)	32,53,57,79, 244
s.9	59
s.15(2)(a)	62
(b)	193
(c)	63, 194
s.24(1)	193
Land Control Act 1967, Cap.302 (1968)	181,337,343, 346,357,360, 387,389,391, 392
s.3	344
s.4	344
s.5	344
s.6	390
(1)	179,180,344
(a)	351
(b)	351
(2)	180
(a)	381,383,384, 387,389,390
(3)(a)	309,351,369
(b)	351,369
s.7	382,385,389
s.8	365
s.9(1)	354
(b)(i)(c)	355
(iii)	355
(iv)	309,356,357, 358
(c)	369
(i)	356
(ii)	356

	PAGE
(2)	351
s.11(1)	364
(2)	365
s.12(1)	365
s.13(1)	364
(2)	365
s.17(1)(a)	351,370
s.22	268,390
s.24	356,368
Sched.s.1	349
s.2	366
s.3	365
Land Control Ordinance 1944, Cap.150 (1948)	339,340,343, 353
s.3(2)	339
s.7(1)	339
(2)	339
s.8(1)(b)	340,356
(c)	340
s.13	340
s.14	340
Land Control (Amendment) Ordinance 1950, No.46 of 1950	
s.2(a)	340
Land Control (Special Areas) Ordinance 1959 (formerly known as the Land Control (Native Lands) Ordinance), No.28 of 1959	31,338,342, 353,365
s.3(1)	340
(2)	340
s.4(1)	340,347
(d)	340
s.9	341
s.11(1)(b)	341
s.12(1)	341
Land (Group Representatives) Act 1968, Cap.287 (1970)	125,131,133, 136,145,154, 155,156
s.5(1)	131
s.7(1)	131
(3)	132
s.8(1)	132
(2)	132,139
s.9	132
s.12	145

	PAGE
s.13(1)(a)	132
(b)	132
s.15	132
(2)	139
(6)	132
s.17(1)	132,140,147
s.18	132
s.19(1)	132
s.28	146,147,148, 149
s.31(2)	132
s.32	354
Land (Perpetual Succession) Act 1923, Cap.286	131
Land Registration (Special Areas) Ordinance 1959 (formerly known as the Native Lands Registration Ordinance), No.27 of 1959	28,31,32,165
s.40(f)	203
s.89	163
(1)(a)	165
s.90(1)(b)	164
s.97	170
Parts I and II	53
Part VIII	198
Land Titles Act 1908, Cap.282	32
Law of Contract Act 1960, Cap.23	
s.2(1)	389
s.3(3)	371
Law of Contract (Amendment) Act 1968, No.28 of 1968	
s.2(b)	363,371
s.3	371
Law of Succession Act 1972, No.14 of 1972	228,229,235, 236,237,240, 242,243,248, 249,250,251, 258,259,261, 265,313
s.5(1)	258
s.8	258
s.9(1)(a)	259
(b)	259
(2)	259
s.18(2)	259
ss.26-30	231
s.29(a)	232
(b)	232

	PAGE
s.32(1)	240
s.35(1)	230
(b)	234
(2)	230,234
(3)	230
(4)	230
(5)	230,233
s.36(1)	230
(b)	234
(3)	231
s.38	231,233
s.39(1)	231,234
s.40(1)	231,236
(2)	231
s.41	230
s.42	230
(a)	232
(b)	233
s.58	235
s.99	229
s.100	229,244
Sched.8	229
Sched.9	229
Limitation Act 1948, Cap.11 (1948)	
s.10	198
Limitation of Actions Act 1968, Cap.22 (1970)	90,198
s.7	198
s.37	198
s.38(1)	199
s.41(a)(v)	90
s.42(c)	90
Magistrate's Courts Act 1967, Cap.10 (1968)	
s.2	398
s.10(1)(a)	224,398
Marriage Act 1902, Cap.150	256
Penal Code 1930, Cap.63 (1970) Chapters XI and XVIII	173
Public Officers Protection Act 1910, Cap.186	
s.2(1)(a)	174
Public Trustee Act 1925, Cap.168 (1968)	244

	PAGE
s.2A	244
s.4(3)	227
(4)(i)	227,235
(ii)	227
Registered Land Act 1963, Cap.300 (1964)	32,63,64,13 178,193,196, 199,202,203, 205,207,211, 214,216,217, 223,364,375
s.3	73,75,193, 197,214
s.8(b)	268,364,370
s.11(2)	194,210
(2A)	132,144
(3)	74,193,195, 203,210
s.12(1)	33
s.14(d)	108
s.21(2)	160
s.24(1)	160
s.25(1)	301
(2)	299
s.27(a)	63,196
s.28	192,196
(a)	63
(b)	63
s.30	63,192,208
(d)	74,193,203, 204,
(f)	199
(g)	202,203,204
s.33(3)	288
s.38(1)	215,373,375, 376, 377
(2)	371
s.39(2)	73,178,378
s.41(1)	268,364
(2)	268,364
s.46(1)(c)	74,195
(2)	193,217
s.47	215
ss.65-84	277
s.74(2)(b)	288
s.85(1)	215

	PAGE
(2)	215
s.89	299
s.100(1)	74,197
(2)	75,197
s.101(3)	68
(a)	311
(4)	68,311,312
s.105(1)	358
s.106(1)	358
s.120	229,244,255, 262
(1)	223
(2)	223
(3)	224
(7)(a)	311
(8)	90
s.121	229,244,262
s.126(1)	72,178
(2)	73,376
(3)	73,178,378
s.128(1)	181,386
s.131(1)	193
(a)	376
(b)	74,197
s.133(2)	74
s.136(1)	73
s.142(1)	108
s.143	105,163,167
(1)	71,78,108, 109,163,167, 175,176,177, 178,183,185, 186,189,192, 211,370
(2)	163
s.144	167
(1)(b)	109,164
s.150(2)(a)	112
s.155(3)	364
s.159(1)	163
s.163	182,373
s.164	33
s.165	32
Sched.	32

	PAGE
Registration of Documents Act 1901, Cap.285	32
Registration of Titles Act 1919, Cap.281	32,375
s.32	375
Statute Law (Miscellaneous Amendments) Act 1969, No.10 of 1969	
s.2 and Sched.	227
Trust Land Act 1938 (formerly known as the Native Lands Trust Ordinance), Cap.288	24,30,31
s.64(1)(s)	29
Part IV	25
Trustee Act 1929, Cap.167	235
Trusts of Land Act 1941, Cap.290	235
2. Applied Acts	
Indian Succession Act 1865, No.10 of 1865	251,254,256, 257,264
s.50	256
Indian Transfer of Property Act 1882, No.4 of 1882	33
s.54	375
3. Constitution of Kenya 1963	
s.219(1)	342,343
(2)	343
Chapter XII, Part 3	339,342
III. MALAWI	
Registered Land Act 1967, Cap.58:01 (Revised Laws of Malawi, 1968)	
s.27(f)	202
s.121(1)	156
IV. SUDAN	
Land Settlement and Registration Ordinance 1925, Title XX, Sub-title 2 (Revised Laws of the Sudan, 1955)	31
V. TANGANYIKA	
Land Registration Ordinance 1953, Cap.334 (Revised Laws of Tanganyika, 1950-54)	31
VI. UGANDA	
Registration of Titles Ordinance 1922, Cap.123 (Revised Laws of Uganda, 1951)	
s.51	374

PAGE

VII. UNITED KINGDOM

Crown Proceedings Act 1947 (10 & 11 Geo.6, c.44)

s.2(5) 172

(6) 174

East African Order in Council 1897, S.R.O. No.1575 of 1897, Art.11(b) 33,251,375

Kenya (Native Areas) Order in Council 1939, S.R.O. No.516 of 1939, G.N. No.138 of 1939 24

Kenya (Land) Order in Council 1960, S.I. No.2202 of 1960, L.N. No. 589 of 1960

s.14(1)(c) 339,342

s.21(1) 24,32,338

s.22 24

Sched.1. 24,32,338

Sched.3. 24

Kenya Order in Council 1963, S.I. No.791 of 1963, L.N. No.245 of 1963

s.11(1) 342

Kenya Independence Order in Council 1963, S.I. No.1968 of 1963, L.N. No.718 of 1963 342

Land Registration Act 1925 (15 & 16 Geo.5,c.21)

s.70(1)(g) 202,204

s.82(1) 163

(3)(a) 163

Law of Property Act 1925 (15& 16 Geo.5,c.20)

s.34 312

s.40 371

(1) 372

Limitation Act 1939 (2 & 3 Geo.6,c.21) 198

TABLE OF RULES AND REGULATIONS

Kenya (Amendment of Laws) Agriculture Regulations 1962, L.N. No.352 of 1962 342

Kenya (Land Control)(Transitional Provisions) Regulations 1963, L.N. No.457 of 1963 ..... 339,342,343, 346

Land Control Regulations 1961, L.N. No.141 of 1961 ..... 339,342,343, 387

s.9(1) 387

(3) 387,388

s.11(b)(iii) 343

Land Control (Special Areas) Regulations 1961, L.N. No.147 of 1961 342

Native Land Tenure Rules 1956, L.N. No.456 of 1956 ..... 28,29,31, 53,164

PAGE

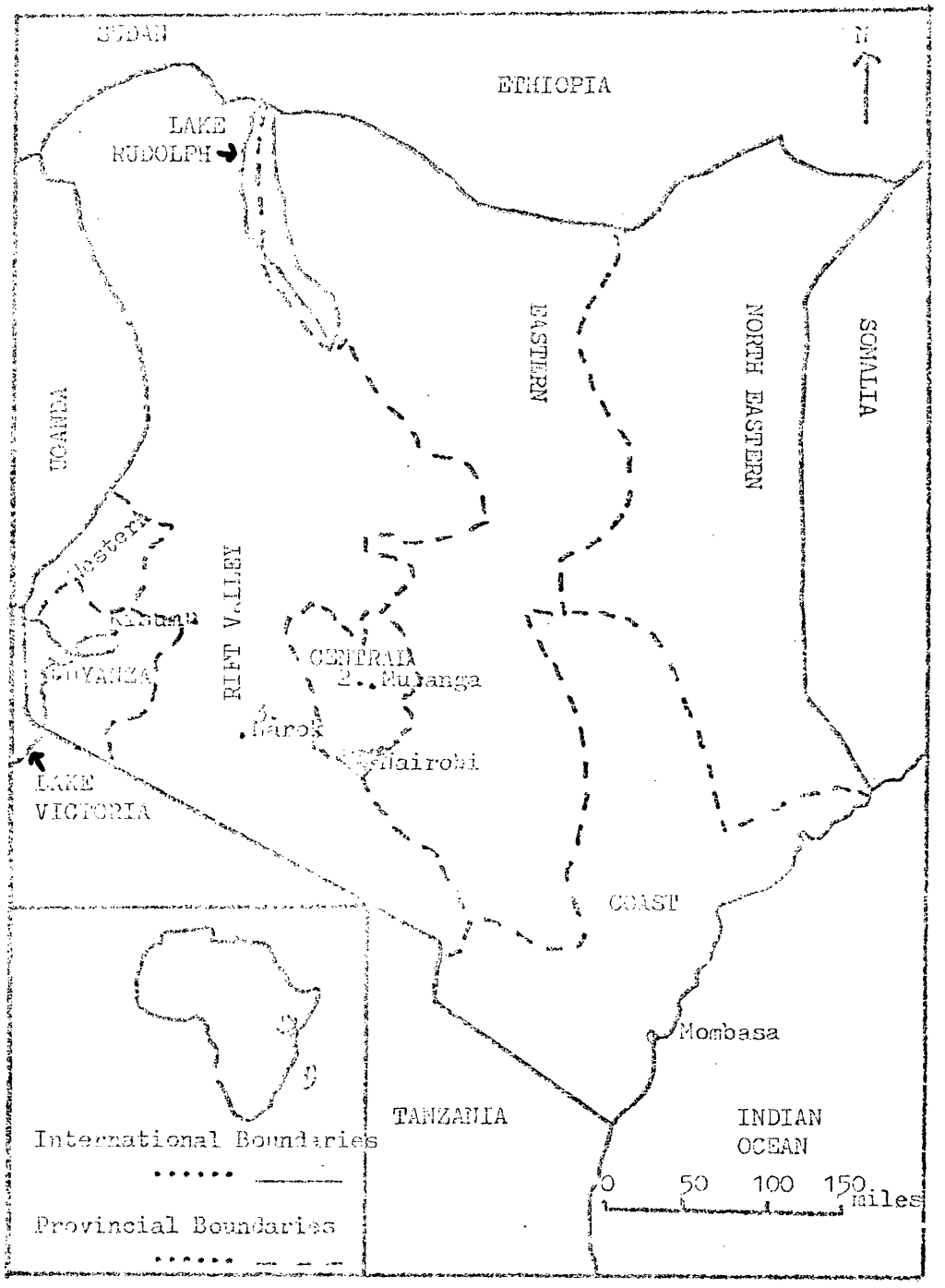
Note: 1. The chapter number of a statute will only be given on the occasion when it is first cited in the text.

2. The following abbreviations will be used throughout: J.A.A. (the Journal of African Administration), J.L.A.O. (the Journal of Local Administration Overseas) and E.A.L.J. (the East African Law Journal).

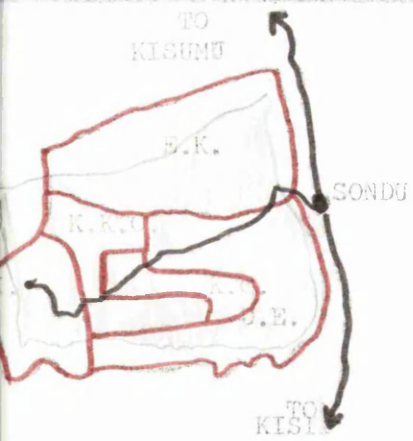
LIST OF TABLES

1. Outcome of objections heard by the adjudication officer in East Koguta. 103
2. Civil cases filed in the Resident Magistrate's Court, Muranga. 161
3. Estates handled by the Public Trustee 245
4. Breakdown of land charges 277
5. Applications made to the Kiharu divisional land control board 367
6. Applications heard by the Nyando divisional land control board 367
7. Number of civil cases filed in the High Court, Nyeri 379
8. Analysis of land cases filed in the High Court, Nyeri, 1967-1973 379

MAP OF KENYA



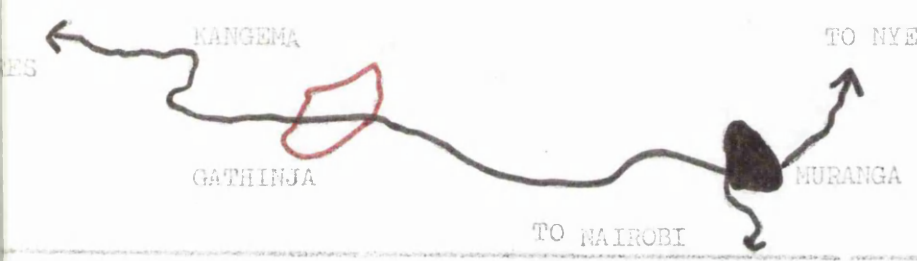
Field-areas: 1. South Nyakach
2. Gathinja
3. Narok



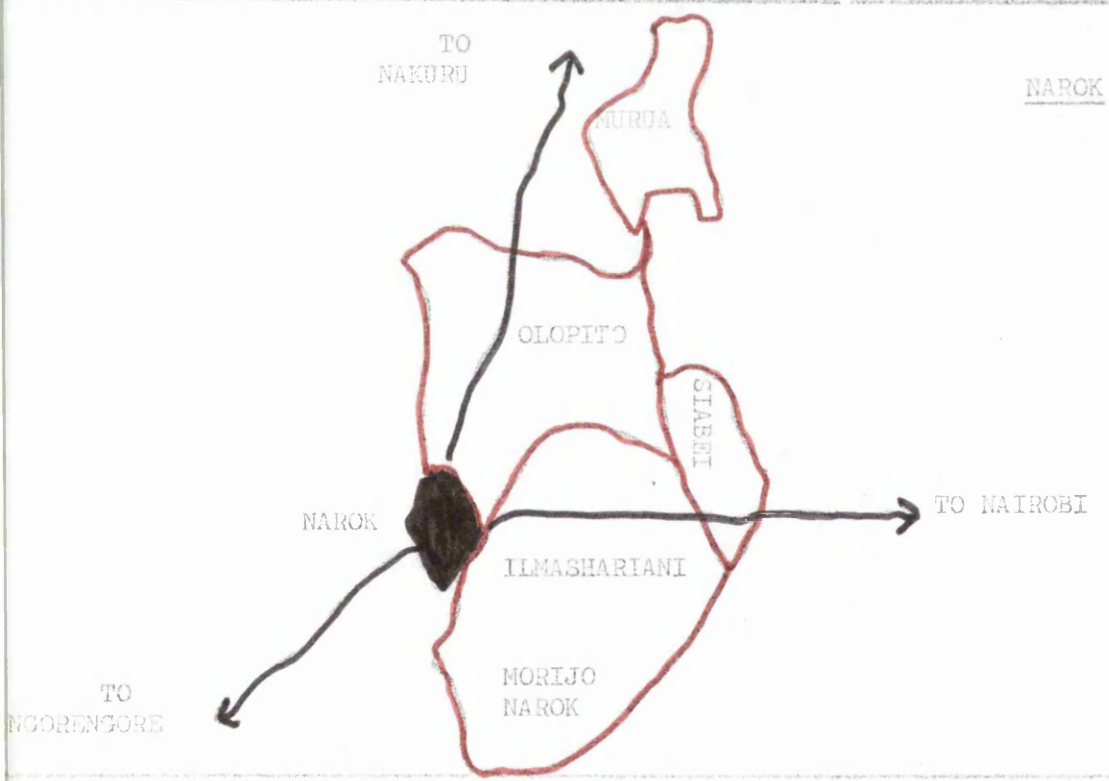
SOUTH NYAKACH

KEY: E.K. = East Koguta
K.K.O. = Kamnwa-Keyo-Ogoro
K.O. = Kabete-Obuya
K. = Kajimbo
D.E. = Diangi East

The shaded area represents the Nyabondo plateau.



GATHINJA



NAROK

N

ATION SECTION BOUNDARIES:

5 10 15 20 MILES

CHAPTER I

INTRODUCTION

1. Historical background to the research[1]

When the State of Emergency was declared in 1952, most Africans in Kenya were living on the land in tribal reserves known as Native Land Units. Several of the reserves bordered on areas of European settlement, known as the White Highlands, and the encroachment on African lands both by the settlers and by the government had long been a source of concern among Africans. Although statutory provision for reserves for the use and enjoyment of the African tribes had been made as long ago as 1915,[2] it had only been comparatively recently, following the Report of the Kenya Land Commission,[3] that such areas had been effectively delimited and a satisfactory system for their control and administration devised. This system largely dated from the passing of the Kenya (Native Areas) Order in Council 1939,[4] which vested Native Lands in the Native Lands Trust Board, and the Native Lands Trust Ordinance 1938,[5] which provided

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1. Only a brief outline of the historical background is given here. The history of registration of title in the Special Areas of Kenya has been fully dealt with elsewhere, particularly in M.P.K. Land Reform in the Kikuyu Country (Nairobi, Oxford University Press, 1967), on which this account is largely based.

2. Crown Lands Ordinance 1915, Cap.155 (1948), Part VI. This Act is known today as the Government Lands Act, Cap.280 (1970).

3. Cmd. 4556, 1934.

4. G.N. No.138 of 1939. This Order was revoked by the Kenya (Land) Order in Council, L.N. No.589 of 1960, s.22 and Sched.3.

5. Cap.288. This Act, much amended, is known today as the Trust Land Act. Its title was amended by the Kenya (Land) Order in Council, L.N. No.589 of 1960, s.21(1) and Sched.1.

for the administration of these lands. Although this system was generally successful in protecting the Native Lands from further encroachments, it did not deal with the problem of the increasing land shortage that was becoming particularly serious in the Kikuyu Land Unit, and the increasing demand for individual titles. The rights of Africans to land in the Native Lands were governed by native law and custom, and there was no way in which they could obtain individual titles to land except through the procedure of setting land apart,[6] a procedure generally used only for the leasing of commercial sites to non-Africans.

The Kikuyu Land Unit was largely situated between the Aberdare Mountains and the road running north from Nairobi through Fort Hall to Nyeri. Numerous rivers flow down from the Aberdares in an easterly direction, creating a landscape of alternating ridges and valleys. Traditionally a ridge would be occupied by a mbari, a lineage grouping of all Kikuyu who traced their descent through the male line from a known ancestor. Each family within the mbari would occupy a segment of the ridge with its landholdings extending down one or both sides of a ridge. When land became scarce, someone would take his family and settle on another ridge that was unoccupied, thus founding a new mbari. Within each Kikuyu household there was considerable fragmentation of holdings since each wife required several plots in order to grow a variety of crops, each requiring different climatic or soil conditions. This fragmentation was aggravated both by the custom of succession by which the mother's plots were divided equally among her sons and by the practice of shifting cultivation.[7]

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6. Native Lands Trust Ordinance 1938, Part IV.

7. Sorrenson, op. cit., pp.4-5.

By the time of the second World War it was no longer possible for someone to leave his mbari and to go and found another mbari elsewhere. There was no unoccupied land; indeed parts of the Kikuyu Land Unit were desperately overcrowded. The problem was compounded by the considerable degree of fragmentation that had occurred, some families owning literally dozens of tiny plots, often separated from each other by great distances. Moreover, the growing congestion often led to serious soil erosion as the Kikuyu were compelled to over-cultivate and over-graze their lands.

Land shortage together with the increasing cultivation of permanent cash crops resulted not only in the stabilisation of agriculture, but in the development of a land market. Formerly the alienation of land had been controlled by the mbari. If someone wished to sell land to an outsider, he had first to offer it to members of his mbari and only if they refused it and the head of the mbari, the muramati, agreed, could he sell it to an outsider. In some mbari the alienation of land to non-members was prohibited altogether.[8] However, during the colonial period the importance of the mbari and the powers of the muramati diminished in this respect, as in many others. This disappearance of traditional controls over the alienation of land is what is generally meant by the "individualisation of land tenure",[9] an expression that is commonly used in this context. This process was accompanied by an increased emphasis on boundaries which itself resulted in a considerable amount of land

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8. Ibid., p.10.

9. Even in 1925 the individualisation process was "particularly noticeable among the natives of Kikuyu and Kavirondo." Report of the East African Commission (Cmd.2387, 1925), p.25. The theme recurs throughout the official reports.

litigation.[10] The demand for individual titles among the Kikuyu arose from the belief that they would provide security against possible encroachments on the part of the government, the settlers or other Kikuyu.

As early as 1910 the Governor of Kenya had proposed the preparation of a record of existing rights as a first step towards the registration of individual African titles[11] and several proposals of a similar kind were made over the next few decades.[12] However, in spite of strong pressure from influential Kikuyu, nothing was done, partly due to a division of opinion among administrators about the desirability of hastening the demise of traditional institutions.[13] Effort was rather concentrated on promoting the agricultural development of the Kikuyu Land Unit by taking measures against soil erosion and encouraging farmers to consolidate their holdings. However, although the provincial administration was keenly aware of the problems caused by fragmentation, consolidation was carried out informally by the sale or exchange of fragments; no programme of systematic consolidation had been devised when the State of Emergency was declared in October 1952.[14]

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10. Sorrenson, op. cit., p.79. Back in 1932 it was reported that land disputes among the Kikuyu were becoming more frequent and more bitter due to the individualisation process. The report continues: "This movement [the individualisation process] has also tended to undermine the authority of the head of the clan in the matter of land distribution, as the new generation is intent on holding its land free of all the encumbrances laid down by immemorial custom." Colony and Protectorate of Kenya, Native Affairs Department, Annual Report, 1932, p.129.

11. Sorrenson, op. cit., p.27.

12. For example, the Kenya Land Commission cautiously proposed the experimental introduction of a register in part of Kiambu district. Report of the Kenya Land Commission (Cmd.4556, 1934), p.423.

13. Sorrenson, op. cit., p.32.

14. In August 1952 the District Commissioners of the Central Province agreed that a pilot consolidation scheme should be started in Nyeri; ibid., p.68.

During the early years of the Emergency the government's most pressing problem was to discover a way of wearing the passive majority of the Kikuyu from their allegiance to Ma-u Ma-u. The guerillas (mainly Kikuyu) were based in the forests bordering on the Kikuyu Land Unit and depended heavily on the passive support of the Kikuyu living in the Land Unit. In order to solve the problem the government took two related courses of action. It confiscated the land of activists and those suspected of aiding the activists with the intention of distributing it to the loyalists. Secondly, it embarked upon a compulsory villagisation policy, as security was difficult to maintain while Kikuyu continued to live in scattered settlements. It was realised at the same time that this would be an appropriate moment to press ahead with land consolidation, especially since this would provide an opportunity of rewarding loyalists with larger and better land holdings.[15] The first large scale consolidation scheme was started in 1953 in Nyeri district. Fort Hall district and Kiambu district soon followed suit and in November 1955 land consolidation had been adopted as provincial policy, to be completed within five years.[16]

Consolidation was usually started in a small area (part of a location, typically) where the cooperation of the local people could be relied upon. A committee of elders was established to ascertain the ownership of all fragments in the area.[17] Each fragment would be measured and each owner would be allocated a single holding of the same acreage as the aggregate of his fragments, a small percentage being deducted to cover the area required for public purposes. Those with sub-economic holdings were at first obliged to live on plots in the villages. In its early stages the

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15. Ibid., p.107.

16. Ibid., p.119.

17. At this stage no attempt was made to record rights which did not amount to full ownership, nor indeed did the Native Land Tenure Rules 1956, make any provision for the recording of such rights. It was the Native Lands Registration Ordinance 1959, that first provided for their entry on the record of existing rights.

land consolidation programme was largely implemented by the Agricultural Officers, who were also expected to prepare a farm plan for each new holding.

Strangely enough, however, it was not until 1956 that the land consolidation programme was given any legal backing. Legislation was needed to provide a uniform and rational consolidation procedure and to validate what was already happening on the ground. Moreover little consideration had hitherto been given to the nature of the title which the owner of a consolidated holding acquired, though by the end of 1955 it seems to have been agreed that a system of registration of title would have to be introduced.[18] The delay in bringing in suitable legislation can partly be explained by differences of opinion as to what sort of legislation, if any, was required.

The "setting apart" provisions of the Native Lands Trust Ordinance 1938 were clearly inadequate to deal with a large scale programme of land consolidation and registration. However, section 64(1)(s) of that Ordinance confined on the Governor the power to make rules with the advice and consent of the Native Lands Trust Board, thus providing a means of dealing with land consolidation and registration within the existing legislative framework. Rules were accordingly made in 1956[19] which provided a consolidation procedure based on the one that was currently being used in the Kikuyu Land Unit, which validated what had already been done and laid down a general legal framework for the

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18. Sorrenson, op. cit., p.119.

19. Native Land Tenure Rules 1956, L.N. No.452 of 1956. Moreover, land suits in consolidation areas were suspended by virtue of the African Courts (Suspension of Land Suits) Ordinance 1956, No.1 of 1957, s.4(1).

consolidation and registration of holdings and the control of land transactions. The Rules were designed as a stop-gap until more detailed substantive legislation was drafted.[20]

One serious shortcoming of the Rules was that though they provided that land transactions must be registered, it was not clear how transactions would be effected nor whattransactions would be possible. Native Lands were governed by native law and custom and the Rules could not create rights or allow dealings in land which were not recognised by customary law. Many people, however, saw customary law as an obstacle to agricultural development and recommended that it be replaced by a system based on the registration of individual titles. The Swynnerton Plan had proposed that "the African farmer ... be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against financial credits."[21] The East Africa Royal Commission had recommended the adjudication and registration of individual titles in suitable areas subject to certain controls[22] and the Arusha Conference on land tenure had largely agreed with these recommendations, favouring a simple system of registration based on existing legislation in the Sudan.[23] Clearly it was not going to be enough to amend the Native Lands Trust Ordinance 1938; new legislation was

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20. Sorrenson, op. cit., p.132.

21. Swynnerton, R.J.M., A Plan to Intensify the Development of African Agriculture in Kenya (1954), s.13.

22. East Africa Royal Commission, 1953-1955, Report (Cmd.9475, 1955), Ch.23.

23. Report on the Conference on African Land Tenure in East and Central Africa, special supplement to the Journal of African Administration, (October, 1956).

necessary and in March 1957 a working party was appointed to consider what form it should take.

The working party reported in the summer of 1958,[24] proposing the enactment of two bills, both of which became law in 1959, as the Native Lands Registration Ordinance[25] and the Land Control (Native Lands) Ordinance.[26] Part of the former Ordinance was based on the Native Land Tenure Rules and dealt with the processes of land adjudication and consolidation. Part of it introduced a system of registration of title to be applied to land which was registered in accordance with these processes. Once first registration was effected, land ceased to be subject to the Native Lands Trust Ordinance 1938; it would be governed by the Native Lands Registration Ordinance 1959 which contained a complete system of substantive law. Once land was registered, customary law ceased to apply to it.[27]

The Native Lands Registration Ordinance 1959 is based largely on the Sudan Land Settlement and Registration Ordinance 1925[28] and the Tanganyika Land Registration Ordinance 1953,[29] both of which had introduced systems of registration of title on the English, rather than the

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24. Report of the Working Party on African Land Tenure, 1957-1958, (1958).

25. Ordinance No.27 of 1959.

26. This Ordinance, No.28 of 1959, was concerned with the control of transactions involving registered land and is discussed in Ch. VII, infra.

27. Succession to registered land continued to be governed by customary law. See Ch. V, infra, for a full discussion of this topic.

28. Title XX, Sub-title 2 (Revised Laws of the Sudan, 1955).

29. Cap.334 (Revised Laws of Tanganyika, 1950-54).

Torrens, model. A Torrens system of registration of title had been introduced into Kenya long ago,[30] but it had met with continuous opposition on the part of the legal profession and its effect was very limited; few new titles were issued under the system and even fewer old titles were brought under it. A consideration of the way the system worked and of the reforms that were necessary would have taken a considerable amount of time and in any case the Working Party felt that it would be quite unsuitable to introduce the Registration of Titles Ordinance 1919 into the Native Land Units. In addition to this Ordinance there were three other Ordinances in force in Kenya providing for the registration of land transactions.[31] The existence of five registration systems within a single country was clearly anomalous and a committee was set up "... to make recommendations for the coordination and, in so far as may be practicable, the unification of the existing systems."

As a result of its recommendations,[32] the registration provisions of the Native Lands Registration Ordinance 1959[33] were repealed and replaced by the Registered Land Act 1963,[34] while its provisions regarding consolidation and registration were retained as a separate Act, the Land Adjudication Act.[35] The former Act contains a complete code of land law

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30. Registration of Titles Act 1919, Cap.281.

31. They are still in force and known today as the Registration of Documents Act 1901, Cap.285, the Land Titles Act 1908, Cap.282, and the Government Lands Act 1915, Cap.280 (1970).

32. Report on the Registration of Title to Land in Kenya (1962).

33. This Ordinance had been renamed the Land Registration (Special Areas) Ordinance by virtue of the Kenya (Land) Order in Council, L.N.589 of 1960, s.21(1) and Sched.1.

34. Cap.300,(1964),s.165 and Sched. It contains much more detailed substantive law than the Ordinance which it replaced.

35. Cap.283 (1964). It was renamed the Land Consolidation Act by virtue of the first schedule of the Land Adjudication Act 1968, Cap.284 (1970). The latter Act was mainly passed to provide a simpler adjudication procedure in areas where no formal programme of consolidation is being carried out.

designed to be applied throughout Kenya. Its registration system was intended to replace all other registration systems[36] and its substantive provisions were intended to replace the Indian Transfer of Property Act 1882,[37] which, though much criticised, continued to regulate most conveyancing outside the Native Lands.

In December 1963 Kenya became independent, but this did not result in any deceleration of the land consolidation and registration programme. On the contrary, the programme is seen to play an important role in the development of rural Kenya and it has been implemented with great vigour.[38] The programme now covers virtually all agricultural areas and in recent years it has been extended to the pastoral areas of Masailand.[39] Although the programme was originally devised in response to a very specific situation in the Kikuyu Land Unit, an attempt had been made, even during the colonial period, to extend it to other parts of Kenya.[40] After all, the sort of conditions that prevailed in Kikuyuland - overcrowding, land fragmentation and the individualisation of land tenure - could all be parallelled elsewhere in Kenya. Nevertheless, while efforts to encourage people to consolidate their holdings by means of informal sales and exchanges were fairly successful, systematic programmes of adjudication and registration were at

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36. Registered Land Act 1963, s.12(1).

37. Ibid., s.164. The East African Order in Council 1897, Art. 11(b) applied the Indian Transfer of Property Act 1882 to Kenya.

38. "Increased emphasis will be given to the land adjudication and registration programme, for the completion of this procedure is felt to be an important pre-condition for rapid agricultural development." Republic of Kenya, Development Plan 1970-1974, s.8.8.

39. This topic is discussed in Ch. III, infra.

40. The attempt to extend it to Nyanza Province is discussed in Ch. II, infra.

first viewed with great suspicion; indeed they were sometimes regarded as a colonial trap to grab African lands. Consequently, by the end of 1963, 1,350,234 acres had been registered, of which only 375,956 acres lay outside the Central Province, in the Eastern and Rift Valley Provinces.[41] Since independence, however, land adjudication has made impressive progress throughout Kenya, the old suspicions have been largely laid to rest and the advantages of the programme have become generally appreciated. By the end of June 1974, 8,034,452 acres had been adjudicated and a further 4,291,138 acres were due to be completed by the end of that year.[42]

2. Research Objectives

The general purpose of the research was to examine how the land adjudication and registration programme worked on the ground. Those who, in the fifties, supported the introduction of the programme, laid great stress on the benefit it would bring to the Africans affected, and these claims have been often repeated since. With an effective system of registration of title, it is argued, titles and transactions are made secure and land rights are clarified, thus reducing the incidence of litigation. The system may also have indirect consequences of a beneficial nature. It may give the farmer an incentive to invest in his land and an opportunity to raise loans on the security of his registered title. It may create a land market and lead to the creation of economic

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41. Republic of Kenya, Report of the Mission on Land Consolidation and Registration in Kenya, 1965-1966, Appendix D, Table B [hereinafter cited as the Lawrance Mission Report after its chairman, Mr. J.C.D. Lawrance].

42. These figures came from summaries of returns located in the Land Adjudication Department in Nairobi. They would form part of the Department's Annual Report, but such reports do not appear to be published with much regularity.

holdings by enabling the owner of the uneconomic parcel or the distant fragment to dispose of his land to someone capable of putting it to better use. It facilitates the implementation of official land policies by giving the government the opportunity of controlling transactions involving registered land. Moreover, the existence of a land register may assist the administration in a variety of ways by providing information for taxation purposes, censuses and so on. It was to some extent the purpose of this research to assess the extent to which these claims were justified and, where they were not, to speculate upon the reasons for this.

The research also raises issues of a rather broader nature. The government of Kenya appears to regard customary law not merely as an obstacle to the development of the country, but as a barrier which prevents the creation of a sense of national identity and the building of a truly united Kenya. A single system of courts administering a uniform body of law is seen to be necessary[43] and that law must be largely based on Western models in accordance with the political and economic ideals of Kenyan leaders. Legislation is regarded as a powerful instrument to bring about social change and it was part of the aim of this research to consider the constraints that bear on schemes of social engineering of this kind and limit their effectiveness. Customary law has shown itself capable of adapting to meet the needs of a rapidly evolving society and unless the laws which are designed to replace customary law have roots in the needs and perceptions of ordinary people, they will be virtually impossible to enforce. Far from contributing to the achievement of national unity,

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43. Apart from the land registration programme, examples are afforded by the Law of Succession Act 1972, No.14 of 1972 and by the Law of Matrimony Bill appended to the Report of the Commission on the Law of Marriage and Divorce (1968). It appears that this Bill is appearing before the National Assembly in the course of 1976.

they will widen further the gap that exists between the town and the country, between the government and the governed.

The problem is not solved by using traditional authorities to supervise the implementation of official policies. The history of indirect rule throughout Africa demonstrates clearly that where traditional authorities are given new responsibilities, their success in carrying them out depends on the new sanctions which they have at their disposal, and not on any traditional legitimacy. Once the traditional land authorities of an area have been formed into a land adjudication committee or a land control board, they cease to act in a traditional capacity and such legitimacy as they enjoy depends on their rôle as government servants carrying out government policies and not on their position in the local community. Yet an interesting theme which recurs throughout the following pages is the degree to which the government relies on bodies of local people for the implementation of its land policies. The courts play virtually no rôle at all and the responsibilities of the government departments concerned are kept to a minimum. The majority of the work is done by informal bodies of a quasi-traditional type.

A further question that arose at various stages of the research relates to the socio-economic effects of the land adjudication and registration programme and, in particular, the extent to which it has created a rural middle class, as many of its early promoters hoped.[44] While it is yet too early to talk about the existence of a class system in the countryside, a middle class is emerging and its emergence has undoubtedly been hastened by the land programme.[45] The whole process of land adjudication favours the man with a bit of money, the man with

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44. See Sorrenson, op. cit., pp.117-118.

45. This subject is discussed in Ch. VI, infra.

some education, the man with the right contact, and it is the same people who reap most of the benefits of land registration. It is perhaps this capacity for manipulating new institutions to his own advantage that distinguishes the member of the emerging middle class.

3. Research methods and materials

Two field-areas[46] were selected for the purpose of discovering the consequences of registration of title and assessing the extent to which the land registration programme had achieved its goals. One field-area was Gathinja sub-location, in Weithaga location of the Muranga (formerly Fort Hall) district of Central Province. The other field-area consisted of the two adjudication sections of Kabete-Obuya and Kamnwa-Keyo-Ogoro in East Kadianga sub-location, in South Nyakach location of the Kisumu district of Nyanza Province. Apart from the fact that the former area is inhabited by Kikuyu and the latter by Luo, there are considerable similarities between the two. Both areas enjoy good soils and a favourable climate which allow coffee to be grown. Both areas were the scene of early missionary activity[47] and have consequently been provided with schools and hospitals for a long time. Both areas are fairly densely populated and had begun to show the effects of land shortage (for example, an increasing number of boundary disputes) by the middle fifties. It was then that the first attempts to consolidate holdings were made, registers for both areas being finally opened in the early

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46. See the maps on pp.22-23, Supra.

47. In Gathinja the present writer stayed in a mission school and in East Kadianga he stayed on a mission station. Both missions were established before the first world war.

sixties. It was hoped that by controlling a large number of variables, generalisations based on the experience of both field-areas would carry more weight.

Fieldwork designed to throw light on the process of land adjudication was mainly carried out in the East Koguta sub-location, in South Nyakach location. As this sub-location adjoined the second field-area described above, it was possible to make useful comparisons between the two areas, to consider why the adjudication in East Koguta took such a considerable time and to speculate upon the likely development of East Koguta in the next ten years. In addition, a short time was spent in Narok district of the Rift Valley Province with a view to discovering how successfully the adjudication of group ranches was proceeding among the pastoral Masai.[48]

The present writer spent a month doing fieldwork in Gathinja sub-location and over two months on Nyabondo plateau where East Koguta and East Kadianga sub-locations are situated. In both areas he travelled everywhere on foot and was soon a familiar figure on the landscape. In the course of his fieldwork he was able to interview a large number of people: about 18% of registered proprietors[49] in Gathinja, about 14% in Kabete-Obuya and Kamnwa-Keyo-Ogoro and about 4% in East Koguta. In the two former areas, the choice of informants was largely dictated by the sort of information that needed to be gathered; thus every attempt was made to interview those who had sold or bought land, those who had charged their land and the families of those proprietors who had died. In East Koguta, on the other hand, it was important to interview as many of those who had been involved in disputes at the time of land

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48. This fieldwork is discussed in Ch. III, infra.

49. Where a registered proprietor was absent or had died, it was generally possible to interview a close relative.

adjudication; of these it was possible to interview about 20%. In none of the areas, then, did the informants constitute a random sample; nevertheless, as far as the majority of the questions asked is concerned, they form as reliable a sample as any random sample.

All informants were asked to explain how they came to be registered as owners of their plots and to describe the way in which land was divided among their families at the time of land adjudication; moreover they were asked whether their plots had previously had marked boundaries and whether any consolidation of plots had occurred. If informants had been involved in any disputes at the time of land adjudication, they were asked to talk about them. However, most of the questions concentrated on the present situation of the informant and it was necessary to discover, particularly in connection with those areas registered some ten years ago, how many people lived on his plot, whether he employed labour, whether he sold any of his farm produce, whether he (or his family) had any off-farm income, whether he had raised any loans and whether he had received any help from the Agriculture Department. Moreover, it was particularly important to obtain details of any disposition of land (including transmissions on death) that had occurred. Finally, informants were asked to comment generally on the land adjudication and registration programme.

While it was obviously essential that a certain amount of information had to be gathered for statistical purposes, the interviews were not very tightly structured and informants were generally encouraged to talk about what interested them. The present writer had studied KiSwahili for a year before going to Kenya and found it extremely useful for chatting to informants about their farms and other things and thereby (hopefully) gaining their confidence; on one occasion, moreover, he was obliged to address a gathering of Luo elders in KiSwahili, at

the baraza of the sub-chief. All interviews, however, were conducted either in English or in the vernacular with the assistance of an interpreter. In both areas the present writer was fortunate enough to find interpreters, both local farmers with a good knowledge of English and an understanding of what the research was about. Both were in their late forties and were well acquainted with all local land matters. Most important of all, perhaps, they were both highly respected within their communities and were warmly received wherever they went, a welcome that was naturally extended to anyone who accompanied them.

In addition to these interviews, a very considerable number of officials was interviewed, usually in English. They included magistrates, land registrars, land adjudication officers, agricultural officers, Agricultural Finance Corporation officials, loans officers of the commercial banks, chiefs, sub-chiefs and members of adjudication committees and land control boards. Here again most informants were very willing to talk and some of the most interesting information was obtained in the course of general conversation rather than in response to some specific question. Officials readily made the majority of their records available and it was in the land registries and the offices of the land adjudication department that much of the most relevant material was located. It was also possible in the course of the research to visit all the High Courts in the country as well as several Resident Magistrate's courts and District Magistrate's courts. Comparatively few cases are reported in Kenya and there is a wealth of material to be found in the court registries. While it must be admitted that some of the records to which the present writer had access were deficient in one respect or another, the general helpfulness of the officials concerned and the considerable interest of the records more than compensated for the occasional obscurity, inconsistency or lacuna.

The land adjudication programme is a live issue upon which most people have very decided views which they are far from afraid of expressing. Students at the University of Nairobi will argue at length about its merits and demerits, and in bars, buses and homesteads throughout the country it is a topic of considerable interest and, sometimes, concern. Although the research described in the following pages is based on the experience of three specific areas, it is the hope and belief of the present writer that the conclusions reached have a more general application.

CHAPTER II

LAND ADJUDICATION: INDIVIDUAL TITLE

1. Introduction

(i) Land tenure on the Nyabondo plateau[1] before land adjudication.

A visitor to the Nyabondo plateau today will go away with the impression of a prosperous farming community, perhaps the most prosperous Luo community to be found anywhere outside the larger towns. The climate is beneficent and the soils are generally good in marked contrast both with the Kano plains to the north which are flooded during the rainy season and provide insufficient grazing during the hot dry season, and with the rocky lands that fall away down to South Nyanza in the South. Visible for miles around, the plateau rises up, lush and green, from the surrounding barrenness.

Surprisingly enough, however, it seems that it was only towards the end of the nineteenth century that settlement of the plateau started on any significant scale. Land shortage prompted families to move from their lakeside lands, especially the district known today as West Kadianga, on to the plateau where they tended to settle near families which had come from the same area. The broad pattern of settlement is easily recognisable today and it is still rare to find farmers who do not belong to one of the three tribal groupings that originally settled the plateau, the Kadianga, the Koguta and the Ramogi peoples.

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1. See the map at p. 23, *supra*.

Any discussion of the tribal organisation of the Luo is fraught with difficulty in view of the lack of detailed ethnographical studies. Mr. Godfrey Wilson, a government anthropologist, divided the tribe into dhoot which he called maximal lineages;[2] each dhoot consisted of several libamba, i.e. groups of people claiming a common ancestor, in the male line, some four to seven generations back; these in turn were divided into Keyo, i.e. groups of people claiming a common ancestor, again in the male line, three to five generations back; finally there was the jokakwaro consisting of those sharing a paternal grandfather. Neat as this classification is, it bears little relation to the findings of the present writer. Not only are the words Keyo and libamba not used on Nyabondo to refer to kinship groups, but the words dhoot and jokakwaro are used much more loosely than this classification would lead one to expect. For present purposes it is unimportant what terminology is adopted as long as it is clear and used consistently.

The present writer's interpreter was a Kadianga person, a member of the dhoot Kadianga; like all Kadianga people he claimed to trace his ancestry back to Dianga (five generations in his case) in the male line. The dhoot Kadianga is in turn divided into four clans, descended from Dianga's four children; these clans are Kobongo, Kodul, Kamnwa and Kamgan. These are divided into sub-clans named after their founders; such sub-clans are really extended families, most of the adult members tracing their ancestry back to a common great-grandfather. A given person may therefore be a member of the dhoot Kadianga, the Kobongo clan and the Abok sub-clan.[3]

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2. G. Wilson, Luo customary law and marriage laws customs, (Government Printer, Kenya, 1961), pp.5 et seq.

3. The term jokakwaro is used generally to refer both to clans and to sub-clans and will be used in that broad sense here.

The dhoot Kadianga settled in the southern part of the Nyabondo plateau, in what is now the East Kadianga sub-location. The dhoot Koguta settled in the northern part which is largely separated from the agricultural lands of the southern part by the siany, an area of open land which becomes waterlogged during the rainy season. In the north-eastern corner of the plateau there is a fairly small settlement of people of the dhoot Ramogi, migrants from the north. The Koguta and Ramogi settlements make up the sub-location of East Koguta.

Not much has been written about the land tenure of the Luo. Mr. Wilson's book[4] is generally accurate, although it was based on research undertaken towards the end of the colonial period and takes little account of regional variations. Luo words used by Wilson in one sense were used by people on Nyabondo in a completely different one. What follows, then, is an account of land tenure on Nyabondo as it existed in the two or three decades before registration, derived partly from written sources, but in the main from discussions with some of the older inhabitants. In its essentials the Luo system of land tenure differs little from that of many other acephalous agricultural tribes of East Africa.

The typical Luo household consists of the head of the family, his wives, his unmarried children and perhaps some female dependants, a widowed mother, for example, or an unmarried sister. As soon as one of his daughters marries, she will go to live on her husband's land. As soon as one of his sons marries or reaches marriageable age, he will be allocated some land by his father where he may build his house and establish his farm. His land will usually comprise part of the land hitherto cultivated by his mother, it will lie to the front of

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4. Op. cit.

his father's compound and he will be expected to build and cultivate in much the same direction as his father; a son would never build his house opposite his father's. Certain land, often land not suitable for agricultural purposes, would be set aside for grazing cattle. All members of the clan or sub-clan would have the right to graze their cattle there.

When it became impossible to continue expanding in a certain direction, because, for example, a river or a cliff had been reached or because the land in front was already occupied by farmers expanding in the opposite direction, it would be necessary to move away and to resettle on vacant land nearby. Where this happens, members of different families, sub-clans become interspersed and fragmentation of land holdings likely to occur. Thus in East Kadianga, where there was some pressure on the land, fragmentation was common and there were no clear boundaries between the clans, whereas in East Koguta, where there was no great land shortage, holdings are generally not fragmented and the boundary between the two Koguta clans, the Kamari and the Kachungo, is clearly defined and well-known.

The rules governing succession are more complicated.[5] The general principle is that the deceased's land should be divided equally among his houses and that within each house his sons should share equally, account being taken of any allocation made during his lifetime. Land reserved for the deceased's own use will go to his youngest son, if there is only one house, and to the junior house, if there is more than one. This may lead to fragmentation of holdings. The task of distribution falls to the deceased's eldest married son or, if he

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5. See generally E. Cotran, Restatement of African Law: Kenya, the Law of Succession (London, Sweet and Maxwell, 1969).

leaves no married son, to his eldest brother. If the deceased's widow enters into a leviratic union with a brother or other close male relative of the deceased, the levir comes to live with her and the sons of such a union are regarded as the deceased's sons and are entitled to the same share of his land as their "half-brothers." If she remarries a stranger, she will go to live on his land and will lose any rights over the land of her late husband.

The traditional view regarding the alienation of land is that "... although a man may use his land as he pleases, he cannot transfer the rights of his lineage to it or the rights of his descendants to it, by sale or outright gift to strangers."[6] It is hard to know what is meant by a stranger in this context. Wilson holds that outright gifts of land can only be made to close agnates. One informant claimed that gifts of land between person in a wat relationship, i.e. fellow-clansmen descended in the male line from a common great-great-grandfather were irrevocable. In this sense the clan or the jokakwaro can be seen as the key landholding unit.

Where a stranger was given land within a certain area, his rights were in theory extremely precarious. They might be revoked at any time and they were automatically extinguished on his death. In practice, of course, he was rarely evicted and his family was usually allowed to remain after his death. He was not allowed to build without authority and his rights were extinguished if he ceased to exercise them. His rights could never ripen into ownership no matter how long he had used and occupied the land. He was, and is, known as a jadak, that is, a member of a different dhoot; thus a Koguta man would be a jadak among the Kadianga people and a Kadianga man would be a jadak in Kajimbo. The

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6. G. Wilson, op. cit., p.75.

position of the jadak is similar to that of the muhoi among the Kikuyu and has similarly given rise to acute difficulties at the time of land adjudication.

Although a jadak must remain in occupation in order to retain his rights over the land, the possession of rights is not generally dependant or visible occupation. It is true that the existence of such rights will usually be indicated on the ground by houses, boundary marks or signs of cultivation, but the absence of such evidence does not necessarily signify the absence of any rights over the land. Competing claims to unoccupied land constitute an important proportion of land disputes. Claims are generally supported by evidence of past user coupled with violent denials of any intention permanently to abandon the land in dispute.

Such, in outline, is the system of land tenure practised by the Luo on Nyabondo in the decades before land adjudication, and many features of the system survive today. During the latter part of the colonial period, however, rapidly changing socio-economic conditions brought about significant changes in customary law. In particular, the growing importance of the cash economy and the increasing pressure on the land required certain adaptations of the traditional system of land tenure. The people of Nyabondo were especially favoured by the establishment of two missions, one Roman Catholic and one Evangelical, on the southern side of the plateau, both providing educational and medical facilities and both employing labour on a small scale. At the mission schools many students picked up the rudiments of literacy and numeracy as well as basic agricultural skills, while a small minority of bright, lucky students could look forward to some form of higher education and a post in government service. Although at first it was the need to obtain cash for tax purposes that prompted most Luo to move temporarily to the towns in search of employment, it was not long

before money began to circulate widely on the plateau and to supplant traditional media of exchange.

At the same time commercial farming began to expand. Improved communications and the growth of new markets provided excellent opportunities for the adaptable farmer willing to experiment with new crops and new methods.[7] The landscape began to take on the appearance which it has today. A few farmers built houses of permanent materials. Some established plantations of coffee[8] or maize and beans and some bought grade cattle. It became common to fence holdings to protect valuable crops from straying livestock. The imposition of the pax Britannica and the provision of medical facilities led to a considerable increase in the population, polygamy remaining widespread in spite of strong mission opposition. It became harder for families with insufficient land to find unclaimed land on the plateau and migration further afield was difficult now that the boundaries of the various tribal reserves had been clearly defined. However, if a farmer with insufficient land had cash, he might contrive to buy land. It was by this process that land became a marketable commodity.

The pace of development on the northern side of the plateau (East Koguta) was slower than on the southern side (East Kadianga), though the direction was the same. The reason for this difference seems to lie in the more favourable treatment that East Kadianga has received both from man and from nature. The soils are better in

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7. The biography of one of the more enterprising farmers, narrated infra, p. 331 vividly illustrates the sorts of changes under discussion here.

8. The introduction of coffee on Nyabondo seems to have occurred during the late forties.

East Kadianga; it is accessible from the main Kisumu-Kisii road to the east, whereas East Koguta is bounded on three sides by a sheer cliff; no doubt owing to its relative accessibility, it was in the southern part that the missions and the district headquarters were established, all linked by a good road, the only road on the plateau. Thus commercial farming was less developed in East Koguta and pressure on the land not so great; fewer farmers fenced their holdings and sales of land were rare.

Even in East Kadianga sales of land were not very common. Land was usually sold to a fellow clansman and then only with the consent of the jokakwaro elders. Some of the wealthier farmers acquired land by lending money to their poorer neighbours and by taking some of their land on their failure to repay the debt.[9] By the time that proposals to start land adjudication on the plateau were mooted, the seeds of a land market had already been sown.

(ii) The early history of land adjudication on the Nyabondo plateau.

As early as 1934 the Carter Commission had observed that the individualisation of land tenure among the Luo had started,[10] but had been reluctant to recommend the establishment of a register of holdings in the area in view of the differences of opinion that existed

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9. This process was described in these terms by several informants. Its effects are similar to those of the so-called "redeemable sale", so common among the Kikuyu, where land was conveyed to a "purchaser" on the understanding that he would reconvey it on repayment of the "purchase price."

10. Report of the Kenya Land Commission (Cmd.4556, 1934), s.1105.

locally.[11] Nevertheless it was not until the early fifties that the government took steps to reform Luo land tenure and it was on the Nyabondo plateau, perhaps the most developed of all the areas inhabited by the Luo, that attempts to carry out these reforms were first made. In 1952 a report on Nyanza province stated that "... the greatest obstacle to proper farming still remains to be overcome and that is native land tenure customs which cause fragmentation, the spoliation of grazing through communal use and the impossibility of purchase or exchange of land to consolidate holdings."[12] The official reports throughout the fifties continue to stress the importance of land consolidation while recognising that customary law and, in particular, the strong clan system militated against the effective implementation of such a policy.

The District Administration seems to have realised that land consolidation could not be carried through in the teeth of widespread opposition from the traditional authorities, as the following comment on Godfrey Wilson's report[13] makes clear:

> These investigations emphasise most strongly the necessity for a clear understanding of the authority of the indigenous elder if plans for intensive agriculture requiring re-allocation of land, consolidation of fragmented parcels of land and the like are to be carried out with the cooperation of the people for whose benefit the plans are made.[14]

Indeed the involvement of the traditional authorities has become the

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11. Ibid., s.1662.

12. Colony and Protectorate of Kenya, Native Affairs Department, Annual Report, 1952, p.6.

13. Op. cit.

14. Colony and Protectorate of Kenya, Central Nyanza District Annual Reports, 1954, p.7.

corner-stone of the land reform programme. Nevertheless in the fifties land consolidation was regarded with considerable hostility both by the clan elders (who no doubt felt that their authority was being threatened) and, for obvious reasons, by the jodak and indeed by the vast majority of Luo farmers. There was only a small minority of farmers who appreciated the potential benefits of land consolidation, but they played an important part in persuading their fellow-clansmen to support the programme. They were the first farmers to exchange fragments on an informal basis and they took every opportunity to expand their holdings in shrewd anticipation of the day when individual titles would be granted.

Propaganda in favour of land consolidation made farmers acutely conscious of the importance of boundaries. The demarcation of boundaries became more common and land which had formerly been used by several neighbouring farmers, amiably vague as to the exact nature of their rights inter se, would now become the subject of intense despute. The District Administration was aware of this problem:

> The propaganda given to land consolidation has tended to increase these disputes [viz. petty boundary disputes] since, although most of the people are still publicly against it, there are large numbers of thinking individuals beginning to understand the benefits of it. Private swapping of land has therefore started with the result that boundaries in general have been more in their minds.[15]

The same phenomenon occurs today. Wherever land adjudication is imminent, farmers attempt to extend their holdings, they become very boundary-

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15. Ibid., 1956, p.2. A considerable increase in the number of land cases and land appeals occurs in Nyanza Province in the last fifties. It is tempting to attribute this increase to the attempts to introduce land consolidation, although it would be impossible to prove a causal link of this kind.

conscious and numerous disputes break out. The statement that "... as a result of starting the land consolidation schemes a realisation of the personal ownership of land has definitely contributed to this [i.e. the large number of disputes]"[16] blurs an important point, namely that land consolidation, indeed the very threat of land consolidation, accelerates the individualisation of land tenure.

Late in 1956 land consolidation was formally started on the Nyabondo plateau and in one other district of Nyanza Province. The latter scheme immediately ran into insuperable difficulties and a year later it was reported: "The biggest scheme of all and the only Luo one is that at Nyabondo. This had to be abandoned at the end of the year owing to the build-up of political pressure against it."[17] In view of strong, continuing opposition to its land consolidation programme, a change of approach on the part of the District Administration was called for. Instead of forcing reluctant farmers to consolidate their holdings, consolidation was in future to be voluntary. Groups of farmers were taken to other parts of Kenya where land consolidation had been successfully carried out and in August 1959 the Central Nyanza African District Council passed a resolution "supporting land consolidation as a first step towards better agriculture in the district."[18] By this time the farmers living in what was to become the Kabete-Obuya adjudication section, the most developed part of East Kadianga sub-location, had already consolidated and planned their holdings and were beginning to demand that they be registered.[19] Land

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16. Ibid., 1957, p.2.

17. Ibid., 1957, p.10.

18. Ibid., 1959,p.8.

19. Ibid., 1958,p.9.

adjudication was duly started in Kabete-Obuya in 1961 and proceeded this time without any difficulty. The register was opened on January 21st, 1964.

The first, abortive, attempt to consolidate holdings on Nyabondo was governed by the Native Land Tenure Rules 1956, the forerunner of Parts I and II of the Native Lands Registration Ordinance 1959, which were later subsumed under the title of the Land Adjudication Act (later renamed the Land Consolidation Act).[20] While the Rules differed from the provisions of the Ordinance in certain important respects, these differences do not help to explain why the second programme succeeded where the first had failed. The official reports throw little light on this question, but a fairly clear picture emerges from discussions with those affected by the programmes.

In the first place, an attempt was made in 1956 to force farmers to live in villages. The enforced villagisation of the Kikuyu during the Emergency was making land consolidation much easier in the Central Province and it was naturally hoped that once the Nyabondo Luo were gathered into villages, they would learn to appreciate the advantages of village life; rational farm planning could be undertaken, more farmland would be made available and the provision of services facilitated. However the Luo, like the Kikuyu, are not accustomed to living in villages and just as the Kikuyu moved away from their villages to their consolidated plots as soon as they were allowed to, so also did the Luo resent any attempt to force them into villages. The villagisation policy was eventually stopped.

Secondly, there were many farmers who questioned the good faith of the colonial administration. There was a strong suspicion that

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20. See p. 32, supra.

land consolidation was a device for depriving them of their lands. It was seen as a sort of punishment being inflicted on the rebellious Kikuyu which should not in all justice be extended to the loyal Luo. It is interesting to note that many Nyabondo farmers of this persuasion changed their minds when Kikuyu detainees were imported to plant boundaries.

Thirdly, it was generally felt that the first committee appointed to consolidate holdings, settle disputes and prepare a record of existing rights was corrupt. The second committee was conscientious and honest.

Finally, the area chosen was considered to be too large, incorporating about half of the sub-location of East Kadianga; some parts of the area were much more developed than other parts and much more ready for land adjudication. The area was finally divided into three parts for purposes of adjudication and it was in the most developed of these parts, Kabete-Obuya, that the second attempt at adjudication was made. It proved highly successful. On October 7th, 1963, adjudication was started in a section adjoining Kabete-Obuya, called Kamnwa-Keyo-Ogoro and here again everything proceeded smoothly, the register being opened on April 1st, 1966. Although the District Commissioner for Central Nyanza was being unduly optimistic when he stated that consolidation, "... once resented by the inhabitants of Central Nyanza, is now becoming increasingly popular in the district",[21] there seems little doubt that by the early sixties it was being warmly welcomed in these areas where population pressure was giving rise to boundary disputes.

While land adjudication was proceeding satisfactorily in East Kadianga, it seemed natural to extend the programme to the northern

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21. Daily Nation, January 17th, 1961.

part of the plateau. Even though this had always been the intention of the District Administration during the colonial period, in fact most of its energies had been concentrated on East Kadianga and the abortive consolidation attempt of 1956-1957 had only affected a small part of that sub-location. No doubt the people of East Koguta were fully aware of developments on the other side of the plateau and one or two of them made some attempt to consolidate their holdings in an informal way. However it was not until 1964 that official steps were taken to consolidate holdings and adjudicate titles in East Koguta.[22] On April 3rd, 1964, the whole sub-location of East Koguta was declared an adjudication section. It was not until ten years later, on February 7th, 1974, that the land register was opened.

The rest of this chapter will be devoted to a study of the process of land adjudication in East Koguta. It is not contended that the difficulties encountered there are typical, although evidence from other areas of Kenya suggests that they are not uncommon. However, it is argued that a large number of land disputes occurring in registered areas can be traced to shortcomings in the planning and implementation of land adjudication. While it was only in East Koguta that a fairly detailed study of land adjudication was carried out, fieldwork in other areas of Kenya (both in Nyanza and in Central Province) combined with a host of informal conversations with a variety of people (adjudication officers, farmers, students, anthropologists, magistrates etc.) has enabled the present writer to present a picture of more than purely local validity and to reach conclusions that have relevance for the land adjudication programme as a whole.

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22. At a mass meeting held by the Provincial Commissioner in East Koguta sometime in 1963 the people, not wholly surprisingly, voted unanimously in favour of land adjudication.

2. The adjudication procedure

(i) Introduction

In 1964, as remains the case today, East Koguta was not so highly developed as East Kadianga. Poorer soils, fewer schools and less adequate communications combined to point a neat contrast between the two neighbouring sub-locations. While the late fifties saw the growth of commercial farming, the enclosure of holdings, the emergence of a land market and a resulting pressure on the land in East Kadianga, the pace of change in East Koguta had not been so rapid. Although no steps to adjudicate land in East Koguta had been taken during the colonial period, they had been proposed and it can hardly have come as a complete surprise to many people when East Koguta was declared an adjudication section in 1964. Indeed one or two farsighted farmers had already begun to extend their holdings by purchase or the enclosure of vacant land in anticipation of land adjudication and this in turn had led to disputes. The same thing had occurred in East Kadianga and, as has been seen,[23] it seems to be a common feature of the period immediately preceding land adjudication that the shrewder farmers tend to extend their holdings with a resulting increase in the number of land disputes.[24]

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23. See supra, p. 51.

24. Where there is little unclaimed land, they purchase fragments, as occurred in the Central Province. Where there is unclaimed land nearby, they enclose it. Acute problems arise where land is subject to the unclearly defined rights of several adjoining farmers, say, to graze or water their cattle. A typical picture is given by one writer on Eastern Kenya who states that "... owing to present attempts to control large bush areas in anticipation of land consolidation and registration, free grazing and cutting privileges in wilderness areas are now challenged by competing groups." J. Glazier, "Conflict and conciliation among the Mbeere of Kenya," unpublished Ph.D. dissertation, University of California at Berkeley, 1972, p.213.

Land adjudication in East Koguta was conducted under the provisions of the Land Consolidation Act.[25] This Act had been designed to be applied in the Central Province where the consolidation of holdings had been carried out, compulsorily and on a large scale. It provided a procedure which would prove extremely cumbersome in areas, like East Koguta, where fragmentation posed less of a problem and where consolidation was effected by the voluntary exchange of fragments. In particular, a process whereby first a record of existing rights was drawn up and then holdings were consolidated, to be followed finally by the compilation of an adjudication register, could hardly be justified in areas where the informal consolidation of fragments took place before adjudication started. As the Lawrance Mission pointed out: "In non-consolidation areas there is, of course, need for only one such record or register and much delay and duplication of work has been caused by the provision for both in the Act with two separate and different processes of 'objection'."[26] As a result of the Mission's recommendations the Land Adjudication Act 1968 was passed, providing a more straightforward procedure for adoption in those areas where consolidation was to occur on an informal basis. In their essentials, however, the procedures laid down by the two Acts are virtually identical and it should be noted thatthe Land Adjudication Act merely gave legal recognition to what was in fact often occurring on the

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25. It was formerly known as the Land Adjudication Act: see supra, p.32. To avoid confusion it will be referred to as the Land Consolidation Act. As land adjudication today usually proceeds under the Land Adjudication Act 1968, reference will generally be made to provisions in that Act; sections in the earlier statute, the Land Consolidation Act, will only be cited where they differ significantly from the corresponding sections in the Land Adjudication Act 1968.

26. Lawrance Mission Report, para. 143.

ground.

(ii) The Committee.

One of the most distinctive features of the Kenyan land adjudication programme is its use of local committees at all stages of the adjudication process, particularly in the settlement of disputes. It is also its most controversial feature whose importance and interest demands a much deeper study than the present writer was able to undertake. In East Koguta passions ran high over the conduct of the committee and the objective evaluation of the committee system in general terms became a well-nigh impossible assignment. The present writer derived most of his information from records of the proceedings of the adjudication committee of East Koguta, supplemented by interviews with committee members, public officers involved in the adjudication process and a substantial number of the local inhabitants, many of them parties to land disputes. However, the adjudication records are often incomplete and cannot necessarily be trusted to give an accurate account of proceedings. Moreover, informants are often partial or biased in their views, the extent and nature of such partiality or bias being extremely hard for the outsider to assess. The outsider, particularly the lawyer trained in the western tradition, runs the additional risk of seeing land disputes in isolation from their social context. It has to be continuously borne in mind that disputants, witnesses, committee members and many of the public officers are all known to each other, even if they are not actually related, and that any decision that is taken merely represents a stage in the history of a complex network of personal and family relationships.

Under the Land Adjudication Act 1968,[27] the adjudication officer, a public officer appointed by the Minister, is required, in respect of each adjudication section, to appoint not less than ten persons resident within the section to be the adjudication committee. Large committees had formerly been favoured, mainly on the spurious grounds that they reduced the chances of corruption, the Land Consolidation Act[28] requiring committees to consist of not less than twenty-five members. Thus it was that the East Koguta committee had thirty-three members, eleven from the Ramogi clan and twenty-two from the Koguta clan, of whom twelve came from the Kamari sub-clan and ten from the Kachungu sub-clan. It seems that the Ramogi, Kamari and Kechungu peoples each held meetings at which they elected their committee representatives and at the sub-chief's baraza the committee members elected a chairman and a vice-chairman from among their number. In addition, the adjudication officer appointed an executive officer to the committee, who acted as a kind of general secretary to the committee, advising members generally on points of law and procedure. Moreover he was responsible for recording committee proceedings and for preparing the adjudication record,[29] thus playing a crucial role in the adjudication process.

The conscientious committee member would expect to spend a considerable amount of his time carrying out his duties and it is therefore hardly surprising that no members had regular employment and few had substantial commitments away from their farms. Indeed they tended to

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27. S.6 (1).

28. S.9.

29. Although this is strictly the task of the recording officer, such an officer was never appointed for East Koguta, his duties being carried out either by the demarcation officer or by the executive officer.

be middle-aged and poorly-educated, though many of them ran prosperous farms and had espoused, early on, the policy of land consolidation. It was elders such as these, household-heads distinguished by their wealth, wisdom or good fortune from other household heads, who settled land disputes in earlier days and it is on their shoulders that much of the burden of land adjudication falls today. They are unpaid, indeed the cost of paying committee members would be colossal, and they receive no expenses. The motives that prompt men (of course, there are no women on the committees) to stand for election are various. The ideal of public service, the desire to enhance their status in the community and the hope of using their power to enrich themselves may be among them.

While the committee is required to advise upon questions of recognised customary law[30] and to assist generally in the adjudication process,[31] its prime function is to "... adjudicate upon and decide in accordance with recognised customary law any question referred to it by the demarcation officer or the recording officer."[32] Such questions include boundary disputes[33] and conflicting claims to an interest in the land.[34] In practice, the demarcation officer, a public officer appointed by the adjudication officer and often not a native of the area, may come to rely heavily on the committee or certain of its members at all stages of the adjudication process. Indeed, in an adjudication section as large as East Koguta, with an area of 2,732 hectares divided ultimately into 1,667 parcels, it is hardly surprising

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30. Land Adjudication Act 1968, s.20(b).

31. Ibid., s.20(e)

32. Ibid., s.20(a).

33. Ibid., s.15(b).

34. Ibid., s.19(2).

to find that committee members distinguished by their knowledge of the district or their general level of education or their assiduous interest in their work should exercise a considerable influence on the public officers and the whole adjudication process.

(iii) The preparation of the register.

(a) General.

East Koguta was divided into a number of sub-sections for the purposes of land adjudication and each sub-section was systematically adjudicated before work started on the next one. The date on which land adjudication was due to start in a particular subsection was publicised in advance and those with claims to land were expected to meet the adjudicating team. In practice this team consisted of the demarcation officer, the committee chairman and a handful of committee members, usually including those members who resided in the particular sub-section. Also attached to the team was a junior employee of the Survey Department whose task it was to measure the boundaries. If no boundary dispute or any other dispute about land rights arose, the boundary would be planted on the spot or at least sufficient marks were made to ensure that there could be no doubt as to the line it followed. A rough sketch of the plot would be made, the plot would be numbered and the names of the owner and those with lesser interests in the land entered on the record of existing rights. This record, in practice, constituted the adjudication record and it was from it that the land register was eventually drawn up.

Where a dispute arose,[35] it would, of course, be referred to the committee which would meet at a later date to consider all the disputes that had arisen within a certain area. When a dispute had been finally settled, the appropriate entries in the record would be made and boundaries planted where necessary. When no more disputes remained to be settled, a Junior Survey Assistant came and, relying on the sketches that had been made and the boundaries that had been planted, he plotted all the holdings on an aerial photograph. From this photograph a map was prepared, known as the demarcation map, which, together with the adjudication record, constituted the adjudication register.[36]

This, in outline, was the adjudication procedure adopted in East Koguta and it seems to be fairly typical of procedures adopted elsewhere in Kenya. Although it appears to be straightforward, considerable difficulties may arise particularly in connection with the preparation of the adjudication record. A heavy responsibility rests on the officer charged with this task. If he is satisfied that any person has, under recognised customary law, exercised rights in or over land which should be recognised as ownership, he is required to determine that person to be owner of that land.[37] This determination is entered on the adjudication record and when the land register is completed from that record, the registration of such a person as the proprietor of land operates to

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35. The settlement of disputes is discussed in the next part of this chapter.

36. Land Adjudication Act 1968, s.24.

37. Ibid., s.23(2)(a). The Land Consolidation Act, s.15(2)(a) provides for the recording of the name of the person "whose right, in the opinion of the Committee or Arbitration Board, should be recognised as ownership." It is doubtful whether the difference in wording is very significant, though it has been contended that the provision in the Land Adjudication Act 1968 is designed to preclude the grant of land to a person who has never used the land or otherwise exercised his rights over it. S. Rowton Simpson, Land Law and Registration (Cambridge University Press, 1976), p.658.

vest in him "the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."[38] The registered proprietor holds free from all other interests and claims, but "subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown on the register"[39] and subject, of course, to the overriding interests listed in section 30 of the Registered Land Act 1963.[40] The adjudication record should not only contain the names of those persons whose rights have been recognised as ownership, but also the names of those entitled to any interest not amounting to ownership, including any lease, right of occupation, charge or other encumbrance, whether by virtue of recognised customary law or otherwise.[41]

(b) Customary rights.

These provisions governing the preparation of the adjudication record rest on two questionable assumptions. They assume that it is possible to equate rights over land recognised by customary law with rights recognised by the Registered Land Act 1963 and they assume that the officer charged with preparing the adjudication record has the time and the expertise necessary to secure the protection of customary

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38. Registered Land Act 1963, s.27(a).

39. Ibid., s.28(a).

40. Ibid., s.28(b).

41. Land Adjudication Act 1968, s.23(2)(e). The Land Consolidation Act, s.15(2)(c) further provides for the recording of any restriction on the power of the landowner or any person having an interest in the land to deal with the land or his interest. It was probably not felt necessary to include a similar provision in the Land Adjudication Act 1968.

rights. It is the argument of the following pages that, owing to the considerable problems involved in the adequate definition and protection of customary land rights, land adjudication often has the effect of depriving some people of their rights while conferring on others greater rights than they are entitled to under customary law. Consequently disputes are likely to arise at a later date.

Since the registration of title of land is not intended to effect any change in substantive rights,[42] it seems to be assumed that it is possible to discover an exact equivalence between customary land rights and rights recognised by the Registered Land Act 1963. This is a dangerous assumption which leads to the making of wholly spurious correlations. It is rarely helpful to apply technical English legal terminology to systems of customary law and when a writer states that jodak are nearer to squatters than tenants,[43] he does not really advance our understanding of an unusual Luo institution. As far as possible it is necessary to adopt a neutral terminology when attempting to describe customary laws and procedures.

Of course, such problems of equivalence would no longer arise if customary land tenure had evolved to a stage where it had shed its more characteristic features and adopted a Western appearance, where, for example, the jadak institution had been replaced by a landlord-tenant relationship on the English model. It often seems to be thought that this stage has been reached when sales of land have become common

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42. "It is ... a cardinal principle of adjudication that it recognises and confirms rights which actually exist." Republic of Kenya, Lawrance Mission Report, para.161.

43. G. Wilson, op. cit. p.57.

in an area and the power of the traditional authorities to control such sales has withered away. Thus after stating that adjudication does not purport to give the individual any rights which he did not previously enjoy under customary law,[44] the Working Party on African Land Tenure declared itself "... satisfied that the rights enjoyed by individual Africans in many cases had now evolved to something like full ownership and should be recognised as such."[45] Even among the Kikuyu, however, where the individualisation of land tenure had gone further than elsewhere, the continuing powers of the clan elders in land matters should not be underestimated; after all, it was on them, the traditional land allocators, that much of the burden of land consolidation was to fall.

Where the power of the elders to control land dealings survives in an adjudication area, it is almost certain to be ignored by the adjudicating authorities; it could, of course, be preserved by, say, entering appropriate cautions against individual titles, but such a course would undermine the main purposes of land registration. However, even where the power of the elders to control land dealings has disappeared, the survival of other aspects of customary law may cause problems for the adjudicating authorities. Three aspects will be mentioned here. They may be crudely categorised as customary commercial institutions, clan land and family interests.

Even among the Kikuyu it was the existence of certain commercial relationships that posed the most serious problems for those carrying

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44. Report of the Working Party on African Land Tenure, 1957-8, (1958), para.25.

45. Ibid., para.34.

out land consolidation. The position of the muhoi (whose rights were similar to the jadak in Luo customary law) was extremely precarious and he frequently lost, without any compensation, the land where he and his family might have been living and farming for a long period of time.[46] The adjudicating authorities were primarily interested in identifying the owner of a given piece of land and in customary law long user by itself could never confer ownership.[47] Difficulty was also caused in the Central Province by the institution known as the "redeemable sale" under which the "seller" was entitled to recover his land on repayment of the "purchase" price. Merely to record one of the parties as the owner of the land, as was usually done, was to deprive the other party of his rights. No attempt was made to define and protect the rights of both parties.

An equally hit-and-miss attitude is taken to what is loosely called clan land, that is, land over which a number of related households may have certain rights, the right to pasture or water their cattle, for example, or the right to collect wood. Although in such cases the land may be registered as group land,[48] an attempt is usually made to divide it among individual right-holders and what was the subject of an amiable vagueness becomes the centre of stormy disputes. Even where the division is fairly carried out, it can hardly be said that adjudication is confirming existing rights.

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46. According to one writer, "... vielen Ahoi wurde die Nützungserlaubnis entzogen." H. Fliedner, Die Bodenrechtsreform in Kenya (Springer Verlag, 1965), p.59. He also discusses the precarious position of widows and other dependant relatives in danger of losing their land rights.

47. A change of policy seems to have occurred. As will be seen in the next section, long user does entitle a jadak to be registered as absolute owner, the owner's rights being extinguished.

48. See Ch.III, infra.

The most important class of customary land rights that requires to be protected by the adjudicating authorities consists of what are here loosely called family interests. While it is at the time of land adjudication that disputes about customary commercial interests and clan land tend to arise, it is after registration has been completed, and often many years after, that disputes about family interests break out,[49] disputes that would in many cases not have broken out, had land adjudication been more carefully carried out in the first instance. The role of the clan elders in land matters may have declined, but where land is unregistered, customary law continues to govern the way in which the head of a household deals with his land and the way in which it devolves upon his death. Under customary law most members of his family will be allocated land over which they have certain rights and it is the function of the land adjudication programme to recognise and confirm these rights. It is difficult enough to define the rights of the widowed mother, the wives, the unmarried daughters, the married sons and all the other members of the family, but if no way is devised to protect these rights, there is a danger that they will be extinguished on the registration of the household head as absolute owner.[50]

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49. These disputes are discussed in Ch. IV, infra.

50. Among the Kikuyu it was the custom that when a man died, his eldest son or, if his eldest son was too young, his eldest brother would act as muramati, that is, the person charged with looking after his family and seeing to the distribution of his estate. It seems that some aramati exploited their position to get themselves registered as owners of the deceased's lands and then proceeded to cheat their relatives of their rights. See H. Fliedner, op. cit., pp.59 et seq.

Where the household head is identified and located, he may decide that all the land over which he has rights should be registered in his name.[51] The adjudicating authorities are unlikely to make any objection even though such a step may well have the effect of extinguishing the rights of members of his family. Alternatively he may decide to take into account these rights by adopting one of two courses of action, both of which, it will be noted, have the effect of conferring on the family member benefited more extensive rights than he or she enjoyed under customary law. In the first place, the household head may have himself recorded as the owner of the land jointly or, more usually, in common with one or more (but not more than four)[52] members of his family. However the registration of co-proprietors is discouraged by the adjudication authorities and is not very common in practice. In East Koguta only twenty-five holdings were registered in the names of more than one proprietor. In six cases the household head had died leaving a young family and his land was registered in the names of his widows as co-proprietors. In the majority of the other cases (and unfortunately it was impossible to investigate them all) brothers had agreed to hold their deceased father's land as co-proprietors, either out of a vague sense of family loyalty or because the land was too small to be divided up and they wished to continue farming it as a single unit. Co-proprietorship clearly does not provide a very satisfactory device for ensuring the protection of family interests; it is much simpler for

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51. In the Central Province relatives sometimes combined their plots and registered them together as a single holding in order to evade the original requirement that those owning plots below a certain acreage should live in villages. Nowadays no objection seems to be made to the registration of tiny, uneconomic holdings.

52. The practical effect of the Registered Land Act 1963, s.101(3) and (4) is that not more than five persons can be registered as co-proprietors.

the household head to allot plots of land to members of his family and have them registered in their names.

This course of action is frequently taken. Where a household head has more than one fragment of land, he may have the extra fragments registered in the names of his sons or, less commonly, his wives. Where he has only one fragment of land, he may subdivide it among members of his family even though this may be economically disastrous, at least where the original fragment is small. Unfortunately it is impossible to make many very helpful generalisations about the practice of household heads since the number of variables to be taken into account is very large. Much will depend on the number, size and situation of his plots and much will depend on the age, marital status and employment of his sons. One thing is certain; it is extremely rare for a household head, however little land he has, to have it all registered in his own name where he has adult sons (whether married or not) living there. Moreover, it is extremely rare for a woman to be registered as the owner of a holding; only 6% of holdings in East Koguta are registered in the names of women and in the majority of these cases the household head had died leaving a widow and a young family. Generally speaking, however, a wide variety of approaches to the question of land allocation is encountered, from the household head who distributed his land among his fourteen sons (some being mere children), each getting a tiny fraction of an acre to the household head who registered all his land in his own name as a way of ensuring the good behaviour of his sons.

It can be seen that it is not enough to rely on the household head to ensure the protection of the rights of members of his family. Certainly some members, particularly married sons, may obtain more extensive rights than they enjoyed under customary law, but the rights of others may not be recognised and it is therefore the duty of the

adjudicating authorities to devise ways of protecting them. The Committee is under a statutory duty to safeguard the interests of persons under disability[53] and to bring to the attention of officers any interest in respect of which no claim has been made.[54] The recording officer is required to record all interests in land not amounting to ownership[55] and the adjudication officer has the power to make a claim or otherwise act on behalf of a person who is under a disability[56] as well as enjoying all the powers of his subordinate officers.[57] If the authorities carried out their statutory duties and made use of their statutory powers, they should be able, subject to problems of equivalence, to secure the protection of all family interests.

In practice, they do nothing at all. They may occasionally encourage a household head to divide his land among certain members of his family, but their primary concern is to identify the person whose rights should be recognised as ownership and recording his name as owner on the adjudication record. The adjudication record for East Koguta contains not a single mention of an interest in land not amounting to ownership and a fortiori the land register which is

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53. Land Adjudication Act 1968, s.20(c). "... the committee has a positive duty to protect the interests of absent landowners or people under a disability, e.g. minors, persons of unsound mind, or very old people who are generally incapable of pressing their claims." Republic of Kenya, Ministry of Lands and Settlement, The Land Adjudication Act. A Handbook for the Guidance of Officers of the Land Adjudication Department, (1970).

54. Ibid., s.20(d).

55. Ibid., s.23(2)(e).

56. Ibid., s.11(c).

57. Ibid., s.10(2).

eventually compiled from the adjudication record will contain no mention either. As it seems reasonable to assume that the adjudication record is intended to be a complete record of rights over a given piece of land, rights not entered in the record would appear to be automatically extinguished. Nevertheless, even though this is the undeniable intention of the legislation, the courts have become increasingly willing to entertain the claims of relatives whose interests do not appear on the adjudication record. As it is not possible to rectify the register in the case of first registration,[58] claimants may assert either an overriding interest or an equitable interest in the land concerned. The treatment of such claims is discussed in detail below;[59] suffice to say here that the courts often find themselves in the position of having to adjudicate questions relating to customary land rights, a task for which they are singularly unsuited and one which should have been carried out by the land adjudication authorities themselves.

It is rather more difficult to suggest the steps which they should take to protect the sort of family interests under discussion. In the first place, the problem of equivalence arises. To take a simple example, if a man has died leaving a widow and a son, the adjudication authorities have four possibilities open to them when they come to draw up the record. They may record mother and son as co-proprietors; this is rare and does not correspond with the position under customary law. They may divide the land in two parts and record the mother as owner of one part and the son as owner of the other; this is fairly commonly done but again it is at variance with customary law. Thirdly, the

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58. Registered Land Act 1963, s.143(1).

59. See Ch.IV, infra.

mother may be recorded as owner. Fourthly, the son may be recorded as owner and this is quite usual, at least where he is an adult. The question that arises in the third and fourth situations is how to protect the rights of the person not recorded as owner, that is, the son in the third situation and the mother in the fourth.

In practice, of course, no steps are taken to protect these rights and problems may arise subsequently where the registered owner seeks to evict the other. It is arguable, however, that such problems could not arise if adjudication had been properly carried out and a complete record prepared. Nevertheless it is far from clear how lesser interests of this kind would be recorded. Do a widow's customary rights over her husband's land amount to an equitable interest in the land? Does she enjoy a right of occupation or does she have a mere licence? Similar questions can be asked about the nature of the son's interest where his mother is registered as owner of the land. None of the three possibilites provide a very satisfactory answer to these questions.

Even if there were no problem of equivalence, the extent to which such interests should be noted on the register raises another difficulty. On the one hand, it is undesirable to clutter up the register and thus make the registration machinery hard to administer, while on the other hand there is the danger that property rights not noted on the register would not be enforceable against certain third parties. This danger would arise if the adjudicating authorities decided that the widow held the land on trust for her son. Trusts are not entered on the register, though a person may be registered "as trustee",[60] and the registered owner is deemed, for the purpose of registered dealings, to be the

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60. Registered Land Act 1963, s.126(1).

absolute proprietor of the land, no person dealing with the land being deemed to have notice of the trust.[61] Thus the transfer of the land to a bona fide purchaser for valuable consideration would operate to extinguish the son's equitable interest in the land, a situation which could never arise under customary law.[62] The son's interest could however be protected if the Registrar saw fit to enter a suitable restriction on the register, as he is empowered to do "for the prevention of fraud or improper dealing or for any other sufficient cause."[63] He could, for example, order that no dealing with the land should be registered save with the son's consent in writing. Such a solution, however, would be less appropriate where the beneficial interest was shared by a large number of dependent relatives. Indeed it might have the effect of rendering the land virtually inalienable. A further problem is that the beneficiary would not necessarily be entitled to occupy the land. Nevertheless, the trust might sometimes provide a suitable means of protecting certain family interests and where this is the case, the adjudication authorities should take pains to record details of the trust, the record being deposited with the Registrar,[64] in the interests of all concerned.

Alternatively, the adjudication authorities may decide that the son's interest (in the case where his mother is held to be the owner of the land) constitutes a right of occupation.[65] In this case they must

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61. Ibid., s.126(3).

62. On the other hand, the title of a volunteer transferee may be defeasible by reason of the fact that the disposition amounted to a breach of trust, ibid., s.39(2).

63. Ibid., s.136(1).

64. Ibid., s.126(2). This seems to be the policy of the Act, though it is a little difficult to bring the record within the definition of an instrument to be found ibid., s.3.

65. Land Adjudication Act 1968, s.23(2)(e).

record the right on the adjudication record together with details as to its nature, incidents and extent.[66] Such a right of occupation is deemed to be a tenancy from year to year[67] and thus constitutes an overriding interest.[68] It is not clear what purpose is served by deeming a right of occupation to be a tenancy from year to year. Where such a tenancy arises in other ways, it may be determined by either party giving the other not less than a year's notice, expiring on one of the days on which rent is payable.[69] However, a right of occupation may surely be determined only in accordance with its duly recorded terms. The rights of the occupier are therefore fully protected, though the land may become unsaleable. Few people will be prepared to purchase land which is subject to rights whose nature and extent it is impossible to ascertain without access to the adjudication record.

Finally, the adjudication authorities may decide that the family member, the son in the above example, has no interest in the land at all and is at best a licensee. While licences are not capable of registration,[70] a licensee may protect his interest by lodging a caution with the Registrar forbidding the registration of dispositions of the land.[71] On the application of any person interested, the Registrar may take steps to remove the caution,[72] but it is not clear at any stage on what grounds he is to make his decision. According to general principles of

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66. Ibid., s.23(3)(c).

67. Registered Land Act 1963, s.11(3).

68. Ibid., s.30(d).

69. Ibid., s.46(1)(c). If the right of occupation may be determined in this way, then it provides very poor protection for the right-holder.

70. Ibid., s.100(1).

71. Ibid., s.131(1)(b).

72. Ibid., s.133(2).

property law, licences are personal transactions and do not create proprietary interests in land. A licence is defined in the Registered Land Act 1963 as "a permission given by the proprietor of land ... which allows the licensee to do some act in relation to the land ... which would otherwise be a trespass...",[73] a definition which implies that a licensee can have no more than a personal action against the licensor. However such an interpretation is untenable in view of a subsequent section of the Act which provides that a licence relating to the use or enjoyment of land is ineffective against a bona fide purchaser for valuable consideration unless the licensee has protected his interest by lodging a caution.[74] This provision clearly indicates that in some circumstances a duly protected licence may be effective against a bona fide purchaser for valuable consideration of the land to which the licence relates, though it is far from certain in what circumstances this will be the case. Perhaps, as in England, the courts will recognise licences by estoppel as capable of creating proprietary interests in land.[75]

In this part of the chapter an attempt has been made to consider the difficult question of customary rights. It has been seen that customary rights survive, in one form or another, in even the most developed areas of Kenya and therefore pose a problem for the land adjudication authorities who have the choice of either ignoring them or recognising them and ensuring their protection. The former course of action works hardship on the rightholders, runs counter to the

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73. Ibid., s.3.

74. Ibid., s.100(2).

75. The way in which the courts handle disputes arising out of customary rights of occupation is discussed infra, pp. 190 et seq.

declared aim of land adjudication, namely the recording of existing rights, and is likely to result in a large number of disputes being brought before the committee or, subsequently, the courts. In practice, however, it is this course of action that is generally adopted by the land adjudication authorities, who are content simply to ascertain the owner of a given piece of land and to enter his name on the record. Even if they were prepared to recognise rights not amounting to ownership, they would be confronted with two major difficulties. In the first place, they would be obliged to define carefully all such rights and to devise suitable means of securing their protection on the register. As the foregoing discussion of family interests has shown, this is by no means an easy task. None of the more obvious devices are free from difficulty and, besides, the more effectively a proprietary interest is protected, the harder it becomes for the landowner to deal with his land, a dilemma, of course, which faces all systems of property law. However, even if a satisfactory way of protecting customary rights could be found, a second and more practical difficulty arises. The adjudicating authorities have neither the skills nor, probably, the time necessary to undertake this task. The committee members and the recording officer are usually people of limited education, as ill-equipped as any layman to handle sophisticated legal concepts and keen to complete the whole adjudication process as soon as possible.[76] Thus it is that land adjudication often has the

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76. Thus, one writer reports from Kisii that land adjudication committees were required to act too hastily, with the result that "... many customary rights are inevitably ignored." R.J.A. Wilson, "The economic implications of land registration in Kenya's smallholder areas," University of Nairobi, Institute for Development Studies, Staff Paper No.91 (unpublished), February 1971, p.8.

effect of conferring on some people more extensive rights than they formerly enjoyed, while depriving others of their customary rights.

(c) Absentees.

An additional problem[77] faces the land adjudication authorities where a person with customary land rights is absent at the time of land adjudication, especially if that person enjoys rights which should be recognised as ownership. Although the concept of absolute ownership is alien to customary law, it is clear that if one individual is to be registered as absolute owner, it should be the household head and in practice this is what generally occurs; indeed it sometimes appears as though the identification of the household head and the entry of his name in the adjudication record as absolute owner is the sole aim of the adjudication programme. However, even this limited aim is difficult to achieve where people are absent at the time of land adjudication. This problem existed in a particularly acute form during land consolidation in the Central Province at a time when a large number of Kikuyu was either in detention or fighting in the forests. While many of them had relatives at home who protected their interests, not all relatives could be relied upon and it seems clear than many absentees lost their land.[78] The problem has also arisen in Nyanza Province

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77. Adjudication officers interviewed by the present writer were unanimous about the gravity of this problem.

78. See p.167 infra.

because a large proportion of active male Luo is away at any one time, working or looking for work in the towns; indeed the rate of Luo labour migration has always been high.[79]

The present writer found one or two people in East Kadianga who had lost their land in this way. One man had been working during land adjudication in Kericho, a nearby town, only to return to find that all his land, inherited from his father, had been registered in the name of his unscrupulous brother. Although the two brothers continued for a few years to farm the land side by side, eventually a quarrel broke out and his brother told him to leave. He has been given temporary accommodation by one of his mother's family and meanwhile bombards the district administration with complaining letters. These have little effect, nor is it clear that legal action against his brother would be any more successful since the courts do not have the power to rectify the land register where a first registration is in question.[80]

In East Koguta several of the objections to the adjudication register were lodged by people who had been absent during the preparation of the register and it seems likely that there are others who did not return in time to object. It is true that demarcation officers often attempt to contact absentees where appropriate, but these attempts are not always successful and even when they do succeed in inducing an absentee to return home at the first stage of the adjudication process, they will not necessarily ensure his presence at

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79. In 1953 it was estimated that rather more than 50% of the adult male population of Central Nyanza District was working outside the district at any one time. Colony and Protectorate of Kenya, Annual District Reports for Central Nyanza District, 1953, p.1.

80. Registered Land Act 1963, s.143(1). This topic is discussed at length in Ch.IV, infra.

the crucial time when the adjudication register is available for inspection and open to objections. Moreover although the adjudication committee is now required to safeguard the interests of absent persons,[81] it is hard to see what steps the most conscientious committee could take (and many committees are less than conscientious) apart from contacting the absentee.[82] Certainly social pressure may be exerted on the person who is seen to be wrongfully laying claim to the absentee's land, but where this fails, land adjudication may have the effect of depriving irrevocably the absentee of his rights.[83]

(iv) The settlement of disputes.

(a) General.

It has been shown in the foregoing section that the preparation of the adjudication record poses serious problems for the adjudication authorities. Nevertheless it is not this aspect of their duties, important as it is, which receives the greatest publicity. Much of their time and energy is inevitably devoted to the settlement of disputes, a vitally important part of the land adjudication programme

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81. Land Adjudication Act 1968, s.20(c).

82. In this connection it is worth noting that the adjudication officer has the power to make a claim or otherwise act on behalf of a person who is absent if he considers it necessary to avoid injustice, ibid., s.11(c). It is doubtful whether this power is even used. There is no parallel protection for absentees in the Land Consolidation Act.

83. The locational chief informed the present writer that he was sometimes approached by people who alleged that they had been deprived of their land during their absence. If he was convinced that their grievances were genuine, he would try and negotiate a compromise with the registered owners of the land in question.

and a subject of considerable controversy. It is hoped that the following account of the settlement of disputes in East Koguta may throw some light on the difficulties involved.

The number of land disputes in East Koguta was extremely large. The adjudication committee dealt with 161 cases, the arbitration board heard 41 complaints, the adjudication officer considered 131 objections to the adjudication register and there were 13 appeals to the Minister from the adjudication officer's determinations. As East Koguta consists of some 1667 parcels, it would appear that about one tenth of the total number of parcels was the subject of a land dispute. This partly explains why land adjudication took such a long time, though there seems to have been an inexplicable delay of twenty months before the arbitration board set about hearing complaints made about committee decisions.

The present writer had access to reports of the proceedings at all four levels. Unfortunately, however, the reports are inadequate in many respects, especially the committee reports. Some, indeed, do little more than record the names of the parties and the outcome of the case. Where more information is provided, it is often difficult to disentangle the complex fact situations that arise and to assess the testimony of the claimants and their witnesses, a difficulty that is compounded by the tendency to refer to the same person by different names, to use the same name to refer to different people and to give a misleading view of family relationships by inaccurate translations into English. In many cases, however, it is possible to discern the criteria on which the various adjudicating bodies purport to rest their decisions and to identify the sort of situations that give rise to disputes. Moreover, fifty-six of the sixty informants in East Koguta

had been involved in at least one land dispute at the time of land adjudication and were able to give a vivid, if partial, view of the process at work.

(b) Procedure.

Surprisingly enough, there is no provision in the Land Adjudication Act 1968 setting out the procedure to be adopted by adjudication committees. They are merely required to "adjudicate upon and decide in accordance with recognised customary law"[84] any questions referred to them by the demarcation officer or the recording officer. Moreover, the handbook[85] issued by the government offers no guidance in this respect. No doubt it is felt that as the committees consist largely of clan elders and settle disputes in accordance with customary law, an informality of procedure such as is generally associated with the administration of customary law is more appropriate than the formal system administered in the courts. In any case it is highly unlikely that committees would either be prepared or able to follow an elaborate set of rules of evidence and procedure. Nevertheless the hearings of the adjudication committee in East Koguta did follow a certain pattern.

On a day fixed in advance for the hearing of a dispute a fairly large crowd would gather on the disputed land: the committee members

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84. Land Adjudication Act 1968, s.20(a).

85. Republic of Kenya, Ministry of Lands and Settlement, The Land Adjudication Act. A Handbook for the Guidance of Officers of the Land Adjudication Department, (1970).

and the recording officer, the contestants accompanied by their families and their witnesses and, finally, groups of curious by-standers, grave elders, young mothers and wide-eyed children. The contestants would be known to most of those present, many of whom would have definite views as to the rights and wrongs of the case. On only three occasions do the reports indicate how many committee members were present and on each occasion the number was in the mid-twenties; however it is unlikely that the attendance was often as good as that, though the chairman, vice-chairman and a few other members seemed to form a nucleus which attended all hearings. The contestants would usually attend in person and, where this was impossible, would ensure that a kinsman (or kinswoman) presented their case.[86] Each contestant would bring two witnesses to support his claim.

One contestant would first present his case. The presentation would often be extremely discursive, recounting events alleged to have occurred in the distant past and alluding to persons long since dead. The contestant would then be questioned briefly by the other contestant and by members of the committee. His witnesses would then make short statements and would also undergo a brief cross-examination. The other contestant would then present his case and the same procedure would be followed. The committee would then confer and judgment would be delivered by the chairman. He would invariably give reasons for the decision which would, in the event of disagreement among the members, be a majority decision.[87] The recording officer

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86. Nevertheless there were six instances where only one contestant put in an appearance, judgment being given in his favour ex parte.

87. Unfortunately in only three instances were the voting figures recorded in the committee reports.

would be responsible for reporting the proceedings and formally recording the decision. Moreover it would be usual, where appropriate, to mark the newly-adjudicated boundary on the spot.

The reports obviously give an extremely abbreviated account of what actually takes place. This is almost inevitable. Without a tape-recorder and without a knowledge of shorthand the recording officer must content himself with giving an accurate account, in English, of the essentials of arguments, in Luo, that often appeared to be unnecessarily repetitive and curiously irrelevant. Nevertheless it is clear that a certain order is followed and has become familiar to those involved. Since the proceedings are essentially inquisitorial it is doubtful whether more formal rules of procedure would be either necessary or desirable.[88] The absence of rules of evidence need hardly be regretted either, though it would be extremely interesting to know what considerations lead committee members to come to their decisions. Where, as is usually the case, a question of fact is in issue, it might be thought that the evidence of witnesses would be critically important. However, witnesses are notoriously unreliable; indeed witnessing may occur on an expressly reciprocal basis. This being the case, it is perhaps surprising that more use is not made of customary oaths, in particular, the Mbira oath. Nevertheless everyone denied that they were ever used, though a member of the local arbitration board informed the present writer that the board

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88. Indeed all courts are required to decide civil cases, where one party or both parties are either subject to customary law or affected by it, "according to substantial justice without undue regard to technicalities of procedure and without undue delay." Judicature Act 1967, Cap.8 (1970), s.3(2).

made use of them.[89] In the absence of reliable witnesses, then, it seems that committee decisions may be heavily influenced by the views of members whose knowledge of the particular area or whose powers of argument enable them to dominate the deliberations.

(c) Analysis of disputes.

The publication of a notice establishing an adjudication section operates to stay all civil proceedings concerning an interest in land in that section. No such proceedings may be instituted save with the consent of the adjudication officer[90] and proceedings already instituted are to be discontinued unless he otherwise directs.[91] A provision of this kind is clearly necessary since it would be most unsatisfactory if two bodies were simultaneously engaged in settling the same disputes. Such a possibility is still not wholly excluded as a person may, for example, bring an action for criminal trespass[92] and there is the danger that court's view on which party has the better right to possession of the land may conflict with the findings of the

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89. The usual procedure seems to be that the two persons laying claim to the land in dispute are required to eat some of the soil and to utter a curse in some such form as: "May this soil kill me, if the land is not truly mine!" Some kinds of customary curse are used in District Magistrate's Courts. See, for example, John Oloo v. Erasto Oduor, High Court of Kenya at Kisumu, Miscellaneous Civil Application No.37 of 1972.

90. Land Adjudication Act 1968, s.30(1).

91. Ibid., s.30(2).

92. Land suits often appear under the guise of trespass actions or claims in respect of crops alleged to have been damaged or stolen. Indeed the local Resident Magistrate informed the present writer that owing to the notorious delay in the settlement of land suits, it had become usual to bring trespass actions instead.

adjudication committee. This, in fact, occurs very rarely.

Where land has already been the subject of a land suit, the adjudication committee holds itself bound by the decision of the court and does not permit the matter to be re-opened. There appears to be nothing in the law which requires the committee to adopt this view and it is at least arguable that the strict application of the res judicata principle is inappropriate in such circumstances. Court records, where they exist,[93] are not consulted and much therefore depends on the memory of members present. It may be surmised that few will have any very accurate recollection of the identity of the parties to the original land suit or of the piece of land in dispute. Moreover, where the committee is not honest, the res judicata principle provides a convenient method of dismissing a case whose merits it is reluctant to consider. The operation of the principle in this context might therefore be inappropriate, though where the land has previously been the subject of dispute before the jokakwaro elders, it would seem reasonable to follow their decision, as is invariably done in practice.

However, in the vast majority of cases the committee does consider the merits and it is with these cases that the present discussion is concerned. The discussion relates to all four stages of the dispute settlement process, from the committee hearings to the appeals to the Minister, and an attempt will be made both to outline the general nature of the disputes that arise at the time of land adjudication and to identify the principles in accordance with which the adjudicating

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93. Magistrates have admitted to the present writer that, even where records exist, it is hard to apply the res judicata principle in land suits since the parties to the second suit are usually different and since the plaintiff may assert that he is laying claim to a slightly different piece of land, an assertion which, in the absence of accurate maps, it is extremely difficult to contravert.

bodies purport to reach their decisions. It is also interesting to consider the degree to which such principles conform to the customary law governing land disputes and to the expectations of the disputants themselves.

The disputes that arise at the time of land adjudication fall loosely into two categories, boundary disputes and ownership disputes. Boundary disputes, which form the larger category, are generally the most bitterly contested. The parties are, in the nature of things, close neighbours and they are often closely related as well. Family disputes are common, particularly between brothers and between cousins, but where the parties are not related, the effect of a dispute is to reinforce family and clan solidarity. Thus a number of boundary disputes in East Koguta had more than a merely individual or local significance; they concerned the determination of the boundary between the Koguta and Ramogi clans, an issue which seemed deeply to affect most people in the sub-location causing both clans to mobilise all their resources in an effort to secure decisions in their favour. Thus the concept of "clan land" or "family land" may still remain real even where the powers of control over land traditionally exercised by the kinship group have largely disappeared.

Boundary disputes generally take one of two forms. Most commonly the dispute concerns a piece of land which adjoins the farms of the two claimants. If the land shows signs of having been used or occupied by one of the claimants, it will of course be awarded to him, unless there is evidence that his occupation was secret[94] and in bad faith. However, where there are no signs of individual use or

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94. In particular, it is often alleged that a neighbour has extended his boundary overnight.

occupation,[95] as is usually the case, other factors may be taken into account, factors which many an English lawyer would consider inconclusive but which have their roots in customary land tenure. For example, the disputed land may be awarded to one party on the ground that it faces his "gate"; as it was the custom of the Luo farmer to cultivate and develop the land which lay in front of his house, land which lay across his natural line of advance (and not, at the same time, across his neighbour's natural line of advance) would be awarded to him. Another important consideration would be the identity of the other people whose land abutted on the land in dispute; if they were all related to one of the parties, the land would be awarded to that party on the grounds that he was "surrounded by his own people," grounds which seem to imply an acknowledgement that he and his people would have been justified to regard the land as theirs to deal with as and when they wished.

Where these kinds of evidence were absent, the vacant land would usually be divided equally between the parties. In no case was the land held to be entirely free from private rights and the county council recorded as the owner.[96]

The second kind of boundary dispute does not concern vacant land but the distribution of land on the death of the household head. Most commonly the parties would be brothers, but one or two cases raised the question of land rights enjoyed by levirs.[97] All such disputes

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95. It may be used for general grazing and is known as alap.

96. Although the Land Adjudication Act 1968, s.23(2)(d) makes provision for such a course of action, it is rarely adopted.

97. On the death of her husband a woman may enter into a leviratic union with a brother or other close relative of his. Children of the union are deemed, for the purposes of inheritance, to be the deceased's children.

purported to be decided in accordance with customary law. Thus in Guya Okite v. Opere Okoth[98] it appeared that on the death of Guya's father his mother entered into a leviratic union with Opere; Opere came to live with her, cultivated her late husband's land and built a house on it. At the time of land adjudication a dispute arose with regard to this land between Guya on the one hand and Opere and Opere's son by a former wife on the other. The dispute was decided in Guya's favour by the adjudication committee, by the arbitration board and by the adjudication officer, and though the appeal to the Minister had not yet been heard, the present writer was able to see a memorandum advising the Minister to dismiss the appeal in the following words:

> The estate of the deceased was passed on to his children and wife. The respondent, as the son of Okite, the deceased, and Mrs Okite who was remarried by Opere Okoth is [sic] according to customary law, the inheritor and owner of the land in dispute. The appellents have therefore no grounds for claim over this land.[99]

Thus customary law was followed in as much as Guya will no doubt be registered as absolute owner of the land. However, not only will Opere have no charge on the land for the value of the improvements effected by him, but he will almost certainly not enjoy the security of tenure which he would have enjoyed under customary law, though his position would in practice be improved if part of the land were awarded to Guya's mother.

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98. East Koguta Adjudication Committee Case no.119; Nyanza Province Arbitration Board Case no.22/69/70; Objection to East Koguta Adjudication Register no.56; Appeals to the Minister no.8 of 1972.

99. Appeal to the Minister no.8 of 1972, memorandum on the case file.

Ownership disputes, the second category of dispute, provide further illustrations of the inflexible all-or-nothing approach exemplified by the decision in this case and of the injustice that such an approach can work. They are loosely termed ownership disputes here because that is how they are seen by the various adjudication authorities; in a dispute between A and B, either A is to be adjudged absolute owner and B to have no rights or vice versa; the possibility of some middle way is not acknowledged. Such an approach ignores the variety of interests in land that may co-exist both under customary law and under a system of registration of title.[100] It has the effect of altering the substantive rights of those concerned, something which has already been seen to be a general characteristic of the land adjudication process.[101]

Ownership disputes generally arise between people who are comparative strangers to one another, that is, they are neither relatives nor neighbours. Such disputes usually fall into one of two categories, the one concerning absentees and the other concerning jodak. The former, and more common, type of dispute might arise in the following way. After occupying a piece of land for a certain period of time, A may go away leaving the land unoccupied. In the meantime B may occupy the land and continue in occupation until the time of land adjudication, when a dispute may arise as to who has the better right to be registered as absolute owner. Clearly no problem exists if it

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100. "Committees have also been prone to neglect interests in land which amount to less than ownership despite every effort made to safeguard them under the law." Lawrance Mission Report, para. 163. This cautiously-worded comment applies equally to other levels of the dispute settlement process.

101. Supra, pp. 63 et seq.

can be established that A intended permanently to abandon the land and to relinquish all rights over it, but the situation is seldom as straightforward as that. The question then arises whether B may acquire by adverse possession a good title to the land as against A. The answer seems to be clear that he may not.

Not only does the Limitation of Actions Act 1968[102] not apply to actions to recover possession of Trust Land, but it is clearly not intended to affect the traditional position in the Trust Lands that customary law alone should govern land held on customary land tenure.[103] Moreover, there seems to be little doubt about the position under customary law. One authority has stated categorically that as a rule customary tenure knows nothing in the nature of a prescriptive claim to land,[104] noting, however, that "... long and undisturbed possession of a piece of land by another has often been taken to be strong presumptive evidence of abandonment by the owner."[105] Few people would question this statement of the position,[106] which certainly coincides with the present writer's findings. The courts, however, have often declined to follow customary law in this matter, holding that it is contrary to the general principles of equity on

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102. Cap.22 (1970), s.42(c). Furthermore, s.41(a)(v) of the Act provides that the Act does not enable a person to acquire any title to land vested in a county council (other than land vested in it by the Registered Land Act 1963, s.120(8)).

103. In Michael Ojode and another v. Dickson Opiyo, High Court of Kenya at Kisii, Civil Appeal No.1 of 1971 (unreported), it was held that the Limitation of Actions Act 1968 applied to land held under customary law and that the appellants' claim to land occupied for 27 years by the respondent was statute-barred. Of the many cases on the subject, this is the only one where this point of view has been adopted.

104. T.O. Elias, The Nature of African Customary Law (Manchester University Press, 1956), p.166.

105. Ibid., p.167.

106. For a full review of the authorities on this topic, see L.L. Katto, "Has customary law in English - speaking Africa recognised long possession of land as a basis of title?", 1 E.A.L.J. 243.

that it is repugnant to justice or morality.[107] The practice of the courts is not consistent and it is virtually impossible to discover the principles that govern their decisions beyond a vague desire to "do justice". Although in one case[108] the Court of Review held that the presumption of abandonment did not apply where the parties were brothers, in the majority of cases the courts favour the person in actual occupation regardless of the relevant customary law.[109] In one case the same court saw fit to divide the disputed land between the two claimants[110] and in yet another it awarded all the land to the party who had been in possession for a long period of time.[111] Sometimes the court attempts to reconcile the demands of justice with customary law by deeming the absentee to have permanently abandoned the land, but it is not clear whether it is a rebuttable presumption or a presumption that the passage of a certain length of time makes absolute. All that can be said with any certainty is that the trend of decisions in the higher courts is in favour of the person in actual occupation. A typical illustration is afforded by the following statement from a recent case: "It is well recognised that failure to assert a title to land as against a person in possession over a number of years leads to the extinguishment of the title of the original owner on the grounds that the court will not help those who sleep on their rights."[112] It is, however, open to

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107. Some support for this view is afforded by the Judicature Act 1967, s.3(1) and (2).

108. Ondiba Omwamba v. Osoro Omwamba (1960), 8 C.R.R.1.

109. See e.g., Simeon Munyae and another v. Mangoka Kilili and another (1962), 10 C.R.R.5.

110. Saulo Khaemba v. Wakhina Khwatenge (1953), 1 C.R.R.3.

111. Ogere Obiero v. Obwoyo Amolo (1954), 2 C.R.R. 10.

112. Nyachero s/o Odigo v. Nelson Ongudu, High Court of Kenya at Kisumu, Civil Appeal No.60 of 1968 (unreported), per Bennett, J.

doubt whether the lower courts adopt the same point of view and even whether the decisions of the higher courts are actually followed on the ground;[113] it might be that the victorious party will regard the court order as a kind of bargaining counter to be used in the elders' deliberations that come later and that finally adjust the parties' rights inter se.

The adjudication authorities, like the higher courts, tend to ignore customary law and to favour the person in actual occupation as against the absentee, where a long period of time has passed without any complaint by the latter.[114] It is never made clear what exactly constitutes effective occupation; certainly evidence of cultivation and fencing is sufficient to support a claim and proof that a claimant has regularly entered on the land to cut trees or even that many of his family are buried there may also suffice. Nor is it clear how long a period must have elapsed, most of the reports referring vaguely to the claimant's long use of the land.[115] Nor do the reports always distinguish cases where a person has simply abandoned his land temporarily and cases where he actually allows another person to use his land. Nevertheless, there is undoubtedly a large number of disputes of this kind. Sometimes the land is divided between the two claimants as in one case where it was found that though the land belonged to one party, the other had been living there for forty-five years.[116]

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113. See L.L. Katto, op. cit., p.257.

114. The chairman of the East Koguta Adjudication Committee confirmed that this was the committee's policy.

115. Twenty years is the shortest period that is specifically mentioned in the reports.

116. Bogo Achacha v. Agai Deta, East Koguta Adjudication Committee case No.54.

However in most cases all the land is awarded to the person in occupation.

The second type of ownership dispute has certain similarities with the type just discussed and is best illustrated by a consideration of the position of the jadak.[117] It would frequently occur among the Luo that a farmer would be asked by a stranger (that is, someone outside his patrilineage) to allow him the use of a piece of land in return for certain services of a modest, rather ritual nature. The stranger would thus be a jadak, enjoying considerable security of tenure, though he could never alienate the land nor would it necessarily pass to his family on his death. However long he and his family used the land, they would always be regarded as outsiders, there by consent and incapable of ever acquiring full rights over the land. This is broadly the position under customary law and the present research indicated that it remains the position today.

However, on the relatively few occasions on which the courts have had to deal with a dispute between a jadak and his host family, they have usually awarded the land to the jadak. In some cases this has meant that the court has merely confirmed the right of the jadak to occupy the land for an indefinite period. Thus in one case[118] the host wished to use the land cultivated by his jadak and although the court granted a declaration that he (the host) was the owner of the land, it also ordered him to allow the defendant (the jadak) to continue using the land for purposes of cultivation "... so long as the defendant remained obedient as a tenant-at-will of the plaintiff."

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117. See supra, p.46-47, for a brief description of the jadak institution.

118. Ondoyi Oyugi v. Okwanyo Owako, Resident Magistrate's Court at Kisumu, Land Appeal Case No.32 of 1969 (unreported). The use of the term "tenant-at-will" is not very appropriate.

Similarly in another case[119] where a jadak had been in occupation for seventeen years and had recently begun to plant trees (a step that traditionally required his host's consent), the court held that such conduct did not entitle the applicant to evict him and added that while the "reversionary title" remained vested in the applicant, the respondent and, after him, his heir were entitled to continue to occupy the land "in accordance with the principles of customary law". Although it is arguable that such decisions give the jadak greater rights as against his host than he would have enjoyed under customary law, some decisions have the effect of totally extinguishing the host's rights.[120] A fortiori the courts will be inclined to favour someone who has been occupying a piece of land over a long period, having originally been granted the use of land by a member of the same partrilineage and not by a person towards whom he stands in a jadak relationship. Thus in one case[121] the appellants (who were not jodak) had been in possession of land for thirty-eight years, but the respondent claimed that his uncle had granted them merely the right to use the land. Although the court appears to have accepted the respondent's story, the appeal was nevertheless allowed on the grounds

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119. John Abuom v. Ogwayo Okelo (1955), 3 C.R.R. 1.

120. See, for example, Cornel Nyambuo v. Henry Onyango, Resident Magistrate's Court at Kisumu, Land Appeal Case No.51 of 1970 (unreported), where the jadak's family had been in continuous occupation for seventy years. See also Cngudi Ojow and Bengo Ochume v. Amwom Atito, Resident Magistrate's court at Kisumu, Land Appeal Case No.4 of 1967 (unreported), where the elders had previously held that the host was entitled to enter upon and cultivate land occupied by a jadak from another location. The jadak was awarded the land in both cases.

121. Atieno Wayumbe and Ogala Atieno v. Pitalis Mbiji, High Court of Kenya at Kisumu, Appeal Case No.36 of 1970 (unreported). A similar principle was enunciated in Erasto Angieno v. Sospiter Achieng et al., High Court of Kenya at Kisumu, Appeal Case No.67 of 1968 (unreported).

of natural justice which required that many years uninterrupted occupation of land conferred a prescriptive title on the person in occupation.

The problem, of course, arises in an acute form at the time of land adjudication. It is well known, for example, that many ahoi (the Kikuyu equivalent of the jodak) became landless during land consolidation in the Central Province and it seems to have become the policy of the authorities to prevent similar injustice occurring elsewhere. In practice this has meant that the person in actual occupation of the land, whether as a jadak or not, is judged to be the owner of the land and registered as such.[122] In fact jodak do not appear to have been very common on the Nyabondo plateau and only one case involving a jadak occurred in East Koguta. In this case[123] the jadak had been granted the use of a piece of land about thirty years previously and at the time of land adjudication a dispute arose between him and the son of the original grantor. The adjudication committee, the arbitration board and the adjudication officer all awarded the land to the jadak even though he had bought land elsewhere in East Koguta and so would not have been made landless by an adverse decision. An award of this kind is contrary to customary law and may be unjust to the grantor and his family, but in no case have the adjudication authorities taken a middle course and attempted to make some adjustment between the two parties, say, by charging the land with the payment of a certain sum by way of

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122. This was confirmed by everyone questioned on the matter including the locational chief and various officers of the Land Adjudication Department.

123. Samuel Owuor Odawo v. Daniel Otieno, Nyanza Province Arbitration Board Case No.20/69/70; Objection to East Koguta Adjudication Register No.16. It was impossible to locate the Adjudication Committee Report.

compensation.[124]

Where someone has granted the use of land to a member of his own patrilineage, the grantee is not a jadak and the adjudication authorities are certain to settle any dispute with the grantor in the grantee's favour, at least where he can prove that he has occupied the land for a sufficiently long period of time. A number of disputes of this kind arose in East Koguta, the grantees usually having been in occupation of the disputed land for upwards of twenty years.[125] Inevitably a certain amount of resentment is felt by the family of the grantor who may have allowed the use of his land as an act of generosity, always intending to take it back when the growth of his family made it necessary. As in the case of the jadak, it is a pity that a way of reconciling the interests of the two parties has not been devised.

A brief attempt has been made in this part of the chapter to consider the sort of disputes that arise at the time of land adjudication and to identify the principles which appear to determine the way in which they are settled. Broadly speaking the disputes are of a traditional nature, such as have always absorbed a large proportion of the courts' time, and fall generally into one of two categories, loosely termed here boundary disputes (the larger category) and ownership disputes. It has been shown that while boundary disputes tend to be settled in accordance with customary law, ownership disputes have not. Both the courts and the adjudication authorities stress the importance of long-term occupation and have demonstrated a

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124. In English law, a proprietary estoppel might arise in similar situations; see, e.g., Inwards v. Baker, [1965] 2 Q.B.29.

125. In one or two cases the grantors have asserted that the grantees have only been in occupation for a couple of years, but the adjudication authorities have not accepted their version of facts.

readiness to award land to the person who has occupied land for a long time, even though the owner under customary law has never intended to relinquish his rights over the land and even though the person in occupation is aware of this. Land adjudication has the effect of depriving people of rights to which they were entitled under customary law and it will continue to have that effect as long as the preparation of the adjudication record is seen to involve merely the determination of ownership.

(d) Complaints, objections and appeals.

Any person named in or affected by a decision of the committee who considers the decision to be incorrect may, within fourteen days, complain to the executive officer of the committee[126] who is required to refer the complaint to the Provincial arbitration board for hearing.[127] The arbitration board consists of not less than five persons appointed by the adjudication officer from a panel appointed by the Provincial Commissioner and consisting of not less than six and not more than twenty-five persons resident within the district;[128] the board itself elects one of its members to be chairman.[129] The boards generally consist of former court elders, civil servants and councillors, though there are also some younger members; a conscious effort is made to ensure that members have little or no direct connection with the

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126. Land Adjudication Act 1968, s.21(3).

127. Ibid., ss.21(4) and 22.

128. Ibid., s.7(1).

129. Ibid., s.8(2).

adjudication area in question. While this is designed to secure impartiality, it may also lead them to rely excessively on committee members who attend their meetings. While no informant ever accused the board of corruption, many criticised it for working too closely with these committee members and tending to confirm a committee decision without seriously considering the merits of the case.

However, this view is not really borne out by what happened in East Koguta. Although the adjudication committee heard some 161 cases, only forty-one complaints were referred to the board. In twenty-five instances the committee decision was confirmed, in thirteen cases it was overruled and in three cases it was varied.[130] The board adopts a procedure similar to that adopted by the committee and the principles on which it acts are also similar. The highly unsatisfactory nature of the reports makes it impossible to generalise about the grounds on which a board may overrule a committee decision, though it seems as though in most cases the board is merely taking a different view of the facts.

No provision is made for the hearing of any complaints about the board's decisions as such. However, the results of these decisions are entered in the adjudication record and when this record is complete, it is displayed together with the demarcation map (collectively they are known as the adjudication register)[131] at a convenient place for purposes of inspection.[132] The adjudication officer is required to give notice that the register has been completed and may be inspected

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130. Minutes of the meetings of the Nyanza Province Arbitration Board.

131. Land Adjudication Act 1968, s.24.

132. Ibid., s.25(b).

during a period of sixty days.[133] Within this period any person named in or affected by the register who considers it to be incorrect or incomplete in any respect may object to the adjudication officer in writing, saying in what respect he considers it incorrect or incomplete.[134] The adjudication officer is then required to determine such objection after making any further inquiries that he thinks fit[135] and to alter the register in conformity with his determinations.[136] He has very broad powers with regard to the whole process of adjudication; he may administer oaths and issue summonses and is empowered to determine any question that needs to be determined in connection with claims made under the Act.[137] While his powers are much broader than those enjoyed under the Land Consolidation Act, it is not clear that he has the power to alter the completed register of his own motion where no objection has been made, nor does it seem desirable that he should have such power.[138] He is certainly empowered to make a claim or otherwise act on behalf of a person who is absent or under a disability if he considers it necessary to avoid injustice,[139] but the use of this discretion is dangerously uncontrolled and should surely be restricted to those special situations.

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133. Ibid., s.25(c).

134. Ibid., s.26(1).

135. Ibid., s.26(2).

136. Ibid., s.27(1).

137. Ibid., s.10(1).

138. The Lawrance Mission recommended that he should; Lawrance Mission Report, para.154. However, the powers of the adjudication officer under the Mission's draft Land Adjudication Bill, broader though they are than the powers granted under the Act, do not appear to include the power to intervene in the adjudication process in this way.

139. Land Adjudication Act 1968, s.11(c).

The exact nature of the objection stage is far from clear and, in particular, it is difficult to know on what grounds an objection to the register should be taken, the words of the Act[140] being capable of various interpretations. A narrow interpretation would restrict the scope of the section to petty clerical errors (mis-spellings and the like) and, more important, to situations where the person recorded as owner in the adjudication record is not the person determined to be the owner in the course of the preceding adjudication process. If, for example, the arbitration board has awarded land to X but for some reason Y's name is entered on the adjudication record as the owner of that land, it is desirable that X should have the opportunity to object to the entry. Similarly, if A and B have been adjudicated co-proprietors of a certain piece of land but only A's name appears on the adjudication record, B should have the right to object. In both instances the record is clearly either incorrect or incomplete, incorrect[141] in the sense that it does not correspond with what had previously been determined. This is a narrow interpretation of the section, but a plausible one.

An alternative approach is to see the adjudication officer as an appellate authority and to allow objections to the record to be made on the grounds that the arbitration board erred in reaching the conclusions it reached and that therefore the record is "incorrect".

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140. "Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may ... object to the adjudication officer in writing ..."; Ibid., s.26(1).

141. S.30(1) of the draft Land Adjudication Bill proposed in the Lawrance Mission Report, Appendix E, used the words "inaccurate or incomplete." It is not clear why "inaccurate" was changed to "incorrect", though it is arguable that the use of the former word would have definitely supported this narrow interpretation and that the change of words was not intended to effect any substantial change in the meaning of the section.

If this interpretation is right, there exists, in effect, a three-tiered system of appeal after the committee has made its original decision. A person affected by the decision may appeal to the arbitration board (though it is called a complaint), thence to the Minister (here it is called an appeal).

A third and extremely broad approach is to see the objection stage as providing an opportunity for all persons affected by the register to voice their grievances, not only those who claim that the record does not correspond with what has previously been determined, not only those who wish to appeal against the decision of the arbitration board, but everyone, whether they have been involved in a dispute at an earlier stage of the adjudication process or not. The adoption of such an approach has serious implications. It enables a person to bypass both the committee and the board; indeed these two institutions would become otiose if aggrieved persons refused to object to the original determination until the register had been completed and the objection stage reached. This would obviously be an absurd situation. Nevertheless it is this third approach which the authorities appear to have adopted.

All adjudication officers with whom the present writer talked agreed that they would hear all objections and that they would be perfectly prepared to settle land disputes that had not previously come before either the adjudication committee or the arbitration board. Evidence from East Koguta confirms that this is in fact the case, though there the approach of the adjudication officer or officers was not consistent. Of the 131 objections lodged, eighty-two[142]

142. The adjudication officer refused to entertain twenty-two of the eighty-two objections on the grounds that the issue had not previously been considered by either the committee or the board. It is not at all clear how he distinguished these objections from the remaining sixty which he did entertain.

represented land disputes that had been heard neither by the committee nor by the board and a further seventeen represented land disputes that had been heard by the committee alone; in only twenty-eight instances had both the committee and the board heard the dispute.[143] Virtually all the objections raised disputed issues, only three or four objections being wholly uncontroversial; these were applications by a household head to have a piece of land registered in the name of one family member rather than another.

In other areas a large proportion of objections concern sales of land that have occurred during land adjudication and are applications by purchasers to have the record altered in their favour. Even applications of this kind may be vigorously contested, especially where only part of the purchase price has been paid. However, the strange thing in East Koguta is that no such application was made. A period of six years elapsed between the start of land adjudication and the hearing of the first objections and it is obvious that during this period many people who were recorded as the owners of land sold a part or all of their land and also that many died.[144] Thus from the start the land register is inaccurate and fails to represent the true state of affairs on the ground.

In East Koguta the objections raised the same kind of issues that were raised before the committee and the board; the adjudication officer was settling boundary disputes and ownership disputes, he heard the same kind of evidence and he applied the same kind of principles.

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143. Of the remaining four objections, two had been withdrawn and two had not been determined at the time of the research; it was therefore impossible to tell whether they concerned disputes already adjudicated upon by the committee and the board, or not.

144. The present writer encountered four such cases, but there must have been many more. The failure to register sales and successions where the land has already been registered is a problem which is fully discussed in Ch. V, infra.

Since most of the contested issues were questions of fact and since the evidence of the two parties and their witnesses was usually totally contradictory, he may inevitably have been obliged to rely on the views of the more articulate committee members and have been reluctant to upset committee findings without overwhelmingly good cause.[145] Certainly the figures for East Koguta would support such an interpretation.[146]

Where the issues have not been previously the subject of a committee decision, the adjudication officer may again be forced to rely heavily

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145. In Guya Okite v. Opere Okoth, Appeal to the Minister no.8 of 1972, one of the grounds of appeal was that the adjudication officer had sat with the committee which had already rejected the appellant's claim. It did not seem likely that this ground would find favour with the Minister. See supra, p. 88.

146. TABLE 1. Outcome of objections heard by the adjudication officer where the issues had already been the subject of a decision by the committee or the board.

Action of adjudication officer	Cases heard by both the Committee and the Board		Cases heard by Committee alone	Total
	Where board confirmed Committee decision	Where board overruled Committee decision		
Upheld Committee decision	17	5	16	38
Overruled Committee decision	2	4	1	7
Total	19	9	17	45

Source: Objections to the East Koguta Adjudication Register, Provincial Land Adjudication Department, Kisumu.

on the views of his staff and prominent locals. However, the procedure before the adjudication officer appears to be such that gives enormous advantage to the educated and the articulate, to those capable of presenting their case in a concise and reasoned fashion.[147] Unlike the protracted, informal procedure of the adjudication committee and the arbitration board, proceedings before the adjudication officer are short and relatively formal; they may not involve a visit to the land in dispute and throughout they are rigidly controlled by the adjudication officer, a busy man, impatient of discursiveness and intolerant of irrelevance. He is, in effect, exercising a judicial function, oaths are administered and the atmosphere resembles that of a court. An area is cleared around the desk where the adjudication officer and his staff are sitting; the crowds that attend these occasions are required to be silent; parties and witnesses are summoned, cross-examined and dismissed; the adjudication officer confers with his staff and others (the committee chairman, perhaps, and the local sub-chief), summons the parties again, gives his decision, dismisses them and, after making any necessary announcements, closes the meeting. The whole procedure stands in marked contrast with the way in which disputes are settled under customary law and by the adjudication committees and suggests an inconsistency of approach on the part of the authorities to the whole process of land adjudication.

Section 32 of the draft Land Adjudication Bill proposed by the Lawrance Mission[148] provided that, after the determination of all

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147. This discussion is based on the present writer's experience of two sessions in the adjoining location; it is impossible to say how far this experience is typical.

148. Lawrance Mission Report, Appendix E.

objections, the Minister or any person aggrieved by any entry in the Adjudication Record might apply to the High Court for its revision in such manner as might be presented. It seems that this provision was designed to enable the High Court to revise a first registration.[149] It would appear, however, that an amendment of section 143 of the Registered Land Act 1963 would be necessary to have this effect and that if such amendment were made, no such provision would be needed in the Land Adjudication Act 1968. The real interest of this provision is that it would have enabled an aggrieved person to appeal from the adjudication officer to the High Court, removing matters for the first time from the control of the administration. However, the Bill was amended in this regard and it was finally provided that any person aggrieved by the determination of an objection may within sixty days appeal to the Minister. He must deliver to the Minister an appeal in writing specifying the grounds of appeal and he must send a copy of the appeal to the Director of Land Adjudication. The Minister's order is final.[150]

If the amendment was made in the expectation that the Minister would be able to deal with appeals more expeditiously than the High Court, it is doubtful whether events have justified such an expectation. The increase in the number of appeals has been remarkable: in 1971 there were 20, in 1972 there were 100, in 1973 there were 278 and in 1974 there were 254. At the time of the research (November 1974) only twelve appeals had been heard. As the Minister is unwilling to

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149. Ibid., para. 176.

150. Land Adjudication Act 1968, s.29(1).

delegate his power to hear appeals from the determinations of adjudication officers, the backlog of appeals is bound to increase at a colossal rate. This may have very serious consequences.

On the one hand it may have the effect of postponing the opening of the land register. This is what seems to have happened in East Koguta where the adjudication officer finished hearing objections in October 1971. Subsequently thirteen people appealed to the Minister against the determination of the adjudication officer,[151] but only three of these appeals had been heard at the end of 1974. It was commonly felt in East Koguta that the long delay in completing the adjudication process and opening the land register was due to the existence of these outstanding appeals. People who were not affected by the appeals and who may not have been involved in a land dispute at any stage resented having to wait indefinitely until they reaped the benefits of land adjudication, until they could get their land certificates and apply for development loans.

However, there is no reason why this highly unsatisfactory situation should arise. The Land Adjudication Act 1968[152] requires the Director of Land Adjudication to certify that the adjudication register has become final subject to the outstanding appeals and to forward it to the Chief Land Registrar together with a list of the appeals.[153] The Land Registry then draws up a land register in

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151. This figure comes from a letter, dated August 17th 1973, from the Land Adjudication Officer for Nyanza Province to the Director of Land Adjudication, LND/ADJ/24/131. However the register of appeals to the Minister records only five appeals from East Koguta. The reason for this discrepancy is not clear. One reliable informant who had led a deputation to the Minister to protest about the progress of land adjudication in East Koguta thought that the other appeals had simply been brushed away."

152. S.27(3)(b).

153. Ibid., s.27(3)(c).

accordance with the adjudication register and where land is affected by an appeal, it is required to register a restriction expressed to endure until the determination of the appeal, the register to be altered in accordance with the determination, if necessary.[154] In view of the long delay in the hearing of appeals it is obviously desirable that this procedure be adopted. Dealings with the land affected by the appeal will be virtually impossible pending its determination, but at least the owners of land not so affected will be able to enjoy the full advantages of land registration.

An interesting problem arises where a land register is opened but, for one reason or another, no restriction is entered against the land affected by an appeal. In Jesii Bitsushe Maruti v. J.A. Mudiambia and the Attorney-General[155] it appeared that a land dispute had arisen between the plaintiff and a certain Barasa Tavashi and that the plaintiff had succeeded at all stages of the adjudication process. Finally Barasa appealed to the Minister who allowed the appeal, awarding all the disputed land to Barasa. However eleven months elapsed before the Chief Land Registrar received the Minister's order and in the meantime the land register had been opened and the plaintiff registered as proprietor of the land in question and issued with a land certificate. No restriction was entered against his title in the first instance, but on receiving the Minister's order the Chief Land Registrar first directed the district land registrar (the first defendant) to register a restriction and shortly afterwards directed him to delete the plaintiff's name and insert the defendant's name in the register. The plaintiff then applied to the

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154. Ibid., s.28.

155. High Court of Kenya at Kisumu, Kakamega Civil Case No.10of 1973 (unreported).

court for a declaration that he was the legal owner of the land and that the alteration of the register was illegal. For reasons which do not concern the present discussion the court ordered that the suit be stayed pending the hearing of an appeal, on a different, but related matter, by the Court of Appeal. The court, nevertheless, discussed the merits of the application.[156]

The main stumbling-block for the defence lies in the provision of the Registered Land Act 1963[157] which restricts the power of the Registrar to rectify the register to cases of errors or omissions not materially affecting the interests of any proprietor. Although the existence of this provision does not appear to have been recognised either by counsel or by the court, it seriously weakens the defence's case. The argument in court tended to centre on the interpretation of another provision of the Registered Land Act 1963 which empowers the court to order rectification where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.[158] It was argued for the defence that the action of the land registrar in amending the land register in accordance with the Minister's order was all part of the process of first registration and therefore no question of rectifying a first registration arose. This is a highly artificial line of argument and one which it is hard to reconcile with the Act's provision that the date of first registration is the date on which the land first came on to the land register.[159] It was argued in the alternative

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156. The present writer was able to discuss the case with the judge, Mr. J. Platt. Both this interview and the report of the case made it clear what his view of the legal issues was.

157. S.142(1); there are other unimportant occasions on which he may rectify the register, but they are not relevant here.

158. Ibid., s.143(1). The implications of this provision are discussed at length infra, ch.IV.

159. Ibid., s.14(d).

that even if this was a case of first registration, section 143(1) of the Registered Land Act 1963 conflicted with the provisions of the Land Adjudication Act 1968[160] in this respect and should be held to have been amended pro tanto by implication. It is doubtful, however, whether there is such a conflict. A restriction which appears on the register on the day it is opened forms part of the first registration and any subsequent amendment of the register in accordance with the restriction is not an amendment of first registration so much as a fulfilment of its terms.

If, as is submitted here, the plaintiff must be successful as the law stands at present, it is not clear what remedy is open to Barasa Tavashi, the man to whom the Minister awarded the land. He is not entitled to be indemnified by the Government, since such a right is specifically denied to persons suffering damage by reason of a mistake or omission in a first registration.[161] He may bring an action in tort against the Government alleging breach of statutory duty or negligence on the part of its servants, but such proceedings are attended with difficulty. The very real possibility that he will have no effective means of redress suggests that the courts should be empowered to rectify a first registration.[162]

The reports of the few hearings of appeals that have taken place give some insight into the procedure that is followed and the principles that are acted upon by the Minister, and it is appropriate to close this part of the chapter with a description of these hearings. It seems that it is usual for the Minister to visit the area where the land in dispute is situated, the hearing taking place in the office of

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160. S.28.

161. Registered Land Act 1963, s.144(1)(b).

162. The issues mentioned in this paragraph are discussed at length in Ch. IV, infra.

the local District or Provincial Commissioner. He sits with a number of important members of the local administration together with representatives of the department of land adjudication; apart from the land adjudication officer who determined the objection there may be noone among his advisers with first-hand knowledge of the dispute. He is exercising a quasi-judicial function and the procedure which he follows is similar to that followed by the adjudication officer; it is formal and brisk. Before the Minister hears an appeal, he will have been efficiently briefed by an official in the Ministry who will have prepared a summary of the issues and may even have recommended what decision should be taken.

It is impossible to gauge the extent to which the Minister relies on the views of this official or his advisers at the meeting. It was only possible to examine the files of nine appeals and in many instances the grounds for his decision were obscure. In one case[163] his only intervention was to ask the parties (who were brothers) whether they both loved their father, before dismissing the appeal. He dismissed six of the nine appeals and allowed three. In one[164] of these three cases he followed the committee decision, overruling the decision of the adjudication officer and the board; no reasons appeared on the file. In the second case,[165] he awarded the land to the appellant contrary to the decisions of both the committee and the board and the adjudication officer; his reasons were vague and unconvincing. It was delay in communicating his order to the Chief Land Registrar that ultimately resulted in the High Court action discussed above.[166] In this third

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163. Appeal to the Minister No.19 of 1972.

164. Appeal to the Minister No.4 of 1971.

165. Appeal to the Minister No.9 of 1971.

166. See Jesii Bitsushe Maruti v. J.A. Mudiambia and the Attorney-General, Supra, p.107.

case,[167] the respondent claimed to have bought the appellant's land before land adjudication and produced receipts purportedly signed by the appellant as evidence that he had paid the purchase-price. In spite of a well-reasoned memorandum from a Ministry official advising him to dismiss the appeal, the Minister seems to have become incensed against the respondent, criticising him for behaving in an ungrateful manner and, more seriously, accusing him of forging the receipts.[168] In the end, he awarded the land to the appellant.

In conclusion, it may be doubted whether any useful purpose is served by providing for an appeal from the adjudication officer to the Minister. It is an expensive[169] and relatively complicated procedure which might discourage a poor, illiterate farmer from lodging an appeal. It involves immense delays both in the hearing of the appeal and, it seems, in the implementing of the Minister's decision. The appeals invariably raise questions of fact and there is no reason to believe that the Minister is more competent to unravel a complex situation and evaluate impartially the parties' versions of that situation than the adjudication officer or the arbitration board; indeed it seems likely that in many cases he will rely heavily on the advice of the adjudication officer. Little would be lost if the adjudication officer's determination of objections was final, subject to no appeal. Adjudication officers have a reputation for fairness and the fact that they may be required to continue adjudication work in the same area may deter them from acting in a corrupt or arbitrary manner.

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167. Appeal to the Minister No.7 of 1971. The proceedings were described in the Sunday Post, February 2nd, 1971.

168. The receipts were later sent to handwriting experts in Nairobi who pronounced them to be genuine.

169. The fee is 100 shillings; see infra, p. 121, n.182.

(c) Critique of the system.

It is a striking feature of the land adjudication process that throughout it is conducted by administrative bodies and officials and that even though important questions regarding individual property rights have to be settled, the courts have no rôle to play at any stage.[170] The use of local committees to assist the adjudication department at most stages of its work is particularly interesting and has undoubted advantages. Committee members are not paid and this obviously reduces the cost of the adjudication programme. Moreover, unlike the courts, the committees can be expected to settle disputes relatively quickly; after all, distances are small and it is the committee which moves from one land dispute to another rather than requiring all disputes to be heard in a single place. The atmosphere that surrounds committee hearings is appropriately informal and the members speak the same language and share the same history as those who attend the hearings.[171] If the courts were to replace the committees at this stage, many of these advantages would be lost. The courts would apply the same legal principles as the committees, but as most disputes raise questions of fact rather than questions of law, the committee might well prove a more suitable forum for their settlement.[172]

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170. Similarly the land control system is administered without any reference to the courts; see infra, ch.VII. The Registered Land Act 1963, s.150(2)(a) provides for an appeal from the Chief Land Registrar to the High Court in certain circumstances, but this possibility is not widely appreciated and is rarely exploited.

171. Addressing a meeting of Wakamba, the Hon. J.H. Angaine, M.P., Minister of Lands and Settlement, assured his audience that the committees would be appointed by the people themselves "... so that any blame arising later on should be upon your own people". Speech reported in the East Africa Standard, November 11th, 1967.

172. Much of what is said in this paragraph about adjudication committees could apply equally well to arbitration boards.

However, the committee system also has its drawbacks and one of these springs from a feature which is in some ways its greatest strength, namely, the fact that its members live in the area and know it well. As each committee member is at once a member of a family, a lineage, a clan and a tribe, the danger of bias is very strong. This bias manifests itself most clearly in areas where persons from other tribes have established rights like the Kikuyu among the Masai in Kajiado District[173] or the Kipsigis among the Masai in Narok District;[174] in both districts the Masai committees may refuse to recognise the non-Masai settlors. The problem arises at a more local level where a dispute arises over the boundary between two clans and one of these clans enjoys a majority on the committee, as in fact occurred in East Koguta. There the committee was especially reconstituted for the hearing of the inter-clan disputes to ensure equal representation of the two clans, but this did not prevent charges of bias being made; the settlement of these disputes caused great resentment and in at least one instance resulted in the lodging of an appeal with the Minister. The same kind of problem is likely to arise in all disputes that come before the committee; it is inevitable that many members will either come from the same lineage or family as one of the parties or will be connected with a party by marriage or some long-standing tradition of mutual aid.[175] The

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173. For a discussion of this situation see the Lawrance Mission Report, paras. 161-162.

174. See Republic of Kenya, National Assembly Debates, 1968, vol. 15, col.437, where a Kipsigis M.P. voiced his concern that his fellow-tribesmen might be compelled to leave Narok District after land adjudication.

175. A detailed examination of this subject would have demanded a much longer period of fieldwork. That it would prove a rewarding and fascinating study is shown by J. Glazier, op. cit.

provision in the Land Adjudication Act 1968[176] requiring that a member with any interest in the claim before the committee should disclose his interest and should not participate in the discussion or the vote would be practically impossible to enforce. It would be fairly rare, indeed, that a member did not have some interest in the determination of a claim.

A further danger that besets the committee system is that some of its members may use their position to take bribes and the position becomes particularly serious where it is the more prominent members, like the chairman and the vice-chairman, who are susceptible to this kind of pressure. This is what is alleged to have occurred in East Koguta. There have been letters to the Press and deputations to the Minister and the local M.P. protesting about the working of the East Koguta Adjudication Committee and most informants, committee members, disputants and outsiders alike, have given the same picture.[177] A number of members resigned early on in disgust at the proceedings of the committee. Even if only a small proportion of members is corrupt, but these members happen to be the more influential members, those who because of education or through force of personality tend to dominate committee deliberations and those whose assiduous attendance in the field makes them indispensable to officers of the land adjudication department, then the possibility of injustice being done is very great. This possibility becomes a certainty, if they secure the cooperation of these officers.

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176. S.8(1).

177. A number of people aggrieved by committee decisions in threatening violence against the committee chairman, who is now apparently reluctant to go out at night. Not long before a demarcation officer had been killed during fieldwork in a neighbouring district; see East Africa Standard, December 10th, 1971.

The most common instance of corruption occurs where the recording officer, the committee chairman and a number of committee members arrive to settle a land dispute. Traditionally, perhaps, it would have been usual for the parties to provide food and drink on such occasions. Today it seems that "food-money" is often expected to be provided as committee members may fear that the food will be poisoned. Even where food is accepted, the respective offerings of the two parties will be jealously compared and if the chairman is corrupt, he may make it known that a further contribution in cash or in kind will favour the party's cause. In some cases a Dutch auction will take place, often under cover of night, the land being awarded to the highest bidder. Several informants testified that committee decisions were sometimes altered overnight and this would explain why some people claimed to have won their cases, whereas the committee reports stated that they had lost. Where bribery is as widespread as it is alleged to have been in East Koguta, it is the honest, the poor and the ignorant that suffer.

It is true, of course, that a person aggrieved by the committee decision may appeal to the arbitration board and that at a later stage he has the opportunity of objecting to the adjudication register, but it is doubtful whether this machinery provides an effective safeguard against the dangers of a biased or corrupt committee. Certainly at these levels the possibility of bias is largely eliminated and even though bribery may occur, it is rarely suggested that it does. Nevertheless it is almost inevitable that both the board and the adjudication officer should rely heavily on the views of prominent committee members, who, after all, are much more closely acquainted with the area. Apart from this, the whole procedure for making complaints and lodging objections tends necessarily to favour the literate, the rich and those

familiar with bureaucratic ways. The fact that all landowners are summoned to sign the adjudication register may in many cases ensure that a landowner is not unjustly deprived of a whole plot. However, not all landowners hear of the publication of the register and not all obey the summonses which are served on them.

If the appeals procedures are not sufficient to counter the dangers of a biased or corrupt committee, perhaps the use of committees ought to be discontinued and all the present functions of the committee should devolve on the adjudication officer. This has, in fact, already happened to some extent where the adjudication officer is prepared to entertain objections raising questions which have not previously been before either the committee or the board. Indeed in East Koguta the number of committee cases (161) did not greatly exceed the number of objections (131). If the adjudication officer were required to be the principal adjudicating authority, he could still have the power to appoint a consultative committee of local people to advise him. This is an attractive solution, but it would place a heavy load on the adjudication officer and consequently slow down the pace of land adjudication; moreover it is arguable that the committee system is so well established in Kenya that any attempt to deprive the committees of their powers would be politically difficult.[178]

It may be possible to reform the present committee system in various ways. It is often suggested, for example, that committee members should, in view of their onerous duties, be paid. Perhaps the payment of an allowance would encourage regular attendance and

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178. Lawrance Mission Report, para.165.

perhaps, though this is dubious, it would reduce the incidence of bribery. It seems certain, in any case, that any possibility of payment by the Government of an allowance to committee members is ruled out by the colossal increase in the cost of the land adjudication programme that it would entail.[179] It would therefore be wiser to devise ways of reducing the work of committees. This work may be considerable, particularly in a sub-location the size of East Koguta, where there were over 1,600 plots to be entered on the adjudication record and 161 disputes to be settled. For the conscientious member this will have amounted to several years continuous work, long distances to be travelled on foot and little thanks at the end. Surely it would have been more satisfactory to have divided up the sub-location into several sections, coinciding with kinship groups, where possible. The people within each section would first be encouraged to settle their own boundaries before the demarcation officer and the committee started work. If any dispute arose, it would be settled by a small committee elected by the people of that section with a right of appeal to the arbitration board. One advantage of this system would be its speed, committees having relatively few disputes to settle and not being obliged to travel long distances. Moreover the likelihood of corruption would be reduced; committee members would be able to eat at home and might be deterred from taking bribes by the knowledge that they had to make their lives within the community. Such committees would also enjoy a kind of traditional legitimacy, since they would consist of members of the local kinship group, whereas committees constituted on a sub-locational basis consist largely of members who settle disputes in areas where, under customary law, they would have no rôle as land allocators.

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179. Ibid., para.170.

A disadvantage of the proposed system is that the position of the outsider becomes very precarious. However the rights of the man from outside the dominant kinship group may be protected if the committee is chaired by a trained member of the land adjudication department. At present, the recording officer acts as secretary to the committee and, though he has no vote, he may influence its deliberations. However, in practice, he is usually young, with little or no secondary education and more likely himself to be overborne by the more prominent committee members. If the committee had a salaried chairman whose training enabled him to advise it on questions of adjudication policy and on points of law, some of the deficiencies of the committee system, which have cast a shadow on its undoubted achievements, would surely disappear.

3. Conclusions.

There can be little doubt that the land adjudication programme is generally popular. Much of the earlier resentment disappeared when the consolidation of holdings was undertaken on a voluntary basis. Even people who are strongly critical of the way in which the programme was conducted in East Koguta have no doubt about the merits of the programme as such. Its obvious results can be seen in the way the landscape has been transformed into a patchwork quilt of fields surrounded by high sisal hedges and it seems certain that most people consider that its purpose is to provide security of tenure, putting an end to boundary disputes and enabling them to raise loans. They do not understand the implications of a system of registration of title, nor has there been much attempt to enlighten them. As far as they are concerned, dealings with land and the allocation

and the inheritance of land continue to be governed by customary law. It will be argued later[180] that a failure of communication of this kind will eventually frustrate the purposes of the programme and will lead to a situation where land adjudication has to be started all over again.

Whether the people concerned understand the full implications of the programme or not, they appreciate the fact that land rights are being recorded publicly and that that record is, for all practical purposes, final. It is all the more unfortunate that so much injustice may occur in the course of the adjudication process, but the experience of East Koguta, whether typical of other areas of Kenya or not, indicates that, though the purpose of land adjudication is to ascertain, confirm and record existing rights, some people may gain rights which they did not previously enjoy, while others may be deprived of rights which they did. In an area like East Koguta, where the number of disputes was considerable and where the whole adjudication process took over ten years, leaving a legacy of bitterness and resentment, questions inevitably arise regarding the manner in which land adjudication was conducted and indeed the advisability of starting it at all in an area which is not highly developed.

An attempt has been made in this chapter to answer some of those questions. It has been seen that most disputes can be loosely categorised as either boundary disputes or ownership disputes. The former type of dispute typically arises where there is an area of land adjoining two or more farms which either is unused or is used in a general way by an uncertain number of people. The adjudication

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180. Ch. V, infra.

authorities tend to divide such land between the adjoining farmers, thus conferring on them rights which they did not previously enjoy. However, it is arguable, at least where the area involved is not small, that such land should be registered in the name of the county council or, if a clan or lineage can prove that its members enjoyed the right under customary law to use and settle on the land, in the name of such clan or lineage. Such a step would at least have the merit of confirming existing rights and the Land Adjudication Act 1968[181] expressly provides for such a possibility.

Ownership disputes, on the other hand, tend to arise because customary institutions survive which it is difficult to fit into the statutory system. If a jadak is registered as the owner of a piece of land rather than his benefactor, or a widow rather than her eldest son, or a person in occupation rather an absentee claimant, some people are gaining rights at the expense of others. It should, however, be possible to avoid this kind of result.

One of the answers to these problems is to delay land adjudication until an area is really ready for it. Few boundary disputes will arise in an area where all the land has been enclosed. Few ownership disputes will arise in an area where land rights have become completely individualised and the customary rights of the kinship groups have disappeared together with customary institutions (e.g. leviratic unions, jadak relationships). The enclosure of land and the individualisation of land tenure are part of the same process, a process which can be seen at work in most agricultural areas of Kenya. However, the government is unlikely to defer the implementation of the land

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181. S.23(2)(b) and (d). The possibility of registering land in the name of a group is discussed infra, Ch.III.

adjudication programme in a given district until the process is completed there. To prevent injustice, then, land adjudication must be conducted in a much more careful manner. Much more use must be made of the provisions of the Land Adjudication Act 1968 in an effort to ensure that all existing rights are protected. It is certainly not easy to define these rights accurately, but land adjudication must be seen to be more than merely determining a certain individual to be the owner of a piece of land. The rights of kinship groups and rights not amounting to ownership can and should be protected if injustice is to be avoided.

Even a more sophisticated approach to the preparation of the adjudication record will not completely eliminate injustice, unless those institutions responsible for settling disputes carry out their duties in a fair and efficient manner. It has been suggested in this chapter that this is not always the case and that the odds are weighted heavily against the poor, the uneducated and those unfamiliar with bureaucratic ways. It is not simply that committee members may be biased or corrupt, nor simply that the arbitration board, the adjudication officer and the Minister may tend to rely on the opinions of the more prominent members, it is also that at all stages of the dispute settlement process calls are being made on skills (and funds)[182] which most ordinary people lack. A lot depends on knowing ones rights and being able to prosecute them effectively. Even if the adjudication committee does enjoy some traditional legitimacy, it is operating

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182. By virtue of L.N. No.143 of 1972, ss.4(2) and 7 and Sched.2, the fee for bringing a case before the committee is fifteen shillings, the fee for making a complaint to the board is thirty shillings, the fee for making an objection to the adjudication register is fifty shillings and the fee for appealing to the Minister is one hundred shillings.

within a system that has no roots in traditional life, a system where summonses have to be answered, where appeals have to be made in writing and within strict time limits, where the concise and articulate presentation of a case is required.

Land adjudication is usually carried out more swiftly and more painlessly than was the case in East Koguta. Nevertheless the experience of that sub-location does highlight a number of problems that have occurred and will occur elsewhere, albeit on a smaller scale. The discussion in this chapter has also introduced a number of themes that will be taken up later in this study. If land adjudication were carried out more carefully, much subsequent litigation would be unnecessary.[183] If an effort was made early on to explain the system of registration of title, that system would be more effective than it is.[184] Moreover, it will be seen that just as the land adjudication process tends to favour the educated and the rich, it is these people who also reap most of the benefits of land registration.[185] Before discussing these issues, however, it is necessary briefly to consider the comparatively rare instances where land is not registered in the name of an individual, but in the name of a group.

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183. See Ch. IV, infra.

184. See Ch. V, infra.

185. See Ch. VI, infra.

C H A P T E R III

LAND ADJUDICATION: GROUP TITLE

1. Introduction

It has been shown in the preceding chapter that difficulties may arise in determining who is to be recorded as the owner of a piece of land in areas where the individualisation of land tenure is incomplete. Where notions of "family land" or "clan land" remain strong and the concept of the individual ownership of land is alien, it may be wise to defer land adjudication unless it is possible to discover ways of protecting the interests of the family or clan. Only five persons can be registered as co-proprietors of a piece of land and even though they could be recorded as holding the land on trust for themselves and other members of the group, this would hardly represent the customary law position nor would it ensure that the land was dealt with in accordance with customary law. It would be perhaps more sensible to incorporate the kinship group, thus making it possible for members to determine the rules which would govern land dealings and land use, but it would hardly be appropriate to register kinship groups as companies or cooperative societies and until 1968 these were the only alternatives.

In some areas, however, the land adjudication authorities tended to ignore the legal niceties of corporate status and to register group land in the name of the clan or family or, a more sophisticated approach, in the name of the local county council to hold it on trust for the clan or family. This is what occurred on the Nyabondo Plateau,

especially where the siany was concerned.[1] The siany, an area of poor land in the middle of the plateau which gets very marshy during the rainy season, was and is used mainly for the purpose of grazing livestock. Before land consolidation it seems that anyone living on the plateau was entitled to graze his livestock on the siany, nor was any particular part of the siany appropriated to the use of any one family or clan, though obviously most people tended to use that part of the siany that lay closest to their farms. At the time of land adjudication, however, the siany was divided up among clans, families and individuals according to the wishes of those concerned. In some cases it was decided to divide the land among the heads of households. In others the family would prefer to keep the land as family land; thus members of the jok Abok, that is those who traced their ancestry in the male line back to Abok (he would be great-grandfather to most members), decided that their ninety-nine acre share of the siany should be registered in the name of the county council to hold on trust for them. Finally, in one case, a large area of siany (some 153 acres) was registered in the name of the county council, "reserved for the Kamnwa Clan, its heirs and successors".

Today most of the people concerned regret that family or clan grazing land was ever registered in the name of the county council and efforts are being made to have it divided among the members entitled. The reasons for this change of mind are various. In some cases people are afraid that the county council will take it away from them. In others the group members may wish to use the land for different purposes, some for grazing cattle, others for cultivating sugar, and so on. Moreover, those enjoying rights in an area of the siany cannot, of course, get land certificates and cannot raise loans to promote its

1. It only occurred in East Kadianga.

development. Most important of all is that the farmers have by now acquired a sense of individual ownership of land which makes them reluctant to share the use of land with others. Indeed a kind of informal division of the Kamnwa clan lands and a demarcation of individual holdings took place some time ago, but it gave rise to so many disputes that the area is now having to be properly surveyed and adjudicated at the substantial cost of 4,000 shillings. It remains to be seen whether each farmer will do what he wants with his newly-demarcated area of siany. The siany is particularly suited to the block cultivation of a single crop, sugar or rice, perhaps, but in spite of pressure from agriculture officers and the better farmers very little measure of agreement had been achieved among clan or family members on this issue.

It is not particularly satisfactory that group lands, whether family lands or clan lands, should be registered in the name of a county council, but neither is it desirable that an area of land that could best be developed as a single entity should be divided into a large number of enclosed holdings. This is a dilemma which faces the authorities both in agricultural areas where block cultivation is necessary, and, more importantly, in pastoral areas, where the registration of individual titles to land would be patently absurd. It is, however, a dilemma that lawyers can help to solve by devising a system whereby the group acquires a corporate personality, empowering it to own land and to deal with that land, while the individual members continue to have rights and duties regarding the land, both inter se and vis-à-vis the group itself. Such an attempt was made by the enactment of the Land (Group Representatives) Act[2] in 1968, a

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2. Cap.287 (1970).

discussion of which forms the main part of the rest of this chapter.

2. The purpose of the Land (Group Representatives) Act 1968.

(i) The history of the Act.

The idea that group ranches should be established in the range areas of Kenya and, in particular, in Masailand is not, of course, a new one. However, it was not until after the report of the Lawrance Mission that a legal framework was devised, designed to facilitate their establishment and to bring them within the ambit of the land adjudication programme. Since then a concerted effort has been made to start group ranches throughout Masailand, first in Kajiado District and currently in Narok District where the present writer was able to do some fieldwork.

Whatever the reasons, it seems agreed that the colonial period saw little change in the life of the Masai. It is true that their freedom of movement may have been restricted by the establishment of tribal reserves and that inter-tribal clashes and cattle-stealing became less frequent as a result of the imposition of the pax Brittannica. However, the introduction of the cash economy and formal education never had the dramatic impact on the Masai that it had on the settled agricultural peoples of Kenya, particularly the Kikuyu. The colonial administration tended to criticise the Masai character for their failure to respond to all the new opportunities. Sometimes the tone of the colonial reports is sad as where one District Commissioner opened his annual report by stating "it is

customary for the writers of Annual Reports in the Masai Districts to seek for signs of progress and to admit ruefully that there are few...!"[3] Sometimes the tone is more violent as where a District Commissioner quoted with complete approval an account of 1915 which talked about the "supineness" of the Masai, their "ingrained conservativism" and their "useless, idle, vicious lives" before recommending "drastic, if not forcible measures".[4]

There was, however, little reason why a Masai should send his sons to school. The distance would be great and transport difficult to obtain. Moreover the sons would be needed to look after the cattle, nor was it obvious that education provided any advantages since most mission-educated boys returned to the traditional life anyway and soon forgot what rudiments of literacy and numeracy they had picked up at school. As for the opportunities offered by the cash economy, it seems clear that the colonial administration was more concerned with protecting the interests of European beef farmers than promoting development among the Masai. Quarantine imposed to protect European-owned cattle from possible infection made it difficult for the Masai to sell meat to other Africans. The low price offered by the Kenya Meat Commission, the body responsible for canning meat, encouraged Masai to smuggle their cattle to Tanganyika where the price was twice as high. The Kenya Masai were prohibited from buying quality Boran stock at the Isiolo auctions. One writer concluded that "... there is little doubt that the amount of encouragement given to the tribe to become commercial pastoralists has been somewhat restricted by the tendancy of those in authority to

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3. Colony and Protectorate of Kenya, Narok District Annual Reports, 1948, p.1.

4. Ibid., 1944, pp.2-3.

regard the cattle industry as an exclusive field for European enterprise."[5]

Whatever the reason, at the end of the colonial period the vast majority of the Masai was leading a recognisably traditional way of life. As long as they paid their taxes and kept the peace, they were unlikely to be interfered with by the administration. Virtually untouched by Christianity and formal education and only peripherally involved in the cash economy, they continued to move with their herds across the great plains of southern Kenya from wet season grazing to dry season grazing and back again.

However, in the late fifties and early sixties one or two things occurred which forced the government to reappraise the situation and led many Masai to demand more active government intervention. In the first place, the Masai realised with increasing concern that more and more of their land, particularly land of high agricultural potential, was being settled by non-Masai. For many years people from other tribes, particularly Kikuyu, had come to live in Masailand; they had usually been accepted by the Masai who gave them land and often married their women. However, as land became extremely short in the Central Province and as Kikuyu began to realise the great potential of much of Masailand, the influx of Kikuyu increased considerably and began to cause conern. The second development that started in the mid-fifties was that some of the more educated Masai began to establish individual ranches. The first reported instances seem to have occurred

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5. L. James, "The Kenya Masai: a nomadic people under modern administration," Africa, vol. XII, (1939), p. 49, at p.71.

in 1955 in the Trans-Mara area[6] but thereafter there was a growing demand for the enclosure and demarcation of individual ranches both in Kajiado and Narok District. Thirdly, it was the terrible drought of 1960-1 combined with the absence of any significant effort on the part of the government to alleviate the situation that led Masai to realise the extent to which Masailand had been neglected.

After Kenya became independent, the Masai were able to channel their grievances through their elected representatives and to exert pressure on a government publicly dedicated to the development of rural Kenya. The former laisser-faire attitude to Masailand was no longer possible. Some sort of government intervention was necessary on a major scale, since the situation there was grave. If Kikuyu and other agricultural people continued to occupy the best agricultural lands, while the more "progressive" Masai continued to enclose the best grazing land to form individual ranches,[7] the point would soon be reached where tens of thousands of Masai with their herds would be forced into the dryest, least fertile areas, areas totally incapable of supporting them. Not only would the government of Kenya have an interest in preventing this occurring, but it also has an interest in developing the range areas of Masailand by providing services and generally trying to raise Masai standards of cattle-keeping.

As the purpose of land adjudication is to give security of tenure and thus to promote development by providing both the incentive to invest and the opportunity to raise credit, it is natural that the

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6. Colony and Protectorate of Kenya, Narok District Annual Reports, 1956, p.21.

7. At the time of the Lawrance Mission eighty-two individual ranches in Kajiado District had already been approved by the County Council, the average size being 1,630 acres. It is estimated that if the total acreage of Masai land was divided, the average acreage per adult male Masai would be about two hundred. See Lawrance Mission Report, para. 105.

Lawrance Mission should have considered extending the adjudication programme to Masailand. After rehearsing a number of the arguments already mentioned regarding the need for government intervention and after noting that the registration of group ranches is a prerequisite to the loan of money for range development, the Mission recommended that land adjudication should be started in Masailand and that group ranches and, where appropriate, individual ranches should be registered.[8] In accordance with this recommendation, the draft Land Adjudication Bill proposed by the Mission and subsequently enacted in an amended form contains provisions requiring a group to be recorded as the owner of land, where that group has, under recognised customary law, exercised rights in or over land which should be recognised as ownership.[9]

The Bill also provided that if the number of members of the group did not exceed ten, all their names should be recorded,[10] but that if it did exceed ten or if the majority of the members so requested, the names of not more than ten members should be recorded as group representatives,[12] who were given the exclusive right of dealing with the land and were deemed to have all the rights and powers of an individual owner.[13] Nothing more was said about groups or group representatives,

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8. Ibid., para. 106.

9. Land Adjudication Act 1968, s.23(2)(b). This follows, fairly closely, the wording of the Land Adjudication Bill, s.26(1)(a), to be found in the Lawrance Mission Report, Appendix E.

10. Lawrance Mission Report, Appendix E, Land Adjudication Bill, s.26(3)(a).

11. Ibid., s.26(3)(b).

12. Ibid., s.27.

13. Ibid., s.26(3)(b).

though it was proposed to amend the Registered Land Act 1963 in order to deal with the appointment, removal and replacement of representatives. However, none of these provisions was included in the final Land Adjudication Act, though the reasons for this are not clear. Perhaps it was felt that the subject of group representatives raised a complexity of issues that could not simply be dealt with by adding a section or two to a bill concerned with land adjudication; a separate Act was required. So, the Land (Group Representatives) Bill was drafted and enacted together with the Land Adjudication Bill, both Acts coming into operation on June 28th, 1968.

(ii) The provisions of the Act.

Where during land adjudication a group has been recorded as the owner of land, the adjudication officer is required to cause the group to be advised to apply for group representatives to be incorporated under the Land (Group Representatives) Act 1968[14] and to notify the Registrar of Group Representatives that the group has been so advised.[15] The registrar then convenes a meeting of the members to adopt a constitution, to elect not more than ten and not less than three group representatives and to elect persons to be officers of the group in accordance with the constitution.[16] The elected representatives must then apply to be incorporated.[17] As a body corporate, they are registered as the pro-

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14. Land Adjudication Act 1968, s.23(5)(a).

15. Ibid., s.23(5)(c).

16. Land (Group Representatives) Act 1968, s.5(1).

17. Ibid., s.7(1). The incorporation provisions are similar to those contained in the Land (Perpetual Succession) Act 1923, Cap.286.

prietors of the land;[18] they have perpetual succession,[19] the power to sue and be sued in their corporate name and the power to acquire, hold, charge and dispose of property of any kind, and to borrow money with or without giving security.[20] They are required, however, to exercise their powers on behalf and for the collective benefit of all the members of the group, and fully and effectively to consult the other members of the group on such exercise.[21]

Provision is also made for the replacement of group representatives,[22] and group representatives are empowered to apply to the registrar for his consent for the amendment of the name, constitution or rules of the group,[23] or for the dissolution of the incorporated group representatives.[24] Provision is also made for group meetings,[25] though no business is to be transacted at a meeting unless at least sixty per cent of the members are present.[26] The groups are required to keep registers of members[27] and books of account,[28] and accounts must be rendered to the members at least once a year.[29]

Finally, it should be mentioned that the Minister is specifically empowered to make regulations prescribing provisions which must be

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18. Registered Land Act 1963, s.11(2A).
19. Land (Group Representatives) Act 1968, s.7(3).
20. Ibid., s.8(1).
21. Ibid., s.8(2).
22. Ibid., s.9.
23. Ibid., s.13(1)(a).
24. Ibid., s.13(1)(b).
25. Ibid., s.15.
26. Ibid., s.15(6).
27. Ibid., s.17(1)
28. Ibid., s.18.
29. Ibid., s.19(1).

contained in the constitution of a group or provisions which are deemed to be part of that constitution or provisions which are deemed to be part of that constitution unless specifically excluded.[30] In the exercise of these powers the Minister made an Order known as the Land (Group Representatives) (Prescribed Provisions) Order 1969,[31] which prescribes in considerable detail the provisions which must form part, or are deemed to form part of every constitution. Reference will be made to the more important provisions in the course of this chapter.

This, in outline, is the system for the establishment of group ranches that was introduced in 1968. The legal provisions are a lot more detailed and complex than the Lawrance Mission advised, but nevertheless the programme has been prosecuted with great vigour. All Kajiado District has been adjudicated and a large number of group ranches set up and registered. Recently a start has been made in Narok District and it was there that the present writer was able to do some research, in an attempt to assess the extent to which the goals of the programme are being achieved and group ranches are actually working.

3. The Working of the Land (Group Representatives) Act 1968.

(i) Introduction.

Narok is a small township situated about seventy miles due west

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30. Ibid., s.31(2).

31. L.N. No.204 of 1969.

of Nairobi.[32] The car journey from Nairobi takes over two hours and at the time of the research about half the journey was on bad dirt roads, though it had long been proposed to build a tar road from the main Nairobi-Nakuru road to Narok. Quite a good dirt road also leads due north from Narok over the Mau Escarpment to Nakuru some ninety miles away. However it is a fairly remote spot, poorly served by public transport. Most government departments have offices in Narok; there are schools there, there is a District Magistrate's court, there is a club. Narok District is very large and the quality of the land varies enormously. Going north from Narok, the road climbs steadily for thirty-five miles up to the top of the Mau Escarpment. The higher the land, the greater the incidence of rainfall. These are the best areas of Narok District, suitable not only for grazing purposes, but also for the cultivation of wheat. Yet these areas are neither highly populated nor fully developed.[33] Wheat cultivation is being undertaken on an increasing scale by non-Masai (since Masai have always spurned the settled agricultural way of life) who lease large tracts of land from the Masai "owners".[34] On the other hand, as one goes south of Narok, one descends to less watered areas where cultivation is impossible and grazing poor. Except for the Loita Hills, the arid plains extend from the Masai Mara Game Reserve in the south-west to the soda-lake at Magadi in the south-east.

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32. See map, supra, p. 23.

33. According to a recent report there are some 900,000 hectares of high-potential land in Narok district, much of it under-utilised. International Labour Office, Employment, incomes and equality: A strategy for increasing productive employment in Kenya (I.L.O., Geneva, 1972), p.172.

34. It seems that the annual rent per acre is fifty shillings, while the value of the wheat that could be harvested from a single acre is 1,400 shillings. Still it seems that the Masai landlord is very content with this unlooked-for and unearned income.

Land adjudication started in Narok District in February 1969 and by March 1974 no less than seventeen adjudication sections had been completed, a total area of some 330,000 hectares. The fact that all these sections each consist principally of a single group ranch accounts for the speed with which the adjudication programme has advanced. Acute problems are clearly going to arise when the programme is extended to the rich wheatlands of the north, currently "leased" by Masai to non-Masai, but this stage had not been reached when the present writer was in Narok. In addition to looking at records and interviewing officers in Narok, it was possible to visit two of the group ranches and to talk to representatives of these ranches. One of these ranches was the Olopito group ranch, situated just north of Narok, in Olopito adjudication section, the first section to be completed in the district (October 1970). The ranch comprises 6,280 hectares, the total area of the section being 6,566 hectares; the remaining 286 hectares consist of twelve individual farms, some of which are little more than subsistence plots, though some are quite sizeable ranches. The other ranch visited was the Ilmashariani group ranch, situated just east of Narok and sharing a border with Olopito. The adjudication section of which it forms part together with two other group ranches and some fifty tiny plots near the township boundary, was declared in July 1970 and completed in June 1972. The Ilmashariani group ranch comprises 4,992 hectares.

It seems likely that the experience of these two ranches is fairly typical; indeed available records regarding other group ranches indicate that this is so. Nevertheless, the conclusions reached in the course of this chapter can only be regarded as tentative. Time did not allow the present writer to carry out as much fieldwork as he

would have liked. Moreover, it is much too early to be able to make any definitive evaluation of the way in which the Land (Group Representatives) Act 1968 is working in Narok District. Research on group ranches has, however, been carried out in Kajiado District, where the system has been in operation for a slightly longer period of time, and reference to this research will be made in the course of this chapter.

(ii) The establishment of group ranches.

The principal unit of cattle management among the pastoral Masai is the Kraal camp, consisting of several independent polygynous families joined together by a common interest in the economic exploitation of their immediate vicinity.[35] In such camps there is no formal system of leadership and members may always leave one camp and apply to join another. A group of Kraal camps tends to gather around a dry-season water supply. Such a group is known as an enkutoto, a "settlement association", and is a fairly stable unit. In parts of Masailand there is a seasonal migration of some fifteen or twenty miles between dry and wet season pastures; in other parts there is no migration at all, the cattle being driven further and further to pasture throughout the dry season. These "settlement associations" (inkutot) are the smallest formal political

35. The information contained in this paragraph comes from A.H. Jacobs, "The pastoral Masai of Kenya", unpublished report submitted to the Ministry of Overseas Development, London, 1965.

segments of the Masai people, seen by themselves and others as a separate corporate entity with its own kind of government, its own machinery for dispute settlement and its own customary rights of priority to certain lands and sources of water. Attempts to organise grazing blocks on clan lines have failed in the past because clan systems cut across the boundaries of sub-tribe, of enkutoto, of Kraal camp. Clearly it is the enkutoto that must be used as the basis for any range development programme; indeed one student of the Masai recommended the incorporation of each enkutoto, the vesting of the legal title to the land in the enkutoto, each individual or family becoming a shareholder.[36]

When group ranches were established in Kajiado District, however, they were not based on traditional units and boundaries, even though the work "enkutoto" was sometimes used to refer to a group ranch.[37] As a result, there is little sense of solidarity among members, for within any given group ranch there may exist a number of corporate and often conflicting units. Moreover there will be little respect for ranch boundaries which cross traditional migration routes. Similarly in Narok District no attempt has been made to base group ranches on traditional units, even though some lip-service to the idea is paid. The land adjudication authorities seem to establish group ranches where convenient boundaries (particularly rivers) already exist; ranchers using land on both sides of a projected boundary are required to elect for one group ranch or the other. Sometimes the boundary coincides exactly

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36. A.H. Jacobs, op. cit., p.85.

37. H.G.B. Hedlund, "The impact of group ranches on a pastoral society", University of Nairobi, Institute for Development Studies, Staff Paper No.100, June 1971 (unpublished), p.5.

with the boundary between two sections of the particular sub-tribe, but such a neat solution is rare. When the Ilmashariani group ranch was being established, a certain river appeared to mark a clear boundary between the Ilmashariani section and the Siabei section. However the Siabei people had been in the habit of crossing the river during the wet season to graze their cattle on the disputed land and to use the cattle dip built there by the local council for general use. When the Siabei people objected to the Ilmashariani adjudication register,[38] the adjudication officer admitted that a Masai from one section was customarily free to move and graze his cattle within the area of the same sub-tribe, but he confirmed the inclusion of the land within the Ilmashariani group ranch on the grounds that the Ilmashariani had used the land all the year round, whereas the Siabei had used it only seasonally. No mention of a right of way to the cattle dip was made.

This example illustrates, on a large scale, the sort of problems that the fixing of ranch boundaries can raise. The Siabei people have lost a valuable right of grazing which they have been exercising for many years without any trouble. In the future they may continue to graze their herds on the disputed land, ignoring ranch boundaries. On the other hand, they may be prevented from doing so by the Ilmashariani with a resulting increase in bad feeling and violence between sections that formerly co-existed amicably. This sort of problem will arise anywhere where a ranch boundary conflicts with customary grazing patterns.

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38. Siabei v. Ilmashariani Ranches, Objection to the Ilmashariani Adjudication Register, No.2. An appeal to the Minister (No.82 of 1972) had been lodged but it had not been heard at the time of the research.

Just as the group ranches are not based on traditional grazing units, so also the body responsible for running a group ranch has no traditional legitimacy whatever. Indeed the whole notion of administration by a board of elected representatives is utterly alien to the Masai way of life. No real elections are held, of course. A meeting of members is simply convened and someone suggests a name. Members will shout their agreement and someone else will suggest a name. The process continues in this way until ten representatives have been "elected". Each of the main family groups is represented, usually by its head or one of its older members. Group representatives are rarely young and rarely educated. Of the ten Olopito group representatives, four were of the ilterito age-set, senior elders aged between forty-eight and sixty-two, four were of the ilnyankusi age-set, junior elders aged between thirty-eight and forty-eight, and two were of the Ilkololiki age-set, senior warriors aged between twenty-six and thirty-eight. The chairman and vice-chairman are senior elders and the secretary and treasurer are both junior elders. Only one representative speaks English; most of the representatives, indeed most of the group members, are illiterate. Such young, educated people that may stay in the area are seldom elected to be representatives.

Group representatives seem to have little sense of collective responsibility. Although they are required fully and effectively to consult the other members of the group on the exercise of their powers,[39] group ranch meetings are uncommon; there was no record of

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39. Land (Group Representatives) Act 1968, s.8(2). Section 15(2) of this Act requires that general meetings of the group be held annually. It is doubtful whether this requirement is often observed.

a single meeting of the Ilmashariani group ranch and only one meeting of the Olopito group ranch had been recorded if one excludes those meetings specifically convened to deal with the dispute with the Murua people.[40] Meetings of representatives appear to be equally uncommon; indeed some representatives seem to take decisions affecting their ranch without consulting their colleagues. For example, one representative had, on his own account, given a valuable charcoal-burning contract to an outsider and pocketed the proceeds himself. Another representative admitted giving his consent to outsiders who wished to reside on the ranch. In spite of all the powers conferred on the group representatives and the duties required of them, as a body they hardly exist; as individuals, they may be able effectively to promote their own interests and those of their families, but as an instrument to ensure the successful establishment and smooth running of group ranches, they have not yet proved their worth.

The group representatives also constitute the adjudication committee for the particular adjudication section and it is they who decide questions of ranch membership. At the time of land adjudication a register of members is drawn up and it is the duty of the group to maintain this register.[41] The register, however, does not contain the names of everyone entitled to live on the ranch; in practice it only contains the names of adult, married males. Moreover the names of males who subsequently come of age and marry are not entered on the register. When a member dies, his adult sons will take his place; if he leaves only minor sons, they will be registered in his place and

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40. This dispute is discussed <u>infra</u>, pp. 148 <u>et seq</u>.

41. Land (Group Representatives) Act 1968, s.17(1).

the name of their guardian noted. Perhaps it is felt that the register would become unworkable if the names of all members were entered on it; on the other hand, the passage of time is going to make it harder for the families of persons who are not registered to prove their right to reside on the ranch. Arguably, therefore, the names of all married men should be entered on the register. In Narok District the average number of members of group ranches is about a hundred; in Olopito it was seventy-eight and in Ilmashariani it was 97. By multiplying the number of members by five it is possible to get a rough idea of the total population of a ranch.

There is nothing in the law to prevent a person becoming a member of more than one ranch, though this practice is discouraged by the Registrar of Group Representatives and in the two ranches studied the present writer only encountered one case where this had occurred.[42] Moreover, while there is nothing to stop a group ranch member acquiring an individual ranch, it is extremely rare for an individual ranch owner to be allowed to join a group ranch. Thus in Olopito only two members had farms elsewhere, the ranch chairman and the ranch secretary. The vast majority of members depend for their entire livelihood on the cattle which they keep and graze on the group ranch.

The question as to who is entitled to join a group ranch is therefore a vitally important one and one which has caused considerable controversy both at the time of land adjudication and after it has been completed. As in agricultural areas, it is the rights of

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42. Thus in Risa Ole Mpusia v. Ilmashariani Group, Objection to the Ilmashariani Adjudication Register No.7, an application by the Mpusia family to join the Ilmashariani group ranch was dismissed on the grounds that they were already registered members of the neighbouring Morijo Narok group ranch.

the outsider who has resided in the area for some time that have given rise to disputes; indeed most adjudication disputes in Narok District are of this kind. Although it is difficult to isolate the principles according to which such disputes are settled, a few generalisations can be made. An example will illustrate the sort of issues that arise.[43]

A certain Samarua applied to join the Olopito group ranch. He had been invited a long time ago to come and stay in the area by a person who has recently been registered as a member of the group, and that person wished him to stay. The adjudication committee rejected his claim for membership on the grounds that he had been born elsewhere and had land elsewhere. The arbitration board upheld his appeal on the grounds that, though he had land elsewhere, his long residence at Olopito gave him the right to stay. However the adjudication officer upheld the objection of the Olopito group on the grounds that Samarua had land elsewhere, and he pointed out that the Masai custom of inviting friends to come and stay with them was inappropriate in the context of a group ranch and should be discouraged. There are many cases of this kind which illustrate that proof of long residence in the area does not by itself entitle a person to become a member of a group ranch. Nor is it enough to show that a Masai of the area had invited him to stay with him and still wished him to stay. He must prove that he or his family before him had been accepted by the group as a whole, something which is unlikely to occur if he has land elsewhere. A fortiori a claim to membership can never succeed where

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43. Samarua Ole Nkuruna v. Olopito Group, Olopito adjudication committee case No.1 and Rift Valley Provincial arbitration board case No.1; Olopito Group v. Samarua Ole Nkuruna, Objection to the Olopito Adjudication Register, No.8.

the claimant has neither been accepted by the group nor invited by one of its members, however long he has resided in the area.[44]

This kind of dispute provides a further illustration of the difficulties of reconciling the establishment of group ranches with Masai custom. On the one hand, it is unjust if the acceptee of a Masai family should be denied full membership of a group ranch, especially if he has lived there for sometime and has nowhere else to go. On the other hand, the members of a group ranch have an interest in limiting the number of persons with grazing rights and denying such rights to acceptees of any individual. As a way out of this dilemma, acceptees are, in some cases, given "rights of occupation" at the time of land adjudication. This appears to mean that while they are not full members of the group, they are not trespassers either. They are entitled to remain on the ranch and graze their cattle there. The exact nature of this right of occupation is not clear; in particular, it is not obvious whether it can be terminated by the acceptor, the group or the group representatives, nor whether it extends to the acceptee's family, passing to his sons on his death.

The establishment of group ranches has not put an end to the Masai custom of inviting friends and relations (particularly sons-in-law) to come and settle. This is one of the main problems that

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44. In Michael Muturi v. Nkairamiram Group, Objection to the Nkairamiram Adjudication Register, the adjudication officer put the point forcefully when he dismissed the objection of Muturi, a Kikuyu. "...whether one lived in a place is immaterial because he could have done it illegally. He therefore had no traditional land rights since he did not qualify so through the customary rituals, thus becoming an acceptee of a Masai family." However the systematic development of a defined area may entitle a person to be registered as the owner of an individual plot.

face group ranches and no attempt has yet been made to solve it.[45] Presumably the group will have to devise regulations limiting the rights of members to "accept" outsiders and defining the status of acceptees. Whether such regulations could ever be effectively enforced is a doubtful question. Certainly attempts to get rid of trespassers have not proved very successful; for example, there are still living at Olopito several families whose claims to be entitled to stay there were dismissed at the time of land adjudication. Although they have land elsewhere and move their cattle away during the dry season, they still wish to stay at Olopito. Due to their constant mobility it is hard for the police or the Assistant-Registrar of Group Representatives to locate them and even if they are ever bought to court, the sort of fine imposed is unlikely to deter them from trespassing on Olopito Ranch in the future. With the presence of large number of acceptees and trespassers on the group ranches it is hardly surprising to find the chairman of one group ranch complaining that members' cattle on the ranch were outnumbered by those of non-members.

A final problem to be considered in connection with ranch membership concerns the nature of the individual member's rights. The legal title to the land is vested in the incorporated group representatives[46] and as no trust exists, it would seem that the members have no proprietary interest in the land, but that their

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45. At present the position is governed by a provision deemed to be contained in the Constitution of every group which states that every member shall be entitled to permit any other person to reside with him on the group land unless a majority of the group representatives decide otherwise; Land (Group Representatives) (Prescribed Provisions) Order 1969, Sched.2.

46. Registered Land Act 1963, s.11(2A), proviso.

rights and duties, together with those of the incorporated group representatives, would be governed by the provisions of the Land (Group Representatives) Act 1968, by the group's constitution and by rules adopted by the group.[47] It is not easy to understand the legal significance of the provision deemed to be contained in the constitution of every group to the effect that every member shall be deemed to share in the ownership of the group land in undivided shares.[48] The force of the words "be deemed to" is not clear. Since the members are neither legal nor (in the absence of a trust) equitable owners of the group land, there seems little point in deeming them to be so. In practical terms, moreover, it can hardly have been envisaged that a member should have the right to demand partition of the group land. Certainly a member is entitled to reside on the ranch, to use the land and all the ranch facilities and to attend and vote at all general meetings of the group.[49] However, he has no interest in the land such as he could dispose of by will or inter vivos, and if he and his family decided permanently to leave the ranch, he would not be entitled to any compensation unless the group's rules or constitution made provision for such payment.

Of more immediate importance is the question whether a member may be expelled from a group ranch and, if so, in what circumstances and by what procedure. On the one hand, it could be argued that if a member constantly breaks group rules and constantly defies the group authorities, expulsion from the group would be the only

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47. See the Land (Group Representatives) Act 1968, s.12.

48. Land (Group Representatives) (Prescribed Provisions) Order 1969, Sched.2.

49. Ibid.

effective sanction. On the other hand, expulsion from the group would, in all probability, leave the expelled member and his family without any form of livelihood, since the whole of Masailand will be adjudicated in the near future and no other group ranch is likely to accept him as a member. The effects of the exercise of a power of expulsion are so drastic that if such power is to be given to the group or its representatives, it must be hedged about with controls to prevent victimisation and other forms of abuse.

The law on this point is most unsatisfactory and in need of clarification. Although the group constitutions contain provisions concerning the admission of persons to membership of the group, they are curiously silent about the termination of membership. However, the Land (Group Representatives) Act 1968 does contain a provision, tucked away towards the end together with miscellaneous general provisions, to the following effect:

> Where a question arises whether a particular person is a member of the group, a certificate signed by a majority of the group representatives shall be conclusive of the question:
>
> Provided that a person who is aggrieved by the issue of such a certificate may apply to a District Magistrate's Court having jurisdiction in the area to determine the question, and in such case the determination of the court shall be conclusive.50

This is a curious provision, open to a number of interpretations. In the first place, the section could be construed to apply only where

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50. Land (Group Representatives) Act 1968, s.28.

a question arises whether a particular person is registered as a member of the group. The group is required to keep a register of members[51] and it is the responsibility of the group secretary to maintain it.[52] This register is based on the adjudication register and if any doubt were to arise as to whether the name of any person appeared on the register or not, it is reasonable that a procedure should be provided for the settlement of the question and that a person aggrieved by the issue of the certificate should be able to apply to the court; without the possibility of applying to the court, there would be a considerable risk that the group representatives might wrongfully add names to, or delete names from, the register. This restrictive interpretation of section 28 is favoured by its position at the end of the Act, which suggests that the legislature did not intend thereby to confer any wide powers on the group representatives, but simply to provide a procedure for verifying the contents of the register.

However, taken by themselves, the words can bear a much broader interpretation. They could mean that a certificate signed by a majority of the group representatives is conclusive of the question whether a particular person is a member of a group, regardless of whether his name appears on the register and, it seems, regardless of whether he has been admitted to membership of the group in

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51. Ibid., s.17(1).

52. Land (Group Representatives)(Prescribed Provisions) Order 1969, Sched.2. A copy of the register is also lodged with the Registrar of Group Representatives.

accordance with the constitution. On this interpretation, if a majority of the group representatives agrees, it may admit and, more important, expel members.[53] A member who feels he has been wrongfully expelled may, of course, apply to the District Magistrate's Court, but it is far from clear what principles would govern the determination of an issue of this kind.[54] In spite of the objections to the broader interpretation of section 28, it is this interpretation which has been followed by all those concerned, though the question has not yet been resolved by the courts.

A difficult situation has arisen at Olopito because some forty-eight persons from a neighbouring area (Murua) were registered as members on the understanding that when that area was adjudicated and another ranch established, Olopito members would be invited to join that ranch, thus continuing a tradition of good relations and reciprocity between the two peoples. However when the Murua group ranch was established, Olopito members were not registered as members though a number of non-Murua people were. Bad feeling has now arisen between the Olopito and Murua peoples, but the Murua refuse to leave Olopito or to have their names deleted from the Olopito register. Consequently the majority of the Olopito group representatives signed a section 28 certificate purporting to

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53. An argument against this interpretation is that a conflict of this kind may arise. According to the Land (Group Representatives) (Prescribed Provisions) Order 1969, Sched.2, a person not recorded in the adjudication register as a member of the group may be admitted to membership if the Group Representatives all agree and their decision is confirmed at the Group's annual general meeting. This provision in the Group's constitution limiting the ways in which a person may be admitted to membership of a group would lose much of its point, if the decision of a majority of group representatives sufficed to make a person a member.

54. In particular, once it has been established that the majority of the group representatives has indeed decided that a certain person is or is not a member, it may be wondered whether the court may, in its absolute discretion, reach a contrary conclusion.

terminate the membership of the Murua people. At the time of the research both parties had started to take legal action.

The scale of this dispute was considerable, involving repeated efforts by Members of Parliament to reconcile the two peoples, but section 28 certificates have also been used in an attempt to expel individuals and their families. In one instance, a person had been registered as the member of a group in accordance with the decision of the arbitration board which was upheld by the adjudication officer. The group continued to resent his inclusion in the register and the group representatives decided to sign a section 28 certificate expelling him. If such a certificate has this effect, as on the wide interpretation of the section it should have, it would operate to undermine the whole adjudication process.

Perhaps, in the last resort, it does not matter very much at present which view of the law is taken. In the last example, the unwelcome member was subject to constant threats and harassment but he nevertheless insisted on his right to stay on the ranch. Similarly the Murua people, over 200 strong, had no intention of giving up what they saw as their right to stay on Olopito. It is highly unlikely that a court decision favouring the broader interpretation of section 28 would induce either an unwelcome individual or the Murua people to move away, any more than a decision favouring a narrow interpretation would lead to their being welcomed by the majority of members. These are areas where respect for court decisions is slender and their enforcement problematical. The settlement of disputes of this kind will eventually depend on the use of force or on agreement between the parties, rather than on the niceties of statutory interpretation.

(iii) Socio-economic developments in group ranches.

It has been suggested in the previous section that group ranches are generally not based on any traditional unit; their boundaries do not coincide with those of the Masai settlement-associations, the inkutot, nor does their system of authority have anything in common with the traditional decision-making processes of the Masai. The ideology behind the establishment of group ranches is a modern one, based on a firm belief in the importance of development. The concept of the group ranch introduces alien notions of land tenure, boundaries which create distinctions between members and non-members, between owners and trespassers, obscuring the position of acceptees. The running of the group ranch calls for the adoption of unfamiliar procedures based on election, representation, delegation and the majority vote. Nevertheless group ranches could succeed in creating a sense of identity and purpose and in replacing traditional institutions, if they were seen to bring economic advantages. Unless they do this, they will merely remain a legal concept; they will never become a reality. The present section is devoted to a consideration of the ways in which group ranches have developed since their establishment. Although the present writer is not an economist and although he had not enough information to reach any definitive conclusions, nevertheless he was able to learn enough, particularly from interviews, to risk making some general predictions about the future of group ranches.

Many group ranches are from the start not viable, economic propositions. A study of the Kaputiei Masai group ranches in Kajiado District found that only one group ranch, Poka group ranch,

was ecologically viable as a self-contained unit.[55] It is likely that in Narok District there are also many ranches which are not ecologically viable and it is certain that most ranches are over-stocked.[56] Thus it is estimated that if the continuous grazing system[57] is used at Olopito (as it is, at present), the ranch can support 934 stock units whereas, according to the Group ranch stock census of September 1973, there were 1,664 stock units on the ranch at that time. Olopito is one of the more favoured group ranches,[58] yet of its 6,565 hectares only some 3,455 hectares can be used for grazing.

A possible solution to this problem would be to reduce the number of cattle on the ranch. However, all cattle are individually owned[59] and individuals will fight any attempt to reduce their herd. Although the group ranches have adopted rules providing for the opening of a stock register and the issuing of grazing quotas, no attempt has been made to enforce them. It is clear that the development of group ranches will not get off the ground until some acceptable system for the culling of cattle is devised. Meanwhile cattle-owners continue to graze their cattle outside the boundaries of their ranch. Sometimes, it is true, this can be accounted for

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55. J.M. Halderman, "An analysis of continual semi-nomadism on the Kaputiei Maasai group ranches: sociological and ecological factors." University of Nairobi, Institute for Development Studies, Working Paper No.78, March 1972 (unpublished),p.29.

56. The problem is aggravated by the presence of acceptees and trespassers with their herds.

57. An attempt to introduce a deferred grazing system has recently been made. Rotational grazing systems are difficult to enforce; besides they require good shepherds and the presence of water in both areas.

58. The discrepancy at Ilmashariani group ranch was even greater.

59. There is no such thing as a group herd, nor has any attempt been made to induce individuals to pool their herds.

as a survival of that traditional spirit of reciprocity that often existed between small groups.[60] Usually, however, it is that there is just not enough grazing on the ranch.[61] Even the members of the Poka group ranch, a ranch which showed, more than any other, that the settlement and development of the Masai was possible, reverted to semi-nomadism during the 1970-1971 drought.[62]

One of the arguments in favour of the establishment of group ranches was that it would facilitate the provision of services since Masai would be settled within a clearly defined area and would be able to make their wishes known through their representatives. It was also hoped that the groups themselves would have an incentive to increase ranch facilities. In fact there is not much evidence of this sort of development. One or two ranches have built dips and some have dug boreholes; these kinds of services are welcomed, though it should be remembered that they tend to lead to an increase in the number of cattle supported on the ranch. The lack of capital severely limits what the ranches can do. For example, on Olopito there is no group marketing cooperative and the only capital the group has been able to raise has been by taking one steer from each family within the group, selling the steers and putting the proceeds

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60. Friends or relations may deliberately join different ranches as a form of insurance. If the rains fail in their area, they may not fail in the area where they have reciprocal rights.

61. In Narok District, Masai tend to migrate with their herds from the barely viable areas south of Narok to the north or to Transmara. It is also regrettably common for people to come down from the north in the rainy season to the saltlicks around Narok and to return home in the dry season leaving little grass behind them. This information was provided in an interview with the Range Officer of Narok District, October 10th, 1974.

62. Halderman, op. cit., p.24.

into the group bank account. The Agricultural Finance Corporation has given no loans to the group ranches in Narok District for ranching purposes[63], nor have the commercial banks; yet group ranches were established in the belief that loans would more easily be made available.

Although little development seems to have occurred on the group ranches of Narok District, at the time of the research Phase II of the Livestock Development Programme run by U.S.I.D.A. and S.I.D.A. and financed by a loan from the World Bank was about to be implemented. This programme could clearly have an important effect on the future of the group ranches, but at present it is only the individual farms of Narok District that show much sign of development. Whether they have wheat farms or cattle ranches, these farmers have little difficulty raising loans and evidence of their prosperity abounds. It is hardly surprising that they should have attracted the envy of members of group ranches who see that any attempt to start commercial farming on the ranch would be frustrated by the traditionalism of most of their fellow members. It is this sort of attitude that may spell the final doom of the group ranches.

An officer of the Olopito group ranch apparently fenced six hundred acres of the group ranch and attempted to start his own farm on group land. Although he was ordered to pull down his fence, he was not without sympathy on the ranch. One informant, another

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63. Loans were advanced for the cultivation of wheat on a couple of group ranches, but although the crop was moderately successful, the experiment was not popular with cattle-owners and is unlikely to be tried again.

officer of the ranch, predicted that the Olopito group would be dissolved in the near future and the land divided into individual wheat holdings. Indeed at a committee meeting of the Ilmashariani group ranch, some of the members expressed their desire that the group be dissolved and the land divided into individual plots. They were told by the Assistant Registrar of Group Representatives that such a course of action was impossible and he is right in the sense that no disposition of any of the group land may be made without his approval and that of all the group representatives.[64] Nevertheless these examples indicate a certain malaise on the part of just those people on whom the success of the group ranches largely depends.

4. Conclusions.

The Kenya government is committed to extending the land adjudication programme to all parts of Kenya and it was just because the registration of individual title is inappropriate in certain areas that the Land Adjudication Act 1968 made it possible for groups to be recorded as the owners of land and that the Land (Group Representatives) Act 1968 was passed to enable the incorporation of group representatives and the vesting of the registered

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64. Land (Group Representatives) (Prescribed Provisions) Order 1969, Sched.2. At a general meeting of the Olopito group ranch it was decided that each member would be allocated two acres on which to build his boma and cultivate a subsistence plot.

title to the land in them as a corporate body. This procedure may be adopted both in pastoral and in agricultural areas, for the word "group" is defined as "a tribe, clan, section, family or other group of persons whose land under recognised customary law belongs communally to the persons who are for the time being members of the group..."[65] In fact the procedure has been adopted in certain agricultural areas where the individualisation of land tenure is not complete and the concept of clan land or family land remains strong. The present writer has no information about the working of the system in these areas, but it seems doubtful whether it is likely to be very successful. Experience on Nyabondo plateau and even in some group ranches shows that where land has not been registered in the names of individuals but in the name of a group, not much time will elapse before members of the group demand that it be divided among them. Very often the demand will come initially from the more progressive farmers who feel that the development of the land is being held up by their more "conservative" fellow-members. On Nyabondo, however, all the members were in favour of splitting up the group land. No doubt it made it easier to raise loans, but perhaps they just wanted a piece of land to call their own.

In view of the fact that in agricultural areas, at least, group members are unlikely to be satisfied with group registration for very long, the wisdom of registering group title in the first place may be doubted and in any case the cumbersome procedure laid down in the Land (Group Representatives) Act 1968 seems singularly

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65. Land Adjudication Act 1968, s.2.

inappropriate. It would surely be simpler, as the Lawrance Mission originally envisaged, to register group land in the name of the group. The difficulty, of course, is that the group is not incorporated and therefore cannot hold land, but this difficulty would be avoided if the group land was registered in the name of the head of the group, but that it was noted on the register that the land was group land and appropriate restrictions were entered accordingly.[66]

The procedure laid down in the Land (Group Representatives) Act 1968 is much more appropriate in the range areas where ranches containing hundreds of people are to be established. It has been seen earlier in this chapter[67] that there were two factors that made the extension of the land adjudication programme to the pastoral areas and, in particular, to Masailand a matter of urgent necessity. One was the fear that if the enclosure of agricultural land by non-Masai and the enclosure of individual ranches by Masai were allowed to continue unchecked, the vast mass of Masai cattle-herders would soon be relegated to areas where water was scarce and rainfall unreliable. Secondly, the government hoped to settle the Masai in order to facilitate the control of stock disease and the provision of facilities of all kinds; most important of all, it was clear that international loans for the development of Masailand would only be forthcoming if the Masai were settled on group ranches.

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66. The Malawi Registered Land Act 1967, Cap.58:01 (1968), s.121(1) provides that where land is family land, it is to be registered in the name of the head of the family to hold it "as family representative". Not much is known about how the Malawi system operates in practice, though one authoritative source reports that "... land has been registered only in the names of families which naturally means but little dealing". Simpson (1976), op. cit., p.458.

67. Supra, pp. 128 et seq.

Insofaras these goals have been achieved, the group ranch programme has been generally appreciated by the Masai. They welcome the construction of cattle-dips and boreholes and they are particularly glad that what they see as the invasion of Masailand by non-Masai has to some extent been stopped. Nevertheless they regard the group ranches as essentially artificial creations, which indeed they are. They are not based on traditional units, nor does the way in which ranches are organised and run have anything in common with traditional decision-making processes. Insofaras the government has attempted to use legislation to bring about social change, it seems totally to have failed. The settlement of the Masai has not occurred; they continue their semi-nomadic existence in search of pasture regardless of ranch boundaries. The spirit of reciprocity that traditionally existed between certain groups is still strong today and leads, where groups ranches have been established, to the problem of "acceptees". Most Masai would have been content with the re-establishment of a Masai Reserve where non-Masai would be unable to acquire any permanent rights and with a significant increase in the provision of cattle-dips, boreholes and veterinary services. The group ranches do not respond to any perceived needs of the Masai.

The ranches could succeed in achieving a sense of solidarity, a sense of shared purpose among their members, if they could justify their existence on economic grounds. If they were the focus of intensive development programmes, if they could raise loans and if their officers and representatives combined to promote development on a group basis rather than on the basis of families, Kraal camps or any other traditional groupings, perhaps a sense of group identity

could be created. This has not occurred so far. Ranches show few signs of development, they have generally not been successful in raising loans and those members who could play a major part in getting ranches to work, are instead pressing for their dissolution.

CHAPTER IV

THE CHALLENGE OF FIRST REGISTRATION

1. Introduction

It had always been hoped that land registration would put an end to the bitter and expensive litigation which plagued certain areas of Kenya during the fifties. It was naturally in the more prosperous and more populated areas that disputes would arise; bitter and often bloody conflicts would occur over a patch of vacant land and the money spent on court fees and advocate's fees seldom bore any relation to the value of the land in dispute. Sometimes the disputes would concern the rights of the occupier of a piece of land to stay there, but more frequently they would be boundary disputes arising, typically, where two farms were separated by land which had previously been unclaimed. The nature of these disputes has been touched upon in chapter two and here it suffices to note that land registration ought to put an end to them.

It is a great credit to the way in which land adjudication has been carried out that one kind of dispute rarely occurs today, namely, the boundary dispute. The boundaries determined at the time of land adjudication are generally accepted (if sometimes reluctantly) and the fact that a sisal hedge, or some other kind of boundary is planted at the same time and a demarcation map drawn up makes it unlikely that a dispute will ever break out again.

Disputes, of course, do occur either where no clear boundary has

ever existed or where some person has deliberately destroyed a boundary and, possibly, built another.[1] In the former case, it may have happened that a person registered part of his neighbour's land in his own name during his neighbour's absence and deliberately refrained from putting up boundaries in order to avoid raising suspicion. This should not occur if the boundaries have been properly demarcated in accordance with the Land Adjudication Act 1968.[2] Where a boundary has been destroyed or moved, the Land Registrar may be required to determine its true position exercising powers conferred on him by the Registered Land Act 1963.[3] With the help of the registry map, the local inhabitants and officials, and evidence on the ground, he seldom has any difficulty in deciding such disputes. Whilst it is a statutory offence to interfere with boundary features,[4] prosecutions under this section are infrequent.

Boundary disputes, however, are extremely rare today and it is certainly one of the undoubted achievements of the land adjudication and registration programme to have put an end to them. When informants were invited to comment generally on the programme, they almost invariably isolated the absence of boundary disputes as its main virtue and sharply contrasted the peaceful state of things today with the bitter feuds that troubled the area fifteen or twenty years

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1. The information contained in this paragraph comes from an interview which the writer had with the Land Registrar (Inspector) for Nyanza Province on August 28th, 1973. He is responsible for deciding boundary disputes referred to him by the District Land Registrars.

2. s.15(a).

3. s.21(2).

4. Ibid., s.24(1).

ago. As they would say, nowadays there is no noise, hapana kelele; there is no war, no killing.

On the other hand, a different kind of dispute is becoming increasingly frequent, a kind of dispute which has its roots in inadequate adjudication. These are not disputes about boundaries, but disputes about ownership and lesser interests in the land. Such disputes are occurring particularly in the Central Province, where land consolidation and registration first started and where it was conducted hastily and at a time when many people were absent. This is illustrated by the table below.[5] Two situations, in particular,

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5. TABLE 2. Civil cases filed in the Resident Magistrate's Court, Muranga.

Year	1966	1967	1968	1969	1970	1971	1972	1973	1974 4 months
Disputes arising out of agreements to sell land:		3	8	6	12	30	33	34	13
Disputes arising out of first registration:		2		6	16	21	24	24	10
Other land disputes:	1	1	3	5	1	11	9	13	3
Total Land cases:	1	6	11	17	29	62	66	73	26
Total Civil cases:	17	28	22	34	41	119	116	106	48

Source: Register of Civil cases, Resident Magistrate's Court, Muranga.

For figures relating to land cases in the High Court at Nyeri, see Ch.VII, p.379. The writer did no research in the third district of Central Province, Kiambu district, but it appears that the number of land disputes (mainly involving first registration) is increasing at an astronomical rate. Interview with Senior Resident Magistrate for Kiambu, July 25th, 1973.

can be identified which recur frequently in the law reports. In one situation, a person will claim that the registered proprietor was wrongfully registered as the proprietor of a piece of land; he will claim that the land is his, but that, owing to his absence at the time of adjudication or owing to irregular adjudication procedures, he has now been deprived of it. The second situation, which is much more common, arises where it is agreed within a particular family at the time of adjudication that a certain person be registered as the proprietor of a piece of land, but it is allegedly understood that he will recognise and protect the customary rights of his kinsmen in the land. Thus if the adjudication authorities refuse to record holdings below a certain acreage, brothers might agree to pool their holdings and register the single plot in the name of the eldest. Alternatively, if the authorities are reluctant to allow any one person to own more than one plot, the owner of several plots may be obliged to register all but one of them in the names of his kinsmen. It is not difficult to see how disputes may arise subsequently, and it is important to note that a thorough adjudication procedure[6] which took into account the lesser interests of relatives and others would largely prevent the situation occurring where today, as we shall see, the court records abound in family disputes of a most virulent nature.

Once the appeals machinery laid down in the Land Adjudication Act 1968 has been exhausted, then disputes of the kind described in the preceding paragraph will have to be brought before the courts,

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6. This aspect has been discussed in Ch.II, _supra_, pp. 63 _et seq_.

either the High Court or the Resident Magistrate's court, according to the value of the land in dispute.[7] Such disputes not only frequently involve tangled fact-situations but also raise difficult questions of law.[8]

2. Rectification of the register.

In most registration systems it is provided that the register may be rectified where an entry in the register has been obtained by fraud or mistake, but that it shall not be rectified so as to affect the title of the proprietor in possession unless he was aware of or contributed to such fraud or mistake.[9] Such a provision is to be found in the Registered Land Act 1963[10] with one important exception; the first registration cannot be cancelled or amended. The relevant section reads:

> 143(1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.11

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7. Registered Land Act 1963, s.159(1).

8. One Resident Magistrate tries to persuade the parties to such disputes to settle out of court and then judgment will be entered by consent. This course is eminently sensible given the nature of the dispute and often succeeds. In one case, each party selected 3 elders and the 6 elders sat under the chairmanship of the chief as a kind of arbitration tribunal.

9. See e.g. the English Land Registration Act 1925, s.82(1)and(3)(a).

10. Registered Land Act 1963, s.143. This section closely resembled the Land Registration (Special Areas) Ordinance 1959,s.89, which it replaced.

11. Section 143(2) contains a similar provision to section 82(3)(a) of the English Land Registration Act 1925, protecting the innocent proprietor in possession.

Moreover it is expressly provided that a person suffering damage by reason of any mistake or omission in the register which cannot be rectified under the Act, other than a mistake or omission in a first registration, shall be entitled to be indemnified.[12]

The potentially harsh effects of such provisions were clearly demonstrated early on in the famous case, The District Commissioner, Kiambu v. R and others, Ex Parte Ethan Njau.[13] Acting under the Native Land Tenure Rules 1956, the local committee had allocated one plot to Njau and one plot to a certain Munge. A certificate of allocation was issued to Njau, but then Munge complained about the allocation to the committee which purported to reverse its previous decision i.e. it purported to give Njau's plot to Munge and vice versa. The register was then drawn up. Before the register was confirmed, Njau complained and his complaint was treated as an objection and rejected by the committee. The committee then confirmed the register and Njau applied for an order of mandamus directing the appellant to register him as proprietor of the plot in question. The Supreme Court made the order sought on the grounds that the committee had acted ultra vires in reversing its original decision and re-allocating the plot to Munge.

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12. Registered Land Act 1963, s.144(1)(b) It is interesting to note that under the Land Registration (Special Areas) Ordinance 1959, s.90(1)(b), this exception is omitted; thus, until the Registered Land Act 1963 came into force, a person whose land had been registered by fraud or mistake in the name of another, could claim an indemnity from the government, even though the register could not be rectified in his favour.

13. [1960] E.A.109 (C.A.).

On appeal, the court agreed that the committee had acted ultra vires and that the registration officer had been under a duty to register the original certificate. However, between the time of the application and that of the hearing the Native Lands Registration Ordinance 1959 had been passed, which transferred the control and custody of the register from the appellant to the registrar appointed under that Ordinance. An order of mandamus could not be made against the appellant as he no longer had the power to carry it out, nor could it be made against the registrar as he was neither a party to the proceedings nor was he "the successor of the District Commissioner within the meaning of the authorities on that subject."[14] So the appeal was allowed. However the court made it quite clear that, even if the registrar had been party to the proceedings, no order could have been made, because section 89(1)(a) of the Ordinance specifically excluded first registration from the courts' powers to rectify the register.[15] The register had become "a register of title with particular protection for those who had 'first registration'. Interference with those registrations is completely forbidden...".[16] "... such an order would offend against the letter and policy of the Native Lands Registration Ordinance 1959,...".[17] The court, moreover,

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14. [1960] E.A. 109, at p.129, per Gould, J.A. The court succeeded in distinguishing R. v. Hanley Revising Barrister, [1912] 3 K.B. 518 from the present case.

15. One writer holds that the court would probably have issued mandamus if there had been no change of office and that it could in any case have simply declared the entry in the register to be void. However, he seems to have ignored the existence of section 89(1)(a) of the Native Lands Registration Ordinance, 1959. See P.J. Bayne, "Government liability for torts by public officials," 6 E.A.L.J. 243, at p.244.

16. The District Commissioner, Kiambu v. R and others, Ex Parte Ethan Njau, [1960] E.A. 109, at p.128.

17. Ibid., at p.129.

felt that no great injustice was being done since Njau still had a plot and could in any case claim an indemnity from the government. Others, as will be seen, were to be much less fortunately placed.

The reasons for thus excluding first registration from the general rules governing rectification and indemnity are largely political and must be sought in the history of land consolidation and registration and, in particular, in its origins in the Central Province. When land consolidation started there in the mid-fifties, the State of Emergency was still in force and large numbers of Kikuyu were absent, either in detention or in the forests. The land rights of absentees were often not protected, indeed land consolidation was often used as a way of rewarding loyalists at the expense of such absentees.[18] Consequently many Kikuyu claimed that they had been wrongfully deprived of their lands.

However, it was felt that if they were allowed to challenge first registration, the readjudication of land titles on a large scale would be necessary, the work of several years on consolidation would be seriously undermined and, most important of all, perhaps, old political animosities would be revived at a time when the official emphasis was on reconciliation, stability and unity. It was also possible and more sensible to compensate those who had lost their land by giving them plots on the newly-established settlement schemes.

These arguments have lost a lot of their force today and certainly cannot apply to the vast areas of land outside the Central Province which have been registered since the end of the State of

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18. See p.28 supra.

Emergency. Within the Central Province itself there does remain a certain legacy of bitterness and resentment which is often voiced through unofficial organisations,[19] but it seems that most people have accepted, if sometimes reluctantly, the situation as it is. The Lawrance Mission recommended that sections 143 and 144 of the Registered Land Act 1963 be amended to enable the review of first registration subject to the leave of the High Court,[20] but this recommendation was not put into effect. This is unfortunate. As suggested above, the original arguments in favour of preventing the challenge of first registration have less force today and the effect of prohibiting rectification of the register in such cases is not to prevent parties bringing their disputes before the courts, but rather to make it more difficult for the courts to do justice and to compel advocates to discover other means of furthering their clients' interests. The next three sections of this chapter will be devoted to a discussion of the various means which have been employed to this end. It will be seen that the courts dislike the limitation on their powers to order rectification imposed by section 143(1) and have generally cooperated with attempts to mitigate the harsh consequences of this provision.

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19. Thus, a group of people calling themselves Mihiriga Kenda was reported as collecting contributions in Muranga district for the purpose of suing the government for compensation for the lands lost during the Mau Mau struggle. Sunday Nation, February 10th, 1974, p.3. Similarly, it seems that some years ago a body styled "The Land Reconsolidation Committee" was campaigning in Nyeri district on behalf of former detainees who had allegedly been deprived of their lands. Lawrance Mission Report, para.273.

20. Ibid., para. 274.

3. Proceedings against public officers.

Since it is impossible for the courts to order rectification of the register where first registration has been obtained by fraud or mistake, persons who feel that land adjudication has deprived them of their land may choose alternatively to bring proceedings in tort against the government or its officers and claim damages for the loss which they have suffered. In fact, this course of action has been taken only rarely, but its possibilities and limitations ought to be outlined here, especially in view of the decision in Kimani v. Attorney-General.[21]

Briefly the facts in that case were these. During land adjudication the plaintiff had had his name entered in the Record of Existing Rights (later replaced by an Adjudication Register) as the proprietor of a certain plot; his name was subsequently removed irregularly from the register by government officials and the name of one Bari substituted for it. At first, the plaintiff applied for an order of mandamus, but this was refused as being the wrong remedy, presumably for the same reasons as those given in The District Commissioner, Kiambu v. R. and others, Ex Parte Ethan Njau.[22] He then brought an action against the Attorney-General for damages, contending that the government was liable for the torts of its servants, and he succeeded.

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21. [1969] E.A.29. The detailed discussion of this case in Bayne, op.cit., has been most helpful. Appeal from the High Court decision was made on the question of the assessment of damages and the appeal was allowed, Kimani v. Attorney-General, [1969] E.A.502 (C.A.). As it appears that it was the Attorney-General who was appealing against the award, it is unclear why the title of the case is reported in this way.

22. Supra.

The defence denied that the plaintiff ever had a cause of action in law, but this contention was vigorously repudiated by the court. Rejecting the theory that there is a law of torts, but no law of tort, Trevelyan, J. relied on the broad principle enunciated by Sir John Holt in Ashby v. White[23] to the effect that if a plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it. There was no doubt that Kimani had a right to have his name on the register as the owner of the land and the law would be shirking its responsibilities if it could provide no remedy to vindicate this right. Moreover, the court maintained that even if the government servants concerned had not acted deliberately and maliciously with the intention unlawfully to injure the plaintiff, they had no doubt been negligent, for a "duty situation" existed and in breach of that duty they had caused the plaintiff to suffer loss. The judgment is short and the ratio hard to identify exactly, the judge summing up his discussion with the words, "Look at it how you will, the plaintiff had a cause of action sounding in damages for the undoubted wrongs done to him."[24]

A detailed treatment of the judgment is unnecessary here, since the case was clearly decided per incuriam. For the Native Lands Registration Ordinance 1959 provided:

> Neither the Registrar, the Deputy Registrar nor any Assistant Registrar nor any officer shall be liable to any action, suit or proceeding for or in respect of any act or matter in good faith done or omitted to be done in exercise or supposed

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23. (1703), 2 Ld. Raym.938; 92 E.R. 126.

24. [1969] E.A. 29, at p.32, per Trevelyan, J.

> exercise of the powers given by this Ordinance or by any rules or regulations made thereunder.[25]

Thus no officer could, in the absence of bad faith, have been made liable in Kimani v. Attorney-General,[26] and neither could the government by reason of the following section of the Government Proceedings Act 1956:[27]

> Any written law which negatives or limits the amount of the Liability of any Government department or officer of the Government in respect of any tort committed by that department or officer shall, in the case of proceedings against the Government under this section in respect of a tort committed by the department or officer, apply in relation to the Government as it would have applied in relation to the department or officer if the proceedings against the Government had been proceedings against that department or officer.

No reference to these provisions is made in the judgment, but they would almost certainly have given the government a complete defence

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25. s.97. The position is much the same today. The Land Adjudication Act 1968, s.34 provides:

> "Any officer appointed under this Act, and any other person appointed for the purpose of adjudication proceedings under this Act, shall not be liable to any action, suit or proceedings for or in respect of any act or matter in good faith done or omitted to be done in exercise or supposed exercise of the powers given by this Act or any regulations made under it."

It would seem, however, that Land Registrars are no longer protected in this way. The draft Registered Land Bill contained a similar provision which was, however, omitted in the final version for no apparent reason.

26. Supra.

27. Cap.40, (1970), s.4(4).

to Kimani's suit.

In a later case, Odhiambo v. Otieno and another,[28] an action was brought against the Attorney-General, the second defendant, on the grounds that the Government was liable for torts allegedly committed by members of the Land arbitration board and the court held that section 34 of the Land Adjudication Act 1968[29] provided a complete defence; strangely enough the court made no reference to section 4(4) of the Government Proceedings Act 1956 but merely found that the protection afforded to persons appointed for the purposes of adjudication proceedings should be extended to the Government. The facts of this case do not emerge very clearly from the judgment, but it appears that the land adjudication committee ruled against the plaintiff in a land dispute and in consequence he appealed to the arbitration board. His appeal was never heard either because the executive officer never forwarded the complaint to the board or because the board neglected to take action on the complaint when it was forwarded. In any case it is clear from the foregoing argument that neither the executive officer nor the members of the board nor the Government could be liable for any actions in good faith done or omitted to be done.

Even if the board members had not acted in good faith, it is by no means certain that the Government would be liable for torts committed by them. In the first place, no proceedings lie against

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28. [1974] E.A.116 (High Court of Kenya). For unknown reasons the case has also been reported as Odhiambo v. Odenyo and another, [1973] E.A.416 (High Court of Kenya). The reports are virtually identical.

29. See supra, p.170.

the Government in respect of acts done or omitted to be done by any person discharging responsibilities of a judicial nature vested in him.[30] In Odhiambo v. Otieno and another the court held that this provision afforded protection to the Government, as the board was discharging responsibilities of a quasi-judicial nature.[31] The use of the word "quasi-judicial" is hardly helpful in this context, but the question whether the board's functions are judicial or not is difficult to answer. Problems surrounding the definition of "judicial" have arisen in other areas of law, but there have been very few cases on this provision in Kenya or on its equivalent in English law. There are certainly important differences of function and procedure between the adjudication committees and arbitration boards on the one hand and the courts on the other. The duty of both the committee and the board is to determine land rights. Proceedings before them are inquisitorial and conducted with a minimum of formality; there are no rules of evidence, there is no plaintiff and no defendant. Moreover the arbitration board is not, strictly speaking, an appellate authority; it merely hears "complaints" which are "referred" to it and these complaints may be made by any person affected by a committee decision, whether he appeared before the committee or not. No question of locus standi seems to arise, since it is not difficult to prove that one has been suitably affected. Another argument against the view that the board's functions are judicial is furnished by section 12(2) of the Land Adjudication Act

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30. Government Proceedings Act 1956, s.4(5), based on the English Crown Proceedings Act 1947, s.2(5).

31. [1974] E.A. 116, at p.120; the court seems to have held that this provision would also have protected persons discharging the responsibilities, but this is clearly wrong.

1968 which provides that a proceeding before the adjudication officer is a judicial proceeding for the purpose of certain Chapters of the Penal Code.[32] The apparent implication is that proceedings before adjudication officers are not judicial proceedings for any other purposes and that proceedings before committees and arbitration boards are not judicial proceedings for any purpose at all.

On the other hand, the boards and the committees are carrying out the classic judicial function, the determination of questions of law or fact by reference to pre-existing rules. In one case,[33] it has been held that the mere fact that a body has no administrative duties but simply hears and determines appeals, does not prevent its functions being essentially administrative, looked at in the light of the overall framework and purpose of the statute. The body in that case was a Board of Review which heard appeals against penalties imposed by the Commissioner of Inland Revenue and, unlike the bodies set up under the Land Adjudication Act 1968, it constituted a small part of an undeniably administrative undertaking (i.e. the assessment of tax liability) and its task resembled that of a reviewing authority rather than that of an appellate authority is that the defendant in the proceedings would always be the body which made the disputed decision.

On the whole, the present writer would incline to the view that adjudication committees and arbitration boards are discharging

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32. Cap.63, (1970), chs.XI and XVIII. Ch.XI deals with perjury and other offences relating to the administration of justice and Chapter XVIII deals with defamation.

33. Ranaweera v. Ramachandran, [1970] A.C. 962 (P.C.).

judicial responsibilities[34] and that the Government is thus protected by section 4(5) of the Government Proceedings Act 1956. Nevertheless, even if this view is mistaken, it has been suggested[35] that the Government might be protected by section 4(6)[36] of that Act which restricts its liability in tort to cases where the officer has been directly or indirectly appointed by the Government and paid wholly out of the Consolidated Fund. Both committee members and board members are, however, indirectly appointed by the Government, the former by the adjudication officer and the latter by the Provincial Commissioner. Members of neither body are paid, but insofaras board members may be able to recover expenses, these are paid out of the Consolidated Fund. Therefore, it is hard to see how this section could protect the Government in this context.

To sum up this section, Kimani v. Attorney-General[37] has shown that the courts may be prepared to take a broad approach to the question of what constitutes a tort. Nevertheless officers involved in the adjudication process will not be personally liable unless they have not acted in good faith. Even if they have not acted in good faith, the Government will not be liable for their torts unless they were neither discharging nor purporting to discharge judicial responsibilities. Moreover both the Government and the officer can call in aid the protection afforded by the Public Officers Protection Ordinance 1910,[38] s.2(1)(a), whereby proceedings must be commenced within six

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34. As are adjudication officers, at least when they are hearing objections.

35. Odhiambo v. Otieno and another, [1974] E.A. 116, at p.120.

36. This section is based on the English Crown Proceedings Act 1947, s.2(6).

37. Supra.

38. Cap.186.

months of the act complained of. For all these reasons, a person aggrieved by the way in which land adjudication has been carried out would seldom be advised to take proceedings in tort against the Government or its officers. It need hardly be added that political considerations, more than mere legal difficulties, would be likely in any case to discourage such a course of action.

4. Declarations of trusts.

It is clear that in only a small number of instances will it be appropriate for a person aggrieved by the loss of his land during adjudication to take proceedings against the government or its servants. Even where officials involved in the adjudication process have carried out their duties conscientiously, it is still possible for injustice to occur and, as the register cannot generally be rectified in respect of first registration,[39] other stratagems must be devised.

In a few cases,[40] of course, the courts completely ignore this prohibition and in one case[41] the court, finding that the defendant had obtained first registration by fraud, ordered him to vacate the land and the register to be rectified accordingly on the principle

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39. Registered Land Act 1963, s.143(1), discussed supra at p. 163.

40. E.g. Kabugu Solomon v. Mwangi Solomon, High Court of Kenya at Nyeri, Civil Appeal No.3 of 1969 (unreported).

41. Njachi Kingathia v. Kingathia Wanjau, High Court of Kenya at Nyeri, Civil Case No.55 of 1968 (unreported).

that "fraud vitiates everything". On the whole, however, both courts and advocates are well aware of the prohibition against amending or cancelling first registrations.

At the same time the courts have tended to interpret rather liberally their power to rectify the register on second registration. Two cases will illustrate this tendency which, though springing from an admirable desire to do justice, sometimes contravenes both the letter and spirit of section 143(1). In one case,[42] due to the difficulty of getting more than one of his plots registered in his name, the plaintiff had registered his second plot in the name of Gathogo Jakumu, though he intended that the land should remain his own. Unfortunately he had three sons of that name and one of them fraudulently had the name on the register changed to Gathogo Jakumu Gathaburo (his own name) followed by his identity card number; he then obtained a certificate of title and required the plaintiff (his father) to vacate the land. Two questions arose: was the change of name a second registration? If so, how should the register be rectified? The court decided that it was a second registration and that, as it had been obtained by fraud, the register should be rectified by inserting the plaintiff's name in place of the defendant's. Though obviously just in the extremely peculiar circumstances of the case, it may be doubted whether the court had the power to introduce a completely new name; the usual course indeed would be to merely cancel the fraudulently obtained registration, leaving the first registration intact. In view of the fact that the

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42. Jakumu Kinoe v. Gathogo s/o Jakumu Kinoe, High Court of Kenya at Nyeri, Civil Case No.55 of 1972 (unreported).

Registrar had failed to delete the original registration and to insert the number 2 in the entry column, it is open to doubt whether the fraudulent entry did constitute a second registration.

The decision in the second case[43] was more questionable. The three plaintiffs and the first defendant were brothers who had jointly purchased a piece of land, each contributing equally to the purchase-price. The land was subsequently registered in the name of the first defendant alone who later transferred an undivided share in the property to his son, the second defendant. The plaintiffs sought an order registering them as proprietors in common with the first defendant of the land in question. They were successful and the court ordered rectification of the register. The decision is worth questioning on two points. In the first place, second registration can only be cancelled or amended under section 143(1) if it has been "obtained, made or omitted by fraud or mistake" and it was far from clear that it had in fact been made by fraud; certainly the court stated that the transfer of an undivided share had been carried out "with the sole purpose of depriving the plaintiffs [of] their share of the land", but no effort was made to explain the nature of the plaintiffs' rights, if any. However, even if the second registration had been obtained by fraud, then the court had the power to cancel it and restore the status quo ante; it surely had no power to add the names of the three plaintiffs to the first registration. The presence of a fraudulently obtained second registration cannot give the court power to amend the first registration.

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43. Rungoyo Wanyoya and two others v. Samuel Gichango and another, High Court of Kenya at Nyeri, Civil Case No.747 of 1971 (unreported).

In both these cases, the effect of rectification was that persons who had not been adjudicated owners of a particular piece of land during land adjudication became registered as owners of the land by order of court, and this is precisely what the exception to the court's power under section 143(1) was designed to prevent. Moreover it is a pity that in neither case was the possibility of the existence of a trust raised, a device which, as we shall shortly see has often found favour with courts faced by similar situations.

Under the Registered Land Act 1963 particulars of trusts are not to be entered on the register,[44] nor are any persons dealing with the land deemed to be affected by notice of such trust.[45] Moreover no disposition by a trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that it amounted to a breach of trust.[46] These principles are common to most registration systems and they have provided the courts with a useful way of avoiding the harsh consequences of the section 143(1) prohibition. If the courts are able to declare that the registered proprietor of certain land holds it as a trustee, they will be able to restrain him from disposing of the land or evicting the beneficial owners in breach of trust, and indeed to order him to transfer the land to them if such are the terms of the trust.

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44. S.126(1). The registered proprietor may be noted in the register as holding the land "as trustee".

45. Ibid., S.126(3). The position is slightly absurd where the proprietor is registered as holding the land "as trustee".

46. Ibid., S.39(2). One of the persons responsible for the drafting of the Registered Land Act 1963 has recently recommended that, whenever the Registrar becomes aware that any registered interest is affected by a trust, he should be empowered to protect such interest in such manner as he sees fit. While admitting that it is generally undesirable to expect the Registrar to police the interests of beneficiaries, the writer feels that such a step may be necessary in an unsophisticated community with little access to professional advice. See S. Rowton Simpson (1976), op.cit., pp.580 - 1.

Before considering the circumstances in which the courts have tended to declare trusts, it is necessary to inquire whether such declarations of trust require the consent of the land control board in accordance with the Land Control Act 1967,[47] which provides that "... the sale, transfer, ... or other disposal of or dealing with any agricultural land which is situated within a land control area... is void for all purposes..." without that consent. The question whether a declaration of trust was a dealing with land within this section was raised in Githuchi Farmers Co. Ltd. v. Gichamba and another.[48] In this case, the defendants together with some fifty other persons formed an organisation for the purpose of purchasing some land. The land was purchased and registered in the names of six of the members upon the "express agreement and understanding" that they should hold the land on trust for the entire group pending its incorporation as a limited company. The plaintiff company now claimed (a) a declaration that the land was held by the registered owners on trust and (b) an order that the defendants (two of the registered owners) should sign all the documents required to transfer the land to the company. The latter claim was not pressed in court.

The court considered that the whole case rested on the proper interpretation of the Land Control Act 1967[49] and in the event held that the declaration of a trust was a "dealing with land" within that section and that the "express agreement and understanding" was void,

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47. Cap.302 (1968) s.6(1). The working of this Act is discussed exhaustively infra, Ch. VII.

48. [1973] E.A. 8.

49. S.6(1), supra.

as no application had been made to the appropriate board within three months.[50] Unfortunately the judgment is not a model of clarity. After referring briefly to authorities cited in argument, Harris, J. continued, "... I cannot treat these judgments as supporting the proposition that the land control legislation does not apply to transactions effecting the vesting of trust property by trustees in the cestuis que trustent [sic]".[51] Later he quoted from the Land Control Act 1967 and commented, "It is apparent therefore that the Act contemplates a very wide measure of control of dealings in land. Can it be said that any exception is intended in favour of transactions effected by way of the creation of trusts?"[52] However, these statements are not wholly to the point. The consent of the land control board may indeed be necessary where the registered proprietor of land conveys that land to trustees to hold on trust or where the trustees vest land in the beneficiaries in accordance with the terms of the trust; in both cases there is a "transfer of land" within section 6(1), in both cases (to use English legal terminology) there is a conveyance of the legal estate. However a mere declaration of trust involves no transfer, no conveyance of the legal estate. From the facts as found by the court, it seems clear that the land was purchased (presumably with the consent of the land control board) and registered in the names of the six members as trustees for their co-purchasers. There is nothing in the land control legislation to

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50. Ibid., S.6(2).

51. [1973] E.A. 8, at p.10.

52. Ibid.

prevent the court from declaring that they hold the land on trust and from ordering that an inhibition be registered in appropriate terms.[53]

One consideration that led the court to make the decision it did was its fear that otherwise "... the creation of trusts [would] provide so effective a means of circumventing the widely drawn prohibition regarding sales, transfers, leases, exchanges and partitions as to defeat almost completely the purpose of the Act."[54] As we have seen, the mere declaration of a trust could not provide such a means, but the vesting of the land in the beneficiaries in execution of the trust would indeed be a way of circumventing the Act, if it were not held to be a transfer or a dealing with land. However it clearly is a dealing in land and hence caught by the Act.

It has been necessary to make these few points about the Land Control Act 1967 at this stage, because, as will shortly be seen, the courts seldom hesitate to declare trusts, where justice so demands, or to order the vesting of the trust property in the beneficiaries, and in neither instance have they ever felt constrained by the land control legislation. This is strange especially since they not infrequently order specific performance of agreements to sell land "subject to obtaining the land control board's consent".

The sort of trusts with which this chapter is concerned are not express trusts. Written evidence of an intention to create a trust seldom exists and, although oral evidence is sometimes submitted to the courts, in the vast majority of cases they simply infer the existence of a trust from the relationship of the parties and the surrounding circumstances. Sometimes it is called a "customary trust", based as it is on customary rules of inheritance and land-holding.

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53. The courts have such powers by virtue of the Registered Land Act 1963, s.128(1).

54. [1973] E.A. 8, at p.10.

Sometimes it is called a "constructive trust",[55] and although the courts rarely refer to authorities from other jurisdictions, their approach resembles that of Lord Denning who sees the constructive trust as "an equitable remedy by which the court can enable an aggrieved party to obtain restitution."[56]

The following case[57] is typical both in its fact situation and in its outcome. The land in suit had belonged to the plaintiff's father, who died in 1921, leaving a widow and one son (the plaintiff) aged fifteen years. According to the customary law of the deceased, the deceased's brother (the defendant) married the deceased's widow and came to live with her on the deceased's land. The plaintiff and the defendant lived amicably together, cultivating different portions of the land, until 1955 when the plaintiff was arrested and detained. During land adjudication the land was registered in the defendant's name so that he could look after it in the plaintiff's absence. After the plaintiff's release, things continued much as before until 1971 when the defendant required the plaintiff to vacate the land. The plaintiff applied to the court for a declaration that the defendant held the whole plot on trust for him and his application was successful. The court first had to adjudicate the rights of the parties under customary law and it decided that the plaintiff, as the only

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55. The courts are empowered to apply equitable principles by virtue of the Registered Land Act 1963, s.163, which extends and applies to Kenya the common law of England, as modified by the doctrines of equity, "subject to the provisions of this Act and save as may be provided by any written law for the time being in force".

56. Hussey v. Palmer, [1972] 3 All E.R. 744 (C.A.), at p.747.

57. Mungora Wamathai v. Muroti Mugweru, High Court of Kenya at Nyeri, Civil Case No.56 of 1972 (unreported).

son, was entitled to inherit all his father's land according to Kikuyu custom. Secondly, the court held that, in view of the plaintiff's rights under customary law, the defendant held the land as constructive trustee for him; he was indeed a trustee de son tort for "... although not a trustee at the time when he became registered as proprietor, [he] did acts characteristic of the office of trustee, in that he intermeddled with the property of another...".[58]

Section 143(1) was not mentioned in this case, but it has often been raised in argument in other similar cases, without success, however. The courts have not felt that the section prevents them declaring trusts or making orders directing the trustees to transfer the land in suit to the cestuis que trust. Indeed the trust is generally recognised as a useful device for avoiding the harsh consequences that flow from the impossibility of rectifying the register in the case of first registration. This attitude is well illustrated by the letter written by the Chief Land Registrar to the Resident Magistrate at Muranga in respect of a decision[59] in which the magistrate had ordered rectification of the register in the plaintiff's favour. After first regretting that it would be unable to rectify the register as it was a first registration, the Chief Land Registrar continued:

> If I may suggest a way out of this difficulty, in my opinion, would be [sic] to make an Order ordering the registered owner personally to execute a

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58. Ibid., at p.3, per Bennett, J.

59. Muchunu Mbaria v. Michael Ithebu Mbaria, Resident Magistrate's Court at Muranga, Civil Case No.19 of 1970 (unreported).

> transfer ... and transfer the property in question to the decree holder. This indirect method achieves the same results without infringing upon the provisions of the Act. Alternatively the Court may declare the Defendant to be a "trustee" and as such order him to transfer the property to the Plaintiff. 60

In the vast majority of cases, the parties are closely related and a customary trust situation is immediately apparent; thus a brother will hold land on trust for his younger brother,[61] or an uncle for his infant nephew.[62] In some cases, however, it may be more difficult to establish the existence of a customary trust, particularly where more complicated questions of customary law are involved. Thus in Ernest Kinyanjui Kimani v. Muiru Gikanga and another,[63] questions arose whether it would be consistent for a muhoi to give assistance in land disputes and whether the outright gift of land requires any ceremony in Kikuyu customary law. The court held that as the law on these questions was neither documented nor notorious, it must be proved by the person relying on it and this the plaintiff (who claimed that a customary trust existed) had failed to do.

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60. Letter, dated 20/2/71, from the Chief Land Registrar to the Resident Magistrate, Muranga, filed with the case file of Muchunu Mbaria v. Michael Ithebu Mbaria, supra.

61. E.g. Joseph Gathogo Gathagu v. Njuguna Gathagu, High Court of Kenya at Nairobi, Civil Appeal No.35 of 1973 (unreported) and Gathekia s/o Mbote v. Muiruri s/o Mbote, High Court of Kenya at Nairobi, Civil Appeal No.52 of 1972 (unreported).

62. E.g. James N. Njaga v. Kahungu Kimamu, High Court of Kenya at Nairobi, Civil Case No.1472 of 1971 (unreported) and Kamau Mukono v. Julius Kamau Nganga, High Court of Kenya at Nairobi, Civil Case No.1762 of 1973 (unreported).

63. [1965] E.A. 735 (C.A.). As the Resident Magistrate's Courts, the High Courts and the Court of Appeal are largely staffed by expatriates, very little customary law is "notorious" and, until recently, very little was documented; this could make things hard for the person relying on customary law and lead to unjust results, as in this instance where the case of the plaintiff/appellant would seem unanswerable to anyone with an elementary knowledge of customary law.

Where there is no customary trust situation, the courts may be more reluctant to imply the existence of a trust. This reluctance was neatly illustrated in Kariuki Thuku v. Adriano Ngure,[64] where the plaintiff claimed shares in two plots of land from the defendant, his brother. The first plot had been inherited by them from their father and registered in the defendant's name alone; the second plot had been bought by them jointly from a third party (before land adjudication) and also registered in the defendant's name alone. With regard to the first plot, the court held that section 143(1) of the Registered Land Act 1963 did not preclude the court from determining whether or not the plaintiff had an equitable interest in the land and it declared that the defendant held half the plot on trust for the plaintiff. However, the plaintiff's claim to part of the second plot failed "... since the defendant was the first registered proprietor of the land and it is therefore not open to the court to order rectification of the register, having regard to section 143(1)..."[65] Seeing that it is a well-established principle of English law that, where a conveyance is taken in the name of only one of several purchasers, he holds the legal title on trust for the purchasers in proportion to their contributions to the purchase-price,[66] it is difficult to see why the court felt unable to declare a trust in respect of the second plot of land.

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64. High Court of Kenya at Nyeri, Civil Case No.35 of 1968 (unreported).

65. Ibid., at p.4, per Bennett, J.

66. Wray v. Steele (1814), 2 V. & B. 388.

Clearly section 143(1) should have been no more of an obstacle than it was in respect of the inherited land.

The reluctance of the courts to declare trusts is perhaps more easy to justify where the situation does not give rise to a fiduciary relationship between the parties. To take a simple example, suppose that A, during B's absence during land adjudication, fraudulently gets himself registered as the proprietor of B's land. In most instances, as has been seen, A and B will be closely related and there has been a customary trust situation which has enabled the courts to declare that A holds the land on trust for B. If, however, A and B are complete strangers and no customary trust arises, can the courts still declare a trust? Unfortunately, decisions on this point are few and in any case it is not always obvious from the case-files whether the parties are related or not.[67] Nevertheless, cases of this kind are bound to arise in the future and it is interesting to speculate on the possible attitudes of the courts.

The views of both the Chief Land Registrar and the Attorney-General favour the adoption of a very liberal approach to the question. In one Practice Note[68] the Chief Land Registrar, after regretting that section 143(1) of the Registered Land Act often prevented the courts doing justice by rectifying the register on first registration, stated that "... a Court would be well within its powers and within the spirit of the Act to make an order in personam directing, for instance, A (the registered proprietor tainted with fraud) to transfer

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67. Thus in Ikonya Kanjuki v. Ikonya Mwai, High Court of Kenya at Nairobi, Civil Case No.2100 of 1973 (unreported), ex parte judgment was given for the plaintiff who simply alleged that during land adjudication the defendant had fraudulently registered his (the plaintiff's land) in his own name and who prayed for a declaration that the defendant held the land on trust for him.

68. 8 E.A.L.J. 68. In effect this is a direction to district land registrars to accept for registration court orders of the kind indicated.

the parcel to B." From a second Practice Note[69] it appears that the Attorney-General agreed with the sentiments of the Chief Land Registrar and recommended that first the Court should declare that A holds the property as a trustee for B and order A to transfer that property to B and then, if A fails to obey the Order, the Court should, on B's application, authorise someone to execute the transfer on A's behalf.

These Practice Notes, though devoid of legal effect, are bound to influence the attitudes of the courts and it is significant that they are couched in the broadest terms, encouraging the courts to declare trusts wherever first registration is obtained by fraud regardless of the relationship of the parties involved. The views which they express have been strongly criticised by the profession and one High Court judge felt that they amounted to "driving a coach and horses through the trust concept".[70]

In the majority of the cases of the kind discussed above, where the parties are brothers or close relatives, it is not clear whether the trust declared is an implied trust or a constructive trust, that is, whether the court finds an intention to create a trust or whether it imposes a trust regardless of the owner's intention. In this context the distinction is not important, but it is necessary to know what conditions need to be fulfilled for the court to impose a trust in order to be able to predict its response to a case where the parties

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69. 8 E.A.L.J. 69.

70. Interview with Platt, J., judge of the High Court of Kenya at Kisumu, October 5th, 1973.

are not related. Is the constructive trust a substantive institution or a remedy? In England, the traditional view is that it is a substantive institution.[71] A number of attempts has been made to classify the various situations in which a constructive trust may be imposed and while it is generally agreed that the list of situations is by no means closed, one factor is common to them all, namely, the existence of a fiduciary relationship.[72] In America, on the other hand, the constructive trust is regarded as a remedy to prevent the unjust enrichment of one person at the expense of another. The adoption of this view, which is favoured both by Waters and Lord Denning[73] and underlies the recommendations of the Practice Notes, would certainly enable the courts to declare trusts where no fiduciary relationship existed but where title to property had been acquired by fraud.

The adoption of the approach of the English law would mean that a fiduciary relationship would have to be proved and, whatever a fiduciary relationship may signify, it certainly would not include situations where the owner of property does not consent to its passing to the defendant. In such a case no constructive trust would arise, nor, of course, would the right to trace the property. The different approach of the English law can probably be explained in terms of the former division of legal and equitable jurisdiction and it could certainly be argued that the courts in Kenya ought to

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71. The case for regarding the constructive trust as a remedy is argued in some detail in D.W.M. Waters, The Constructive Trust (London, 1964), Ch.1.

72. See e.g. Re Biss, [1903] 2 Ch.40.

73. See supra, p. 182.

accept the alternative view of the constructive trust as an equitable remedy. Nevertheless, since a large proportion of the judges and advocates in Kenya has been trained at the English bar, this is unlikely to occur in the near future.[74]

This part of the present chapter has demonstrated the ways in which the courts are willing to use their equitable jurisdiction to do justice in cases where rectification of the register is impossible under section 143(1) of the Registered Land Act 1963. The extent to which they will use the constructive trust in cases where no fiduciary relationship exists is still in doubt, since in the vast amount of litigation over first registration that has arisen in recent years the parties are almost invariably closely related. Since the use of this device has largely frustrated the purpose of the legislature in prohibiting the rectification of the register on first registration, it is unlikely that to allow rectification in such cases would lead to an appreciable increase in litigation.

A more important point needs to be made. When the courts hear the sort of cases discussed in this part and declare trusts or refuse to declare them as the case may be, they are in affect acting as adjudication authorities and making decisions that should ideally have been made at the time of land adjudication. Cases like

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74. In the case of Marie Ayoub and others v. Standard Bank of South Africa Ltd., and another, [1963] E.A. 619 (P.C.), Lord Guest, considering the question whether a trust existed, quoted with approval certain passages from nineteenth century authorities and concluded from them: "The courts will not imply a trust in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied." Ibid., at p.623. It is sad to see his words quoted unquestioningly and his narrow approach adopted by magistrates adjudicating on customary trust situations, as occurred, for instance, in Kiona Kihumba and others v. R. Kireri, Resident Magistrate's Court at Muranga, Civil Case No.50 of 1971 (unreported).

Ernest Kinyanjui Kimani v. Muim Gikanga and another[75] show that the adjudication of customary land rights is usually not best done by the higher courts. If the adjudication authorities were doing their work properly,[76] few disputes about first registration should ever reach the courts and the courts would not be obliged to play a role for which they are not wholly suited.

5. Rights of occupation.

(i) Introduction.

It has been demonstrated in the previous section that, where a person, A, has been registered as the proprietor of a piece of land, the courts may in appropriate cases declare that he holds all or part of the land on trust for B. This usually occurs where A and B are closely related and a customary trust situation exists; B's claim is based on his right to own the land according to customary law. Obviously some knowledge of the local customary law is required of the courts, but in practice certain types of situation tend to recur. Particularly common is the case where a father dies leaving sons and the land is later registered either in the name of his brother (if the sons are young) or in the name of the eldest son (if the other sons are young) or occasionally in the name of the widow. In such cases,

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75. Supra.

76. Suggestions in this regard are made in Ch.II, supra.

the courts are willing to give effect to customary law (under which a man's land is inherited by his sons) by declaring that the registered owner holds all or part of the land on trust for the sons who have not been registered.

However it sometimes occurs that these unregistered sons do not claim ownership of the land in question, but merely assert a right to occupy it according to customary law. There is no denial of title here but simply the demand that the law protects their occupation. As this demand will only be made when their alleged rights of occupation are challenged by the registered owner, the few cases on this topic illustrate the bitter conflicts over land that continue to poison family relationships.

One typical case of this nature is Obiero v. Opiyo and others.[77] The plaintiff was the widow of a certain Opiyo and the defendants were the sons of her co-wives. In 1968 the plaintiff was registered as the owner of a piece of land and in 1970 she brought an action against the defendants claiming damages for trespass and a perpetual injunction restraining them from continuing or repeating such acts of trespass. Unfortunately the judgment is short and one could wish for a more detailed account of the facts. Nevertheless the main issues are clear.

The defendants based their defence on two grounds. First they claimed that they were the owners of the land under customary law, that they had cultivated it from time immemorial and that the plaintiff had obtained registration by fraud. The court held, however,

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77. [1972] E.A. 227.

that even if registration had been obtained by fraud (which it doubted), her title was indefeasible by virtue of section 143(1) of the Registered Land Act 1963, since this was a first registration.

The defendants claimed in the alternative that they had the right to occupy the land at customary law and that this right survived the registration of the plaintiff as absolute proprietor. The court rejected these contentions in the following words:

> I am not satisfied on the evidence that the defendants ever had any rights to the land under customary law, but even if they had, I am of the opinion that these rights would have been extinguished when the plaintiff became the registered proprietor. S.28 of the Registered Land Act confers upon the registered proprietor a title "free from all other interests and claims whatsoever" subject to the leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register.... Rights arising under customary law are not among the interests listed in s.30 of the Act as overriding interests.78

In view of the finding that the defendants never had any rights to the land under customary law, these statements are obiter, but they merit consideration if only because they have been followed in later cases.[79] The last sentence of the passage quoted above, in particular, oversimplifies the actual legal position in that it fails to distinguish three categories of rights: (1) rights of occupation under customary law

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78. Ibid., at p.228, per Bennett, J.

79. E.g. Esiroyo v. Esiroyo and another, [1973] E.A. 388, discussed infra, p.

recorded in the adjudication register, (2) rights of occupation under customary law not recorded in the adjudication register, and (3) rights of occupation recognised by the Registered Land Act 1963. These must now be discussed in turn.

(ii) Rights of occupation under customary law recorded in the adjudication register.

During the process of land adjudication an adjudication record is drawn up and it is expressly provided that where a person or a group is entitled to a right of occupation "whether by virtue of recognised customary law or otherwise", such a right should be entered on the record.[80] It is further provided that a right of occupation under customary law recorded in the adjudication register shall be deemed to be a tenancy from year to year.[81] A tenancy from year to year is a periodic tenancy,[82] and a periodic tenancy is an overriding interest[83] and, though incapable of registration,[84] it may be protected by a caution.[85] In short, a right of occupation under African customary law recorded in the adjudication record is an overriding interest incapable of registration in the land register.

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80. Land Adjudication Act 1968, ss.23(2)(e) and 23(3)(c). Virtually identical provisions are to be found in the Land Consolidation Act (Cap.283), s.15(2)(b) and s.24(1).

81. Registered Land Act 1963, s.11(3).

82. Ibid., s.3.

83. Ibid., s.30(d).

84. Ibid., s.46(2).

85. Ibid., s.131(1).

The land register is, of course, prepared from the adjudication register and it is provided that everyone shown in the adjudication register as being entitled to the benefit of any interest, lease, right of occupation, charge or other encumbrance affecting the land shall be registered as being so entitled.[86] However, it is not clear what it means to say that a right of occupation recorded in the adjudication register shall be registered, when, in fact, as has been shown, no such right arising under customary law is registerable. It might simply refer to rights which do not arise under customary law, but it is hard to see what rights this category would include. On the other hand, it might simply mean that such rights should be protected on the register, for example, by the entering of a restriction,[87] but this interpretation stretches unreasonably the meaning of the words "shall be registered". The question is not one of merely academic importance. If a person claimed that his right of occupation had been recorded in the adjudication register, it would be hard for him to prove his claim unless the registrar had entered a restriction at the time of first registration, and this occurs rarely, if ever. Otherwise he would be obliged to produce the adjudication register, which (if discoverable at all) would probably have been gathering dust for some years in a cellar in Nairobi. This also

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86. Ibid., s.11(2).

87. Curiously enough, section 15(2)(c) of the Land Consolidation Act (Cap.283) provides for the recording of "any restriction on the power of the landowner or of any such person[i.e. a person entitled to a lesser interest in the land] to deal with the land or his interest, lease, right of occupation, charge or encumbrance", while the Land Adjudication Act 1968 contains no such provision. The reason is not clear.

casts an unreasonable burden on the prospective purchaser.

As a right of occupation under customary law recorded in the adjudication register is deemed to be a tenancy from year to year, it is presumably terminable by either party at a year's notice.[88] This may be fair where the person in occupation is a customary tenant e.g. a muhoi or a jadak; it is manifestly unfair where the person in occupation is a close relative e.g. a widowed mother or an unmarried sister of the registered owner. Thus even if the defendants in Obiero v. Opiyo and others[89] had succeeded in proving a right of occupation under customary law and had established that the right was recorded in the adjudication register, their step-mother (the plaintiff) could still have given them a year's notice terminating their right. Whether rights of occupation under customary law should be recorded in the adjudication register and whether, if so, they should be registrable or overriding interests are questions to be discussed later;[90] but really nothing is gained by deeming them to be tenancies from year to year and accordingly section 11(3) of the Registered Land Act 1963 should be repealed.

(iii) Rights of occupation under customary law not recorded in the adjudication register.

It seems, however, that the defendants in Obiero v. Opiyo and

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88. Registered Land Act 1963, s.46(1)(c); even the period of notice is not certain, since it is not wholly clear that the deemed periodic tenancy is a periodic tenancy "created" by this subsection, not what the period of a periodic tenancy should be where no rent is payable.

89. Supra.

90. Infra, p.206 et seq.

others[91] were claiming rights of occupation under customary law not recorded in the adjudication register. Such a claim must surely fail. Since the recording officer is required to record such rights where he is satisfied that they exist,[92] it can reasonably be inferred that unrecorded rights are extinguished.[93] After all, it is the policy of land registration to replace customary rights by rights recognised by the Registered Land Act 1963 and, subject to the provisions of that Act, to vest in the registered proprietor the absolute ownership of the land[94] and to confer on him an indefeasible title.[95]

(iv) Rights of occupation under the Registered Land Act 1963.

Opiyo and his brothers could have claimed that their rights of occupation did not derive from customary law but from the provisions of the Registered Land Act 1963. Three possibilities arise. They could claim to be licensees; they could claim to be in adverse possession; they could rely on section 30(g) of the Act. In the first place, they could claim to have a licence to be on the land.[96] A licence is defined "a permission given by the proprietor of land... which allows the

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91. Supra.

92. Land Adjudication Act 1968, s.23(2)(e).

93. This view seems to be supported by the decision in Esiroyo v. Esiroyo and another, [1973] E.A. 388, discussed infra, p. 205.

94. Registered Land Act 1963, s.27(a).

95. Ibid., s.28.

96. In the event, this claim would also have failed, as they had been cultivating the land without the plaintiff's consent.

licensee to do some act in relation to the land... which would otherwise be a trespass..."[97] It is not capable of registration,[98] although a licensee may protect his interest by lodging a caution;[99] if no caution has been lodged, the licence is ineffective against the bona fide purchaser for valuable consideration.[100] It is not therefore an overriding interest.

The estoppel licence, in particular, may well provide a defence to a trespass action in the sorts of situation under discussion. Where, for example, the registered proprietor allows his widowed mother or his sister or his son or even a stranger to cultivate a certain piece of land and to build a house thereon, may he subsequently sue for possession of the land? In English Law, a long line of cases[101] has established that where a licensor makes a representation which causes the licensee to act to his detriment, an estoppel arises in the licensee's favour and the licensor will be unable to eject him inconsistently with the representation. So the courts might, in the exercise of their equitable jurisdiction, prevent the registered proprietor from ejecting persons whom he had allowed to cultivate and build on his land. The court has a variety of remedies at its disposal; it may award monetary compensation or it may allow the licensee

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97. Registered Land Act 1963, s.3.

98. Ibid., s.100(1).

99. Ibid., s.131(1)(b).

100. Ibid., s.100(2).

101. In the present context, good illustrations are provided by Inwards v. Baker, [1965] 2 Q.B. 29, Plimmer v. Wellington Corporation (1884), 9 App. Cas. 699 and Ives (E.R.) Investment, Ltd., v. High, [1967] 2 Q.B. 379.

to stay on the land for as long as he likes and in one much criticised case[102] it ordered a conveyance of the land to the licensee. No discussion of the problems associated with estoppel licenses is necessary here. It suffices to note that, in the many cases that arise where the registered proprietor ejects his relatives or brings a trespass action against them, the estoppel licence would often be a strong weapon in the defence's armoury.

If, on the other hand, the relatives are, like Opiyo and his brothers, in occupation without the registered proprietor's consent, they may nevertheless succeed in a claim based on adverse possession. In practice, this is unlikely to occur very frequently as holdings are small and farmers traditionally sensitive to any encroachments on their boundaries; however some discussion of this topic is appropriate at this stage.

The Limitation of Actions Act 1968, based largely on the English Limitation Act 1939, provides that, in the case of registered land, the title of the registered proprietor is not extinguished after twelve years' adverse possession,[103] but is held by him on trust for the adverse possessor.[104] Moreover, rights acquired or in the process of being acquired under the Limitation of Actions Act 1968 are over-

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102. Dillwyn v. Llewellyn (1862), 4 De G.F. & J. 517.

103. S.7 provides that actions to recover land are barred at the end of twelve years. A similar provision was previously found in the Limitation Act 1948, Cap.11 (1948), s.10. The provisions regarding limitation to be found in the Land Registration (Special Areas) Ordinance 1959, Part VIII are generally simpler and more appropriate than the Limitation of Actions Act 1968. See the Lawrance Mission Report, para. 272.

104. Limitation of Actions Act 1968, s.37.

riding interests.[105] As intimated above, cases on the adverse possession of land registered under the Registered Land Act 1963 are very rare, but one case merits discussion, as it raises an interesting question as to the moment from which time begins to run. Unfortunately the facts are rather obscure and some aspects of the judgment questionable, although the outcome was fair.

In Hosea v. Njiru and others,[106] the plaintiff's father had "bought" the land in dispute from the first defendant's uncle in 1920 and had lived there with the plaintiff without interruption ever since; the last instalment of the purchase price was paid in June 1957. However the redemption of clan lands was allowed at the time of land consolidation and the Unit Committee accordingly awarded it to the first defendant in June 1958 making it clear in a document of that date that no action in trespass should be brought against the plaintiff until the defendant had repaid the purchase price plus a sum by way of compensation for improvements. The land was sold almost immediately to the second defendant and the land was registered in his name in November 1959; this was the first registration. The first and second defendants both knew about the arrangement and admitted that no money had ever been refunded. Conceding that first registration could not be rectified, the plaintiff applied under section 38(1) of the Limitation of Actions

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105. Registered Land Act 1963, s.30(f).

106. [1974] E.A. 526.

Act 1968 for an order registering him as the proprietor in place of the second defendant. His application was successful.

An important question that arose was from what time did the limitation period begin to run. The court answered this question as follows:

> Although an agreement to redeem can be inferred from the "redemption" document, it is not an acknowledgement by the plaintiff of the title of the first defendant. The date on which a right of action accrued is not therefore affected by it.
>
> The possession of the plaintiff is not referable to the decision of the Unit Committee because the land was never redeemed by the first defendant. The plaintiff continued to possess as purchaser.
>
> His possession became adverse on 22nd June 1957, the date on which the last payment of the purchase price was made. A right of action accrued to the first defendant on that date.107.

It is not clear why the learned judge held that the plaintiff's possession became adverse in June 1957. The case illustrates the difficulty of defining ownership in customary law. It would seem, however, that on payment of the last instalment (if not before) the plaintiff became the owner of the land and that there could be no question of his possession being adverse until the ownership became vested in someone else, as occurred in November 1959. On the other hand, the nature of a so-called "redeemable sale" might be such that the defendant or his family would continue to be regarded as owners

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107. Ibid., p.530, per Simpson, J.

and the plaintiff would have a mere licence terminable on refund of the amounts paid; but in this case the date of June 1957 is equally irrelevant.

However, the interesting point is whether there can be adverse possession before land is registered, i.e. while it is still subject to customary law, and if so, whether registration operates to interrupt the limitation period. The defendant contended that the notion of a prescriptive title was unknown to customary law and that therefore there could be no adverse possession until after registration. The court felt unable to discuss this contention as no evidence of customary law had been adduced, yet the point at issue is important.

In English law, anyone who is registered as first proprietor holds subject to rights already acquired by adverse possession whether or not he is aware of them,[108] and this seems to be the view taken by the court in the case under discussion. The crucial difference, however, is that in England the Limitation Acts apply both to registered and unregistered land; the mere fact of registration should not alter the substantive law applicable. In Kenya this is not the case. As has been argued in chapter II,[109] prescriptive title is virtually unknown in African customary law and where courts and adjudication committees award unregistered land, as they often do, to someone who has been in possession of it for a long time, it is always on general grounds

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108. Chowood Ltd. v. Lyall (2), [1930] 1 Ch. 426, affirmed [1930] 2 Ch. 156.

109. Supra, pp.90 et seq.

of fairness; no reference is ever made to any Limitation Act, no particular length of period is ever laid down, nor is it ever proved that the possession has been adverse in the sense known to English law.[110] If this argument is valid, and it certainly accords with the general policy of land adjudication, then the limitation period will only start to run at the moment of registration. In Hosea v. Njiru and others,[111] the period would have run from November 1959 and this might well have affected the outcome of the case. In Obiero v. Opiyo and others,[112] the defendants had been in occupation of the land "since time immemorial", but the plaintiff's claim could not be barred because she had only been registered as proprietor in 1968 i.e. two years before bringing proceedings.

There is a third way in which the rights of a person in actual occupation of land may be protected by the Registered Land Act 1963; they may constitute an overriding interest within section 30(g) of the Act. By virtue of this section, overriding interests include "the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed." This is a rather obscurely worded provision, though it seems it was intended to have the same effect as the parallel provision in the English Land Registration Act 1925,[113] itself a

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110. See e.g. Leigh v. Jack (1879), 5 Ex.D. 264; Wallis's Cayton Bay Holiday Camp Ltd., v. Shell Mex and B.P. Ltd, [1975]Q.B.94.

111. Supra.

112. Supra.

113. S.70(1)(g). One of the people responsible for the drafting of the Registered Land Act 1963 admits that this provision is not easy to understand and explains that this is why the Malawi Registered Land Act 1967, s.27(f), reverts to the English wording. Simpson (1976), op. cit., p.500.

provision which is not free from difficulty. The question which arises here is whether section 30(g) includes the customary rights of a person in actual occupation of the land. The Chief Land Registrar clearly thinks that it does; he holds that "subsection (g) means someone living on the land and having a right, usually based on customary law, to live there".[114] As examples, he cites the customary rights of widows and ahoi.

However, although the interpretation of this subsection has yet to come before the courts, there are powerful arguments against this view. The Land Registration (Special Areas) Ordinance 1959, s.40(f), had expressly included a "right of occupation under native law and custom" as an overriding interest. It was, however, considered "inadvisable to repeat"[115] this subsection in the Registered Land Act 1963, its place being taken by section 11(3) of that Act according to which a right of occupation under African customary law recorded in the adjudication register is deemed to be a tenancy from year to year i.e. an overriding interest within section 30(d).[116] The inference to be drawn is clear. Customary rights of occupation not recorded in the adjudication register are extinguished; they do not survive as overriding interests.

If section 30(g) does not include the customary rights of those in actual occupation (which have either been extinguished or are

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114. Republic of Kenya, Ministry of Lands and Settlement, The Registered Land Act 1963. A Handbook for the guidance of Land Registrars (June 1969), p.16.

115. Simpson, op. cit., p.483.

116. See supra p. 193.

protected by section 30(d), the question arises as to what sort of rights it is designed to protect. According to one writer it is simply concerned with the rights of the occupation tenant.[117] This would presumably include a tenant's option to renew the lease or to purchase the reversion, though arguably this category of overriding interests ought to be restricted to contractual rights of occupation.[118] It is, however, open to the Kenyan courts to interpret the sub-section to include the equitable rights of the person in actual occupation. This could have very serious consequences. If a "customary trust" (of the sort discussed at length in part 4 of this chapter) existed, the rights of the beneficiary in actual occupation of the land would be enforceable against a purchaser of the registered title.[119] This would complicate conveyancing and would seriously undermine the worth of a registered title as a security for loans. As yet, however, the courts in Kenya have not been called upon to interpret section 30(g).

(v) Conclusions: Methods of protecting rights of occupation under customary law.

It has been the argument of this section of the chapter that it is important to distinguish rights of occupation under customary

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117. Simpson, op. cit., p.498. It is arguable, however, that the enforceability of such rights depends entirely on whether the lease itself is enforceable against a purchaser, either because it is an overriding interest within section 30(d) or because (being registrable) it is registered.

118. This has been proposed by the Law Commission, Working Paper No. 37 (1971), p.60.

119. The English Court of Appeal adopted this interpretation of the Land Registration Act 1925, s.70(1)(g), in Hodgson v. Marks, [1971] Ch.892.

law recorded in the adjudication register, rights of occupation under customary not so recorded and rights of occupation under the Registered Land Act 1963. It was a pity that the court in Obiero v. Opiyo and others[120] did not make these distinctions, but as the defendants claimed rights of occupation under customary law and the court found these claims baseless, any discussion of the law was unnecessary. This case was shortly followed, however, by a similar case where the court did admit the defendants' claim to customary rights of occupation, but again the discussion was disappointingly jejune.

Esiroyo v. Esiroyo and another[121] concerns a long-standing quarrel between a man (the plaintiff) and two of his sons (the defendants). The plaintiff, a person of a moody and truculent disposition, lived with his family on a twenty-two acre plot of land, some ten acres of which the two defendants had been cultivating for some years before the present proceedings were brought. After family rows, the plaintiff had on a number of occasions entered on the land occupied by the defendants and caused wilful damage to their crops and personal possessions; in consequence, the sons had reported his behaviour to the police and he had been tried and sent to prison. The plaintiff now brought an action for trespass against the defendants and a perpetual injunction to restrain them from continuing or repeating their acts of trespass. The court gave judgment for the plaintiff on the grounds that, although the defendants had rights of

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120. Supra.

121. [1973] E.A. 388.

occupation under customary law, he was the registered owner of the whole plot and that such rights of occupation were not overriding interests; a passage from the judgment in Obiero v. Opiyo and another[122] was quoted and the reasoning in that case approved and followed.

Again it was a pity that the court did not see fit to analyse rights of occupation a little more precisely, especially in view of the harsh consequences of the decision; the defendants and their families were rendered homeless, without means of support and owing four thousand shillings in damages plus costs. Clearly if the defendants had appreciated the true meaning of land registration and had understood that it was not merely a device for preventing boundary disputes, they would no doubt have taken steps to protect their interests at the time of land adjudication. Granted the injustice of the result in this case, two questions arise: can the court in such circumstances do anything for the defendants when faced by the argument that the plaintiff is the registered proprietor and that his title is indefeasible and free of all encumbrances? Secondly, how should the adjudication machinery be altered so that the interests of people like the Esiroyo sons are adequately protected?

Various answers to the first question have been canvassed in the course of this chapter. If the defendants are on the land as contractual licensees, they may be able to restrain revocation of the licence in breach of contract. If they cultivate and build on the land in reliance on the licensor's representation that they will be

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122. Supra.

allowed to stay indefinitely, an estoppel may arise which will prevent the licensor acting inconsistently with his representation. By far the most common defence argument, however, is that the plaintiff (the registered proprietor) holds the land or part of it on trust for the defendants. Such claims, based on customary law, have tended to succeed[123] and there is little doubt that the Esiroyo sons would have been successful, if they had held that they were entitled beneficially to the ten acres which they occupied. If this is the case, the ironic conclusion is reached that they would have done better to claim beneficial ownership under a customary trust rather than a mere right of occupation at customary law.

The second question, as to how customary rights of occupation should be protected at the time of land adjudication, is difficult to answer. Part of the difficulty, already discussed in Chapter two, stems from the virtual impossibility of finding in the Registered Land Act 1963 exact equivalents for customary land rights; thus the rights of ahoi, widows, unmarried daughters and unmarried sons have little in common although they can be loosely subsumed under the name "rights of occupation", but they have nothing in common with the tenancies from year to year (or any other tenancies) which they are deemed to be, if recorded in the adjudication register. Most of the difficulty, however, lies in the conflicting objectives of land registration. The government favours the registration of individual title on the English model, but at the same time expects

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123. See supra, pp. 175 et seq.

proprietors to honour their customary obligations. It is necessary to protect all interests in a given piece of land, but at the same time the register should not be cluttered up with entries nor should the task of the prospective purchaser be made unduly onerous.

Supposing that customary rights of occupation should survive registration and should be protected, three possibilities arise. In the first place, they could be made registrable as encumbrances; this would clutter up the register unjustifiably and be generally impracticable. Secondly, they could simply be protected by a restriction entered on the register by the Registrar, not unlike licences; this would recognise their rights and would operate to prevent dealings inconsistent with them. If no restriction was entered, the purchaser would know that he took free of any such rights. In the same way, the interests of the beneficiaries under a customary trust could be protected. Thirdly, customary rights of occupation could be made overriding interests i.e. a special category of their own, not (as today) as periodic tenancies. No entry on the register would be necessary. It is thus the simplest of the three methods, although it suffers from one drawback: it requires the purchaser to make a thorough inspection of the land. Of course, in view of the possibility of the existence of overriding interests at present listed in section 30 of the Registered Land Act 1963, the prudent purchaser will always inspect the land; however a glance through the list suffices to show the extreme unlikelihood of any such interests existing, while plots of registered land <u>not</u> subject to customary rights of occupation would be few and far between. Thus the addition of such rights to the list of overriding interests would enormously increase the purchaser's task.

All three methods, however, are subject to one major objection, springing from the uncertainty of customary law. Even supposing that a prospective purchaser became aware of the possible existence of a customary right of occupation, either by consulting the register or by inspecting the land, it is difficult to see how he could learn the exact nature and extent of such a right. It would be clearly impossible for the adjudication authorities to record the details of each customary right of occupation, interesting as such records would be from an anthropological viewpoint, but at the same time no person is likely to buy land subject to an overriding interest of whose nature and extent he is uncertain. In this way, anyone entitled to such a right would be in a position effectively to prevent the land being sold. The land would become inalienable.

In conclusion, therefore, it is submitted that customary rights of occupation should not survive land registration. After all, it is the purpose of the programme that customary land law with all its uncertainties and complexities should be extinguished and be replaced by a system whose concepts are familiar to the courts and the legal profession and which confers on the proprietor a negotiable title free from traditional constraints. This would, moreover, facilitate the task of the purchaser and although it might have harsh consequences in occasional cases like Esiroyo v. Esiroyo and another,[124] the courts have shown that by a flexible use of the trust concept such consequences may often be avoided. If this

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124. Supra.

recommendation were accepted, appropriate amendments would have to be made to section 23(2)(e) of the Land Adjudication Act 1968 and section 11(2) of the Registered Land Act 1963, and section 11(3) of the latter Act would have to be repealed. The right of occupation would cease to exist as a distinct legal entity.

4. Conclusions.

One of the purposes of the land adjudication programme was to put an end to the land disputes that had plagued certain areas of Kenya for some time and it is perhaps the greatest achievement of the programme that disputes of that kind, i.e. boundary disputes, have virtually disappeared. However, a new type of dispute has emerged, i.e. disputes about first registration. Whereas the previous disputes concerned boundaries between clans and families, disputes about first registration arise between close relatives, brother brings an action against brother and father against son. They are becoming increasingly numerous, particularly in the Central Province, and it will be interesting to see whether this occurs in other areas of Kenya as the adjudication programme gathers momentum. Given the circumstances in which land consolidation was carried out in the Central Province at a period of high absenteeism and political bitterness, it would be surprising if the litigation that ensued were closely paralleled in any other area. On the other hand, inasmuchas the litigation springs from the persistence of customary notions of land tenure, it is more likely to occur in those areas

where modernising influences have as yet hardly made their mark and where the individualisation of land tenure, discussed in Chapter II, has hardly started.

Those aggrieved by first registration are prevented by section 143(1) of the Registered Land Act 1963 from obtaining rectification of the register and the main body of this chapter has been concerned with the alternative courses of action open to them. It has been shown that it would seldom be legally advisable to take proceedings in tort against the Government or its officers, let alone the political unwisdom of such a step. On the other hand, the courts have been willing to impose constructive trusts in situations where something analogous to a trust existed in customary law. In such cases, the parties are invariably related and it has yet to be seen whether the courts will extend the application of the constructive trust to cases where the parties are not closely related, but where one party has unjustly enriched himself at the expense of the other. Finally, claims to rights of occupation under customary law and under the Registered Land Act 1963 have been examined and the circumstances outlined in which such claims would succeed.

Two inescapable conclusions emerge. In the first place, if land adjudication had been carried out more competently and, in particular, with more regard for the opportunities afforded by the register, e.g. the entering of restrictions and the registration of lesser interests, then a lot of this litigation would never have arisen. In many cases the courts are effectively readjudicating land rights and this is a rôle for which their ignorance of customary law and of local history ill equips them. Secondly, it is high time that

rectification of the register in respect of first registration was made possible. The prohibition has not prevented litigation, litigation on a large scale illustrating bitter family tensions, but it has sometimes prevented the courts from doing justice and sometimes obliged them, in the interests of justice, to stretch legal categories in a questionable way. The courts would not be placed in this dilemma, if they were empowered to order rectification of the register on first registration on the proof of fraud or mistake.

C H A P T E R V

THE EFFECTIVENESS OF THE REGISTER

1. Introduction

In Chapters II and III the main problems encountered during land adjudication were described and analysed and it was found that they sprang in part from the inherent difficulty of translating customary interests in land into the framework of the new system based on registration of title and in part from deficiencies in the adjudication process. In the event, some people benefitted from land adjudication in that they acquired interests in land to which they were not previously entitled, while others, on the other hand, lost interests which they had enjoyed under customary law. Persons in the latter category have, since registration, made a variety of attempts, successful and unsuccessful, to recover the interests in land of which they had seemingly been deprived and those attempts were discussed in chapter IV.

It would be rather cavalier to write off these problems as the growing pains of the new system, but it could nevertheless be argued that with time disputes about first registration will die out and people will resign themselves to the new state of affairs. The problems arising from land adjudication are only temporary, the argument goes, whereas the benefits of registration are permanent and indisputable. The former uncertainties of customary law have disappeared, to be replaced by a system where title is secure,

where transactions are secure and where rights in land are easy to define. These are three direct consequences of any system of registration of title and important consequences they are. The title of the registered proprietor is, generally speaking, unimpeachable and no person dealing with him is concerned to go behind the register; customary procedures for transferring interests in land have been superseded and customary restraints on alienation have no legal effect. Whereas the nature of rights conferred by customary dealings was often obscure e.g. the rights of widows, ahoi or parties to a "redeemable sale", rights arising under the Registered Land Act 1963 are relatively easy to define both by reference to the Act itself and to the large body of case law to be derived from other jurisdictions where registration of title pertains.

These advantages are obvious but they depend for their realisation on one crucial factor: the registration system must be effective i.e. its nature must be understood and its virtues appreciated by at least a majority of the registered proprietors. If registered proprietors see registration as simply a means of preventing further boundary disputes and continue to deal with their land according to customary law and not according to the Registered Land Act 1963, the system is not being effective and to state that such dealings[1] are without legal validity, though true, is poor consolation.

This chapter, then, is about the effectiveness of registration of title in two areas of Kenya and casts serious doubts on the wisdom of imposing on alien cultures systems of law based on Western

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1. Throughout this chapter the word "dealings" will be used to include both dispositions and transmissions, in accordance with the definition in the Registered Land Act 1963, s.3.

models. The next section will be concerned with dispositions of registered land and the following section with successions. In both sections the discussion will concentrate on two related issues, the degree to which dealings are registered and the degree to which customary law still governs land matters. The section on succession will be much the longer owing to the large amount of accessible material on that topic.

2. Dispositions of registered Land.

The Registered Land Act 1963 provides that no land, lease or charge shall be capable of being disposed of except in accordance with the Act and that every attempt to dispose of them in any other way "shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge".[2] Moreover it is provided that transfers of land[3] and the creation of leases for specified periods exceeding two years require to be registered.[4] Similar provisions will be found in any jurisdiction where a system of registration of title exists, but it can be assumed that the vast majority of the people living within any such jurisdiction is ignorant of their existence and has little idea of the difference between registered and unregistered land. Nevertheless the system works because people tend to rely on their legal

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2. S.38(1).

3. Ibid., s.85(1) and (2).

4. Ibid., s.47.

advisers in conveyancing matters and because the legal profession co-operates with the system. In Kenya, on the other hand, the legal profession is small and concentrated in the big cities and there is no tradition of employing experts to handle land dispositions on one's behalf. Therefore it would not be surprising to find that, even though the system of registered conveyancing under the Registered Land Act 1963 is almost as simple as it could be, dispositions take place off the register. While it is virtually impossible in the nature of things to obtain exact details of the number and nature of such dispositions, the research of the present writer shows that this is indeed the case.[5]

To start with it will be convenient to look at sales and leases of land. Sometimes the whole of a piece of land is sold or leased; sometimes only a part of the land is sold or leased and the rest is retained by the proprietor. In the two East Kadianga adjudication sections studied, Kabete-Obuya and Kamnwa-Keyo-Ogoro, nine sales of whole plots and twenty sales of parts had been registered[6] since the registers were opened on January 21st 1964 and April 1st 1966 respectively. No leases were registered. During the same period there were at least nine unregistered transfers of whole plots and at least four unregistered transfers of parts. No unregistered leases were

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5. In 1967, J.T. Fleming, a government officer, investigated the working of the land registration system in a number of sub-locations and, in particular, examined the problem under discussion. His report, An Analysis and Review of the Kenya Land Reform Programme, 1966-1968, though extremely interesting, was never published and is difficult to come by. His conclusions on the effectiveness of the land registers are in substantial agreement with those of the present writer.

6. At the time of the research, i.e. August 1973.

discovered. In short, there were twenty-nine registered sales of land and at least thirteen unregistered sales; it is of course possible, though unlikely, that there were many more than thirteen.

In Gathinja, since the register was opened on October 15th 1963 there had been eleven registered sales of whole plots and at least two unregistered sales of whole plots; no leases or sales of parts were registered. Nevertheless land is occasionally rented out on tenancies that resemble periodic tenancies and as such are not capable of registration.[7] Thus in one case an area of low-lying land was let out at a rent of twenty shillings per six month season to someone who wanted to grow arrowroot. Much more interesting is the survival of the customary institution commonly known as the "redeemable sale." Such"sales" are never registered; in fact their very existence is often shrouded in secrecy. The present writer came across five instances and it is likely that others exist. They tend to arise where the proprietor of land needs a lump sum of money, be it for school fees or a bus fare. He will therefore allow someone to cultivate a piece of his land in return for this sum (usually of the order of a few hundred shillings i.e. not much in an area where an acre of good land may fetch several thousand shillings) on the understanding that the land will be "redeemed" on repayment of the sum.[8] It is difficult to fit this kind of institution into the framework of the Registered Land Act 1963 and

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7. Registered Land Act 1963, s.46(2).

8. In one instance, two ahoi rendered landless by land adjudication were cultivating half an acre each on such terms.

questions as to whether the provider of the lump sum is a purchaser, a tenant, a chargee or a licensee and as to whether his interest is registrable are difficult to answer. It is probable that in the absence of registration the courts would hold him to be a licensee, although customary law, which in practice governs these transactions, would afford him greater protection.

While sales and leases of land remain comparatively infrequent, voluntary transfers of land are extremely common. Registered gifts of land are few. In East Kadianga, two gifts were registered; in one instance a large landowner decided to give part of his land to a son; in the other instance, it was really a sale of land, but called a gift by the parties in the hope of avoiding registration fees. In Gathinja, two gifts were also registered; in one instance again a father gave a plot to one of his sons; the other instance throws an interesting light on what occurred at the time of land adjudication. After land had been consolidated, a certain man emerged as the owner of several plots, but as the practice was that no person should be registered as the proprietor of more than two plots, he was obliged to register one of his plots in the name of a friend. After registration, the friend gave the plot back. Where a person had more than 2 plots, he would generally register the extra plots in the names of his wives or sons; if one were unaware of this practice, a glance at the register might give one the impression that land consolidation had been carried out more thoroughly than was in fact the case.

The question of unregistered gifts of land is a difficult one. Under both Luo and Kikuyu customary law, when a man married or

reached a certain age, his father or the head of the household would allocate him a piece of land which he could cultivate and where he could build his house. While in practice this "gift" of land was seldom revoked, nevertheless the son remained subject to his father's authority and his powers of dealing with the land were restricted accordingly. As land continues to be the main source of wealth, it is hardly surprising that this custom has survived and that plots are subdivided on the ground between the registered proprietor and his married sons. The incidence of these informal subdivisions and the degree to which they have adverse economic consequences are questions to be discussed later.[9] Suffice to say here that they are extremely common.

While it is desirable that such subdivisions be registered, they do not constitute such a threat to the register as do unregistered sales, leases and successions. Although the sons in such cases have no legal title to the land they have been given and may indeed be evicted, the register still reflects what is occurring on the ground and can still be relied upon by, say, a prospective purchaser. It is where a registered proprietor sells land off the register or where a succession to his land remains unregistered, that the main problems will occur.

Even though dispositions of land continue to reflect the persistence of customary law, the control over land exercised by traditional authorities has almost died out in both the areas studied.

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9. Infra., pp. 304 et seq.

Certainly a man may consult with his brother before distributing or selling his land, but the general supervisory powers of the clan elders have not survived. Registered proprietors (no doubt over-emphasising the efficacy of the land certificates which they treasure so much) are fully conscious of their power to deal with their land as they like and even if customary considerations govern the way in which they deal with it, they do not recognise the right of anyone to control the manner in which they exercise this power. In only one instance, in East Kadianga, did the present writer find a person who had consulted the jokakwaro elders about the sale of his land. The rôle of the elders, even in land matters, had long been on the decline before land adjudication and it is unlikely that the registration of individual titles to land did much to hasten this decline.

Finally, it is necessary to consider why proprietors are not registering their dispositions. In one case, the seller let the purchaser into possession of his land, grabbed the purchase-money, rushed off to the nearest town to lead a life of debauchery and has not been heard of since. As the transfer forms have to be signed by the vendor, the sale cannot be registered unless, of course, the purchaser obtains a court order. At a more general level, unregistered dispositions do occur even where the parties have some awareness of the necessity of registration. Secret "sales" may occur where the land control board has refused or is likely to refuse its consent.[10] A father may refuse to register

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10. For the working of the land control boards, see infra, Ch.VII.

gifts of land to his sons on the grounds that it is not theirs until after his death. A seller may be reluctant to register the sale until all the instalments of the purchase price have been paid.

Such cases are not common, however. The main reason (and further support for this view will be forthcoming in the next section of this chapter) why people do not register their dispositions is that they do not appreciate the necessity of doing so. They may feel that they ought to register their dispositions but they do not understand the nature of the registration system nor the legal consequences of non-registration. The land registry may be far away, money will have to be found for transport expenses and registration fees, problems may arise with registry staff who may be rude or corrupt. There is little inducement to register, particularly where the parties are friends or relatives. Meanwhile the land register becomes increasingly less reliable.

2. Successions to registered land.

(i) Unregistered successions:

It must be admitted that the total number of sales and leases in the two field-areas is extremely small and the fact that a proportion of them is not registered might be regarded as a matter of no great consequence. It is when successions to registered land are examined that the true gravity of the situation becomes apparent.

The existence of the problem was fully recognised a long time ago and in 1963 a government officer is found writing that "after about four years of full registration in Kiambu district, over 3,000 titles are still registered in the names of deceased persons".[11] If this was the case in Kiambu district, a district which on most criteria would rank as the most advanced district to be found in the Special Areas, the situation elsewhere must give considerable cause for concern. The present research confirms that this is so. In Kabete-Obuya and Kamnwa-Keyo-Ogoro, sections which contained at the time of registration a total of 621 parcels of land, only one succession[12] had been registered since the registers had been opened some 9½ years and 7½ years (respectively) previous to the research. In Gathinja, which contained 347 parcels of land at the time of registration, only nine successions had been registered since the register had been opened some twelve years previously.

While it is difficult to ascertain the exact number of unregistered successions in any district, both my interpreters were well acquainted with the field-areas and were able to inform me which registered proprietors had died. The figures that follow, then, are fairly accurate, though they may slightly under-estimate the number of unregistered successions; even as it is, the picture is clear. In East Kadianga, there were at least twenty-eight unregistered successions, i.e. not more than 3.4% of successions were

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11. F.D. Homan, "Succession to Registered Land in the African areas of Kenya", J.L.A.O., Vol II, No.1, (January 1963) p.49 Fliedner reported in similar terms that "... nur ein Verschwindend Kleiner Prozentsatz der Erbfälle überhaupt in Land register berücksichtigt ist". H. Fliedner (1965), op. cit., p.69.

12. This succession, moreover, was only registered because the heir wanted subsequently to sell a part of the land.

registered. In Gathinja, there were at least thirty-three unregistered successions, i.e. not more than 21.4% of successions were registered. As in the case of dispositions, the proportion of successions registered in Gathinja is rather larger than that in East Kadianga. This is hardly surprising; in terms of wealth, education and agricultural development Gathinja is much more advanced than East Kadianga. What is surprising is that the number of unregistered successions is so high in what is one of the more favoured sub-locations of Kenya. A clue to the reason for this state of affairs may lie in the complicated procedure laid down in the Registered Land Act 1963 for the ascertainment of heirs and the registration of successions.

(ii) Succession under the Registered Land Act 1963:

The two main features of the provisions laid down in this Act governing intestate succession[13] are, first, the complexity of the procedure involved and, second, the retention of customary law. It is the former which it is necessary to examine at this stage. Upon being informed of the death of a proprietor intestate, the Registrar must satisfy himself both of the death of the proprietor[14] and that the proprietor was subject to African customary law; a certificate signed by an administrative officer is conclusive evidence on the latter point.[15] The Registrar then applies to the District

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13. Testate succession is discussed infra., pp. 250 et seq.

14. Registered Land Act 1963, s.120(2). False reports of deaths are sometimes made with a view to getting hold of the "deceased's" land.

15. Ibid., s.120(1).

Magistrate's court for the determination of the heirs. The court sends the certificate of succession containing details of the heirs and their shares to the Registrar who makes the appropriate entries in the Register.[16]

The first problem is that very few deaths are ever reported to the land Registrar. The registration of deaths is compulsory today throughout all Kenya. It was made compulsory in Kisumu district in 1968 and in Muranga district in 1969.[17] Deputy-Registrars of births and deaths are appointed for the rural areas;[18] they may be chiefs or primary-school headmasters or registrars of local hospitals, though often private individuals of some standing in the locality may be appointed. When the Deputy-Registrar is not a government employee, he is entitled to remuneration at the rate of fifty cents per death reported. Cases have arisen where Deputy-Registrars have reported deaths which have not occurred, thus increasing their income. Generally speaking, however, the number of deaths reported represents only a small fraction of the number of deaths that has occurred. The present writer encountered a number of instances where, even though the kinsmen of a person who had recently died had applied to the chief for a burial permit, the death had never been reported to the Registrar

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16. Ibid., s.120(3). By virtue of the Magistrate's Courts Act 1967, Cap.10(1968), s.10(1)(a), the District Magistrate's court has jurisdiction in succession matters.

17. L.N. 7 of 1968 and L.N. 30 of 1969. The Minister declared these districts registration areas by virtue of powers conferred on him by the Births and Deaths Registration Act 1928, Cap.149 (1967), s.15(2).

18. The information in this paragraph is largely derived from interviews with the Registrars of Births and Deaths at Kisumu and Muranga.

of Births and Deaths. More important from the point of view of the present study is the fact that there seems to be no liaison between the Registrars of Births and Deaths or administrative officers on the one hand and the land registrars on the other. The land registrar, therefore, will only learn of the death of a registered proprietor, where one of the deceased's Kinsmen sees fit to inform him. This is unlikely to occur where there is no dispute about the succession, but the complicated and lengthy procedure involved no doubt deters people from registering successions and encourages them to settle their disputes in other ways.

Parties instituting succession proceedings must first produce a death certificate; such a certificate costs ten shillings and is obtainable only in Nairobi. A long and expensive bus-trip may be necessary. Even when this obstacle has been overcome, the parties may well have to wait a few years before the proceedings are finalised, even if they are unanimous about the way in which the land should be distributed. The land registrar may delay applying to the court for a certificate of succession. On receiving the application, the court will generally then attempt to obtain a list of the deceased's relatives from the appropriate administrative officer and will then summon them all to appear on a certain day. The court's decision, which in the vast majority of cases merely records the unanimous decision of the deceased's family, is then forwarded to the land registrar. He may then make appropriate entries on the register, but if subdivision of the land is required, it will first be necessary to obtain the consent of the land control board. The whole process can take a long time and at every stage of the process fees are

payable. It is hardly surprising, therefore, that few successions are registered.

It is outside the scope of this study to make detailed recommendations as to how the present procedure should be altered. Nevertheless a few suggestions may be hazarded. Clearly the death-reporting system needs to be decentralised. Chiefs and sub-chiefs should be under a duty to report deaths to the local Registrar and if this would add excessively to their responsibilities, then a deputy-registrar attached to the chief's office should be appointed on a full-time basis. His duties would be to register births, deaths and, possibly, marriages.[19] He would issue death certificates and maintain an active liaison with the district land registrar. He should be well-acquainted with the area where he is employed.

The procedure for the determination of heirs could be shortened by excluding the courts. Disputes about successions to registered land are extremely rare; for example, of the 88 succession cases decided in 1973 by the Kiharu District Magistrate's court,[20] not a single one was contested; the family had agreed on how the deceased's land was to be distributed and the magistrate merely recorded its decision. Even if disputes do occur, it is doubtful whether the court is the best forum for their settlement. If, then, the courts are excluded from the process, the land registrar would simply ask the

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19. If the Law of Matrimony Bill is ever enacted, he could act as assistant district registrar.

20. The jurisdiction of this court extends over five locations in Muranga district, including Gathinja sub-location.

local chief (or, possibly, the deputy-registrar of births and deaths) to summon the deceased's family and anyone else interested in his land and to get them to agree on the way in which this land should be distributed. The chief would then send a copy of the decision to the land registrar who would make appropriate entries in the register. This procedure would be quick, simple and cheap. It is modelled on the practice of the Public Trustee when dealing with estates of Africans.

The Public Trustee may administer estates nor exceeding 10,000 shillings in value without reference to any court[21] and he may, where the value of the estate does not exceed 4,000 shillings, issue a certificate of summary administration on the application of any person to whom Probate or Letters of Administration may be granted.[22] Where the value of the estate exceeds 10,000 shillings, he must apply to the High Court for letters of administration.[23] When the administration of a certain estate has been undertaken, the following procedure is adopted. The office of the Public Trustee requests the local administrative officer to submit a list of the deceased's property and its value together with a list of the deceased's relatives and dependants and an account of the various proportions in which they have agreed that the property be divided. In the present writer's experience, this system works very well and disputes are extremely rare. Seeing that succession both to land and to other kinds of property is governed by the same law i.e. customary law, the question naturally arises why the administration of the land of a deceased person and the determina-

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21. Public Trustee Act 1925, Cap.168(1968), s.4(4)(i), as amended by the Statute Law (Miscellaneous Amendments) Act 1969, No.10 of 1969, s.2 and sched.

22. Ibid., s.4(4)(ii).

23. Ibid., s.4(3).

tion of the heirs to his land should be divorced from the administration of his other property. Surely a uniform procedure is necessary. The Law of Succession Act 1972 makes an attempt to provide such a procedure, but simultaneously renders its success highly unlikely by abolishing customary law. The nature of this serious step will be examined in the following section.

(iii) Succession under the Law of Succession Act 1972:[24]

On March 17th, 1967, a Commission was appointed to consider the law of succession as it then existed in Kenya and "to make recommendations for a new law providing a comprehensive and, so far as may be practicable, uniform code applicable to all persons in Kenya". In the course of the following sixteen months the Commission (most of whose members were not Africans) sent out questionnaires, invited memoranda from members of the public and held public meetings in most of the important towns. Its recommendations were embodied in a report[25] submitted to the President in August 1968 together with a draft Bill, the Law of Succession Bill. This Bill was subsequently amended in several ways after a number of lively debates in the National Assembly[26] and was eventually enacted, in its amended form, on November 13th 1972.

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24. No. 14 of 1972.

25. Republic of Kenya, Report of the Commission on the Law of Succession (1968). Hereafter cited as the Succession Report.

26. The National Assembly, in particular, rejected the proposal that illegitimate children should be treated in the same way as legitimate children. Republic of Kenya, National Assembly Debates, 1970, vol.21, cols. 1931-1965, 2001 - 2045, 2078 - 2099.

The Law of Succession Act 1972 has still not come into operation, largely, it appears, due to the need to train the large number of officers required, especially in the office of the Public Trustee, if the implementation of the Act's provisions is to be effective. However, as it is the government's intention that it be brought into operation as soon as possible, it is necessary to examine its provisions in some detail, especially those concerning the devolution of the estates of Africans dying intestate. The Act provides a uniform code applicable to all persons in Kenya. Consequently all Acts which formerly governed succession have been repealed;[27] particularly important, in the present context, is the deletion of sections 120 and 121 of the Registered Land Act 1963.[28] When the Law of Succession Act 1972 comes into operation, intestate succession to registered land, and indeed to all other kinds of property, will cease to be governed by customary law. The provisions regarding intestate succession are contained in Part V of the Law of Succession Act 1972. Here an attempt is made to create, with the exception of certain kinds of property in certain areas,[29] a universal code of intestate succession; it is hardly surprising, therefore, that its provisions are highly controversial. However, it will be best first to outline these provisions before subjecting them to critical scrutiny.

Where an intestate dies leaving one spouse and a child or

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27. Law of Succession Act 1972, s.99 and Sched.8.

28. Ibid., s.100 and Sched.9.

29. See infra p. 240.

children, the surviving spouse is entitled to all the deceased's personal and household effects absolutely and to a life interest in the whole residue of the net intestate estate[30] with power of appointment to the surviving child or children;[31] any child may apply to the court if he considers the power to have been improperly used or withheld,[32] and the court may in its discretion award the applicant a share of the capital.[33] On the death or, in the case of a widow, the remarriage of the surviving spouse, the estate (subject to any appointment or award made) is to be divided equally among the surviving children.[34] The Commission adopted the principle of the discretionary trust as being less rigid, "more akin to customary law"[35] and more appropriate to the economic circumstances of Kenya than the fixed-shares system characteristic of Islamic law and followed by the Indian Succession Act.

Where an intestate dies leaving a spouse but no children, the spouse is entitled to the deceased's personal and household effects, the first ten thousand shillings out of the residue of the net intestate estate and a life interest in the remainder.[36] Upon the determination of the life interest, that is - on the death or, in the case of a widow, the remarriage of the spouse, the property

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30. Law of Succession Act 1972, s.35(1). References in the text to the Act in this subsection are references to the Law of Succession Act.

31. Ibid., s.35(2).

32. Ibid., s.35(3).

33. Ibid., s.35(4).

34. Ibid., s.35(5). The principle of substitution applies, ibid., s.41 and account is taken of previous benefits, ibid., s.42.

35. Succession Report, para.131.

36. Law of Succession Act 1972, s.36(1).

subject to such interest passes to the deceased's relatives in a stated order of priority.[37]

Where an intestate leaves no spouse or children, his estate passes to his relatives in the same stated order of priority.[38] Where an intestate leaves a child or children but no spouse, his estate devolves upon the surviving child, if there is only one, or is equally divided among the surviving children.[39]

Where an intestate was polygamous, his estate is first divided equally among the houses of his wives according to the number of children in each house, also adding any surviving wife as an additional unit to the number of children;[40] thereafter distribution within each house takes effect in the accordance with the various principles outlined above.[41]

This, then, is a brief summary of the basic rules governing intestate succession under the Act, although it should be noted that the court has a discretion to order provision to be made for certain categories of dependants not adequately provided for under these rules.[42] Next it is necessary to consider the extent to which these provisions can be reconciled with the customary law of succession and indeed with the expressed goals of the commission.

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37. Ibid., s.36(3).

38. Ibid., s.39(1).

39. Ibid., s.38.

40. Ibid., s.40(1).

41. Ibid., s.40(2).

42. Ibid., ss.26-30.

The Commission helpfully outlined the general policy considerations that guided it in framing its recommendations and these provide us with one criterion for measuring the success of the Act. One particular policy consideration is repeatedly emphasised, namely that "the new law should generally be compatible with the African way of life"[43] and that any changes recommended "should generally be understood by and acceptable to the people"[44] and "should offend as little as possible their respective beliefs".[45] Given that these were the principles governing the Commission's deliberations, it would be surprising to find any serious incompatibility between the Act and African customary law. Nevertheless this incompatibility exists and indeed gravely threatens the successful working of the Act.

The Commission has summarised what it sees as the general characteristics of customary law.[46] Sons only can inherit, wives and daughters are excluded, distribution in a polygamous household is according to houses regardless of the number of children in each house, the administrative successor has a wide discretion to vary shares and account is taken of lifetime distribution. The Commission had to devise a way of reconciling these features of customary law with the needs of contemporary Kenya. However, while the Commission did take customary ideas into account in its definition of "dependant"[47] and in its provisions regarding lifetime distribution,[48]

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43. Succession Report, para.11.

44. Ibid., para.14.

45. Ibid., para.12.

46. Ibid., para.128.

47. Law of Succession Act 1972, s.29(a) and (b).

48. Ibid., s.42(a).

the Act does not embody many of the features of customary law. It is proposed to discuss these features in turn and even though the discussion will be about succession to property generally, it should be remembered that land is still the prime source of wealth for the majority of Africans in Kenya today.

The rights of inheritance of women under customary law are very restricted. An intestate's property, and his land, in particular, passes to his sons and, if he has no sons, to his nearest male relatives (i.e. father, brothers, nephews). While unmarried daughters and unmarried sisters will generally have, for example, the right to cultivate a piece of land during their lifetimes, the patrilineal system of inheritance ensures that property, particularly land, does not pass out of the clan. When a woman marries, it is the duty of her husband and his family to provide for her; she does not expect to inherit any property from her family. However, it was the policy of the Commission[49] that distinctions based on sex or marital status should have no place in the new law. Under the Act all children take equally regardless of sex.[50] Even though, as the Commission points out, the surviving spouse may be expected to exercise the power of appointment in favour of the more needy children to the exclusion, for instance, of married daughters, benefits derived from such an appointment are taken into account on the termination of the life interest when the remaining property is divided among the children.[51]

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49. Succession Report, para.138.

50. Law of Succession Act 1972, ss.35(5) and 38.

51. Ibid., s.42(b).

Where the intestate leaves no surviving spouse or children, his estate devolves on his father or, if he is dead, on his mother or, if she is dead, on his brothers and sisters, and so on.[52] Seeing that under customary law neither daughters, nor sisters, nor mothers had significant rights of inheritance, these are important changes indeed.

Even more drastic is the change in the position of the widow. While under customary law her husband's property would pass to his nearest male relatives together with an obligation to support the deceased's widow, her position under the Act is the same as that of a widower except that her life interest terminates on her remarriage, as would her rights under customary law. Her entitlement to the first ten thousand shillings of her husband's estate in the event of his leaving no children[53] will mean in practice that she will usually inherit his whole estate, estates of more than ten thousand shillings not being very common. The deceased's land will therefore pass out of his clan. Even where he leaves a surviving child or children, his widow is entitled to a life interest in the whole estate[54] with a power of appointment to the children,[55] a position which she would never enjoy under customary law. For even if the Commission was correct in holding that the principle of the discretionary trust to be "akin to customary law", the customary "trustee" is almost always the deceased's eldest son (the muramati of the Kikuyu) or, where that son is too young, his nearest male relative. Moreover the

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52. Ibid., s.39(1).

53. Ibid., s.36(1)(b).

54. Ibid., s.35(1)(b).

55. Ibid., s.35(2).

customary "trust" has little in common with the trusts that will arise under the Act. These trusts will normally be managed by the Public Trustee where the value of the estate does not exceed ten thousand shillings.[56] Where its value exceeds this sum, the trustees will normally be the surviving spouse and at least one other person.[57] Their powers and duties are defined by the Trustee Act 1929[58] and where part of the estate consists of land, it will be held on a trust for sale in accordance with the provisions of the Trusts of Land Act 1941.[59] This raises a further problem. It is obviously absurd to expect a widow (or widower), who will usually be old and often illiterate, to appreciate the nature of her statutory duties and it is equally unrealistic to expect her to employ professional advisers. Many people in the rural areas have little idea of what an advocate is. Besides, advocates are people of the town, their ways are different and they cost money. Their fees will usually bear small relation to the value of the estate which may simply consist of two or three acres of coffee plantation. Nevertheless, without professional advice no widow will know that she has a power of appointment and no child will know that he is entitled to object to the way in which this power is exercised.

The third major break with customary law is the Act's treatment of polygamous households. It is a characteristic of the customary law of succession that each house shares equally in the

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56. The Law of Succession Act 1972 has left unchanged the powers of the Public Trustee to administer such estates under the Public Trustee Act 1925, s.4(4)(i).

57. Law of Succession Act 1972, s.58.

58. Cap.167.

59. Cap.290.

estate regardless of the number of children in each house. The Commission, understandably, found this custom inequitable and the Act provides [60] that the number of persons within each house be the major consideration when the estate of a polygamist comes to be distributed.

Finally, there are a number of traditional institutions which it will be impossible to fit within the framework of the Act. The present writer encountered two such institutions in the course of his research. In the first place, it has been the custom among the Kikuyu for a childless woman of property to "marry" a younger woman.[61] The latter will be encouraged to bear children, indeed the older woman may select suitable lovers for her, and these children will inherit the older woman's property in the same way as if she was their father. A certain amount of secrecy seems to surround such marriages, but it is likely that they are becoming increasingly rarer; only two instances came to light during field-work in Gathinja sub-location. Another custom, and one which is a long way from dying out, is the leviratic union.[62] When a man dies, it is the custom for his widow to enter into a union with his brother or some other close male relative. This man will then come to live on the deceased's farm and the children of this leviratic union will be deemed, for succession and other purposes, to be the

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60. S.40(1).

61. Such a marriage, often called a "ghost marriage", certainly used to exist among the Luo also; see G. Wilson, op. cit., p.123. The present writer came across no instances.

62. This institution is discussed in G. Wilson, op. cit., pp.109 et seq and pp.126 et seq.

deceased's children. This institution, which has been described as "derogating from the dignity and status to which woman are entitled,"[63] is common among the Luo and certain other tribes.

While it could be argued that customary institutions of this kind are of marginal and declining importance, the customary rules of inheritance regarding the rights of widows, the rights of women generally and the rights of houses (where the deceased was polygamous) are clearly still of central significance. If these rules continue today to govern succession, then the changes wrought by the Law of Succession Act 1972 are very radical indeed and hardly likely to prove acceptable to the majority of Africans in Kenya. Before reflecting on the consequences of such a situation, however, it is necessary to consider the extent to which the customary law of succession still operates in the way described above and the extent to which it has adapted to the new political, social and economic climate of the last twenty years. If the ghost marriage and the leviratic marriage survive today merely as curiosities of interest to old-fashioned anthropologists, can it also be said that the new educational and employment opportunities that exist for women today have resulted in changes in the woman's status and, in particular, in her right to own and inherit property? The answer is that such changes have occurred, but that they have affected only a small but growing, minority of the population. The schoolmistress, the nurse and, that symbol of the emancipated female, the office

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63. Republic of Kenya, Report of the Commission on the Law of Marriage and Divorce (1968), para.54. The Commission probably exaggerates the widow's lack of freedom of choice in such cases.

secretary still expect property to devolve according to customary law; they may feel free to dispose of their salaries as they like, but bridewealth will have been paid on the occasion of their marriages and they will not generally expect to inherit property from their parents, and land least of all.

In the course of fieldwork in Gathinja and East Kadianga the present writer examined the files of the 432 succession cases that were filed in the Kiharu District Magistrate's court between 1960 and 1973, together with the files of the 49 succession cases that were filed in the Nyando District Magistrate's court between 1969 and 1973. These researches point overwhelmingly to the conclusion that succession to registered land continues to be governed by the rules of customary law outlined above.[64] Certainly the deceased's widow, and occasionally, perhaps, an unmarried daughter, may be registered as the owner of part or all of his land; but the land will continue to be regarded as family or clan land and on her death will generally revert to the deceased's nearest male relatives. Thus, where a man dies intestate leaving a widow and no children,[65] the widow is likely to be registered as the owner of the land in preference, say, to the deceased's father, the danger being that if the latter were registered as owner, on his death the land in question would be divided between the widow and her brothers-in-law; there is no doubt that these brothers-in-law or their families will eventually inherit the land on the widow's death in preference to her family.

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64. Supra, p. 232.

65. This situation actually occurred in the Kiharu African Court, Succession Case No.30 of 1966 (unreported).

In not a single case did a married daughter or a married sister inherit land, although in one instance a daughter who had been divorced was allowed a share of her father's land where she had been living, but on the understanding that the matter would be "reviewed" if she ever returned to her husband.[66] The inheritance of land remains strictly patrilineal; the land is subdivided among the deceased's sons, the rule of substitution applying where a son has predeceased his father leaving sons of his own.

The clan elders often play an important role in getting the various parties to reach agreement before appearing before the District Magistrate. In some cases the District Magistrate rejects the agreed decision of the parties, though this is rare. In one case,[67] the elders had allocated the deceased's land according to houses; thus the two sons of one house received half the land while the only son of the other house received the other half. The District Magistrate refused to accept this division. He was of the opinion that "if this custom is applied strictly, it would be contrary to natural justice and equity and therefore it should be superseded".[68] The land was accordingly divided equally among the three sons. This is a solitary instance, however; all informants approved the principle of division according to houses and the practice of the courts also conforms with this principle.

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66. Kiharu District Magistrate's Court, Succession Case No.12 of 1971 (unreported).

67. Kiharu District Magistrate's Court, Succession Case No.35 of 1970 (unreported).

68. This, presumably, is a vague reference to section 3(2) of the Judicature Act 1967 which provides that "the courts shall be guided by African customary law in civil cases..., so far as it is applicable and is not repugnant to justice and morality...".

There is no indication, then, that the customary law regarding succession to land has altered much during recent years in spite of registration of title and the enormous increase in commercial farming, nor is there any reason to suppose that it has altered with regard to other traditional types of property like cattle or livestock. Succession to modern kinds of property is discussed below; here it suffices to emphasise once more that it is land and, to a lesser extent, animals that constitute the main source of wealth for the vast majority of Kenyan Africans.

The Law of Succession Act 1972 does not incorporate any of the major principles which currently govern succession to the estates of Africans who die intestate and this refusal to compromise with customary law may well prove fatal to the successful operation of the Act. However, there is an interesting and important exception to the universal code of intestate succession laid down in the Act; customary law will continue to apply to certain kinds of property in certain areas. Section 32(1) of the Act provides:

> The provisions of this Part [i.e. the Part dealing with intestacy] shall not apply to -
>
> (a) agricultural land and crops thereon; or
>
> (b) livestock,
>
> situated in such areas as the Attorney-General may, by notice in the Gazette, specify.

The areas suggested by the Commission are the vast but thinly populated areas of northern and southern Kenya, inhabited largely by

nomadic pastoral tribes.[69] It is envisaged, however, that the universal law of intestacy will be applied in due course to these areas as well.

The reasoning behind this provision is interesting and is spelt out in some detail in the Report.[70] Basically, however, there are two considerations which influenced the Commission in recommending this exception to the universal law of intestacy. In the first place, it was felt that the people of certain areas were not yet ready for such a universal law, that "... a new law in those areas might be completely incompatible with the people's way of life."[71] Secondly, it was argued that while customary law catered satisfactorily for certain kinds of property, succession to so-called "modern" kinds of property would have to be governed by the universal law in those areas gazetted by the Attorney-General as well as elsewhere. A detailed examination of these two arguments will, it is submitted, highlight the basic weaknesses in the Act's attempt to create a universal law of intestacy.

The Act is clearly not an example of progammatic legislation, that is, it is not intended merely to represent an ideal to which the practice of Kenyans should aspire. It is intended to become effective at once and to be enforced from the day on which it comes into operation. It is for this reason that the Commission decided to except from its provisions on intestacy certain areas where enforcement would be difficult, for "it would be futile to recommend a law which is apt

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69. Succession Report, para.74. Little land has been registered in these areas as yet.

70. Ibid., paras. 58-74.

71. Ibid., para.74.

to be hated, ignored or even not understood by any large percentage of the population".[72] If, however, such broad grounds are proposed for excepting an area from the universal law, it is surprising that the Commission merely envisaged excepting the pastoral areas of Kenya. It has already been suggested[73] that the universal law is wholly incompatible with customary law and that it is highly unlikely to be followed even in the populous, developed agricultural areas of central and western Kenya. Many of its provisions will not be properly understood and those which are understood are likely to be ignored.[74] It is extremely difficult to enforce a law of succession against the wishes of the people concerned. The very minimum requirement would be an efficient system of death-reporting; indeed this would be necessary for the successful operation of the whole Act including the provisions regarding testate succession and the administration of estates. The local government officers have an important part to play in the implementation of the Act's provisions; it is their duty to see to the protection of the deceased's property, to ascertain the identity of those people who might have an interest in his property and to advise prospective administrators as to their responsibilities and the necessary formalities to be observed. Decentralisation is clearly a sensible policy, though it may be doubted whether sub-chiefs will find the time or the energy to carry

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72. Ibid., para.61.

73. Supra, p.

74. Whenever the present writer mentioned its provisions regarding the inheritance rights of women to people met in the course of fieldwork, they would burst out laughing and would shake their heads knowingly, assuring him that that would never happen in their part of Kenya.

out their new duties. The point is that even if they do, the Act will still remain a dead letter unless the cooperation of the people involved is also secured.

In the second argument advanced to justify the exception to the universal law of intestacy, the Commission drew a distinction between traditional kinds of property for which customary law was felt to cater adequately (e.g. unregistered land and livestock) and modern kinds of property, like registered land, stocks and shares, motorcars and bank accounts to which it was considered appropriate that the universal law should apply.[75] It is doubtful whether this is a very useful distinction to make. The customary law relating to the transmission of land works equally well whether the land is registered or not. Moreover, customary law as a whole has proved extremely flexible over the last seventy years; institutions which have lost their relevance have been discarded, while those which still perform a necessary function have survived. The customary law of succession has also adapted to the changing needs of society in order to cater for the modern kinds of property which feature in many Kenyan homes today and in order to reflect new ideas about the status of women.

A glance at the files of the Public Trustee shows that little difficulty has been experienced in applying customary law, in a suitably modified form, to modern kinds of property.[76] The system appears to work efficiently, but at present the estates of relatively

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75. Succession Report, paras. 72 and 74.

76. Most of the information that follows in derived from the files of the Officers of the Public Trustee at Nairobi, Kisumu and Mombasa, together with interviews with the Assistant Public Trustees at those offices.

few Africans are handled by the Public Trustee, largely because the majority of African estates consist for the most part of land and land is excluded from the jurisdiction of the Public Trustee by section 2A of the Public Trustee Act 1925 (as amended) which provides:

> Nothing in this Act shall confer on the Public Trustee or his agents any powers in respect of -
>
> (a) the estate of an African, living among the members of any African tribe or community in accordance with their customary mode of life, who has no property purporting to belong to him as an individual; or
>
> (b) land registered under the Land Adjudication Act or the Land Consolidation Act.

The reason for the second exception, of course, was that succession to registered land was governed by sections 120 and 121 of the Registered Land Act 1963. However now that these sections have been deleted by virtue of section 100 of the Law of Succession Act 1972, some amendment to the Public Trustee Act will presumably be necessary to enable the Public Trustee to deal with registered land in the same way as any other property.

Nevertheless, the number of the estates handled by the Public

Trustee is continually rising[77] and the reasons for this are suggested

77. TABLE 3. Estates handled by the Public Trustee.

Year	Estates Undertaken			Estates Distributed			Certificates of Summary distribution
	African	Other	Total	African	Other	Total	
1962	492	53	545	456	46	502	56
1963	634	38	672	601	35	636	56
1964	636	34	670	542	56	598	50
1965	669	32	701	490	31	521	26
1966	822	36	858	647	41	688	24
1967	1115	52	1167	937	43	980	24
1968	1044	46	1090	897	23	920	24
1969	1152	60	1212	1018	46	1064	18
1970	1279	42	1321	948	49	997	15
1971	1282	37	1319	979	56	1035	20

Republic of Kenya, Annual Report of the Registrar-General (1971), Appendix XXV (Public Trustee, estates undertaken and administered).

by the Registrar-General:

> The steady increase in current work reflects changing social conditions, particularly the continued toll of lives in motor-car accidents which results in payments of large sums by insurance companies by way of compensation, and also the increased use of life insurance by individuals and payment of death grants or gratuities by employers, all of which result in comparatively large sums of money coming into what otherwise have been very small estates.78

In view of the foregoing comment it is hardly surprising that the average age of those whose estates are administered by the Public Trustee is depressingly low and that hence there is often a large number of minor beneficiaries. Where a sum of money is awarded to a minor, it is usually given in practice to the relative responsible for his education, the relative being exhorted by the Public Trustee to carry out his responsibilities conscientiously. Occasionally the Public Trustee will open a bank account in the minor's name on which his "guardian" can draw provided that the cheque is signed by a specified third party. Only where the sum awarded to the minor exceeds 10,000 shillings will a trust be created.

As far as it is possible to generalise from the files of the Public Trustee, it seems fairly clear that the rules which govern succession to land and other traditional kinds of property are not being applied where the distribution of cash is concerned. More

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78. Ibid., p.5.

regard is had to need as opposed to status. Where the families are large, often fairly complicated calculations are made in order to achieve a fair result. Where the deceased has left a widow, she will never get less than any one of her children and frequently she will get more than the total of her children's shares. Where there are two widows, their shares will be identical. Where there are children, they will generally take equally regardless of sex; however, economic need is relevant and a child who is still at school is likely to get a larger share, while a daughter who is married may be given nothing. Where the deceased was a polygamist, his estate will be distributed in as fair a way as possible; it will rarely be distributed according to houses. Finally, widowed mothers are often given a small share in the estate.

It is hard to provide typical examples of the ways in which these estates are distributed, partly because a son or a widow may be given a disproportionately large share on the understanding that he or she will pay school-fees for the younger children or provide bridewealth for the unmarried daughters. Nevertheless a few examples will show how far succession to bank-balances and similar property differs from succession to land. In one case,[79] a Mkamba, killed in a road accident, left a life insurance policy worth 40,000 shillings. His family consisted of a mother, a widow, a small daughter and two brothers; it was unanimously decided that 50% of his estate should be held on trust for his daughter, 20% should be given to his wife

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79. Office of the Public Trustee at Nairobi, Administration Cause No.82 of 1971 (unreported).

and 30% to his mother. A sizeable Luo estate consisting mainly of shares and damages awarded under the Fatal Accidents Act 1946,[80] was distributed as follows: 15% to each of his two widows, 15% to each of his two sons, 10% to each of his three youngest daughters, 5% each to his mother and his eldest daughter (aged 16).[81] Where a Kikuyu man had died, his widow was given 60% of his estate and his three sons and one daughter 10% each; his two adult daughters received nothing, presumably as they were married.[82] These examples illustrate the ways in which customary law has adapted to modern kinds of property. While no clear rules have emerged, one can discern a tendency to recognise the rights of women, a tendency which is largely absent where succession to land is concerned. At the same time, it should be remembered that those who own modern kinds of property, those who insure their lives and become entitled to gratuities and pensions, are the very people one would expect to have more "modern" ideas on the status of women.

Two arguments have been put forward in the preceding pages. In the first place, it has been argued that the law of intestacy embodied in the Law of Succession Act 1972 is, at least in its more important aspects, hard to reconcile with the customary law of succession and that therefore the likelihood of its being observed on the ground is doubtful. Secondly, it has been argued that the

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80. Cap. 32.

81. Office of the Public Trustee at Mombasa, Administration Cause No.2 of 1972 (unreported).

82. Office of the Public Trustee at Mombasa, Administration Cause No.42 of 1972 (unreported).

Commission was mistaken in holding that "... it is difficult to apply the customary laws to the modern property like houses, modern furniture, etc. nor to property that cannot pass without proof of title such as registered land, bank accounts and deposits, stocks and shares, insurance policies, motor vehicles, etc."[83] The files of the District Magistrate's Courts show that disputes about succession to registered land rarely arise and the files of the Public Trustee show that families find no difficulty determining the distribution of modern kinds of property.

If these arguments are valid, then there appears to be only one solution. It is necessary to postpone the introduction of the universal law of intestacy until such time as the people are ready for it and meanwhile to allow the various customary and religious laws to continue to govern intestate succession. Such a suggestion was put to the Commission, but it was unfortunately dismissed without any argument except a vague reference to "the best interests of Kenya."[84] Part II of the Act, dealing with testate succession, and Part III of the Act, dealing with provision for dependants, could be brought into operation forthwith, whereas Part V, dealing with intestate succession, would only be brought into operation when it was likely to prove enforceable and acceptable to the majority of Kenyans, though the possibility of its successive application to appropriate areas could also be considered. The effect of the acceptance of this recommendation would be to enable someone to opt out of his personal law by

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83. Succession Report, para.56.

84. Ibid., para.64.

making a will, contrary to the policy of the Act which will enable someone to opt out of its provisions regarding intestacy by making a will declaring that he wishes the devolution of his property to be governed by his personal law. It would, however, be desirable to apply Part IV of the Act, dealing with provision for dependants, in those cases where the relevant customary or religious law of intestacy fails to provide for dependants.

On the whole the present writer shares the aims of the Commission. It is desirable that there should be a single law for all Kenyans. The continued existence of a multiplicity of tribal and religious laws certainly militates against the development of a national identity. However, it is one of the themes of this thesis that modernisers of every kind and legislators in particular tend to underestimate the strength of customary law and to exaggerate the power of legislation as an instrument of social engineering. The most perfectly drafted statute embodying the noblest ideals of the government will be of absolutely no effect unless it responds to the needs of the people, unless its legitimacy is recognised at grass-roots level. However national unity may be achieved, it is certainly not by imposing a uniform law of succession based largely on Western values and ideas upon heterogeneous peoples committed to their own law and culture.[85]

(iv) Testate succession:

So far the discussion has concentrated on intestate succession

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85. It is hardly surprising that the most hostile reaction to the Commission's proposals came from the Moslem community.

which continues, in the case of African estates, to be governed by customary law, although this will cease to be the position when the Law of Succession Act 1972 comes into operation. It was argued in the last section that customary law catered satisfactorily for all kinds of property, both traditional and modern, and that the procedures currently employed by the Public Trustee for the ascertainment of heirs were sensible and fair. In this section, it is proposed to examine testate succession, to consider the sorts of wills made by Africans and the various laws that govern them.

The Africans' Wills Act 1961[86] applied certain provisions of the Indian Succession Act 1865[87] relating to wills, codicils and probate to wills made by Africans. Previously any wills made by Africans had been governed by customary law and the effect of the 1961 Act was to enable an African to opt out of the customary system. Under customary law wills were (and still are) upheld only to the extent that their provisions did not depart unduly from the law relating to intestacy;[88] therefore if an African wishes, for example, to leave all his property away from his family, the Africans' Wills Act 1961 enables him to do so, although it is expressly provided[89] that nothing in the Act shall authorise a testator to bequeath property which he could not have alienated inter vivos or deprive any person of any right of maintenance to

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86. Cap.169, s.3 and Sched.2.

87. This Act was applied to Kenya by Art. 11(b) of the East Africa Order in Council 1897. As amended from time to time, it continues to govern succession to the estates of Europeans and certain other groups in Kenya.

88. This point is elaborated infra, pp. 253 et seq, where it will be argued that it is rather misleading to talk about "wills" under customary law.

89. S.4.(a) and (c).

which such person would otherwise have been entitled. Subject to these limitations the Act gave Africans complete freedom of testation.

The Commission found that very few people in the rural areas availed themselves of this opportunity to dispose of their property as they please,[90] but the evidence shows that it is not only in the rural areas, but in Nairobi itself that the Africans' Wills Act 1961 has proved a dead letter. The present writer looked through the Probate and Administration files in the High Court Registry in Nairobi and found that in the last four years, 1971-1974, only two African wills were admitted to probate, one of which was the will of the famous Kenyan politician of the twenties, Harry Thuku. The principal reason suggested to the Commission for this state of affairs was that "ordinary people have no knowledge of their legal rights"[91] and the Commission accordingly recommended that the Government take steps to publicise a person's right to make a will, the advantages of making a will and the necessary formalities to be observed.[92] Even if the Government took such steps, however, it is doubtful if there would be a dramatic increase in the making of wills under the Africans' Wills Act 1961 as long as traditional constraints remain as strong as they are.

However, it has long been the custom for a person to make known his wishes regarding the disposal of his property on his death. This may be done in writing, although it is much more usual to give oral instructions. The use of writing appears to be on the increase, at

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90. Succession Report, para.79.

91. Ibid.

92. Ibid.

any rate in Gathinja sub-location. Oral instructions may be postponed till the person feels he is about to die, whereas if someone puts his instructions in writing, he can die without having made them known to anyone. In many instances the present writer was aware of a certain secretiveness about testamentary intentions coupled often with a malicious pleasure in playing one relative off against another. This usually occurs where a person has no spouse or children; he may then invite his nephews to compete for the inheritance.

Where a person has expressed his wishes as to the way in which his property should devolve upon his death, the courts will usually give effect to these wishes, whether made orally or in writing, as long as the proposed course of devolution does not seriously depart from that which would have been followed if no such wishes had been expressed. Thus, in one case,[93] a widow died leaving two married daughters. The deceased had expressed the wish that the land (which was registered in her name) should pass to her husband's great-nephew, rather than his nephew, and the court gave effect to her wish. Similarly in another case[94] a man had died leaving two sons; it was held, however, that his land should only pass to one of his sons, the other son having been effectively disinherited by his father's deathbed curse, "Cursed is he who will call Irungu my son!" It will be noted that in both these examples the land remained within the patrilineage. Where, however, a person expresses the wish that his

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93. Kiharu African Court, Succession Case No.6 of 1963 (unreported).

94. Kiharu African Court, Succession Case No.13 of 1965 (unreported).

land should pass out of his patrilineage, it is unlikely that effect will be given to his wish. In one case,[95] for example, a bachelor had asked that his registered land should pass to his sister's son who had looked after him in his old age; his request, which, of course, ran counter to customary law, was ignored and the land was given to his brother. Except in cases of this nature, however, the courts will generally give effect to the deceased's wishes whether he expressed them orally or in writing.

This approach has given rise to a problem which is illustrated by the following case.[96] The main part of the deceased's estate consisted of a sum of 17,000 shillings which he had received as compensation after being the victim of a motor accident. After the accident he had committed to writing his wishes concerning the distribution of his property after his death and in this document which was in Kikuyu he had made no reference to one of his two wives who had left him some eight years previously, though they had never been customarily divorced. The question arose as to whether this wife and the deceased's children by her were entitled to share in his estate. The Public Trustee argued that, as the written document was neither signed nor attested in accordance with the provisions of the Indian Succession Act 1865, there was no valid will in existence and that therefore the estate should be administered according to the relevant customary law of intestacy, i.e. shared between the two houses. However the clan elders insisted on following the terms

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95. Kiharu District Magistrate's Court, Succession Case No.1. of 1969 (unreported).

96. Office of the Public Trustee at Nairobi, Administration Cause No.28 of 1968.

of the written document; their view was forwarded to the Public Trustee by the local District Officer who wrote that "the Kikuyu customary law of succession is that any statement recorded from any person at the time of death and whether or not signed, cannot be ignored".[97] In the event, all the interested parties were gathered together and were persuaded of the rightness of the Public Trustee's approach; the deceased's estate was divided equally between the two houses (regardless of the number of children in each house).

In this instance, of course, there was no proper legal argument; the debate was carried on by correspondence and the Public Trustee's policy of getting every interested party to agree to the final outcome was evidently successful. In at least two cases, however, the same point of law has arisen before the High Court.

In one case[98] the owner of a piece of registered land had died and the local District Magistrate, assuming that he had died intestate, had proceeded to ascertain his heirs in accordance with section 120 of the Registered Land Act 1963. The land was eventually awarded to the deceased's three nephews, the second, third and fourth respondents. However the appellant claimed that the deceased had allowed him to use and occupy the land in dispute for the previous ten years, had expressed publicly his wish that he (the appellant) should inherit the land on his death and had

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97. Ibid.

98. Kiboko v. Assistant Land Registrar and others, [1973] E.A. 290.

deposited the title deeds [i.e. the land certificate] with him. The appeal was allowed and the case remitted to the District Magistrate's Court for a rehearing on the ground that no evidence had been recorded either way by the District Magistrate on the question whether the deceased died intestate. At the same time, however, the court expressed its view that what it called the deceased's "oral will" was of no effect, since the Indian Succession Act 1865, which requires all wills to be in writing,[99] applied to all wills made by Africans after 1961. This statement of the law was approved and followed in a more recent case,[100] but in neither case were the issues at stake clearly raised.

It is respectfully submitted that the Public Trustee and the High Court were wrong to take this view of the effect of the Africans' Wills Act 1961. That Act was passed merely to enable Africans to opt out of their personal law; it was not intended to affect customary law.[101] Similarly an African can opt out of his personal law by marrying under the Marriage Act 1902,[102] but his power to do this does not affect the validity of customary marriages. Those responsible for the introduction of the Africans' Wills Act 1961 no doubt envisaged, and correctly, that the estates of the vast majority of Africans would continue to be governed by the customary

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99. S.50.

100. Kahunyo Waweru v. Mwangi Waweru, High Court of Kenya at Nairobi, Civil Appeal No.140 of 1972 (unreported).

101. Indeed S.4. of the Act provides that nothing in the Act "shall ... (e) ... invalidate any such [i.e. testamentary] disposition which would otherwise have been valid." This would seem to save wills which are valid according to customary law.

102. Cap.150.

law of succession, but they felt that there might exist a small, but increasingly larger group of propertied Africans who would like to avail themselves of the advantages of making a will under the Indian Succession Act 1865, the advantages of certainty and of freedom of testation. Therefore when the Africans' Wills Act 1961 provides that certain provisions of the Indian Act shall apply to wills made by Africans, the word "wills" should be interpreted to mean "wills valid under the Indian Succession Act 1865". Thus if an African had made a written will which had been duly signed and attested, the High Court would grant probate of the will. If, however, he had executed a document but had failed to comply with the necessary formalities, then there would be no "will" in existence and customary law would apply.

The Public Trustee and the High Court seem to have interpreted the word "wills" to mean "expressions of intention as to the distribution of property on death" and have held that if such expressions of intention do not comply with the necessary formalities, they are to be wholly ignored. If this view is correct, then the consequences are extremely serious. In succession cases heard by District Magistrates daily in courts throughout the country the informally expressed intentions of the deceased are regarded as having a major, if not decisive, bearing on the outcome. In close-knit, largely illiterate societies it is inappropriate to seek any clear distinction between testate and intestate succession. Nevertheless, in the sense that most Africans make known their wishes about the devolution of their property before they die and, in the case of land, often long before their death, in that sense most

Africans die testate and it would create grave discontent in the countryside if the courts ignored the deceased's wishes on the grounds that they did not comply with the necessary formalities. It can hardly have been the intention of the Africans' Wills Act 1961 to undermine customary law in this way. It is to be hoped that the Court of Appeal will see fit to overrule the decisions of the High Court on this question.

This issue will cease to have any importance when the Law of Succession Act 1972 comes into operation. The Act provides a uniform code of testate succession. Generally speaking, the customary law of succession will no longer exist and no possibility of opting out of one system into another can arise. However the Act[103] does empower a testator to declare by his will that succession to his estate shall be governed by any law he chooses. This provision is designed to enable any person to opt out of the universal law of intestacy which, as has been seen, embodies few of the features of customary law. Presumably an African who chooses to avail himself of this opportunity will declare that he wishes his property to devolve according to his personal law and in that case the courts might again be faced with the question whether to admit informal expressions of intention. Again it is submitted that they should.

The Law of Succession Act 1972[104] makes a further concession to African custom and conditions in the rural areas by allowing a

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103. S.5(1).

104. Ibid., s.8.

form of oral will. This is an imaginative step and enables effect to be given to the deathbed declarations of intent so common in traditional society. Owing to the notorious difficulty of proving an oral will, the Act requires that it be made before two or more competent witnesses[105] and provides that it shall not be valid unless the testator dies within a period of three months from the date of making the will.[106] Moreover, no oral will is valid if, and so far as it is contrary to any written will which the testator has made, whether before or after the date of such oral will;[107] nor may an oral will revoke a written will.[108] The Commission's justification for this rather surprising provision is that "... it would be unwise to allow an oral declaration before death to defeat the written intentions over which a person probably had much thought."[109] However, it would seem to the present writer that the possibility, or even the fact, of insufficient thought hardly constitutes a convincing reason for defeating the express intentions of a testator.

The rules laid down in the Law of Succession Act 1972 regarding capacity, formalities for written wills, revocation, alteration, revival and construction are largely based on the equivalent provisions in the Indian Succession Act 1865, which in turn are derived from English law. Even if the right of Africans to make wills is publicised through the media, at meetings and in other ways, and even if simple

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105. Ibid., s.9(1)(a).

106. Ibid., s.9(1)(b).

107. Ibid., s.9(2).

108. Ibid., s.18(2).

109. Succession Report, para.98.

forms of wills were made available at local centres of administration, it is extremely unlikely that many Africans will adopt the practice of making formal written wills, at least in the foreseeable future.

The discussion of testate succession in this section has highlighted two themes which recur throughout the thesis. In the first place, customary law will continue to operate in African societies for as long as it succeeds in catering adequately for their needs; when their needs change, customary law must adapt or disappear. Secondly, legislation designed to replace customary law is likely to prove ineffective to the extent that it does not respond to these needs. It is true that the very existence of a law on the statute-book may alter the nature of these needs, but the process is in any case a slow one and meanwhile the law remains a dead letter. Africans continue to express informally their wishes regarding the devolution of their property; these wishes are almost always observed except in those rare cases where they depart seriously from customary law, and disputes are exceedingly rare. The advent of new kinds of property has made no difference to this practice. There is little to induce an African to make a formal will. It is true that by doing so he could leave his property away from his customary heirs, but it is almost literally unthinkable that he should do so. The idea that land, in particular, should remain in the family is still very strong and it will continue to be so as long as African societies remain stable and closeknit, tied to particular localities and bound by complex kinship networks. The total failure of the Africans' Wills Act 1961 shows that it responded to no real needs, but as it merely offered Africans the opportunity of opting out of their personal

law, its failure was of no great moment; African estates continued to be governed by customary law. It is equally unlikely that Africans will start making formal wills when the Law of Succession Act 1972 comes into operation (although the provisions regarding oral wills will save many deathbed declarations), but the consequences of not doing so will be more serious; their estates will be governed, not by customary law, but by the intestacy provisions of the Act, provisions which themselves respond to no real needs and are likely for that reason to prove ineffective.

4. Conclusions.

Registration of title to land may serve many purposes, political, social and economic and it may equally be judged according to a variety of criteria, but it has always been held to have two direct consequences, security of title and security of transactions. The two consequences are obviously linked; generally speaking the registered proprietor is secure and no one dealing with him need look behind the register. Where security of title and security of transactions do not exist, it is a sign that the registration system has collapsed. This threatens to occur in Kenya.

A large part of this chapter has been devoted to the question of succession; although the discussion has covered succession generally, it always has to be borne in mind that land forms the larger part of most African estates. The reasons for this extended treatment are two. In the first place, the present writer's fieldwork has shown

that the number of successions to registered land that have not been registered is increasing at an alarming rate and it is likely that the situation is considerably worse in areas which are less advanced than his field-areas. It has been necessary, therefore, to consider the procedure for registering successions in an attempt to discover whether an improved procedure might result in a larger proportion of successions being registered.

At present it is extremely rare for Africans to make wills under the Africans' Wills Act 1961. In this sense virtually all Africans die intestate, although most make it known during their lifetime how they wish their property to devolve on their death and although these wishes are almost invariably respected. Estates of Africans dying intestate are at present governed by customary law, though the procedures vary according to the kind of property. Succession to registered land is governed by sections 120 and 121 of the Registered Land Act 1963. Where the deceased leaves shares, for example, or life insurance or a bank account, the estate will generally be administered by the Public Trustee, though he may issue a certificate of summary administration where the value of the estate does not exceed 4,000 shillings. Succession to other kinds of property, like cattle and household effects, is determined informally, within the family, and no special procedure is involved; in practice succession to registered land is often determined in the same way. Two questions arise. Firstly, is the present way of determining the heirs to registered land satisfactory? Secondly, is it desirable to treat succession to different kinds of property in different ways?

It is essential that any procedure which depends for its success

on the cooperation of the people themselves must be both simple and cheap. It has been argued[110] that the present procedure governing registered land is both cumbersome and expensive and that these factors are partly responsible for the small number of registered successions. On the other hand, the procedure adopted by the Public Trustee which relies largely on the assistance of the local administrative officer and requires no more of those interested in an estate than that they communicate to the officer their decision as to its distribution, appears to work very well; it is true that it is not particularly cheap,[111] but the scale of charges could easily be altered, if necessary.

Granted, then, that the procedure followed by the Public Trustee is preferable and that the ascertainment of heirs should be carried out without recourse to the courts except in those rare cases where one party refuses to accept a decision or where the value of the estate (not including registered land) exceeds 10,000 shillings, the question arises as to whether the land registrar should deal with succession to registered land in the same way as the Public Trustee deals with succession to other types of property or whether there should be a single system for all kinds of property administered by the Public Trustee. In the interests of simplification and uniformity the latter course would be preferable. This course would enormously increase the work of the Public Trustee and its task would be further complicated by the fact that the customary law governing succession to registered land is different from that governing succession to other types of property. At the

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110. Supra, pp.223 et seq.

111. The Public Trustee takes 10% of the first 4,000 shillings and 5% of the remainder of the estate.

same time, the work of the courts and the land registrars would be significantly reduced. While it is outside the scope of this thesis to make detailed recommendations as to the working of the proposed system, it is clear that a substantial degree of decentralisation would be desirable plus effective liaison between the relevant officials. Deputy-Registrars of Deaths in the rural areas could perhaps be appointed agents of the Public Trustee and could be made responsible for assembling the deceased's relatives and procuring their agreement as to the distribution of his estate. The Public Trustee would then be obliged to forward to the land registrar the certificate of succession to any registered land which the deceased may have owned. The Commission on the Law of Succession, of course, recommended the adoption of a uniform procedure for the ascertainment of heirs, regardless of the kind of property concerned, and its recommendations in this respect are welcome, even though it made little attempt to work out the implications of its recommendations and even though it was seemingly unaware of the enormous increase in the work of the Public Trustee that they entailed.

The second reason for discussing succession in such detail was the hope that the discussion would prove the continuing strength and adaptability of customary law and underline the doubtful wisdom of passing laws which fail to recognise this fact. Thus the Africans' Wills Act 1961, which was designed to enable Africans to opt out of their personal law of succession by making a will in accordance with the provisions of the Indian Succession Act 1865, is bound to remain a dead letter as long as the customary law governing the distribution of estates commands widespread support

and continues to give effect, within certain well-defined limits, to the wishes of the deceased. Similarly the Law of Succession Act 1972, although providing a uniform and uncomplicated procedure for the ascertainment of heirs, has introduced a law of intestacy so at variance with customary law that the chances of its being enforced in the foreseeable future are not very high. In the absence of powerful enforcement machinery on a scale quite impossible in the present circumstances of Kenya, no law can be effective without the cooperation and understanding of the people affected.

These arguments apply with equal force to the land adjudication and registration programme. Constraints on the alienation of land certainly used to exist under customary law, although they had largely disappeared before land adjudication started, at least in the present writer's field areas. Even if they did exist at the time of land adjudication, there is no reason to suppose that they would not survive registration. The mere fact of registration is unlikely to have any effect on customary law. Customary controls will continue to be exercised; customary dealings like the "redeemable sale" or the "muhoi tenancy" will continue to flourish; customary rules and procedures for the determination of heirs will continue to govern succession to land. Only if people understand the meaning of registration of title and are prepared to cooperate with the system, will customary law die out and the new system become effective.

It is extremely difficult to generalise about what people understand by registration but the following conclusions can be drawn from the research in the field. A small minority of people

understands the full implications of the system. These people recognise the necessity of registering dealings in registered land and are also likely to appreciate the advantages of charging their land by way of security for a loan. These are also the sort of people who tend to buy land and this fact may account for the relatively large number of sales which is registered. The majority of people, however, has little idea of the nature of registration. They would see the adjudication process partly as a means of determining boundaries and thus preventing future disputes and partly as a way of ensuring, by consolidation or exchange of fragments, that holdings were economically viable. They do not appreciate that registration of title introduces a new system of conveyancing. This would not be so serious if advocates were employed, but this is seldom done, partly because of the time and expense involved and partly because the advocate is an unfamiliar figure in most rural areas.

The large and growing number of unregistered dealings should be a matter of considerable concern. In both field-areas the present writer came across a few plots which had been the subject of <u>two</u> unregistered dealings. A glimpse of the chaos that could ultimately ensue is afforded by the following example. P owned plot A and subsequently bought plot B from V. P died leaving two sons and a widow who married a distant kinsman of P. The widow is young and children are likely to be born of the leviratic "marriage". Neither the sale nor the succession was registered. It is not difficult to imagine the sort of dispute that may arise in thirty years time. It is true that no difficult points of law are likely to arise, but the fact situations are going to be extremely tangled, extremely reminiscent of the disputes settled in the course of land adjudication; there will be the usual conflicting accounts of what the dis-

putants' grandfathers said and did, when they said and did it and what pieces of land were involved. As in the case of adjudication disputes, there will be little difficulty applying the law once the facts are established, but the point to be stressed here is that this is just the sort of dispute that should not arise where registration of title is effective and that, as the land registers increasingly fail to record the true state of things on the ground, the courts will be increasingly called upon to settle disputes of this kind. In effect, they will be re-adjudicating titles to land.

Fleming's report[112] fully appreciated the danger that land would have to be re-adjudicated on a large scale, if the number of unregistered dealings was allowed to continue unchecked. However, even where his recommendations have been implemented, they have had but a marginal effect. Efforts have been made, for example, to educate the public in the significance of land registration. Prominently featured on the walls of most land registries is a large cartoon (in Kiswahili) illustrating the story of the purchaser who failed to register his sale. The story is entitled, "Hilishamba ni lako?" "Is this plot of land yours?" and the moral is obvious. It is no doubt understood by many of those who visit the land registries and are capable of reading Swahili. Attempts by chiefs at their meetings to publicise the nature of land registration reach a wider audience, but their impact is minimal. There is simply no incentive for people to register successions to land,

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112. Fleming, op. cit.

nor even sales, at least where the parties are known to each other.

The Land Control Act 1967[113] makes it an offence to carry out acts in furtherance of controlled transactions (successions involving subdivision and sales are both controlled transactions) which have become void for want of the land control board's consent. Moreover the Registered Land Act 1963 empowers land registrars to summon people "... to appear and give any information or explanation respecting land,...".[114] and also to compel registration of instruments registrable under the Act.[115] Fleming feels that greater use of the powers conferred by these statutory provisions would encourage people to register their dealings and the government seems to endorse this view.[116] Political and moral scruples might well militate against such a course of action, but it would in any case be certain to prove an ineffective way of dealing with the problem, as it depends on the land control board or the land registrar becoming aware of an unregistered dealing. This is very unlikely to occur and, given the large areas in which any land registrar or land control board has to operate, even a highly conscientious use of their powers to check unregistered dealings is bound to have but a marginal effect.

To sum up, there are no ways in which unregistered dealings (especially successions) on a large scale can be prevented. Chiefs

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113. S.22. This Act is discussed at length infra, Ch. VII.

114. S.8(b).

115. Ibid., s.41(1). It is an offence not to comply with orders made under this section, ibid., s.41(2).

116. Republic of Kenya, Ministry of Lands and Settlement, The Registered Land Act 1963. A Handbook for the guidance of land registrars (June 1969), p.55.

and sub-chiefs can publicise the nature of registration at their meetings and it is to be hoped that the new generation of landowners, more educated than their fathers, will begin to appreciate the virtues of the system. However, it is the opinion of the present writer that unregistered dealings will continue to occur on a large scale and that the register will increasingly fail to reflect the true state of things on the ground. Disputes will become more frequent and the courts will be faced with the task of repeating the process of land adjudication. If these prophesies are correct, then the wisdom of the whole registration programme is called into question.

CHAPTER VI

THE ECONOMIC CONSEQUENCES OF THE LAND REFORM PROGRAMME

1. Introduction

This study has so far been concerned with the processes of land adjudication and land registration and with the problems that have arisen in the course of these processes. It has been demonstrated that faulty adjudication may cause grave injustice and that the courts are being faced with an increasingly large number of disputes relating to first registration, disputes which they are not ideally qualified to settle. It has also been argued that the introduction of the system of registration of title among people who are both ignorant of its rationale and unaccustomed to taking professional advice on land matters has resulted in the majority of dealings taking place off the register which thus becomes increasingly unreliable. These are serious problems which have been insufficiently appreciated, partly because they are regarded as temporary, the "growing pains" of the system which will disappear as the adjudication machinery becomes more efficient and landowners more sophisticated, and partly because the justification of the land reform programme has almost invariably been argued in economic terms, the economic benefits of the programme having seldom been doubted. It is the purpose of this chapter to consider the extent to which the land reform programme has promoted economic development in the rural areas. However, while it is clear that any discussion of the programme which

ignored this question would be incomplete, it must be admitted at the outset that the present writer is not a trained economist. Any conclusions reached will necessarily be highly tentative.

The economic benefits which are claimed to be the result of the programme seem to fall into two categories. In the first place it is argued that as landowners now enjoy security of tenure, they have an incentive to invest in their farms. Money that may previously have been spent on litigation over boundaries can now be more productively employed in introducing new crops, purchasing new equipment, hiring labour and generally developing their land. Farmers are more likely to make use of the agricultural extension services and, most important of all, they may raise loans on the security of their land.[1] The claim that registration of title leads to increased investment in the land has been made on numerous occasions and seems, indeed, to be the most important single consideration in the minds of the programme's proponents. The Swynnerton Plan had recommended that the African farmer be given an indefeasible title, thus providing him with an incentive to invest in his land and enabling him to offer it as a security for loans.[2] In a speech urging Kenyans to go back to the land President Kenyatta took the same view:

> In order to use our land efficiently and effectively, we must arrange that each farmer is sure of his land rights. We must also ensure that each farmer has the kind of security that would enable

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1. The British Government made its offer to help finance the land reform programme conditional on the Kenya Government's ability to obtain funds for agricultural credit and to provide the necessary advisory services. See Lawrance Mission Report, para. 404.

2. See supra, p. 30.

> him to have access to necessary credit and loans ... Our manifesto called for encouragement of land consolidation and registration of land titles in order to facilitate these measures.3

The enthusiasm of the government for the land reform programme seems to be based on similar premises. In 1965 the official view was that "consolidation and registration will make farm credit and modern methods of agriculture possible and should expand employment much more rapidly than settlement can, by bringing more land into productive use"[4] and this view was reiterated in somewhat more general terms several years later when it was proposed that increased emphasis be given to the land adjudication and registration programme, "for the completion of this procedure is felt to be an important pre-condition for rapid agricultural development."[5]

It is the purpose of the second part of this chapter to question some of the assumptions on which such bland statements of principle seem to be based and in particular to look at the rôle which credit plays in the registered areas. It should however be mentioned here that there can be no necessary connection between registration of title and economic development. Any development which has occurred will at best be an indirect consequence of registration. Moreover it is difficult to attribute such development to any single factor. In the last fifteen years there has been an enormous expansion in many fields, in communications, in education, in the provision of

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3. J. Kenyatta, Harambee! (Nairobi, Oxford University Press, 1964), p.6●.

4. Republic of Kenya, Sessional Paper No.10 of 1965, African Socialism and Its Application to Planning in Kenya, s.102.

5. Republic of Kenya, Development Plan, 1970-74, s.88.

agricultural extension services and so forth. With so many obviously relevant variables to take into account, it is clearly impossible to isolate a single factor as being responsible for whatever development that has been achieved.

The second kind of economic benefit which is credited to the land reform programme relates to the pattern of land holding. Both the fragmentation and the uneconomic parcellation of landholdings have an adverse effect on agricultural productivity. Although these two problems are related, it is important to distinguish them at the outset.[6] Fragmentation exists where a single farm consists of a number of separate parcels of land, often scattered over a large area. Where fragmentation is prevalent in a certain area, it may be possible to aggregate the fragments and then redistribute the land so that the holding of each person falls together as one parcel of better size and shape. This process is known as land consolidation and is of course an important part of the land adjudication programme, though now the emphasis is on voluntary consolidation.[7] Parcellation, on the other hand, refers to the process whereby a holding formerly operated by one farmer is split into a number of holdings operated by different farmers. In the areas under investigation, where the average size of holdings was small, parcellation would generally have an adverse effect on agricultural productivity. In the third part of this chaper it will be necessary to consider the extent to which the land reform programme has succeeded in eradicating these two problems.

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6. These definitions are largely taken from the Lawrance Mission Report, paras. 21-22.

7. See supra, p. 57.

Finally, in the fourth part of this chapter, an attempt will be made to analyse the social changes that are occurring in rural Kenya today and to assess how far these changes have been accelerated by the land reform programme. In the second and third parts of the chapter it will have been seen that new institutions have been created and new opportunities provided. The question naturally arises whether it is possible to make any generalisations about the people who exploit these institutions and take these opportunities. It will be suggested that socio-economic relationships are developing in the same way in both field-areas and that it is possible to identify signs of increasing stratification on socio-economic lines.

2. The development of holdings : the role of credit.

(i) General:

There can be no doubt that a considerable degree of agricultural development has occurred since land registration in both the areas studied. In both areas more land has been brought into cultivation, cash-crops have been grown on an ever-increasing scale and farming methods have improved. Unfortunately it is impossible to substantiate this rise in agricultural productivity as those records that do exist make no attempt to distinguish the performance of individual sub-locations. Thus it is reported that for Muranga district as a whole the average return per grower from coffee was £K91.5 in 1973 compared with £K26.3 in 1972.[8] Such figures tell us very little. It would

8. Republic of Kenya, Muranga District Annual Report, 1973, p.53.

be much more helpful to have a large number of studies of particular farmers, which examine their various sources of income, their expenses and the ways in which they dispose of their surplus. In the absence of case studies of this kind and in the absence of detailed agricultural records it is hard to prove that agricultural development has occurred in the two areas under study. Certain indicators do exist however.

In Gathinja sub-location coffee started to be grown by three enterprising farmers in 1951. In 1958 a coffee cooperative was established in the neighbouring sub-location and a coffee factory was built there; in 1972/3 the turnover of this cooperative, the Kahuhia Cooperative Society, was 3,652,523/05 sh.[9] The enormous increase in the cultivation of coffee can also be inferred from information provided by respondents. In the normal way, they would be expected to be vague about the exact year in which they started growing coffee. However it is possible to find out who was growing coffee at the time of land consolidation since it was government policy that coffee-growers should not be moved from their coffee plantations. Of the seventy-four landowners questioned twenty-five had their land consolidated around their coffee plantations and this fact would indicate that approximately one third of the total number of farmers was growing coffee at the time of land consolidation. However at the time of the research sixty-four out of these seventy-four farmers were growing coffee, a highly successful crop which may give growers a net profit of 3,000 sh. per acre. Work has now started on

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9. Ibid., p.56.

the construction of a coffee factory within Gathinja sub-location itself.

Agricultural development in Kabete-Obuya and in Kamnwa-Keyo-Ogoro has been much less dramatic. There is still a considerable amount of subsistence farming. Farmers who produce more than they need will sell their surplus maize and vegetables in the local markets as they have done for many years. However there are indications that cash-cropping in an organised way only started in the middle sixties at least so far as the marketing of coffee and milk is concerned. Of the sixty-eight farmers interviewed only one had started growing coffee before 1963, the year in which Kenya became independent and land adjudication started in East Kadianga; today fourteen of these farmers are growing coffee and a cooperative society has been started. Moreover it was not until 1966 that the first grade cow was introduced in this area. Now eight farmers have grade cattle and in spite of the occasional death of a cow many farmers seem keen to purchase such cattle, milk being seen as a profitable source of income. At the time of the research a Dairy Farmers' Cooperative Society was in the process of being established.

In spite of the absence of any official evidence tracing the growth of agricultural productivity in the two areas under discussion, there can be little doubt that development has occurred and this view has been confirmed in numerous interviews with farmers and officials. The question then arises as to the extent to which this development can be attributed to the land reform programme and in particular as to the role of credit in promoting development. As it has always been one of the programme's main justifications that a land owner would be able to raise loans on the security on his registered title, it is now opportune to consider the loans which have been raised,

the identity of the borrowers and the purposes for which they are used.

The table below[10] establishes one highly important point: it is only a fairly small minority of landowners that raise money by charging their lands. In Gathinja only thirty-one owners out of a total of 330 have charged their lands and in Kabete-Obuya and Kamnwa-Keya-Ogoro only fifty-two out of a total of more than 620. In several cases owners had charged their lands on more than one occasion and one Gathinja landowner had charged his land no less than eight times. Since the Registered Land Act 1963[11] provides a simple procedure for the registration of charges as well as defining in some detail the various powers, rights

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10. TABLE 4. Breakdown of land charges.

District	Gathinja			Kabete-Obuya & Kamnwa-Keya-Ogoro		
Agency	AFC	Other	Total	AFC	Other	Total
1959	-	1	1			
1960	-	6	6			
1961	-	-	-	NOT		
1962	-	2	2		REGISTERED	
1963	-	4	4			
1964	-	3	3	-	-	-
1965	-	3	3	-	1	1
1966	-	1	1	5	-	5
1967	-	1	1	4	2	6
1968	3	2	5	-	-	-
1969	3	4	7	12	1	13
1970	-	3	3	12	2	14
1971	-	6	6	10	4	14
1972	1	4	5	-*	2	2
1973	-	13	13	-*	3	3
Total	7	53	60	43	15	58

Source: Gathinja, Kabete-Obuya and Kamnwa-Keya-Ogoro land registers. (A.F.C. = Agricultural Finance Corporation).
* The absence of figures for these years is almost certainly due to delays in the processing of applications.

11. Ss. 65-84.

and duties of both the chargor and the chargee and since farmers are well aware of the possibility of raising loans on the security of their lands, it is prima facie surprising that less than a tenth of them have done so. In an attempt to answer this question, it will be convenient to distinguish loans provided by the Agricultural Finance Corporation and those provided by other agencies, in particular by the commercial banks. It will be argued that it is the policies of the lending institutions rather than any ignorance on the part of the farmer that accounts for the small number of loans that has been granted.

(ii) Agricultural Finance Corporation loans.

Loans have been made available to African farmers from official sources from the early fifties but only on a very small scale, at least until recently. The Lawrance Mission traced the history of the various credit programmes and concluded that "... since the Swynnerton Plan began to be implemented in 1954 only modest sums have been advanced to African farmers from official sources for development (other than the tea development programme), although credit to follow up the land tenure reforms was one of the principal elements of the transformation envisaged in the Plan."[12] The availability of agricultural credit has somewhat improved since the Agricultural Finance Corporation has started to operate.[13] This corporation, which was established in 1963, is today

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12. Lawrance Mission Report, para. 421.

13. It was established by the Agricultural Credit (Amendment) Act 1963, No.27 of 1963, s.4. The Agricultural Credit Act was repealed and replaced by the Agricultural Finance Corporation Act 1969, Cap. 323 (1970).

by far the most important source of agricultural credit, as can be seen in the figures in the table relating to Kabete-Obuya and in Kamnwa-Keyo-Ogoro; these figures may, however, give a misleading impression since it appears that loan applications made in Kisumu District between 1964 and 1969 were not processed until 1969 owing to lack of organisation.[14]

The sums advanced by the A.F.C. tend to be small,[15] the average size of the forty-three loans advanced in Kabete-Obuya and Kamnwa-Keyo-Ogoro being 2,580 sh. Moreover, due to the necessity of ensuring that loans are spent on developing agriculture, it is rare for cash sums to be advanced to farmers; loans are short-term and made in kind, whether the farmer wants chickens or grade cattle, fencing or fertiliser. This policy is not very popular and indeed the rarity of A.F.C. loans in Gathinja is due in part to the availability of bank loans which are cash and which may be larger and more quickly processed than A.F.C. loans; moreover the work of the A.F.C. is clearly more limited in highly developed areas like Gathinja where farmers seek loans for non-agricultural investment. However, there are two situations in which the A.F.C. may grant cash loans. In the first place it may advance cash for the employment of labour, but only where this furthers the more efficient use of animals or equipment which have been provided on credit. Thus if the A.F.C. provide a grade cow worth, say, 1,000 shillings, it may also advance a cash loan of 500 shillings to enable the farmer to employ someone to fence the pasture and the total loan of 1,500 shillings would be charged on the land. Secondly the A.F.C. does occasionally

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14. Information gathered from an interview with an official of the Department of Agriculture, Kisumu District, on August 28th 1973.

15. Most of the information which follows was gathered from interviews with A.F.C. officials both in Kisumu (August 28th 1973) and in Muranga (June 14th 1974).

advance cash loans to enable individuals to purchase land, but the land must be at least ten acres in area and in practice the vast majority of such loans is made to cooperatives, partnerships and individuals purchasing large farms in the former White Highlands. In such cases the loans will not exceed half the purchase price.

Although farmers often express their preference for cash loans, the A.F.C. nevertheless remains by far the most important source of agricultural credit, particularly in the less developed areas, and it is interesting to consider who receives A.F.C. loans. Although all applications for loans are forwarded to Nairobi where they are considered individually, in practice most applications are successful. However, it is the Agricultural Officer in the field who is responsible for processing these applications and forwarding them, often with comments, to Nairobi. It is therefore necessary to consider his rôle and the rôle of the agricultural extension services generally. The following discussion will concentrate on Kabete-Obuya and Kamnwa-Keyo-Ogoro, areas where A.F.C. loans are relatively numerous.

Perhaps the most striking feature of the extension services in the Nyando Division of Kisumu District is the very small number of staff involved. The Division consists of three locations (North, South and West Nyakach) and is headed by an Assistant Agricultural Officer who is based in South Nyakach.[16] Under him there is one Divisional Agricultural Assistant based in North Nyakach, three Agricultural Assistants specialising in home economics, animal husbandry and farm

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16. Most of the information which follows is based on numerous discussions with the Assistant Agricultural Officer and some of his staff.

management, a further three Agricultural Assistants each assigned to one of the three locations and fifteen Junior Agricultural Assistants i.e. five per location. Thus the location of South Nyakach with a total population of around 42,000 and some 6,000 farms is served by six full-time staff plus five officers who have to divide their activities between South Nyakach and the two other locations. Clearly the bulk of the work falls on the shoulders of the Junior Agricultural Assistants each of whom is allotted a definite area which might well contain more than 1,000 farms.

In such circumstances even the most conscientious Assistant could hardly be expected to visit each of the farmers in his area in the course of a year, let alone carry out any other of his duties like holding demonstrations, working out farm plans, processing loan applications and so forth. In practice, however, an Assistant makes little effort to visit all the farmers in his area; indeed thirty-one of the sixty-seven informants had never at any stage received a visit from the extension staff. This proportion is astonishing enough but due to a bias in the selection of informants [17] it is likely to be an underestimate of the true situation. Indeed it is not the policy of the extension staff to visit all farmers; they only visit farmers who invite them. It appears, moreover, that it is the more educated landowners, the so-called "better farmers" who summon their assistance. It is thought that time is more profitably spent raising the productivity of cash-cropping farmers than introducing subsistence farmers to new crops and new methods. It is obviously difficult to prove that this

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17. Thus only one-fifteenth of the landowners has received an A.F.C. loan whereas one-sixth of the informants has.

is the case especially as the staff appear to keep no record of visits which they have made, but a number of studies from other parts of Kenya reinforce the view that the extension services are favouring the more progressive farmers. One researcher working in the Central Province concludes his study: "... the diffusion of new agricultural technology seems to benefit those who are well-off already, a process which is reinforced by the de facto progressive farmer strategy followed by extension workers."[18] Similarly a detailed study of extension services in the Western Province reveals that 57% of the extension worker's time is spent with the top 10% of farmers and 6% of his time with the bottom 47%.[19]

If it tends to be the better farmers who receive the most help from the extension services, it will similarly tend to be the same people who obtain A.F.C. loans. Of course, only a small proportion of those who receive help will also obtain loans and it is not surprising to discover that it is the more educated farmers, those who appreciated the possibilities of agricultural development even during the colonial period, to whom agricultural credit is channelled. Of the forty farmers who had obtained A.F.C. loans in Kabete-Obuya and Kamnwa-Keyo-Ogoro ten were interviewed. Three of these had been among the earliest supporters of land consolidation and registration and had subsequently been appointed officers of the consolidation committees. The fourth informant is an employee of the Land Adjudication Department. The fifth is a chief and the sixth an ex-chief of the colonial era. The seventh is a substantial

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18. J. Ascroft and others, "Does extension create poverty in Kenya?", 1972 East Africa Journal, vol.9 no.3, p.28, at p.32.

19. D.K. Leonard, "The social structure of the agricultural extension services in the Western Province of Kenya", University of Nairobi, Institute for Development Studies, Discussion Paper No.126 (unpublished), January 1972, p.4.

farmer of the area and the eighth the nephew of a Cabinet Minister. The remaining two might be called ordinary farmers, though they both have other sources of income. Two of the ten interviewees had obtained two A.F.C. loans each and a further two were in the process of applying for second loans. The general impression is that loans tend to be advanced to the most successful members of the community, whether success is measured in terms of political or economic achievement. Indeed one A.F.C. official agreed that preference was given to those with off-the-farm incomes, though stressing that the best security was the farming activity of the borrower.

Studies done in other parts of Kenya present a similar picture. One researcher working in Nyeri District concludes that "most of those able to raise loans are those with outside sources of finance."[20] Judith Heyer who has written extensively on smallholder agriculture in Kenya, summed up the selection criteria as follows:

> The criteria in use at the moment appear to be some notion of creditworthiness, some notion as to the viability of the investment, and some ability to provide security. Loans are more likely to be given to people with regular off-farm incomes; they are more likely to be given to people with established reputations as good farmers and as men of integrity; they are more likely to be given to people who have ample resources to carry investments through. The criteria clearly favour the farmers who are relatively well-off, the farmers who only farm part-time, the farmers who have adequate resources already.21

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20. M. Ali, "Political implications of land registration: a case-study from Nyeri District in Kenya", University College, Dar-es-Salaam, unpublished dissertation, 1970, p.36.

21. J. Heyer, "Smallholder credit in Kenya agriculture", University of Nairobi, Institute for Development Studies, Working Paper No.85 (unpublished), February 1973, p.10.

Neither writer distinguishes A.F.C. loans from loans from other sources, but it will be shown now that the policy of the commercial banks is no different from that of the A.F.C.

(iii) Bank loans.

The table above[22] showed that in Gathinja the vast majority of loans secured on the land came from sources other than the A.F.C. and that in Kabete-Obuya and Kamnwa-Keyo-Ogoro a substantial minority came from such sources. Virtually all these loans were advanced by the commercial banks i.e. Barclays Bank, the Standard Bank and, most important of all, the Kenya Commercial Bank. Bank Loans are slightly larger on average than A.F.C. loans, though only eleven of the sixty-six bank loans under discussion exceeded 10,000 shillings and only three exceeded 20,000 shillings. As in the case of A.F.C. loans, it is important to consider the criteria used by the banks in considering loan applications.[23]

Bank loans are normally short-term, repayable over between three and five years at an interest rate of 10%; A.F.C. loans are repayable over a similar period of time depending on the use to which they are put, though they carry an interest rate of only 8%. The banks favour farmers who already have an account with them and also those who have independent sources of income. Thus of the twelve secured bank loans granted in Kabete-Obuya and Kamnwa-Keya-Ogoro, two were given to a

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22. Supra, p. 277.

23. The information which follows is based on interviews with the Loans Officer, Kenya Commercial Bank, Kisumu, with the Loans Officer, Standard Bank, Kisumu, and with the Manager, Kenya Commercial Bank, Muranga. The responses of all three informants were virtually identical.

magistrate, two to an Education Officer, one to a headmaster, one to a settlement scheme officer, two to a pensioned ex-chief and ex-teacher, one to another magistrate, one to a Nairobi businessman and only two to farmers without outside income. A similar picture emerges in Gathinja, where only twenty-one farmers have ever received bank loans although some have received as many as six bank loans on different occasions. The present writer was able to interview eighteen of these farmers and discovered that fifteen of these eighteen had alternative sources of income, as teachers, shopkeepers, agricultural officers and clerks. The banks are obviously doing good business and it is hardly surprising that the loan repayment record is impressive, the borrowers being generally men of substance, enjoying steady incomes.[24]

Although the banks do not usually send valuers to assess the value of the land, they invariably require the borrower to charge his land in their favour and to deposit his land certificate with them. The banks are not very interested in the purpose for which a loan is required and, unlike the agricultural extension staff, they certainly carry out no follow-up to ensure that the purpose is effected. By interviewing the recipients of bank loans it was possible to ascertain the various ways in which such loans were used and in particular to assess the extent to which they have promoted agricultural development.

The answers to these questions are clear. In both field-areas bank loans are rarely invested in agriculture, they are invested off

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24. This seems always to have been the case. Discussing bank loans to farmers up to the end of 1965, one writer concludes that "probably a good many of the loans did not go to typical small farmers but to employers having a farm as a second source of income." J. Vasthoff, Small farm credit and development (Munich, Weltforum Verlag, 1968).

the farm and any beneficial effect such investment may have on agricultural development will necessarily be indirect. Of the twelve secured bank-loans obtained by farmers in Kabete-Obuya and Kamnwa-Keyo-Ogoro it was only possible to discover how six were used. One was used to build a posho mill i.e. a mill for grinding maize into flour; one was used to buy a general goods shop in Sondu, a township nearby; two were used to buy plots of land on settlement schemes and two to buy property in Nairobi. None of the six loans were invested in agriculture.

In Gathinja the picture is slightly different. The rôle of the A.F.C. is not so significant here. Many farmers have bank accounts and naturally prefer to borrow money from their banks rather than apply to the A.F.C. where cash is rarely advanced and the procedures are more cumbersome. Moreover the presence nearby of an important town, Muranga, makes it unnecessary for farmers to rely on the A.F.C. for supplies of equipment, seed etc. Such considerations explain why Gathinja farmers who wish to invest in their land will naturally turn to the banks for credit. Nevertheless the present writer would estimate that approximately three-quarters of the bank loans secured on farms in Gathinja are used for non-agricultural purposes. It is difficult to get exact figures as some farmers have obtained several loans on various occasions and find it hard to apportion specific sums to specific purposes. Of the twenty-one farmers who had obtained bank loans secured on their farms it was possible to interview eighteen; twelve of these had obtained more than one bank-loan; five of them had obtained more than three. Only six of the eighteen farmers use their loans for agricultural purposes; these purposes would be various, though often connected with cattle-keeping, which requires the provision of water-tanks, fenced enclosures and cattle-houses. Eleven of the eighteen

farmers used their loans for non-agricultural purposes and it is important to note that most of the regular borrowers are to be found in this group. Here again purposes vary; many loans are used for building shops or houses, one loan was used to purchase a Peugeot motor-car to enable the borrower's brother to set up a taxi service and one loan was used to purchase shares in the British American Tobacco Company. The remaining farmer used his loans for both agricultural and non-agricultural purposes.

The role of the banks in the promotion of smallholder agriculture is small compared with that of the A.F.C., but in the last analysis the contribution of both the banks and the A.F.C. is peripheral partly due to their overriding concern with the credit-worthiness of applicants for loans. In the following section it is proposed to look a little more closely at the sort of security which an applicant might reasonably be expected to offer.

(iv) The nature of the security required.

Those who argue in favour of land registration that it enables the registered owner to raise loans on the security of his land, seem to imply two things. In the first place, they imply that a registered title does in practice constitute good security. This may generally be the case, but there is evidence to suggest that the banks are extremely reluctant to realise their security. They would often prefer to write off a debt rather than incur the odium to which the

exercise of their statutory power of sale[25] would expose them.

The Lawrance Mission reported:

> Although land titles are normally charged to secure the repayment of loans, the banks are generally very loath to sell a man's land in the event of a complete breakdown in repayment, and they have taken this action in very few cases indeed. This reluctance is due partly to the difficulties of sale in such circumstances and to a natural unwillingness to take any step which could seriously harm the bank's public image in the countryside. In fact, the main motive in taking a charge on a borrower's land is to induce the farmer to take seriously the commitments he has entered into through the knowledge that he could lose his land if he defaulted on repayment.26

In short, the power of sale is held as a threat over the chargor's head, though it is but rarely exercised.

Secondly, they imply that some security must be provided by the borrower and that the only acceptable security is a charge on registered land. This is certainly the view held by the lending agencies considered so far. Both the A.F.C. and the banks require borrowers to charge their land as security for the loans advanced and to hand over their land certificates.[27] It is extremely rare for either the A.F.C. or the banks to advance loans to farmers in unregistered areas; thus in East Koguta, a large sub-location consisting today of over 1,600 registered holdings, only four loans had been granted prior to land

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25. Registered Land Act 1963, s.74 (2)(b).

26. Lawrance Mission Report, para.427.

27. It is difficult to overstress the psychological importance of land certificates, which are generally referred to as "title deeds". Nearly a half of the landowners of Kabete-Obuya and Kamnwa-Keyo-Ogoro have taken out land certificates which are then jealously guarded. There seems no good reason for this, although if affords a further illustration of that ignorance, on the part of farmers, of the system of land registration that was discussed in Ch. V, supra. Although the Registered Land Act 1963, s.33(3) expressly provides that the chargor should retain the land certificate, lending agencies insist on land certificates being deposited with them, no doubt with a view to impressing on the borrower the serious nature of his commitment.

registration. This policy clearly retards agricultural development and raises the question whether alternative kinds of security exist and indeed whether loans might not in suitable instances be advanced on no security whatever.[28]

It was probably the disastrous loans repayment record of the early sixties[29] that caused official lending agencies to revise their selection criteria and to concentrate, as the banks have necessarily always done, on the credit-worthiness of applicants for loans. A registered title may not always constitute sufficient security; the A.F.C., like the banks, will prefer the applicant with an off-farm source of income. It is certainly questionable whether official lending agencies like the A.F.C. should consider credit-worthiness more important than need, but it does appear that the loans repayment record has improved. In the last five years there has been no occasion in Muranga district on which the A.F.C. has been obliged to sell a defaulter's land, the mere advertisement of the sale sufficing to ensure full repayment of the outstanding debt. Similarly in Kisumu district the A.F.C. had never sold a defaulter's land, though at the time of the research there was talk of taking action against a few persistent defaulters. Bank-loans are also almost invariably repaid; a letter from a lawyer in the last resort can be relied upon to galvanise recalcitrant debtors into action. In the last eight years

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28. Very occasionally the A.F.C. may grant a farmer a loan on condition that he gives the A.F.C. power of attorney to charge his land as soon as it is registered.

29. This change of policy particularly affected unregistered areas. "The Government is facing a serious problem of arrears in repayments of loans not secured by title and will therefore give more emphasis to loans in areas where land consolidation and registration is complete. The World Bank has similarly made this a condition of its pending loan for smallholder credit." Republic of Kenya, Development Plan, 1966-1970, p.130.

the Kenya Commercial Bank at Muranga has had farms sold on only two occasions.

The recent loans repayment record appears then to be very good and it may be wondered whether the lending agencies would have lost much money if they had not required borrowers to charge their land in their favour. Moreover the existence of other forms of security suggest that farmers could have access to credit even where their land is not registered. Two particular forms of security deserve brief mention.

In the first place, farmers may mortgage their chattels to lending agencies under the Chattels Transfer Act 1930.[30] When the banks first started advancing credit to smallholders, they were willing to accept chattels as security for their loans. This is no longer the case. The banks would often find it hard to recover their security in the case of a borrower defaulting and today will generally only grant loans on the security of a registered title to land. On the other hand, it appears to be the general policy of the A.F.C. to insist on borrowers executing both a charge on their land and a chattels mortgage.[31] Moreover it is interesting to note that while the A.F.C. at Muranga has never sold the land of defaulting borrowers, it has on a few occasions realised its chattel security. Farmers are perhaps less attached to their chattels and therefore their sale provokes less resentment. The chattels most commonly mortgaged are cattle and tractors, never household goods, and the precarious nature of such security is self-evident;

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30. Cap.28.

31. The A.F.C. is not bound to do this; indeed the Agricultural Finance Corporation Act 1969, s.19(1) gives the Board a broad discretion as to the terms which it imposes on borrowers.

cattle may die, tractors may be neglected. Nevertheless, if extension workers provide an efficient follow-up service to ensure that loans are properly used, there is no reason why such chattels should not be accepted as good security for small loans and this would clearly be a desirable policy in unregistered areas.

An alternative and increasingly important way of securing loans is to require the borrower to issue an irrevocable letter of instruction to his employer or cooperative society authorising them to make repayments from his salary or his sales income. In cash-cropping areas there is a continuous increase in the number of cooperatives responsible for the processing and marketing of farm produce. Where such cooperatives are working efficiently, such letters of instruction should constitute adequate security and indeed the A.F.C. does occasionally advance loans in reliance on them. Again this would provide a suitable kind of security in unregistered areas. A significant development in recent years has been for the cooperatives themselves to give their members credit. For example, the Kahuhia Coffee Cooperative Society (of which all Gathinja coffee-growers are members) provides almost everything that its members might require for the development of their farms; it sells maize beans, seed and seedlings, fertiliser and so forth. The cooperative is responsible for the processing and marketing of all the coffee and any debts owed by members are subtracted from their shares of the profits. Moreover recently the cooperative has started to advance cash loans to its members on similar security, the loans never exceeding one quarter of the average value of the borrower's coffee crop taken over the past three years. It looks as though this will prove to be a very important source of credit in the near future.

No attempt has been made in this section to make a complete survey of the ways in which lending agencies can secure their loans. Doubt has, however, been cast on the view that the availability of credit should depend on land registration. The WaChagga of Tanganyika became highly efficient producers of coffee during the colonial period, even though their land was held under customary law, and examples of this kind can be multiplied all over Africa. If credit is necessary for development and credit will not be advanced without security, then forms of security other than a registered title must have existed. Two alternative forms of security have been mentioned in this section and, although they would hardly be appropriate where large loans were required, they could both play a more important rôle both in registered and unregistered areas.

(v) Summary.

It has not been the intention of the present writer to provide a complete picture of the rôle of credit in smallholder agriculture in Kenya today, nor would it have been within his competence to do so. There are a large number of organisations operating within Kenya today which provide credit to farmers. They differ both in the criteria they use, in the kinds of security they require and in the results they achieve. A survey of their activities would need to be complemented by an analysis of farm budgets over a wide variety of areas. While a certain amount of work has been done in this field, largely sponsored by the Institute for Development Studies at the University of Nairobi,

it is certainly not within the scope of this study to make any generalisations about the rôle of credit in smallholder agriculture. The purpose of the foregoing pages has been limited and negative. An attempt has merely been made to question the generally accepted connection between registration of title and access to credit for agricultural investment. It has been argued that it is spurious to attribute much of the agricultural development that has occurred in Kenya's smallholder areas over the last ten years to the farmer's newly-acquired power to raise loans by charging his land.

In the first place, a mere glance at the land registers suffices to show how rare it is for farmers to charge their lands. It is not that farmers are ignorant of the possibility of raising loans on the security of their lands; on the contrary, it is that the supply of credit falls a long way short of the demand for it. The Lawrance Mission reported in 1966:

> During our tour of the country we were told with monotonous regularity that the people wanted land registration so they could go to the banks to obtain loans with which to develop their holdings... This belief, if sincerely held, must be based on a mistaken appreciation of the opportunities for obtaining credit. Even though the banks' programme has been as large as the Government's, it is nevertheless very small in terms of the numbers of farmers who have benefitted.32.

The same is true today.

Moreover, the evidence suggests that those loans which are being made available to farmers are frequently not invested in their farms;

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32. Lawrance Mission Report, para.431.

in particular, it has been shown that the considerable majority of bank loans in both field-areas is used for non-agricultural purposes. Even where the loans are used for agricultural purposes, as are A.F.C. loans, it might be argued that agricultural productivity would be more effectively promoted by channelling such loans to the poorer rather than the richer farmers; a government-subsidised loans system should take more account of the farmer's need for credit than of his creditworthiness. This would require a reversal of the present policy.

Thirdly, there is no reason why access to credit should necessarily depend on the borrower being able to charge his land as security for any loan. The policies of the lending agencies is crucial in this context but their extreme reluctance to sell the land of a persistent defaulter throws some doubt on the value of land as a security. Other forms of security do exist and may prove more effective; the irrevocable letter of instruction to a marketing cooperative may prove an appropriate alternative to the charge of land.

The argument in this chapter has, of course, proceeded on the assumption that it is lack of credit that has retarded agricultural development.[33] However, it is worth noting that one writer with considerable experience of smallholder agriculture in Kenya has seen fit to question this assumption. She concludes:

> There is evidence from many parts of Kenya of the successful and widespread adoption of new practices, some of which involve substantial investment expenditures, without the provision of credit, and there is

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33. This assumption is shared by the Government of Kenya. "The Government recognises that lack of agricultural credit has been an important constraint on agricultural development." Republic of Kenya, Development Plan, 1970-74, s.1.38.

> evidence... of plentiful supplies of rural savings. It is certainly possible that the important requirements are the technical information, the extension advice, the farmer education, the availability of inputs, and other elements making for high returns to investments... It may well be that alternative measures to aid smallholders would represent more effective uses of scarce development resources than programmes of subsidised credit.[34]

The considerable surpluses that are being generated in the rural areas are, it appears, being saved or invested in non-agricultural activities.[35] This certainly seems to be the case in both the present writer's field-areas where agricultural officers estimated that less than ten per cent of farm profits were re-invested in the farms.

However, even assuming that the availability of credit is an important precondition of agricultural development, it seems hard today to justify the land registration programme in terms of the amount of credit for agricultural investment that has been given to farmers on the security of their registered titles. Such little credit as has been available has not played the significant part in promoting rural development that was originally hoped. The Lawrance Mission reported that "the limited scale of credit available has hitherto meant that the greatest possible advantage has not been taken of the costly programme of land reform."[36] This understates the position. Insofaras one of the main justifications of land registration has always been the increased amount of credit for rural development that would become available, the wisdom of the whole "costly programme of land reform" is called into question. Any development which has occurred in recent years may in part be attributable to

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34. J. Heyer, op. cit., p.29.

35. Ibid., p.16.

36. Lawrance Mission Report, para. 421.

that security of title which is conferred by registration and which may provide an incentive to invest in the land,[37] but very little is due to increased access to credit.

3. The pattern of holdings: the role of the land market.

(i) General.

It has always been hoped that the land reform programme would go a long way towards solving the twin problems of fragmentation and uneconomic parcellation. Discussing the widespread fragmentation of holdings that existed particularly in the Central Province of Kenya, the Working Party on African Land Tenure stated that "the whole programme of land consolidation and registration is aimed at removing this serious obstacle to agricultural development."[38] While this may be a slight exaggeration, there is no doubt that the programme was expected to lead to the emergence of economically viable landholdings. The security of title conferred by land registration would create a land market enabling farmers owning unviable plots or unworkable fragments to sell them off to neighbours who would be in a position to develop them more effectively. The pattern of landholding would naturally be affected; holdings would become larger and consequently, it was argued, more productive. The promotion of agricultural development seemed to

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37. One economist of considerable fieldwork experience in Kenya found no evidence that registration of title provided such an incentive. See R.J.A. Wilson, "Land Tenure and Economic Development: a study of the economic consequences of land registration in Kenya's smallholder areas." Unpublished paper given to the Statistical and Social Inquiry Society of Ireland, April 1972.

38. Report of the Working Party on African Land Tenure, 1957-1958 (1958), para.64.

be the main concern and little thought was given to the fate of those who would become landless in the process. According to Swynnerton, as a consequence of land registration "...energetic or rich Africans will be able to acquire more land and bad or poor farmers less, creating a landed and a landless class", a process which he calls "a normal step in the evolution of a country."[39] It is the aim of this section to assess the extent to which the fragmentation and uneconomic parcellation of land have been checked by the land reform programme and in the last section of this chapter an attempt will be made to consider how far the sort of stratification along class lines predicted by Swynnerton has occurred in rural Kenya.

(ii) Fragmentation.

Programmes for the consolidation of fragmented holdings are among the least controversial of land reform programmes. There may, of course, be good agricultural reasons for land fragmentation; for example, it enables the farmer to spread the risk of crop failure and to exploit lands of different quality.[40] Generally speaking, however, fragmentation hinders agricultural development. It inhibits a sound manuring policy. It makes it harder to plan farms effectively, to organise rotation and to make full use of modern equipment. A large amount of land is used for paths and boundaries and this in turn makes soil conservation more difficult. Farmers are obliged to waste time

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39. R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya (1954), s.14.

40. This is particularly true of the hilly country of the Central Province. A farmer might have a small banana plantation in the valley, a coffee shamba on the ridge and some rough pasture elsewhere.

walking to their scattered plots with the frequent result that the more distant ones tend to be neglected.

Fragmentation of holdings was common in many smallholder areas of Kenya but nowhere so widespread as in the Central Province. It is hard to give exact figures, but the average number of fragments owned by informants in Gathinja before land consolidation was nine, one informant owning thirty-four plots and another no less than forty! After land consolidation sixty-one of the seventy-four informants owned only one farm-plot each; a further twelve owned two farm-plots each, five of which were situated in neighbouring sub-locations, and one informant owned three farm-plots. Land consolidation was very thoroughly carried out and its results are clearly visible today. It was only where further consolidation was practically impossible, as where a farmer's coffee plantation was surrounded by the coffee plantations of other farmers, that more than one plot would be registered in the name of the same person.

In Kabete-Obuya and Kamnwa-Keyo-Ogoro there was relatively little pressure on the land and the fragmentation of holdings was not a serious problem; the present writer came across no instance where one person had claimed to be entitled to more than three fragments. A compulsory consolidation policy was not introduced, although farmers were encouraged to exchange or sell off fragments. Of the sixty-eight farmers interviewed, some twenty-four had consolidated their farms, usually through informal exchanges within the clan. In a few cases consolidation was impossible either because the necessary people were absent or refused to cooperate, but in the majority of cases it was unnecessary. Where someone owned another plot in another sub-location, little attempt was made (as in Gathinja) to consolidate his land, but

only a handful of people found themselves in this position.

As land consolidation was successfully carried out in both field-areas, it is interesting to consider the extent to which re-fragmentation of holdings has occurred over the intervening period. Clearly it is likely to occur wherever land is sold or leased to someone who already owns or leases other land and therefore an analysis of the operation of the land market is necessary. As the land market is considerably more active in Kabete-Obuya and Kamnwa-Keyo-Ogoro than in Gathinja, the larger part of the discussion will concentrate on the former area. Since land registration was completed in this area, ten transfers of whole plots had been registered at the time of the research, of which one was a gift (a father transferring a plot to his son) and nine were sales. During the same period eighteen subdivisions of land were registered, of which seventeen were made for valuable consideration and one in favour of the landowner's son. Strictly speaking, there are two stages involved; first the registered owner subdivides the land and new registers are opened in respect of each subdivision and then he transfers one of the newly-registered plots.[41] In practice, the whole transaction is known as a subdivision and that term will be used here. Finally on two occasions the owner of a plot had conveyed it to himself and another in undivided shares; however, as in both cases the aim was to circumvent the rules prohibiting the uneconomic parcellation of land, they can both be treated as subdivisions for the purposes of the present discussion.

In addition to the ten registered transfers of whole plots and the twenty registered subdivisions, there took place a considerable number

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41. Registered Land Act 1963, ss.25(2) and 89.

of dealings off the register whose full extent it is impossible to estimate with any certainty. The present writer encountered six cases where whole plots had been sold and seven cases where subdivisions for valuable consideration had occurred;[42] in only a few of these cases had the parties any intention of registering the sale. A special effort was made to interview at least one of the parties to each of the forty-three transactions mentioned above and much of the information that follows derives from these interviews. An attempt was made to ascertain the reasons why people bought and sold land and to obtain an impression about the ways in which sales of land affected agricultural productivity.

There is no doubt that transfers of land are causing fragmentation. This is particularly obvious where a plot is subdivided and a part is transferred to another person. In such a case fragmentation automatically results where the transferee already owns land which is not contiguous to the land transferred. In seventeen of the twenty-seven subdivisions investigated, the purchasers already owned land but in only one instance did a purchaser own land contiguous to the land purchased. In sixteen cases, therefore, the sub-division resulted in fragmentation of ownership; however it did not always result in fragmentation of use, since in five of the sixteen cases a father had bought the land for his son or sons to cultivate and set up house. In the remaining ten subdivisions the buyers owned no land of their own, although they may have

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42. The problem of unregistered gifts of land is not discussed here. It is extremely common for landowners to give land to their adult sons and this usually involves the subdivision of the family holding. Such subdivisions are rarely registered. This topic receives detailed treatment infra, pp. 304 et seq.

had access to their fathers' land, and therefore the subdivisions resulted neither in fragmentation of ownership nor in fragmentation of use. Indeed, three of the purchases were made by the same person and consisted of contiguous parcels of land; thus a combination of ownership had been effected de facto.[43]

Where a whole plot is transferred, fragmentation of ownership will again result where the transferee already owns land which is not contiguous to the land transferred. In thirteen of the sixteen transfers investigated, the transferees already owned land but in only two cases was this land contiguous to the land transferred. Thus in the substantial majority of cases fragmentation of ownership has resulted, though not necessarily fragmentation of use; two of the transfers were cases where a father had given his son a fragment of land which that son was already developing and where he had built his home. In only three of the sixteen transfers investigated had the transferee previously owned no land of his own.

While the transfer of whole parcels of land will increase fragmentation of ownership to the extent that the transferees have other non-contiguous land, it will of course reduce it insofaras the transferors will own fewer fragments. This is in fact what occurred in thirteen of the sixteen transfers; the transferors retained one or more parcels of land and the transfers had, from their point of view, resulted in less fragmentation of ownership. In the three remaining cases, the transfers had made the transferors landless.

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43. Although the Registered Land Act 1963, s.25(1), provides for the combination of contiguous parcels in common ownership and their registration as a single parcel, the present writer never encountered an instance where this had occurred. Indeed there seems no good reason why the landowner should apply to the Registrar to take such steps.

There is little evidence, then, that transfers of whole plots result in increased fragmentation of ownership, since generally both transferor and transferee will have other land elsewhere. However, subdivisions are more common than transfers of whole plots and are likely to occur with increasing frequency in the future, and they do result in fragmentation of ownership in the majority of instances, though not necessarily in fragmentation of use. Even where fragmentation of use does occur, agricultural productivity is not necessarily adversely affected. In the first place, where the purchaser of part of a plot already has land of his own, that land will seldom be far from the purchased land; of the sixteen subdivisions where purchasers already owned land, in nine instances that land was situated in the same adjudication section, in four instances in the same sub-location and in two instances in neighbouring sub-locations. As far as distance is concerned, then, there is no reason why the purchased plots should be neglected. Secondly, the evidence suggests that the purchasers of plots tend to be wealthier and more progressive farmers than the vendors[44] and while it is hard to generalise about the effect of a change of ownership on the development of a plot of land without knowing exactly how it was used before that change, one nevertheless gains the distinct impression that the change has been for the better. The purchaser would often have built a new house, erected fencing, planted cash-crops and employed labour to look after a farm which on the vendor's own admission had previously been unused or at least underdeveloped for one reason or another. It does

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44. A more detailed examination of this evidence is carried out in the fourth section of this chapter, infra p.321.

happen, of course, that purchasers buy land as an investment or for their retirement and meanwhile neglect it, but such cases are rare in this area.

Where refragmentation is occurring, its effects may be aggravated by the customary rules of inheritance. According to these, if a person owned two plots of land of widely differing quality, it was only fair that his sons should each inherit a fraction of each plot. Over a couple of generations, of course, this practice would lead to a vast proliferation of smaller and smaller fragments and the complex pattern of landholding that had arisen in the Central Province by the mid-fifties. It is certainly too early to predict whether this will occur, but the indications are that it will not. One informant who owned two plots of land, one in a favoured position on the Nyabondo plateau and one in the dry, stony valley below, said that his sons would have to share each plot between them. This was, however, an isolated case. Land is no longer the sole or even the principal source of wealth in many families; it is likely in the future that the son who inherited the less fertile land would be compensated in other ways.

Finally it is necessary to say a few words about the situation in Gathinja. Here there is no danger of refragmentation. In the first place, there have been very few transfers of land; since land registration only thirteen transfers have been registered[45] (an average of one a year) of which two were gifts. Secondly, they were all transfers of whole plots, the transferors always having some other land and the transferees usually having some. Finally, in four cases the transferee already owned land contiguous to the land transferred, while in seven cases the transferor lived in a distant location; in short, the overall

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45. Only one unregistered outright sale was discovered.

pattern seems to be that Gathinja farmers are buying fragments of land in Gathinja sub-location from people who are residing and farming some distance away, presumably a desirable development.

To sum up this section it is suggested that the fragmentation of holdings is unlikely ever to become the problem it was in the Central Province in the mid-fifties. It is certainly likely to occur in those areas where the land market is active, but even there it will not necessarily have an adverse effect on the development of the land especially since it tends to be the better farmers who are accumulating fragments. Nevertheless, land consolidation ought to be seen as a continuous process and it ought to be the duty of agricultural officers in the field to encourage the exchange of fragments, where appropriate, in the same way that it is encouraged wherever land adjudication takes place.

(iii) Parcellation.

One cardinal principle governing land registration in Gathinja was that no person should be registered as the owner of more than one plot, though in a handful of cases an exception was made as further consolidation proved impossible. One consequence of the strict application of this principle was that if a farmer wished to retain more than one of his fragments, he was obliged to have them registered in the names of other people. Most frequently he would have them registered in the names of his sons, but sometimes he would use his wife's name and very occasionally the name of a friend on the understanding that he would later

reconvey it. More often the head of the household would agree to the consolidation of all his fragments into a single plot which would be registered in his name alone and which he would subsequently divide among his family. Indeed relatives would sometimes combine their plots and register them as a single holding in order to evade the original requirement that those owning less than a certain minimum acreage should live in villages away from their land. This requirement was eventually dropped and indeed it would have been impossible to enforce. The average size of registered plots in Gathinja was 2.02 acres after land consolidation and it remains the same today. Of the 328 plots in private ownership only three are more than ten acres in area while ninety-four are less than an acre. Needless to say, it is difficult to discover any undeveloped land. Land is in very short supply and consequently plots are farmed intensively. With the coffee boom one first-class farmer claimed that it was possible to make a net profit of 3,000 shillings per acre from coffee, but an income of this nature is no longer adequate today when, for example, the fees (including the cost of school uniform) for a good secondary school in the rural areas may approach 1,000 shillings a year. To meet this sort of commitment the small farmer requires alternative sources of income.

The picture becomes rather bleaker when one comes to consider the number of people who live on these tiny plots and who depend on them for the basic necessities of life. The survival of polygamy and of the customary law relating to the allocation and inheritance of land is likely to cause increasingly severe pressure on the land and this process will be accelerated as the familiar vicious circle begins to operate, farm profits declining as the number of people dependent on

such profits increases, credit becoming harder to raise as plots become smaller and more congested.

Polygamy is rare in Gathinja today. Of the seventy-four informants only six had two wives and only one had three, none having more than three. Moreover they were all older men, many of them grandfathers several times over. Polygamy is clearly dying out in this area and while it is difficult to isolate any single reason for this, there can be no doubt that the early activity of the missions around Gathinja and, in particular, the early growth of mission schools have played an important part. While traditionally the head of the household would allocate land to each wife, the sons of each wife expecting to receive a share of their mother's land, this had in fact occurred in only two cases. In the other cases the landowner had refrained from subdividing his land according to houses, no doubt because subdivisions of this sort tend to reduce farm efficiency.

Even though polygamy may have died out in Gathinja, families continue to be large, the provision of health services in the rural areas being considerably more successful than the organisation of family planning programmes. Taking into account the fact that some of my informants or their sons had other holdings in Gathinja, information gathered by the present writer suggests that each plot is occupied by an average of eight persons. This figure includes men who have gone to work elsewhere but have left their families behind on the plot. It is true that a figure of this kind leaves a lot of questions unanswered, but it does give some indication of the congestion which has started to occur in this area. One or two examples may serve to demonstrate the human reality that underlies this figure.

Thomas Kamau has two wives and at the time of land consolidation he had registered one of his plots in his own name and gone to live there with his younger wife; his other plot he had allotted to his first wife and it was registered in the name of his eldest son by this wife, Jackson. Today this plot is occupied by Jackson, his mother, his wife and son, his two brothers (one of whom is married and has three sons and one daughter), his sister and her six illegitimate children (three male and three female). In all there are eighteen people living on the plot. However Jackson is relatively fortunate; he is employed as an agricultural officer and he has a shop in the village, bought largely with loans raised by charging his plot. Moreover the plot is nearly six acres large, a sizeable plot by Gathinja standards, and it is largely planted with coffee. The plot has not yet been subdivided on the ground between Jackson and his brothers,[46] but it was made quite clear that it would eventually be subdivided between Jackson's sons and nephews, including his sister's illegitimate sons, in accordance with Kikuyu customary customary law. On the reasonable assumption that he is likely to have more sons and many more nephews, the conversion of a single prosperous coffee plantation into a large number of tiny parcels planted with food crops emerges as a real possibility.

Jackson was lucky in that he had off-the-farm sources of income and a relatively large plot of land. David Njoroge was less fortunate; although his holding is 3.9 acres, his income derives entirely from the profits he makes on his coffee and he has been blessed with an exceptionally large family. He has two wives, of whom one gave him

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46. One brother has regular employment, the other works as a casual labourer.

four sons and two daughters and the other four sons and four daughters. All his sons by his wife are married and have fathered seven grandsons; one of his duaghters (unmarried) has produced another grandson for him. The plot has been subdivided between the houses and each married son has been allotted his own piece of land where he lives with his family. None of the sons have regular jobs though some work as casual labourers on neighbouring farms. David Njoroge is likely to have many more grandsons with a claim to a share in the land and if it continues to be subdivided according to Kikuyu customary law and if they continue to take up residence on their parcels, it is not fanciful to imagine that, after the passing of a generation, David's coffee plantation will have been replaced by some twelve or fifteen quarter-of-an-acre plots each with a house and a few rows of maize.

No example could be wholly typical of the land situation in Gathinja today, but the cases of Jackson and David do illustrate the sort of problems that are beginning to appear and the sort of outcome that is likely to occur if solutions to these problems are not devised. The parcellation of land is attributable to the persistence of the customary law relating to the allocation and inheritance of land. According to Kikuyu customary law, when a man married, he would be allocated a piece of land by the mbari elders, though latterly by his father, where he would build his home and start farming on his own account. When a man died, such land as he had not distributed during his lifetime would be divided among his sons, account being taken of any such distribution. His eldest son would generally be the Muramati, that is, the person charged with distributing the deceased's property and providing for his widow or widows and any unmarried daughters. Such a system worked well

as long as land was plentiful and crops were planted on an annual basis, but as pressure on the land increased and a more settled form of agriculture was adopted, the system was bound to result in the division of land into smaller and smaller parcels.

While the existence of this problem has been appreciated for some time, no effective solution has as yet been devised even though various attempts have been made by statute to regulate the parcellation of land. One device has been to determine the minimum acreage required to make a holding in a given area economically viable and to prohibit the registration of holdings which are smaller than this minimum.[47] Thus the Land Control Act 1967 provides that a land control board ought generally to refuse its consent to the division of land into two or more parcels where the division would be likely to reduce the productivity of the land.[48] The local agricultural officer, often himself a member of the board, will generally assess what the minimum acreage should be for that particular locality. This system has not proved very effective. In the first place, it is useless to set minimum acreages without taking into account the number of people who live on the land and depend on it for their livelihood. Secondly, the minimum acreages set in many areas, including the two field-areas, exceed (often by a considerable amount) the average size of holdings at the end of land registration. Thirdly, land control boards in practice tend to ignore such considerations; even where a board does refuse its

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47. This policy was recommended in the East Africa Royal Commission, 1953-1955, Report (Cmd.9475, 1955), Ch.23, para.29.

48. S.9(1)(b)(iv). For a more detailed discussion of this topic, see infra, - pp. 356 et seq. Where succession does not result in the division of the land into two or more parcels to be held under separate titles, the consent of the land control board is not required; ibid., s.6(3)(a).

consent to a subdivision, ways have been discovered to evade the consequences of such refusal. Finally, it is extremely rare for subdivisions to be brought before the land control boards. Where a person has agreed to subdivide his land and sell one part to another, the transaction is likely to be submitted to the local board for obvious reasons. However where a landowner divides his land among his sons and even where on the death of a landowner his sons divide his land, the parties involved will frequently have no interest either in applying to the land control board or in registering the subdivision. Since the Gathinja register was opened, only ten successions have been registered and no subdivisions at all. Yet the vast majority of plots support at least two households and in such cases some sort of informal subdivision has been made on the ground. This impression is confirmed by another researcher who has written that "an examination of the cultivated areas reveals the presence of traditional boundary marks indicating that illegal subdivision is taking place."[49] Indeed one writer discovered that many disputes were arising in Kisii between farmers cultivating separately within a single registered holding and, where the landowners worked away from home, between their families, but that such disputes were rarely taken to the courts.[50] This situation does not appear, however, to have arisen as yet in either of the field-areas investigated.

Another attempt to control land parcellation was made by the Registered Land Act 1963 which empowers the Minister of Lands and

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49. D.R.F. Taylor, "Agricultural change in Kikuyuland" in Environment and land use in Africa, M.F. Thomas and G.W. Whittington (eds.), (Methuen, 1969), p.480.

50. R.J.A. Wilson (1971), op. cit., p.7.

Settlement to prescribe for any registration section the maximum number of persons who are allowed to be registered in the same register as proprietors[51] and provides that until he does so prescribe, no dealing shall be registered which, if registered, would have the effect of vesting any parcel of land in more than five proprietors.[52] As the Minister does not seem to have taken advantage of his statutory powers, the effect of section 101 is to prevent the registration of more than five coproprietors. Of course this is partly a device to facilitate conveyancing and to ensure that the land registers are not cluttered up. However the fact that the Minister may prescribe different maximum numbers of coproprietors for different areas clearly indicates that this section was primarily designed to prevent the unending division of land into smaller parcels. Moreover provision is made for the compensation of an heir who is prevented by this section from being registered as the coproprietor of land to which he is entitled under customary law. The court may order that such compensation be secured by way of charge on the share of the person who has benefitted.[53]

As a device for the prevention of land parcellation this has not proved very successful. In the first place, it is hardly a very satisfactory solution that heirs should be compensated with other property. More often than not the land will constitute the principal if not the only asset of the estate. The development of the land may suffer if the proprietors are obliged to find money to pay the heirs who have

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51. S.101(3)(a).

52. Ibid., s.101(4).

53. Ibid., s.120(7)(a).

been excluded from a share of the land; if the land has already been charged with the payment of compensation, it is highly unlikely that any lending agencies will advance loans on the security of the land. Suing for the payment of compensation may be costly and complicated.

Secondly, equity provides a means of avoiding the implications of the rule that no more than five persons may be registered as the proprietors of any parcel of land. Where, for example, a man dies leaving eight sons all of whom are entitled to a share of his land under customary law, the court may simply direct that the five older sons be registered as co-proprietors holding the land on trust for themselves and their three younger brothers. This sort of device is of course familiar in English law where since 1925 co-ownership has given rise to a statutory trust for sale.[54] Nevertheless it is slightly odd to find the Chief Land Registrar of Kenya recommending the use of this device and instructing district land registrars, in cases where there are more than five heirs, to register the first five as trustees and to enter a restriction on the title to that effect.[55] Moreover, where land is conveyed inter vivos to more than five persons, a trust presumably arises.

It will be appreciated, however, that the main reason why section 101(4) of the Registered Land Act 1963 has not proved very effective is that so few successions are ever registered.[56] Perhaps the rule

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54. Law of Property Act 1925, s.34.

55. Republic of Kenya, Chief Land Registrar, Practice instruction, (March 13th 1973).

56. This problem is fully discussed in Chapter V, supra, pp.221 et seq.

restricting the number of co-proprietors is partly responsible for this, though it does not seem very likely.

Where the Law of Succession Act 1972[57] comes into operation, customary law will cease to apply to registered land unless the landowner makes a will expressing his desire that it should apply. Succession to registered land will, like succession to all other forms of property, be governed by the Act. The Commission on the Law of Succession felt that the new law of succession should "help the implementation of the land consolidation and registration programme, and prevent the uneconomic subdivision and fragmentation of land holdings."[58] In fact the provisions of the Act do little to achieve these goals nor indeed was it necessary that they should, given the existing provisions of the Registered Land Act 1963 and the Land Control Act 1967 discussed above.[59] It is true that, where the deceased leaves a widow and children, the widow may exercise her power to appointment in a way which ensures the preservation of the land as an economic unit, but this is very unlikely to occur, at any rate where land constitutes the major part of the deceased's estate.

Since attempts to prevent by statute the uneconomic parcellation of land have largely failed, it remains to consider the extent to which land registration has created a situation where the owners of plots that are not economically viable are prepared to sell them to bigger farmers in a position to develop them more effectively; after

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57. For a detailed discussion of this Act see supra, pp. 228 et seq.

58. Succession Report, para. 15.

59. Supra, pp. 309 et seq.

all, this was commonly seen to be the consequence of the establishment of a land market free from customary restrictions on alienation. In fact, the very opposite seems to be the case. As far as it is possible to generalise, it would appear that the smaller the amount of land which a person owns the more reluctant he becomes to sell it. In Gathinja, where the average size of holdings is about two acres and where there are very few holdings of more than ten acres, an average of one sale of land has occurred each year since land registration and in every case the seller owned other land, often in a distant location. Sales of land, both outright and redeemable, were much more common before land registration. It is arguable that in areas of intense pressure on the land, like Gathinja, the effect of the land reform programme has been to destroy the land market that existed by making it more difficult for potential sellers to find land in other districts where they can settle. While formerly a person might simply migrate to a neighbouring district where land was more plentiful and find some unoccupied land where he might settle, today he would be obliged to pay for such land. Moreover the districts where land is plentiful tend to be the less favoured agricultural areas where the soils are poor or the climate unsuitable or access to markets difficult, and they may require the adoption of different farming techniques. Nevertheless, farmers in Gathinja are very keen to buy land elsewhere and in the course of his interviews the present writer encountered four instances where farmers had succeeded in obtaining plots on settlement schemes and six instances where farmers had purchased land in other smallholder areas.

However the vast majority of landowners has only one piece of farmland. They can neither afford to buy more nor to sell what they

have, and so the parcellation of holdings continues. While parcellation has not yet reached catastrophic proportions, there are already signs of the way in which things are going to develop. Formerly, when a man married, he would be allocated a piece of land where he would build his house and start farming on his own account. Today residence patterns are beginning to change and it is becoming usual for married sons to live on their father's compound, thus saving valuable land. Even so, increasing numbers of coffee trees are being uprooted to make room for houses and for the food crops necessary to feed the increasing number of people dependent on the farm. Farmers are, of course, fully aware of the dangers of parcellation and, where possible, continue farming the land as a single unit, though informal boundaries will be made on the ground between the shares of the various households. If a landowner has other kinds of property, he will often leave his land to one son and share his other property among the rest; thus one farmer plans to give his farm to one son, his shop to another and his shares to another. If one son has a well-paid job off the farm, he may disclaim all rights of inheritance to the farm in favour of his less fortunate brothers.

In the majority of cases, however, neither the landowner nor his sons have substantial sources of wealth off the farm and in such cases the landowner regretfully admits the inevitability of parcellation. Although it has been suggested that, where there is only one economic unit, it should be inherited by only one heir,[60] any such steps would be dangerous and ineffective. As long as land remains the main source of a man's wealth, his sons will continue to assert their traditional

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60. See, for example, the Report by the sub-committee of the Kenya African Affairs Committee, "Land titles in native land units," 1950 J.A.A., Vol II, No.2, p.19, at p.21.

rights of inheritance. Sorrenson writes that "if the landowners do try to hand over their land to only one heir, without making alternative provision for the others, they may find that they have another revolt of the young, embittered men on their hands."[61] A man is expected to provide land for all his sons and the consequences may indeed be grave if he fails in his duty. In one instance encountered by the present writer, where a father had died leaving his sons landless, they exacted a terrible punishment on him; they exhumed his corpse and burnt it, thus symbolically killing him a second time.

The foregoing discussion of parcellation has concentrated on Gathinja sub-location where the problem is arising in a particularly acute form.[62] The various attempts to solve the problem by statute have been considered and particular attention has been given to the rôle of the land market as a regulatory device. The situation in Kabete-Obuya and Kamnwa-Keyo-Ogoro is not so critical, largely because pressure on the land is not so strong. At the time of land registration, the average size of holdings was about five acres. Families tend to be as large as in Gathinja and polygamy is more frequent. The land is not so intensively developed as in Gathinja and there is a certain amount of buying and selling of small parcels. Nevertheless it is probable that Gathinja's experience will be repeated here; the parcellation of holdings will increase and as the intensive development of plots is undertaken to meet the new situation, so the land

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61. M.P.K. Sorrenson, "Counter-revolution to Mau-Mau: land consolidation in Kikuyuland 1952-1960," East African Institute of Social Research, unpublished paper, 1963, p.13.

62. It is estimated that in 1969 more than 50% of registered small holdings in Kenya were less than two hectares and more than 80% were less than five hectares: Statistical Abstract, 1970, table 79 (a).

market will begin to stagnate. It seems that Gathinja on the one hand and Kabete-Obuya and Kamnwa-Keyo-Ogoro on the other are simply at different stages on a line of development along which most of the better agricultural areas are doomed to pass. This is the theme which the last section of this chapter will elaborate.

4. Socio-economic change in rural society.

(i) General.

Swynnerton thought that one of the consequences of land registration would be the creation of a landed and a landless class in the rural areas.[63] Farms would become larger and better developed as the bigger farmers bought up the smaller farmers, the latter apparently finding work in the towns or as agricultural labourers. Perhaps some such development was envisaged as took place in England after the enclosures, when many small farmers sold up and migrated to the towns to join the labour force necessary to bring about the Industrial Revolution. Those who remained were compelled either to work on the larger farms that were emerging or to exploit the commercial opportunities that closer links between town and country had provided. The result was that differentiation on socio-economic lines became more marked.

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63. See supra, p. 297.

The situation in Kenya is obviously different. There is no Industrial Revolution nor is one ever likely to occur. Certainly the industrial sector of the economy is expanding, but the country has few raw materials and will always have to depend heavily on its agricultural sector. The ranks of the unemployed and the underemployed increase annually, the number of new employment opportunities being constantly exceeded by the number of new people looking for them. However, in spite of the inaccuracy of the parallel with post-enclosure England, it is interesting to trace the evolution of rural society over the past fifteen or twenty years and to test the correctness of Swynnerton's prediction. Ideally such a study should be undertaken by a person trained in anthropology and political science and should cover all aspects of the society's development. Nevertheless an examination of land tenure and land use does provide valuable insights into this question. It will now be possible to look in a new light at some of the economic issues raised earlier in this chapter, to bring together some themes outlined there and to hazard some generalisations about the future.

(ii) Exploitation of economic opportunities.

Long before independence, even before land consolidation was started in the Central Province, there had emerged a number of people in both field-areas who were extremely interested in developing their farms and making use of such agricultural services as existed during the colonial period. A variety of reasons would explain why these

particular people took this interest; more often than not their fathers had distinguished themselves from their neighbours by their wealth or the favour they found with the administration or their industry or simply their luck. The sons of these fathers would have access to education where they would at least learn the rudiments of English, arithmetic and agricultural science. A very few might go on to higher education and jobs in town; the majority would remain in the rural areas where they were in a unique position to take advantage of all the opportunities that began to arise after the second world war. These are the men who first enclosed their lands, who first experimented with coffee and other cash-crops, who first championed the land reform programme, who first started to accumulate land, who first enjoyed off-the-farm sources of income. It is hard to know how to categorise these men without distorting reality and it seems best, though not wholly satisfactory, to call them the "better farmers". This is the term to be used for the remainder of this chapter.

Just as it was the "better farmers" who responded most to the aid and advice provided by the agricultural services during the colonial period, so today it is they who benefit most from the agricultural services of independent Kenya. They invite extension workers to their farms and no doubt the latter enjoy the company of farmers to whom they can talk on fairly equal terms and who are likely to profit from their advice. The concentration of extension workers on the "better farmers" has already been discussed;[64] suffice to add here that one

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64. Supra, p. 281.

report surveying all the existing literature on the subject holds that "evidence from all over Kenya" confirms this view point.[65]

It is the same farmers who tend to attract loans both from the commercial banks and from government agencies.[66] The subsidised loans system which the government operates through the Agricultural Finance Corporation tends to favour the better farmers in two ways. In the first place, it is the credit-worthiness of the applicant that is the principal consideration rather than his need or the proprotionate increase in productivity that the loan is likely to bring about. Secondly, loan applications require the cooperation and the support of the local agricultural officer who in turn is more likely to promote the interests of those whose farms he visits, whose farming methods he approves and whose education and know-how he shares. Similarly, the banks regard the credit-worthiness of the applicant for a loan as the prime criterion and tend in practice only to advance loans to people who enjoy off-the-farm incomes. These tend to be the better farmers, for they are the ones who have had access to an education which qualifies them for government posts and they are the ones whose farm profits enable them to invest in non-agricultural activities like shops, transport business and even residential property.

It is the same "better farmers" who have benefitted from the existence of a land market. This is particularly evident in areas where there is no great pressure on the land, like Kabete-Obuya and Kamnwa-Keyo-Ogoro. In these areas it seems that there were relatively

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65. G.M. Ruigu and J. Ascroft, "Land policy and the small-scale farmer," University of Nairobi, Institute for Development Studies, Working Paper No.35 (unpublished), March 1972, p.2.

66. Credit is discussed more fully in part II of this Chapter, supra, pp. 274 et seq.

few land transactions before land registration, partly because there existed "unowned land" in the neighbourhood where those with little land to cultivate could settle and partly because traditional controls on the alienation of land still operated to some extent. Nevertheless sales of land did take place and with the approach of land consolidation and registration some farmers exchanged plots and some bought plots. These were always the "better farmers", that is, those who had some understanding of the meaning of the land reform programme. This, at least, is the impression given by the rather scanty information it was possible to gather on sales of land before registration.[67] Such a view is plausible when one remembers that at that stage it was only the "better farmers" who had access to cash in the necessary quantities. In one of the six cases that it was possible to investigate such a farmer had, it seems, spent 4,000 shillings buying land around his farm; this is a relatively large sum even today, but in the late fifties it demonstrated considerable wealth on the part of the purchaser. Even more interesting is that in three cases richer farmers had advanced loans to their poorer neighbours, who had later transferred some of their land to the lender on finding themselves unable to repay. In this way those with a shrewder idea of the value of land were able to accumulate quite large tracts.

Even though today farmers are much more conscious of the value of land, sales of whole plots or of parts of plots are relatively common and it is interesting to consider the identity of the vendors

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67. The accumulation of land by certain individuals was occurring in Kikuyuland on a considerable scale long before the land consolidation programme was implemented. Thus the Rev. L.J. Beecher is reported as saying that "the protection which the African needed was not so much from the alienation of his land to non-native peoples as protection from the gradual process of abuse whereby increasingly large tracts of land were becoming alienated into the lands of privileged and powerful fellow-Africans." Quoted in A. Phillips, Report on Native Tribunals (1945), para. 143.

and purchasers and the reasons for their selling or buying. It was possible to investigate forty-one such sales in the area, of which twenty-eight were registered and thirteen unregistered. In thirty-six cases the purchasers had off-the-farm incomes and in two of the remaining five cases the purchasers were wealthy farmers (one being the son of an ex-chief, the other the brother of a sub-chief); in only three cases were the purchasers what one might term ordinary farmers. These figures are striking when it is remembered that no more than a quarter of the landowners in the area, at the most generous estimate, has or has ever had an off-the-farm income.[68] Reasons for purchasing land vary. In many cases the purchasers feel they have insufficient land especially where they have a number of sons for whom they have to provide. Land may also be seen as a good investment, especially where the land is undeveloped and alternative channels of investment are few.

Wherever a land market exists, the same process seems to be occurring and inasmuchas land registration has stimulated the development of a land market, it has contributed to the pattern of landholding which is emerging in those areas. Discussing the refragmentation of holdings that is occurring in the Nyeri District of Central Province, one writer stresses that "the circumstances are different this time because it is the more prosperous farmers who now tend to have more than one unconnected piece of land in the same area."[69]

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68. Twenty-five of the sixty-eight landowners interviewed fell into this category but the proportion this indicates grossly distorts the true situation since interviewees were selected partly on the grounds that they had charged or purchased land.

69. J. Ascroft, "The Tetu Extension Pilot Project", University of Nairobi, unpublished paper presented at the Workshop on strategies for improving rural welfare, May 31st 1971, p.21.

Another writer found that 70% of the land in the Kiambu District of the same province had been purchased by the present owners who tended to be young bureaucrats and traders.[70]

If it is the richer farmers who tend to be buying land, the identity and motives of the vendors are no less clear. In Kabete-Obuya and Kamnwa-Keyo-Ogoro twenty-six sales of parts of plots were investigated. In four cases the purchase-money was invested, twice in the purchase of a shop, twice in the purchase of oxen. In a further three cases the sellers owned large farms but had little or no family to work or inherit them. However, in nineteen of the twenty-six cases the sellers were poor people in need of an immediate cash sum. This was required for a variety of purposes, sometimes to pay hospital or school fees, sometimes to raise the necessary brideprice and sometimes simply to buy food. In none of the twenty-six cases did the sellers have off-the-farm sources of income.

When one comes to consider the fifteen sales of whole plots investigated in the area, the picture is only slightly different. In the case of twelve of these sales, the sellers had land elsewhere and it is rather harder to disentangle their motives. Certainly six claimed, as their main reason, that they had sufficient land elsewhere and that the distances involved made it uneconomical to retain the plot they had sold. Seven others admitted that they had sold in order to raise some cash to meet some pressing demand (e.g. fees, brideprice). Of the three sellers who had been made landless, one had sold his plot in order to buy food and he had taken his wife and two children to live with his brother; the other two (one of whom had sold his plot to raise a bride-

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70. J.G. Karuga, "Land transactions in Kiambu", University of Nairobi, Institute for Development Studies, Working Paper No.58 (unpublished), August 1972, p.19.

price) had also gone to live with their brothers. Only two of the fifteen sellers had off-the-farm incomes.

As far as one can judge, there has been an increase in the average number of sales per annum in Kabete-Obuya and Kamnwa-Keyo-Ogoro since the land registers were opened and this increase can be attributed, at least in part, to land registration. The effect of these sales has been that the richer farmers have accumulated land at the expense of the poorer farmers and it might be thought that in the course of time all the land would be owned by a small group of wealthy farmers, all those who had been made landless being obliged to seek work as farm labourers or in the towns. This, of course, is what Swynnerton predicted, but research in Gathinja suggests that the position is not quite so simple. In Gathinja there are virtually no sales of land at all and it is interesting to speculate why the land market in one field-area is fairly active while in the other much more developed area it has almost ceased to exist. The reply to this question proposes the theory that there is a line of development through which all the agricultural areas of Kenya pass and that Gathinja has simply reached a further stage than Kabete-Obuya and Kamnwa-Keyo-Ogoro; it is possible that in, say, fifteen years time the latter areas will have reached the same stage as Gathinja today.

The less pressure that exists on the land, the greater the increase in the number of sales after land registration; where there is some pressure on the land as in Kabete-Obuya and Kamnwa-Keyo-Ogoro, the land market will be less active. Where sales of land do occur, it will be the richer farmers who purchase land from the poorer farmers. However, unless they have plots elsewhere, the vendors will almost

invariably retain some land. They will subdivide their plots and sell off parts of them in order to raise some cash, but the smaller the plots that remain the more reluctant they are to sell. This stage has been reached in Gathinja where there is considerable pressure on the land; the plots are small and support an increasingly large number of people, but the prediction that farmers would sell up their small, uneconomic plots to their richer neighbours has not been fulfilled. Land sales are very rare and the pattern of holdings remains much as it was when the first registry map was drawn up. Insofaras the richer farmers accumulated land at the expense of the poorer, and evidence of this is strong though largely circumstantial, it was done in the years prior to land registration.

This section of the present chapter has attempted to show that there emerged during the post-war period a group of people, loosely called "better farmers", whose fathers had in many cases succeeded in exploiting the new opportunities offered by colonial rule. The "better farmers", it has been argued, manipulated to their own advantage the various institutions established both before and after independence to promote agricultural development. It is they who appreciated the nature of land consolidation and registration and the benefits likely to result from these policies; it is they who profit from the creation of a market in land; it is they who receive most help from the agricultural extension services and it is they who attract credit from the various lending agencies. The process is cumulative; the rich become richer at an increasingly faster rate and the poor become poorer at a similar rate. In the following section the effect of this process on social structure is considered and some predictions as to possible future developments hazarded.

(iii) Changes in the social structure.

Hardly a day passes in Kenya without one newspaper or another referring to the pitiful plight of the landless on the one hand and the scandal of land accumulation on the other.[71] While, however, it has long been recommended that holdings above a certain size should be prohibited[72] and indeed a motion to that effect has been put before the National Assembly,[73] no ceiling on landholdings has ever been imposed. It seems, though, that the outcry has generally been directed at the accumulation of land in the former White Highlands by prominent Kenyan politicians and civil servants; the fact that 500 acres was the land ceiling suggested in the debates on the Land Control Bill 1967 would certainly indicate that this is the case. Nevertheless it is arguable that the accumulation of land throughout Kenya by national figures is parallelled by the accumulation of land in the former Special Areas by prominent figures of the locality and that developments in East Kadianga sublocation, for example, mirror, in microcosm, developments in Kenya as a whole.

The gradual accumulation of land and other sources of wealth in the hands of a relatively small group of farmers in the two field-areas has been described in the previous section of this chapter. It has had two closely inter-related consequences. On the one hand, an increasing proportion of the "better farmers" work and sometimes live

71. The following extract is fairly typical. "It is being said that recently some dignitaries got together and decided to allocate the free land along the Ngong Hills. Some of those who were given land already own many acres; others have acquired a number of shambas all over the district. There are many genuine landless people at Ngong who need greater consideration whenever there is free land to be distributed to wananchi". Daily Nation, November 6th 1973.

72. See e.g. the Report by the subcommittee of the Kenya African Affairs Committee, "Land titles in native land units", 1950 J.A.A., Vol II, No.2, p.19 at p.21 and the East Africa Royal Commission, 1953-1955, Report (Cmd.9475, 1955), ch.23, para.35.

73. Republic of Kenya, National Assembly Debates, 1967, Vol.11, col. 20. An amendment to the Land Control Bill 1967 to similar effect was equally unsuccessful; ibid., 1967-8 Vol.13, col.2765.

away from their land, leaving their families or employed labourers to look after their farms. On the other hand, the poorer farmers are finding it increasingly difficult to support their growing families on their plots and while they will rarely be induced to sell their plots, more and more members of these families will be obliged to seek paid employment elsewhere. Some will go to try their luck in Nairobi or the nearby town; others will work as labourers on the farms of their richer neighbours. Work on coffee plantations is only seasonal and it is particularly at picking time that labour is needed; at this time the men, women and children of the poorer families can earn enough to tide them over a few months.

Even in the early days of land consolidation it was envisaged that the poorer farmers would provide a source of labour for the richer ones. Discussing the abortive villagisation policy, one administrative officer wrote that "the progressive farmer with an economic holding must sooner rather than later return to live on his land... A small labour force will be required by these farmers and this can best be provided by local villagers with little or no land of their own."[74] While in Kabete-Obuya and Kamnwa-Keyo-Ogoro the employment of labour is not very widespread, the evidence suggests that it is likely to increase as the richer farmers acquire more land and the poorer farmers find it harder to live off their farms. Of the sixty-eight landowners interviewed, twelve employed labour on a permanent basis, usually only one labourer

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74. O.E.B. Hughes, "Villages in the Kikuyu Country", J.A.A., Vol VII, No.4 (1955), p.170.

but in one case as many as four.[75] All twelve landowners would be immediately recognisable as forming the core of the group of "better farmers". Eleven of them have off-the-farm incomes and two of them live away from their farms. The labourers they employ are not landless, strictly speaking. They all have access to land in the neighbourhood, but their plots are small enough or their families large enough to enable them to work elsewhere during the daytime; as far as could be ascertained, most (if not all) of the labourers went home at night.

The situation in Gathinja is fairly similar. Eight of the farmers interviewed employ labour on a permanent basis generally for the purpose of looking after grade cattle. All eight farmers have at least one off-the-farm source of income and two of them live away from their farms. Again the labourers are local people from families which do not own much land. The seasonal employment of labour, particularly at the time of coffee-picking, is much more widespread. No fewer than forty-eight of the seventy-four farmers interviewed employ labour at this time, sometimes as many as twenty workers. As the coffee-picking period is extremely short, the competition for labour is harsh. It is hard to assess the extent to which casual labour of this kind is paid in cash rather than organised between families on a reciprocal basis. Nevertheless, the person with little land is provided with the opportunity to earn money locally at certain times of the year, not only when coffee needs to be weeded or picked, but whenever one of his

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75. The proportion of farmers who employ labour is, of course, much smaller than these figures suggest since the majority of the better farmers was interviewed. Certainly no more than twenty farmers in this field-area would employ labour on a permanent basis.

richer neighbours requires help on his farm. It is doubtful, however, whether this opportunity will continue to exist for very long. In areas, like Gathinja, where sales of land are rare, the size of holdings remains constant and consequently the better farmers are likely to need less labour as their families grow. This in turn will force the poorer farmers or their sons to leave the locality in search of work elsewhere, work which it is becoming increasingly difficult to find. These people may never return home; they may drift into one of the shanty-towns that have sprouted up around Nairobi and there they may succeed in eking out a marginal living. Although they may be entitled to a plot of land in their home areas, their links and their families' links with these areas become weaker. They are in a sense landless.

It is tempting to analyse in class terms the increasing stratification of rural society that has been described in the course of this chapter. Certainly the group of "better farmers" could be identified as an embryonic rural middle class. It is in their hands that economic and political power in the rural areas is concentrated and, paradoxically, it is by virtue of their success in exploiting the new opportunities that they are allocated an important role in what remains of the traditional structure of society. One historian of Kenya writes: "Divisions based on the ownership of property began to emerge in the fifties whenever the consolidation of land took place. Such economic divisions tended to overlap political divisions: official chiefs, for example, tended to become a propertied class."[76] This is no doubt true, but today it is possible to find the opposite process occurring; persons who enjoy no traditional legitimacy but who have succeeded in Western terms will be accorded great respect by their

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76. C. Gertzel, The politics of independent Kenya, 1963-8 (Nairobi, East Africa Publishing House and Heinemann, 1970), p.12.

kinship groups and consulted on all family matters. To put it crudely, they have a foot in both societies and are capable of manipulating both societies to their own ends. However, it is difficult to describe them as a class as long as traditional institutions and values survive and loyalty to the family, the clan and the tribe retains its present importance. Patron-client relationships based on locally circumscribed loyalties of this kind cut across the links derived from a shared socio-economic situation which unite the "better farmers."

Lower down the scale it becomes more difficult to identify strata in rural society. On current trends it is possible to predict that the better farmers will expand their holdings and will employ as farm-labourers those who have been made landless as a result; even tenant-farming may become more common, though there is little sign of this at present. Differentiation on these lines has not yet occurred, but growing pressure on the land is bound to lead to the emergence of a rural proletariat. Moreover, the interests of the poorer farmers are increasingly being articulated through the political process and while they may not yet perceive themselves as a class whose interests conflict with those of the "better farmers", the growing disparities of economic and political power will not long go unheeded. Leys puts the point well when he writes that "... a cumulative process of differential recruitment into the salaried and landowning classes is at work whose consequences will be felt in the next generation much more keenly than they are now."[77]

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77. C. Leys, "Politics in Kenya: the Development of Peasant Society", University of Nairobi, Institute for Development Studies, Discussion Paper No. 102 (unpublished), December 1970, p.23.

(iv) Some case studies.

The present writer has neither the skills nor the information to attempt an analysis in class terms of rural society in Kenya and the comments made in the previous section are highly tentative, being based on evidence which is necessarily incomplete. It is, however, unlikely that patterns of land holding and land use do not provide a fairly reliable indication of the way in which rural society is evolving and it is proposed to close this chapter with a number of case-studies selected to illustrate the arguments that have been put forward in the course thereof.

Peter Onyango is a vigorous, efficient-looking man in his mid-sixties. He has a large, decently-furnished brick house on Nyabondo which is approached by a tree-lined path. His English is good and as he talks, he has a shrewd twinkle in his eye. His lucky day came fifty years ago when his uncle, the locational chief, was asked to nominate a young man to go to the provincial agricultural college. The chief nominated his nephew, Peter, then a youth who had recently completed his primary education. Peter studied agriculture for four years and in 1928 was employed by the government as an agricultural instructor. After the war he devoted himself entirely to developing his farm which he gradually extended by judicious purchases and exchanges, apparently spending no less than 4,000 shillings on purchases of adjoining farms at the time of land consolidation.[78] He was the first farmer to grow coffee on the plateau and one of the earliest to espouse the land consolidation programme. The colonial government sent him to other parts

78. Today he has a twenty-seven acre farm, one of the largest in the location.

of Kenya to see how the programme worked and he was appointed chairman of the first consolidation committee. It is alleged that he took bribes; in any case, the first consolidation programme was not successful and Peter was not appointed chairman of the second committee which was established a few years later.

Today Peter is an important figure in the area. In 1951 he had been elected to the Local Native Council and he has remained a member of the council (now the Kisumu District Council) ever since. He is a member of the Provincial Arbitration Board and of the Nyando Divisional Land Control Board. He owns a posho mill (a mill for grinding maize) and recently obtained a loan of 20,000 shillings from the Industrial Development Corporation to build a new mill. It seems that he defaulted in his repayments and that the Corporation was only prevented from foreclosing by the intervention of the local Member of Parliament, Peter's cousin. He employs two permanent workmen on his farm which is regarded as something of a showplace by the local agricultural officers and he recently obtained a loan for the growing of hybrid maize. His children have been well-educated and have good jobs in Nairobi.

Nevertheless Peter has by no means broken with traditional values; indeed his role within his clan is all the more important by virtue of his success in manipulating modern institutions. He has three wives and it is alleged that the Industrial Development Corporation loan was spent partly in raising bridewealth for his third wife and partly in providing lavish entertainment at the wedding. He has divided his land between his three wives and his sons will inherit it according to houses, as required by customary law, though he hopes it will still be run as a single unit. He is probably the most influential elder of his Jokakwaro

and has recently been engaged in discussions with the other elders concerning the future of the clan land on the siany. He favours the communal cultivation of a cash crop, like sugar, rather than the division of the land into a mass of tiny family strips, as some advocate, and his view seems likely to prevail.

Peter's biography is to some extent paralleled in that of Wilson Njoroge, a Gathinja farmer, though in Gathinja modern institutions like banks, cooperatives etc. play a much more important part in everyday life and traditional values are correspondingly less widely respected; indeed it is not uncommon to find people who are ignorant of the name of their clan. Wilson is now fifty and lives on a ridge overlooking the village; his land[79] stretches right down into the valley and he uses the lower part for grazing his grade cattle while cultivating coffee in the higher part near his house. His father was a relatively successful farmer and managed to send him and his brothers to the local missionary school. An apt pupil, Wilson went on to secondary school and thence to the Nyeri Teachers' Training College. He then returned home to become headmaster of the local primary school.

He realised early on the value of land and began to buy fragments, keeping records and calling witnesses to guard against the possibility of future disputes. When, in 1951, the colonial government allowed the cultivation of coffee, Wilson was one of the first farmers to take advantage of this opportunity. He was an original committee member of the local coffee cooperative and later became treasurer of the District Cooperative Union. In addition to owning one of the largest and most

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79. His farm is about twelve acres in area, a large farm for this district and he has another fragment of one acre nearby.

prosperous farms in the sub-location, he has bought a shop as well as shares in a tobacco company. He finances his various activities partly out of profits from the sale of his coffee and partly from bank loans. He has two wives, having married a second time in the hope of getting a son, but the farm is run as a single unit. He employs five people on a permanent basis and a further half a dozen people at particular times of the year. Unlike Peter, Wilson takes no direct part in local politics, but both men would exert considerable influence over the opinions of their relations and neighbours and their support would be courted by aspiring Parliamentary candidates.

A final case-study will serve to illustrate the links that unite the local and the national scenes. Samson Mwangi is a brisk, business-like man in his mid-sixties. Born in Gathinja he went to the local mission primary school where he was singled out by an English missionary for help and encouragement. As a result he became the first boy from the northern part of the Central Province to go to the prestigious Alliance Secondary School in Nairobi. He later returned home and became the first African to teach at the local teachers' training college. After spending many years as headmaster of the local primary school, he retired in order to devote himself to his business activities, although he still does some part-time teaching at the school.

He was his clan representative on the second consolidation committee, of which he was the secretary. He has a six-acre coffee farm within the location and has bought a fifteen-acre farm on a nearby settlement scheme; apparently the local chief proposed him for a plot on the scheme owing to the fact that he had several children but little land. He also owns a bar in his village and he bought a new Toyota van which he uses for

bringing goods from the nearby town. While he charged his land to the bank in order to raise money to purchase the bar, he also receives help from his sons. A relatively rich man, he was able to educate his three sons to a high level. One son works as a Community Development Officer; one son is managing-director of a para-statal corporation, owns many farms, has property interests in Nairobi and is a prominent figure throughout the country; the third son manages one of his brother's farms, a carnation farm which exports to the United Kingdom. Samson is reluctant to say how he intends to leave his land, but it is clear that, though he is a wealthy man by local standards, his sons' business interests are of such a substantial nature that rights of inheritance to their father's land do not concern them very much.

There can be few family histories which illustrate so well the social changes that have occurred over the last fifty years. Samson's father was an ordinary farmer who died when Samson was a boy. Samson, through a combination of talent and good luck, achieved wealth and status within his local community. His sons have in turn surpassed his level of achievement; their interests extend beyond their native area and one, at least, is a national figure. Like Peter and Wilson, Samson exploited the opportunities that arose during the colonial period from the growth of education and the development of trade. Moreover it has been one of the arguments of this chapter that it is people like them who have manipulated to their own advantage the institutions that have become important since land registration, the land market, the credit facilities and the agricultural extension services. It is people like them who are gradually coming to constitute a class united by a common education, a common language (English), a common economic interest and a common political programme. Even though today links based on kinship

and tribal loyalties remain strong, the growth of education combined with the increase in mobility, particularly the abandonment of their home areas by the richest and the poorest inhabitants, is likely to lead to the emergence of a class structure both in urban and rural society. Such a process may be inevitable but it has certainly been accelerated by the land registration programme.

C H A P T E R VII

LAND CONTROL - A POSSIBLE SOLUTION

1. Introduction

A system of land control whereby no disposition of registered land would be valid without the consent of a certain official or body could be used as a device for forestalling or mitigating some of the less desirable effects of registration which have been discussed above. Thus the proprietor who obtained first registration by fraud could be restrained from disposing of the land against the wishes of his defrauded kinsmen. Moreover, both the process of refragmentation and the development of uneconomic parcellation could be checked by an effective system of land control. Finally, such a system could be used to prevent land accumulation and its counterpart, increasing landlessness.

The success of any system of land control in achieving such goals will depend primarily on two factors: the grounds on which consent to any given transaction is refused and the sanctions available for ensuring both that dispositions of registered land are controlled and that decisions of the controlling authority are observed. The importance of these two factors will become apparent when the present system of land control is examined. This system is based on the Land Control Act 1967, though the history of land control goes back much further; it is an interesting and chequered history which it would be helpful to outline before considering the system that exists today.

It had long been recognised that some system of land control would be necessary if the benefits of land consolidation and registration were to be maintained. The East Africa Royal Commission recommended the establishment of such a system, giving its reasons in the following terms: "Elsewhere the individual ownership of land in peasant communities has sometimes led to the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little alternative income-earning opportunity for those who have parted with their land."[1] Of the three reasons given by the Commission, only one is purely economic, namely the danger that the fruits of consolidation would not be reaped if uncontrolled re-fragmentation were allowed to occur. The two other reasons given, namely the connected dangers of peasant indebtedness and land accumulation, are primarily social in that their effect on the economic development of the land is not necessarily adverse. Unfortunately the Commission said little about how these consequences were to be avoided and it was left to the Working Party on African Land Tenure[2] to make recommendations in this regard and to draw up a bill which laid the foundations of the modern system of land control. This Bill, which was enacted in 1959 as the Land Control (Native Lands) Ordinance,[3] was modelled on the Land Control

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1. East Africa Royal Commission, 1953-1955, Report (Cmd.9475, 1955), Ch.23, para.28. These reasons are elaborated upon in paras. 29-35.

2. Report of the Working Party on African Land Tenure, 1957-1958 (1958).

3. No.28 of 1959. Renamed the Land Control (Special Areas) Ordinance by the Kenya (Land) Order in Council 1960, L.N. No. 589 of 1960. S.21(1) and Sched. I.

Ordinance 1944,[4] which had introduced a rather different system into the White Highlands some years previously.

While it had long been government policy to subject grants of land in the White Highlands to development conditions designed to discourage land speculation and ensure development, it was not until 1944 that a formal system of land control was established there. The Land Control Ordinance of that year was introduced partly to provide a more effective way of enforcing development conditions and partly to facilitate further European settlement by deterring land speculation and preventing the accumulation of large holdings. To achieve these various goals a single control board was established composed of the Commissioner for Lands, the Financial Secretary, the Director of Agriculture and six other persons appointed by the majority of the European Elected Members of the Legislative Council present and voting at a meeting convened for the purpose.[5] Most dealings in land required the consent of the Board[6] and without such consent any agreement to effect any such dealing was void.[7] The Board was empowered to refuse its consent on four grounds, namely where it considered that the applicant already had sufficient land, or that the area of land was likely to prove uneconomic for the purpose for which it was intended, or that the terms and conditions of the sale were onerous, or that the proposed selling price or rent was

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4. Cap.150 (1948). The Ordinance was repealed and replaced by the Land Control Regulations 1961, L.N. No.142 of 1961, issued under the authority of the Kenya (Land) Order in Council 1960, s.14(1)(c). These regulations were in turn revoked by the Kenya (Land Control) (Transitional Provisions) Regulations 1963, L.N. No.457 of 1963 (as amended), which, together with Ch.XII, Part 3 of the Constitution, sought to unify the system of land control in Kenya; See infra, pp. 342 et seq.

5. Land Control Ordinance 1944, s.3(2).

6. Ibid., s.7(1).

7. Ibid., s.7(2).

objectionable.[8] These provisions clearly constituted a serious invasion of the doctrine of freedom of contract and it is interesting to note that of the four grounds laid down only the second was designed to promote economic development of the land in question. Moreover the Board was empowered both to make the grant of its consent conditional on certain kinds of development being undertaken[9] and non-compliance with these conditions rendered the land liable to forfeiture.[10]

However effective the system may have proved in the White Highlands,[11] it was clearly an inappropriate model to be adopted in the Native Lands where conditions and needs were so drastically different. In fact, the Bill drawn up by the Working Party bore little resemblance to the Land Control Ordinance 1944 except insofaras it accepted the general principle of control by statutory boards. Under the Land Control (Native Lands) Ordinance 1959, the Minister for African Affairs was empowered to apply the Ordinance to any area of the Native Lands[12] and the Provincial Commissioner in any such area was empowered to divide the lands into divisions[13] in respect of which Divisional Native Land Control Boards would be set up;[14] in this way and also by providing for a large number of locally elected representatives to sit on the Boards,[15] the Ordinance attempted to ensure the system's acceptability at grass-roots level.

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8. Ibid., s.8(1)(b). The fourth ground was deleted by the Land Control (Amendment) Ordinance, No.46 of 1950, s.2(a).

9. Ibid., s.8(1)(c).

10. Ibid., ss.13,14.

11. In fact, the board very rarely rejected applications. For example, in 1956 only 3 applications of a total of 1,141 were rejected and in 1957 only 7 out of a total of 1414, Colony and Protectorate of Kenya, Lands Department, Annual Reports, 1956-7.

12. s.3(1).

13. Ibid., s.3(2).

14. Ibid., s.4(1).

15. Ibid., s.4(1)(d).

Appeals against the decisions of the Divisional Boards lay to the District Commissioner[16] and thence to the Provincial Native Land Control Board whose decision was final and conclusive and was not to be questioned in any court.[17] Thus, from the start, the land control system was characterised by its decentralisation, its dependence on local representation and its exclusion of the courts, and these remain central features of the present system, as will be seen shortly.

Even though most dealings with land in any area to which the Ordinance had been applied required the Board's consent, surprisingly little attempt was made to define the grounds on which the Boards should refuse their consent. Certainly the Provincial Boards were empowered to direct that a Divisional Board should not give its consent to any transaction whereby any separate parcel of land would be created which fell below the minimum area laid down for that division by the Provincial Board,[18] but uneconomic parcellation of land was only one of various dangers that had been foreseen and it is surprising that no provision was made to prevent the unsophisticated landowner selling his land to his wealthier neighbours or to moneylenders, a problem which had deeply concerned both the East Africa Royal Commission and the Working Party.[19] It is even more surprising that nothing specific was done about this problem in view of the Minister for African Affairs having stated in the Legisla-

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16. Ibid., s.9.

17. Ibid., s.12(1).

18. Ibid., s.11(1)(b).

19. The Working Party felt it was sufficient to give the Boards a very wide discretion which would enable them "to forbid, for instance, if they so wish, the alienation of land outside the tribe, clan or family group, and also to exercise some restraint over the newly emancipated landowner who wishes to sell his land to the detriment of his family". Report of the Working Party on African Land Tenure 1957-8, (1958), para.101.

tive Council debates that the Bill had four objectives, to prevent, firstly, uneconomic fragmentation, secondly, the accumulation of land for speculative purposes, thirdly, widespread unproductive indebtedness and, fourthly, transactions detrimental to the landowner's family which may occur when he realises he has a negotiable asset.[20]

The Land Control (Special Areas) Regulations 1961[21] repealed and replaced the Land Control (Special Areas) Ordinance 1959; this seems to have been a transitional step on the way to amalgamating the two systems of land control in Kenya. In any case, the Regulations introduced no major changes and were themselves revoked and replaced by the Kenya (Land Control) (Transitional Provisions) Regulations 1963[22] which together with the Kenya Constitution[23] formed the system of control until 1967. The 1963 Regulations were intended to deal with land control until provision for a more appropriate system was made in accordance with the Constitution. Although the discriminatory nomenclature of Special and Scheduled Areas had been jettisoned[24] and although the two land control systems had apparently been integrated, the two areas continued to be treated differently in a number of respects. Particularly interesting are the different provisions relating to the grounds for refusal of consent. In the former Scheduled Areas it was provided that a Board should not refuse consent save on agricultural or economic grounds;[25] this

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20. Colony and Protectorate of Kenya, Legislative Council Debates, 1959, Vol. LXXX (pt.1), para. 1257.

21. L.N. No.147 of 1961. These Regulations were made under the authority of the Kenya (Land) Order in Council 1960, L.N. No.589 of 1960, s.14(1)(c).

22. L.N. No.457 of 1963. These Regulations were made under the authority of the Kenya Order in Council 1963, L.N. No.245 of 1963, s.11(1). They also revoked the Land Control Regulations 1961 which until then had applied in the Scheduled Areas; see above note 4, p.339.

23. The Kenya Independence Order in Council 1963, L.N. No.718 of 1963, introduced the Constitution of Kenya of which Chapter XII, Part 3 related to the control of transactions in agricultural land.

24. Kenya (Amendment of Laws) Agriculture Regulations 1962, LN. No.352 of 1962.

25. Constitution of Kenya 1963, s.219(1), proviso.

provision reflected an important change of policy, since both under the Land Control Ordinance 1944 and under the Land Control Regulations 1961 which replaced that Ordinance the Board was also empowered to refuse its consent where the person seeking to acquire land already had sufficient land and where the terms and conditions of the dealing were unduly onerous.[26]

With regard to the former Special Areas, however, the Constitution did not insist on purely economic criteria being applied by the Divisional Boards which were empowered to grant or refuse consent in their absolute discretion;[27] nevertheless it was provided that "a Divisional Board shall when appropriate, have regard to the effect which the grant or refusal of consent may have on the economic development of the land concerned or on the raising or lowering of the standards of good husbandry within the division...".[28] Such a provision would suggest that it was the potential economic benefits to be gained that recommended the system of land control to the new government.

Whatever justification there may have been for maintaining the dual system, it was clear that it could not long survive the large-scale transfer of European-owned farms to individual Africans and African companies and the establishment of settlement schemes in the former Scheduled Areas. The 1963 Regulations finally expired in 1967[29] and were replaced by the Land Control Act 1967 the effect of which was to impose a uniform system of land control throughout Kenya.

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26. The Ordinance was concerned to protect both parties, but the Regulations only empowered the Board to refuse its consent where the terms were unduly onerous on the person acquiring the land, Land Control Regulations 1961, s.11(b)(iii).

27. Constitution of Kenya 1963, s.219(1).

28. Ibid., s.219(2).

29. The Kenya (Land Control) (Transitional Provisions) Regulations 1963, as amended by L.N.523 of 1963, L.N.578 of 1963 and L.N.712 of 1963, were renewed by the Constitution of Kenya (Amendment) Act 1965, No.14 of 1965, s.6(7) and further renewed by the Constitution of Kenya (Amendment) Act 1966, No.16 of 1966, s.4 and Sched 2.

The Act empowers the Minister of Lands and Settlement to apply the Act to any area[30] and to divide any such area into divisions.[31] He is required to establish a land control board for every land control area or, where it is divided into divisions, for each division;[32] thus the principle of decentralisation, first proposed by the Working Party on African Land Tenure, has prevailed.[33] Any transaction affecting agricultural land within a land control area requires the consent of the appropriate land control board and, unless that consent has been given, it is "void for all purposes."[34]

This brief outline of the history of land control in Kenya has illustrated both the variety of aims that a control system can be designed to achieve and the variety of systems that can be established to achieve these aims. Any control system by its nature interferes with freedom of contract and has to be justified in terms of some more important objective, be it economic development or social justice. It is now proposed to examine the present Kenya land control system in some detail and to evaluate its success in terms of its own aims and its potential ability to deal with some of the problems discussed in the previous chapters.

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30. S, 3
31. Ibid., s.4.
32. Ibid., s.5.
33. Supra, p. 340.
34. Land Control Act 1967, s.6(1).

2. The land control system today.

(i) Introduction.

Although regrettable delays in establishing land control boards have occurred, there can be little doubt today that the land control board is an established and well-known institution in most registered areas. Given its unquestioned importance, it is perhaps surprising that so little research has been undertaken on the working of the system. The present writer has endeavoured to discover anything relevant that has been written and in some instances the law reports throw an interesting light on some of the problems that have arisen in this connection, but generally he has had to rely heavily on his own fieldwork and, in particular, his experience of two land control boards, the Nyando board and the Kiharu board, both of whose sittings he has attended and whose members he has questioned.

The Nyando division and the Nyando land control board were established in 1968.[35] Previously land control in this area had been exercised by the Kisumu Divisional Board,[36] but as the registered areas of South Nyakach are situated a long way from Kisumu and as land adjudication had been proceeding fairly rapidly throughout the district, it was obviously desirable that a separate board be established for the southern part of Kisumu district. Nevertheless, owing to delays in the

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35. L.N. No.48 of 1968.

36. Established by L.N. No.521 of 1963; additional members were appointed by L.N. No.573 of 1963.

implementation of the land adjudication programme in North and South Nyakach, the business of the Nyando board is not very heavy,[37] being confined (at the date of research) to applications from only 2 sub-locations, namely Kajimbo and East Kadianga (which consists of three adjudication sections, Kabete-Obuya, Kamnwa-Keyo-Ogoro and Dianga East). The meetings of the board take place at the headquarters of the District Officer, no more than an hour's walk from the furthest corners of the two sub-locations.

The Kiharu Division[38] and Divisional Board[39] were originally established in 1963 under the Kenya (Land Control) (Transitional Provisions) Regulations 1963 and both the Division and the Board were re-established under the Land Control Act in 1967.[40] The board covers a vast area, composed of 5 locations;[41] all the land in these locations has been registered, most of it a long time ago; the board is consequently extremely busy, as can be seen from the number of applications made in recent years.[42] Here again the board meets at the headquarters of the District Officer which are situated at one end of the division, thus compelling some applicants to cover considerable distances; local communications are good, however, and there can be few farmers without convenient access to a bus route.

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37. In 1970, 35 applications were heard; in 1971, 79; in 1972, 58. Nyando land control board minutes, Land Registry, Kisumu. See tables below p. 367.

38. L.N. No.713 of 1963.

39. L.N. No.714 of 1963.

40. L.N. No.256 of 1967 and L.N. No.287 of 1967.

41. One of these locations, Weithaga location, contains Gathinja sub-location, one of the writer's research areas.

42. In 1971, there were 1,111 applications; in 1972, 771; in 1973, 1033. Register of Applications to the Kiharu board, Land Registry, Muranga. See tables below p. 367.

The present writer was given a friendly welcome by both boards and every effort was made to answer his questions and to explain to him the proceedings. He found no significant differences in the working of the two boards and though the discussion that follows will be largely based on his knowledge of the working of these boards, it is likely that any generalisations made could be fairly applied to the working of land control boards throughout the country.

(ii) Composition of the boards.

The question of composition is clearly a crucial one and one to which two fundamentally different approaches are possible. On the one hand, the boards could be modelled as far as possible on traditional institutions of an analogous nature; members would be drawn from the ranks of the local elders and would be distinguished by their knowledge of the area and the authority which they enjoyed within their clans. Provision could be made, as it was made in the Land Control (Native Lands) Ordinance 1959,[43] for the election of the majority of board members; elections could perhaps be organised along the lines of the elections of land adjudication committee members. The Lawrance Mission certainly favoured the local election of the majority of board members[44] and the arguments in favour of such a proposal are obvious; it would

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43. S.4(1).

44. Lawrance Mission Report, para.292.

ensure that members were aware of local problems and responsive to local needs; the boards would enjoy a certain legitimacy which would in turn promote their effectiveness. On the other hand, reliance on traditional institutions can only be justified as long as they are required to carry out traditional functions, for the loyalty which they command may not survive a crucial change of role. In areas where traditional institutions have lost their former importance, such arguments would not apply and the elected members would no doubt come from the ranks of the teachers, traders, officials and more successful farmers, that is, from those who represent the ideals that have largely replaced traditional ideals.

The second approach would be to compose the board of government officials whose expertise enabled them properly to appreciate and implement the goals of the land control system and whose relative ignorance of local problems would ensure that proceedings were conducted impartially. Such a board would perhaps resemble the arbitration boards discussed above.[45] A point of view frequently expressed in the debates on the Land Control Bill would apply with even greater reason to such a proposal; thus one member of the National Assembly claimed, "... the board will be full of no other but civil servants and civil servants' stooges. Therefore the people of a given area are not going to get the chance to be represented by people they would like to be on this board."[46] This comment accurately reflects the widespread resentment, already noted in other contexts, of the faceless offical, the outsider who executes alien policies and whose loyalties are to another world.

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45. Supra, p. 97.

46. Republic of Kenya, National Assembly Debates, 1967-1968, vol.13 (pt.2), col.2497, per Mr. Shikuku.

Any policy depending on local cooperation which fails to take this point of view into account is bound to fail.

The Land Control Act 1967 takes a middle way between these two approaches and, while rejecting the idea of elected members, nevertheless provides for a substantial degree of local representation. The Schedule to the Act provides:[47]

> A land control board shall consist of -
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> (a) the District Commissioner of the district in which the land control area or division is situated, or a District Officer deputed by him in writing, who shall be chairman;
>
> (b) not more than two other public officers;
>
> (c) two persons nominated by the county council having jurisdiction within the area of jurisdiction of the board;and
>
> (d) not less than three and not more than seven persons resident within the area of jurisdiction of the board,
>
> all appointed by the Minister:
>
> Provided that -
>
> (i) not less than eight and not more than twelve persons shall be appointed as members of the board; and
>
> (ii) more than one-half of the members of the board shall be owners or occupiers of agricultural land within the jurisdiction of the board.

In practice, the Minister appoints members under sub-section (d) on the advice of the local District Commissioner or District Officer, who may or may not hold elections, but will in any case seek to ensure fair representation for all the locations in the division. The members of

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47. S.1.

both the Nyando and the Kiharu boards were drawn generally from the ranks of the more educated and more prosperous farmers. At the first meeting of the Nyando board that the writer attended[48] the chair was taken by an Assistant Education Officer (in the absence of the District Officer) and the other members present included a chief, an ex-chief, a district councillor, a farmer, the district Agricultural Officer and the Veterinary Officer, all of who (except the last two) had large farms in the area. The ex-chief and a local member of the National Assembly (absent on this occasion) were the two members appointed by the Kisumu District Council. The chief of the second location in the division was also absent on this particular occasion.

The composition of the Nyando board is typical. The members are men who, for one reason or another, have successfully exploited the opportunities that have arisen in recent years; they are educated, they speak English, they are prosperous farmers and they enjoy off-the-farm incomes. Though they may still exercise authority in traditional terms, as elders of the clan, for example, their appreciation of the realities of economic and political power sets them apart from the majority of their fellow-clansmen. It is largely on them that the effectiveness of the land control system depends.

(iii) Procedure of the boards:

The Land Control Act 1967 provides that the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with

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48. It took place on August 29th, 1973. The Land Registrar, Kisumu, acted as Secretary to the board.

agricultural land which is situated within a land control area, and the division of any such agricultural land into two or more parcels to be held under separate titles are void for all purposes unless the local board has given its consent;[49] the transmission of land on the death of the registered owner does not require the board's consent unless it will result in the sub-division of the land, nor do mortgages in favour of certain public bodies.[50]

The general procedure is as follows. The parties to a controlled transaction go to the land registry and fill in forms applying for the local board's consent; their application is entered in the presentation book and they are asked to attend the following board meeting. If either, or both, of them fails to attend the meeting, the hearing of their application will be deferred till the next meeting; the hearing may be deferred a second time, but if at the third meeting (meetings occur once a month) one of the parties is absent, then the application is deemed to have been refused.[51] There is nothing in the Act requiring either party to attend the meeting, although the board has the power to order the attendance of the applicant or any person interested in or affected by the application,[52] and it will be seen below[53] that this self-imposed restriction on its freedom of action may, in some cases, diminish the board's effectiveness.

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49. Land Control Act 1967, s.6(1)(a) and (b).

50. Ibid., s.6(3)(a) and (b). These exceptions will be discussed infra, p. 369.

51. Ibid., s.9(2), which provides, "Where an application for consent in respect of controlled transaction is made to a land control board, and the board does not determine the application within a period of three months after the application is made, the application shall be deemed to have been refused at the expiry of that period." Thus, where a board defers an application beyond the three-month period, pending the gathering of information about the applicants' circumstances, and subsequently gives its consent, this consent is a nullity being based on a non-existent application; Wambua v. Wathome and another, [1968] E.A. 40.

52. Land Control Act 1967, s.17(1)(a).

53. Infra, p. 368.

Suffice to say here that applications are frequently deferred and finally deemed refused owing to the absence of one or other of the parties.

If both parties are present, then the hearing will go ahead and usually a decision will be reached on the spot, although occasionally hearings are deferred for the purpose of collecting further information or summoning witnesses. The boards have generally worked out their own procedures. The sittings are in private and the proceedings conducted in an inquisitorial manner;[54] the parties are questioned in turn, first by the chairman and then by other members of the board; they are then asked to leave the room while the board comes to its decision. At this stage the Agricultural Officer may give his views, members acquainted with the parties may impart their knowledge and the atmosphere becomes almost convivial. Finally the parties are recalled to hear the board's decision and, if the decision is in their favour, they will be requested to sign the appropriate registry forms before leaving.

This procedure has little in common with that followed at the meetings of traditional bodies or even meetings of the land adjudication committees. The private nature of the hearing, the mode of cross-examination which puts a sharp distance between board and applicant, the briskness with which hearings are conducted and the hasty dismissal of problems outside its jurisdiction all combine to illustrate this difference.[55]

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54. The vernacular is used, if it is understood by everyone present; otherwise English or Swahili would be used.

55. Thus at one meeting a man came forward to demand the repayment of a sum of money he had purportedly paid in pursuance of an agreement to sell land which the vendor had later refused to implement. The Chairman of the Board, the local District Officer, was clearly disposed to discuss the problem, but the Land Registrar and other members were swift to point out that it lay outside the competence of the board.

(iv) The decisions of the boards.

The brief outline of the history of land control in Kenya sufficed to show the variety of objectives that a land control system can be designed to achieve. These objectives can be conveniently, if somewhat crudely, be classified as economic or social. Economic objectives would typically include the prevention of fragmentation, uneconomic parcellation and the unproductive accumulation of land for speculative or prestige purposes; a land control system designed to further these goals would be concerned to ensure that plots were farmed by those most likely to develop their full potential. Social objectives, on the other hand, would include the prevention of indebtedness, landlessness and land accumulation (whether it resulted in greater productivity or not) and a land control system established for these reasons would no doubt be obliged to investigate the financial and family circumstances of the applicants and the terms of every transaction.

It is obviously possible that economic and social objectives will on occasion conflict and it is therefore particularly desirable that the objectives of any land control system be made explicit. In the Scheduled Areas, under the Land Control Ordinance 1944, the board was empowered to refuse its consent on a variety of social and economic grounds,[56] although under the Constitution boards in the former Scheduled Areas were not empowered to refuse consent save on agricultural or economic grounds.[57] On the other hand, in the Native Lands no attempt was made in the Land Control (Native Lands) Ordinance 1959 or its

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56. See supra, p. 340.

57. See supra, p. 342.

successors to define the criteria which boards should adopt, even though the control system was a direct result of the recommendations of the East Africa Royal Commission and the Working Party on African Land Tenure.[58] By contrast the Land Control Act 1967 defines very clearly the criteria on which boards are to proceed and it is interesting to note that the criteria are virtually all economic. The provision is worth quoting in full:[59]

> In deciding whether to grant or refuse consent in respect of a controlled transaction, a land control board shall -
>
> (a) have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the land control area;
>
> (b) act on the principle that consent ought generally to be refused where -
>
> (i) the person to whom the land is to be disposed of -
>
> (a) is unlikely to farm the land well or to develop it adequately; or
>
> (b) is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or
>
> (c) already has sufficient agricultural land; or
>
> (ii) [Not relevant in the present context.]
>
> (iii) the terms and conditions of the transaction (including the price to be paid) are markedly unfair or disadvantageous to one of the parties to the transaction; or

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58. See supra, p.338. The latter report stated that boards should have discretion to prevent sales outside clans or families and sales which would result in suffering for the seller's family; Report of the Working Party on African Land Tenure, 1957-1958 (1958), para. 101.

59. S.9(1), as amended by the Land (Group Representatives) Act 1968, s.32.

(iv) in the case of the division of land into two or more parcels, the division would be likely to reduce the productivity of the land;

(c) refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not -

(i) a citizen of Kenya; or

(ii) a private company or cooperative society all of whose members are citizens of Kenya; or

(iii) group representatives incorporated under the Land (Group Representatives) Act 1968.

It seems that social considerations are only relevant in two instances. In the first place, the board should generally refuse its consent where the person to whom the land is to be disposed of already has sufficient land;[60] the definition of 'sufficient' is not clear, but in the context it would seem to mean 'sufficient to develop efficiently' rather than 'sufficient for his family's needs'; if this interpretation is correct, then this provision merely introduces another economic criterion. That this is the correct interpretation would seem probable from a passage in the Handbook issued to guide land control boards which reads:

> It would be wrong for the Board to turn down an application merely on the grounds that a man already has a bigger plot than most. The prime considerations are the economic development of the land, the maintenance of good farming standards and the availability of land generally.[61]

Secondly, section 9(1)(b)(iii), by requiring the board to refuse its consent where the terms of the transaction are unfair, harks back to

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60. Land Control Act 1967, s.9(1)(b)(i)(c).

61. Republic of Kenya, Ministry of Lands and Settlement, The Land Control Act. A Handbook for the guidance of land control boards, (1969), p.8.

the Land Control Ordinance 1944[62] and introduces a wholly non-economic consideration inasmuch as the provision is designed to protect the unsophisticated landowner (and, possibly, the innocent purchaser) rather than to promote agricultural development. In practice, however, the boards ignore this provision; the writer raised this question with both the Nyando and the Kiharu boards and was assured on both occasions that the boards favour a 'willing buyer willing seller' approach and do not concern themselves with the terms of the transactions. Examination of the records, moreover, discloses no instance where consent was refused either on the grounds that the purchaser already had sufficient land or because the terms were unfair. Thus, insofaras the Land Control Act 1967 tried to introduce non-economic criteria,[63] it has failed.

The question then arises as to whether the boards use the economic criteria laid down in the Land Control Act 1967 and, if so, which particular criteria are used and, if not, on what grounds are their decisions based. It is possible from the records to discover why consent was refused in any individual instance, but attendance at the board's deliberations is really necessary in order to appreciate the factors that influence its decision.

Of all the economic factors which the Land Control Act 1967 requires boards to take into account, only one in practice is considered relevant, namely the undesirability of uneconomic parcellation.[64] It is

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62. S.8(1)(b).

63. Section 9(1)(c)(i) and (ii) is an exception, though it should be noted that President often uses his power (conferred by section 24 of the Act) to exempt transactions from the provisions of the Act in favour of non-Kenyans and non-Kenyan companies.

64. Ibid., s.9(1)(b)(iv). As sub-divisions have been extremely rare in Gathinja sub-location but common in East Kadianga sub-location, the discussion of sub-divisions which follows is based on the writer's knowledge of the workings of the Nyando board.

obviously difficult to decide what is the minimum size required for an economically viable holding; however, the Agriculture Department attempts to do this and for East Kadianga sub-location has fixed the minimum at 6 acres. As rather over 90% of the holdings in the sub-location are less than 6 acres, sub-divisions could rarely occur if the economic minimum was strictly adhered to and nowadays the question to be considered is not whether the holdings to be created by the proposed sub-division would be less than the minimum economic size recommended by the Agriculture Department, but whether the sub-division would reduce the productivity of the land.[65] This, of course, is a much more difficult question to answer but the boards do seem to take it seriously and, where the relevant information is not immediately available, they may defer an application until the Agricultural Officer's report has been presented. In practice, consent is given to sub-divisions in the majority of cases, however minute the holdings that result.[66]

Where, however, the board feels bound by the Land Control Act 1967 to refuse its consent to a proposed sub-division, it may either reject the application outright[67] or it may attempt to satisfy the parties' wishes in other ways. One way is to suggest that the parties apply to be registered as proprietors in common of the piece of land; in this way, s.9(1)(b)(iv) is not infringed, the parties can sub-divide the land on the ground as they like and apply to the board for consent

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65. Republic of Kenya, Ministry of Lands and Settlement, The Land Control Act. A Handbook for the guidance of land control boards, (1969), p.10.

66. The smallest holding resulting from a registered sub-division that the writer encountered was two-thirds of an acre.

67. The consequences of rejection are discussed infra, p.367.

to the partition of the land, which will never be refused.[68] In this roundabout way the sub-division is finally achieved. This device was approved by the District Land Registrar.[69] In the period 1969-1973 (August) sixteen applications for sub-divisions coming from Kabete-Obuya and Kamnwa-Keyo-Ogoro were approved by the Nyando board and two were rejected;[70] the parties whose applications were rejected applied shortly afterwards to be registered as proprietors in common; they were successful and now intend to apply for partition.[71] Another device for avoiding the provisions of s.9(1)(b)(iv) has been reported by an economist working in the Kisii and Nyeri Districts of Kenya; he writes that where a proposed sub-division is likely to be uneconomic, "the Board's policy is to grant long leases... rather than approve outright sales."[72] It is hard to see why the grant of a lease of part of a holding should not be caught by s.9(1)(b)(iv), but this further illustrates the reluctance of the boards to refuse their consent to sub-divisions on economic grounds.[73]

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68. Strictly speaking the partition should be caught by s.9(1)(b)(iv) as it involves the division of the land into two or more parcels; the boards, however, are understandably reluctant to counter the wishes of the registered co-proprietors who have already, in all likelihood, sub-divided the land on the ground.

69. Under the Registered Land Act 1963, ss.105(1) and 106(1), the Land Registrar has powers, in certain circumstances, to prevent partition where it would adversely affect the proper use of the land or, where the resultant share would be below a certain minimum area. These powers do not concern the present discussion and, in any case, have never to the writer's knowledge been used.

70. Minutes of the Nyando land control board, Land Registry, Kisumu.

71. Information gained from interviews with the applicants.

72. R.J.A. Wilson, "Land Control in Kenya's Smallholder Farming Areas", East African Journal of Rural Development, vol.5, Nos. 1 & 2 (1972) p.123, at p.132.

73. Perhaps the argument of the board is that the sub-division is not permanent and that when the lease expires (the normal term is 10 years), the board will consider the development that has been undertaken before granting a renewal. The parties would be unable to avoid this situation by inserting in the lease an option to purchase the reversion, because the consent of the board would be necessary for the exercise of such an option, Russell v. Principal Registrar of Titles, [1972] E.A. 249 (C.A.)

The boards, therefore, are not being very successful in preventing the uneconomic sub-division of holdings. They are no doubt aware that a large number of unregistered sub-divisions occurs and that the rejection of such an application is likely merely to increase this number; it is hard for them to predict the effect of any proposed sub-division on the future productivity of the land; it is much easier simply to approve the application. Nor do they take account of the dangers of re-fragmentation and the unproductive accumulation of land. Nearly every sale of land that occurs results in a further fragmentation of holdings; if this continues at the present rate, another land consolidation programme will become necessary in the not too distant future; yet the boards are given no guidance in this respect and appear totally unaware of the problem.

If economic considerations carry little weight with the boards, it is pertinent to ascertain what considerations do. All the evidence indicates that they are social considerations and, in particular, the concern that the applicant or his family should not be rendered landless or left without sufficient land for their needs. As all applicants will be known to at least one member of the board, there is rarely any difficulty in verifying their accounts of their financial and family circumstances and their reasons for selling their land. The records are full of cases where applications to sell land have been deferred pending information that the applicant has land elsewhere or in order to hear his dependants' views on the proposed sale or in order to give him the opportunity of obtaining land elsewhere. Applications will generally be rejected if the applicant has no other land to go to or

if his family objects.[74]

There is certainly nothing in the Land Control Act 1967 which forbids the boards to take these social considerations into account or which requires the boards to reject applications on the grounds laid down in the Act and on no others; nevertheless it is clear that the land control system established by the Act is designed to promote agricultural development and that, as long as boards use social rather than economic criteria in reaching their decisions, these aims will be frustrated. The Handbook issued to boards deplores the great weight attached to social considerations and insists that they "should only take second place";[75] it emphasises that the landowner has absolute ownership of his land and "isn't subject to considerations and duties based on customary law...".[76]

The last statement raises an important point. The two main social concerns of the boards seem to be to prevent landlessness and to prevent transactions to which the applicant's family objects. The second concern has its roots in customary law under which a man would not be able to alienate his land without the consent of his clan elders who would often insist on him selling to a fellow clansman. The rôle of the clan elders as a land-controlling authority has virtually disappeared today.[77] Most

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74. Similar accounts are given by other writers e.g. C. Leys, "Politics in Kenya: the Development of Peasant Society", University of Nairobi, Institute for Development Studies, Discussion Paper no.102, 1970, note 45. See also M. Ali, "Political implications of land registration: a case-study from Nyeri district in Kenya", University College, Dar-es-Salaam, LL.B dissertation (unpublished), 1970, p.17.

75. Republic of Kenya, Ministry of Lands and Settlement, The Land Control Act. A Handbook for the guidance of land control boards, (1969), p.11.

76. Ibid.,

77. The writer encountered one man who felt unable to sell part of his land because his elder brother had refused his consent and one man who had consulted the jokakwaro elders before selling his land. Moreover in two cases where a man had sold his land without his brother's consent, the brother (who had land of his own) insisted in regarding the sale as redeemable; the purchaser, understandably, did not. Vestiges of the concept of family land are still to be found, but increasingly rarely.

registered owners are fully aware of their power freely to charge and dispose of their land. By limiting the exercise of this power in the way it does, the land control board appears to be playing the part formerly played by the clan elders. It is possible to justify imposition of this limitation on the power of the registered owner by seeing it as a means of avoiding the injustices that inadequate land adjudication can cause.[78] If a person achieves first registration by fraud or if land adjudication fails to protect interests in the land which were recognised under customary law, the land control board can to some extent force the registered owner to take account of the interests of the person he has defrauded and of those whose interests are unprotected, by refusing to give its consent to any transaction which ignores those interests. Laudable as this argument sounds, it is arguable that it is not an appropriate task for the land control boards to remedy deficiencies in the land adjudication process. The registration of individual title to land was introduced partly in order to free the landowner from the constraints of customary law, constraints which have largely died out in the last decade; it can hardly have been intended that they should be reintroduced by a statutory board.

The other main social consideration that influences the boards is the danger of landlessness. The chairman of the Nyando board, on being asked the purpose of land control, stated that it was to prevent landlessness and improvidence, and all his fellow-members agreed. The first question invariably put to someone who proposes to sell his land is whether he has other land to go to. If he has not, consent is likely

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78. These injustices and other ways of avoiding them have been discussed *supra*, ch.IV.

to be refused. It was, of course, one of the fears of the East Africa Royal Commission that the unsophisticated landowner might be tempted unwisely to sell or change his land[79] and the Lawrance Mission criticised the Land Control Bill for failing to make suitable provision for this danger.[80] There is no doubt that the danger has been grossly exaggerated; as has been suggested above,[81] little would induce the Kenyan farmer to sell his last piece of land, be it ever so small. The writer only came across two instances where consent was refused because the vendor had no other land;[82] so the board's paternalist concern is hardly necessary. Here again, as with the board's questionable insistence on the concurrence of the vendor's relatives in the proposed sale, it is open to doubt whether it ought to be its function to prevent landlessness by refusing it consent to transactions which would have this result.[83] In such cases it would be more appropriate to subject the improvident vendor to the more informal pressures of the chief, subchief or family.

Where a controlled transaction has been approved, the parties will, in the majority of cases, attend the Land Registry sometime afterwards to have the transaction registered. Nevertheless there remain a few instances where approved transactions are not registered.[84] One of two situations may arise. In the first place, the parties may have treated

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79. See supra, p. 338.

80. Lawrance Mission Report, para.287. Interestingly enough, Mr. Lawrance was able to report a few years later, "The procedure devised for control of dealings in land has been successful in its primary purpose of safeguarding the new landowners." J.C.D. Lawrance, "Land Consolidation and Registration in Kenya", University of London, Institute of Commonwealth Studies, Seminar paper (unpublished), 1969, p.5.

81. Supra, p. 314.

82. It would be interesting to know if the 'sales' took place unofficially; unfortunately both cases fell outside the writer's research area.

83. In this connection, it is curious to note that, where charges of land are brought before the board, consent is automatic even though non-repayment of the loan could in theory result in the chargor being rendered landless.

84. The writer came across three cases of this kind, all in East Kadianga.

the obtaining of the board's consent as a tedious, but necessary preliminary step; they may still be negotiating terms or the vendor may be waiting for the full purchase-price to be paid. There is, of course, a specifically enforceable contract in existence;[85] equally the parties could, be mutual agreement, resile. Alternatively, the parties may have implemented their agreement (for example, the purchaser may have paid the purchase-price and entered into possession), but have taken no steps to register the transaction, perhaps because they are ignorant of the need for registration or perhaps because they are reluctant to incur the necessary fees and transport expenses. In view of the large number of transactions that are neither registered nor approved,[86] it may seem absurd to isolate for particular treatment the relatively small group of transactions that have been approved but not registered, but the reason is that any Land Registry anxious to maintain the efficacy of the Land Register could tackle the problem of the non-registration of approved transactions without difficulty.

One obvious way of doing this would be to take the registers and appropriate forms to the board meeting and effect the registration of a transaction as soon as it had been approved; consent would not be given in cases where the parties were still negotiating terms. The objections to such a step are practical but not insuperable; it is inconvenient to take registers from the Land Registry and it is undesirable to mix Registry business with land control board business. An alternative and

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85. The application for the consent of the land control board would usually constitute a sufficient memorandum of the agreement to satisfy the requirements of the Law of Contract (Amendment) Act 1968, No.28 of 1968, s.2(b).

86. These were discussed supra, ch. V.

more cumbersome course of action would be for the Registrar to use his powers under the Registered Land Act 1963. If several weeks elapse without the parties registering the transaction, he may summon them and require them to explain their reasons[87] and, if he sees fit, he may compel registration.[88] These powers are rarely, if ever, used; yet the Land Registrar could, be summoning the parties or at the board meeting itself, take the opportunity of warning the purchaser or lessee of the precariousness of his position.

Where the board has refused its consent to a proposed transaction, the parties may, of course, accept the board's decision. If they do not, then three courses lie open to them; they may re-apply, they may appeal or they may carry out their agreement regardless of the board's refusal.

If they re-apply, they will clearly have to take into account the board's former objections. Where a sub-division has been held uneconomic, an application to be registered as co-proprietors may be successful. Where a sale is rejected, a lease may be approved.

On the other hand, they may decide to appeal. The Land Control Act 1967 provides that where a land control board refuses to grant its consent, the applicant may within thirty days appeal to the appropriate provincial land control appeals board.[89] If his appeal is dismissed by that board, he may within thirty days appeal to the Central Land Control Appeals board.[90] Two general points should be noted concerning the appeals procedure. In the first place, land control is throughout left

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87. Registered Land Act 1963, s.8(b). It may be an offence to refuse to attend in accordance with the summons, ibid., s.155(3).

88. Ibid., s.41(1). It is an offence to fail to comply with such an order, ibid., s.41(2).

89. S.11(1).

90. Ibid., s.13(1).

to be operated by administrative bodies and it is expressly provided that decisions of boards at all three levels "shall be final and conclusive and shall not be questioned in any court."[91] Such has been land control policy ever since the Land Control (Native Lands) Ordinance 1959 and it can be justified on the grounds that the granting or refusal of consent does not require familiarity with judicial principles, but rather an understanding of local circumstances.

Secondly, appeal only lies against the refusal of consent. If the board approves an application, but its procedure is irregular or it takes irrelevant considerations into account, a person aggrieved by its decision will have no remedy. He cannot apply to the courts for an order quashing the board's decision, as he will have no locus standi, unless he is one of the parties to the application.[92]

The central land control appeals board was established by the Land Control Act 1967[93] and consists of the Minister for Lands and Settlement (Chairman), the Attorney-General and the Ministers for Home Affairs, Finance and Planning, Agriculture, and Cooperatives and Social Services.[94] The provincial land control appeals boards consist of the Provincial Commissioner, not more than two other public officers appointed by the Minister for Lands and Settlement, and not less than 2 and not more than 5 persons appointed by the same Minister, provided

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91. Ibid., ss.8, 11(2), 13(2).

92. See, for example, Uasin Gishu Land Control Board v. Kipwalei Molosoi, Court of Appeal for East Africa, Civil Appeal No.22 of 1974 (unreported), where the respondent unsuccessfully sought an order quashing the appellant board's decision in granting its consent to the sale to a third party of land which he (the respondent) had already agreed to buy. However, where, for example, the seller holds the land on trust, there is nothing to prevent the person beneficially entitled from applying to the court for an order restraining any disposition in breach of trust; still it is probable that an agreement to sell land does not give rise to a trust. See infra, p.372.

93. S.12(1).

94. Ibid., Sched. s.3.

that more than half of the members must be owners or occupiers of agricultural land within the province.[95]

Of the two provincial boards covering the areas of the present research, the Nyanza provincial board had heard no appeals since its establishment while the Central provincial board conducted a fair amount of business. Thus in 1973, fifteen appeals were heard, all of which concerned sales of plots or parts of plots.[96] All appeals were allowed, one on condition that the purchaser provided permanent accommodation for the vendor, who would otherwise have been rendered landless. Where an appeal is dismissed, it is usually for social reasons; one particular case will serve to illustrate the conflicts involved.[97] The divisional board had refused its consent to the sale of a plot of land on the grounds that the vendor's deceased brother's widow and her five children were living there and had developed the plot. The vendor and the purchaser (who had paid the purchase price and lodged a caution) appealed arguing "that the grounds for refusal relied upon are contrary to the provisions of the Registered Land Act and that the people referred to are staying on my land without my consent." The appeal was dismissed "on the grounds that the children who live in the parcel will become destitute if consent to sell is given."

The central land control appeals board has heard an average of two appeals a year since it was established and as with the divisional

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95. Ibid., s.2. The relevant boards were established by L.N.47 of 1968.

96. Central provincial land appeals board minutes, Land Registry, Nairobi.

97. Ibid., 27/1/74.

and provincial boards, it tends to stress social considerations. Given the large number of controlled transactions that occur each year, it is surprising that little use is made of the appeals machinery. Part of the reason lies in the fact that only extremely rarely do the divisional boards refuse their consent to an application.

The third course open to parties whose application has been rejected is to implement their agreement regardless; this is likely to be common practice where no possibility of re-applying exists (as it existed in the writer's field areas). However, rejections were so rare that it was impossible to follow up this conjecture.

The tables below indicate the relative frequency with which boards approve and reject applications.[98] The figures relating to the Kiharu

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98. TABLE 5. Applications made to the Kiharu divisional land control board:

Year	1970 (from March)	1971	1972	1973
Approved	432	1,003	716	933
Rejected	6	3	2	8
Other	52	105	53	92
Total	490	1,111	771	1,033

Source: Kiharu land control board minutes, Land Registry, Muranga.

TABLE 6. Applications heard by the Nyando divisional land control board:

Year	1969	1970	1971	1972	1973(till end of July)
Approved	12	17	36	38	25
Rejected	1	4	1	3	1
Other	6	14	42	17	10
Total	19	35	79	58	36

Source: Nyando land control board minutes, Land Registry, Kisumu.

board indicate the fate of applications made during a certain year, whereas those relating to the Nyando board indicate the fate of those heard during a certain year; however the general picture is clear. The residual category, termed "other", consists in part of applications which have subsequently been withdrawn, but largely of applications which have been deferred owing to the absence of one or other party and those which, having been twice deferred, are deemed to have been rejected.[99] The frequency with which this occurs is noteworthy enough, but the really striking fact demonstrated by these figures is the extreme rarity with which boards reject applications.[100] This surely casts grave doubts on the effectiveness of the present land control system.

3. The Avoidance of Land Control.

There exist certain classes of transactions which do not require the consent of the land control board. Thus the Land Control Act 1967[101] empowers the President to exempt (a) any land or share, or any class of land or share; or (b) any controlled transaction, or any class of controlled transaction; or (c) any person in respect of controlled transactions or some class of controlled transaction, from all or any of the provisions of the Act. Such matters are in practice considered by the Attorney-

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99. This problem has been discussed supra, p.351.

100. The writer was also able to collect information about a board in the neighbouring province. In the four years, 1970-3, it had heard 1,730 applications of which it had rejected only 5. Buret Land Control board minutes, Land Registry, Kericho.

101. S.24.

General and the Ministers of Lands and Settlement, Agriculture, and Finance and Planning. The power of exemption is generally exercised in favour of sales or leases to non-Kenyans or companies with non-Kenyan shareholders;[102] applications to effect such transactions would otherwise be rejected by the boards.[103]

Successions to land do not require the consent of the board unless they would result in the division of the land into two or more parcels to be held under separate titles;[104] on economic grounds this sounds a reasonable provision, but in practice the title to the land may be vested in, say, the deceased's widow while on the ground the farm may be divided into five uneconomic plots among his five sons.

However, it is the major concern of this part of the chapter to deal, not with those few classes of transactions which do not require the board's consent, but with the many transactions (usually sales of land) which do require this consent but which occur without any attempt being made to obtain it.[105] Such transactions can be conveniently labelled "uncontrolled transactions" and they have given rise to considerable litigation, particularly in the Central Province. A variety

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102. An exception to this rule is illustrated by L.N. No.263 of 1967, which exempted from the provisions of the Land Control Act 1967 mortgages in favour of the Land and Agricultural Bank of Kenya, the Agricultural Finance Corporation, the Agricultural Settlement Trust, the Commissioner-General of Income Tax, and Lands Ltd. It is an important exception in the present context because, as we have seen(supra, p. 278), one of the commonest ways of raising a loan is by way of charge to the Agricultural Finance Corporation.

103. Land Control Act 1967, s.9(1)(c).

104. Ibid., s.6(3)(a). Nor do transactions to which the Government or the Settlement Fund Trustees or (in respect of Trust Land) a county council is a party require the consent of the board, Ibid., s.6(3)(b).

105. Registered transactions which have not obtained the necessary consent, are, for obvious reasons, extremely rare. Perhaps the commonest instance is where the court orders the vesting of trust property in the beneficiaries. This is briefly discussed supra, ch. IV,p. 181.

of factors may explain why the parties do not apply to the board, among them fraud, ignorance, dislike of the board members and reluctance to pay fees.

The land registrar has certain powers in respect of uncontrolled transactions, of course; he may summon the parties[106] and he may point out the dangers of not obtaining the board's consent. If only one of the parties refuses to apply to the board, the other party may apply and the board may either order the absent party to attend[107] or decide the matter in his absence. If consent is given, then the applicant may lodge a caution and apply to the Resident Magistrate's court for an appropriate order e.g. an order requiring the absent party to sign the necessary forms, or a vesting order, or an order to rectify the register.[108] Although this course of action has been recommended by the Chief Land Registrar,[109] it has rarely, if ever, been carried out. Where neither party proposes to apply to the board, the land registrar's task is more difficult as he is unlikely to hear of the uncontrolled transaction that has occurred. Chairman of boards were encouraged to start a big campaign to get all uncontrolled transactions before the boards,[110] but the campaign cannot have been very successful. As we have seen,[111] the number of unregistered transactions is continually

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106. Registered Land Act 1963, s.8(b).

107. Land Control Act 1967, s.17(1)(a).

108. Registered Land Act 1963, s.143(1).

109. Ministry of Lands and Settlement, Chief Land Registrar, Practice Instruction (February 24th, 1972).

110. Ibid., Practice Instruction (January 12th, 1970).

111. Supra, ch.V.

growing. The parties are often of the same clan and usually good relations subsist between them; it is only when a dispute arises that their exact legal rights come into question.

Most commonly this occurs where there is a contract to sell a piece of land. As in English law,[112] such a contract is unenforceable by action, unless there is either a sufficient memorandum thereof in writing or a sufficient act of part performance. In Kenyan law, the relevant provisions are contained in the Law of Contract Act 1960 and read as follows:[113]

> No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some note or memorandum thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it.
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract -
>
> (i) has in part performance of the contract taken possession of the property or any part thereof; or
>
> (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.

The first part of the sub-section is largely based on the English Law

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112. Law of Property Act 1925, s.40.

113. Cap.23, s.3(3) as amended by the Law of Contract (Amendment)Act 1968, s.2(b). Previously an almost identical provision had formed part of the Registered Land Act 1963, s.38(2), but this was deleted by the Law of Contract (Amendment) Act 1968, s.3.

of Property Act 1925, s.40(1), but the proviso is interesting in that it attempts a codification of the law of part performance. One or two points may be noted in passing with regard to this codification. In the first place, it is not provided that the act of part performance must have been done by the plaintiff with the knowledge of the defendant that it was done on the faith of the contract. Yet this is surely how the courts would interpret the proviso; since the basis of the doctrine is that it would be fraudulent to allow the defendant to take advantage of the absence of a signed memorandum after standing by and watching the plaintiff alter his position for the worse by carrying out acts in performance of the contract. Secondly, and more importantly, the proviso severely restricts the scope of the doctrine of part performance; only the taking possession or the remaining in possession and doing some other act in furtherance of the contract constitute sufficient acts. Now while in English law possession is generally linked with the doctrine, this is not invariably the case.[114] Indeed it has recently been stated by high authority that there is no general rule that the payment of money can never constitute a sufficient act of part performance.[115] At any rate, the restrictive wording of the proviso will at least free the Kenyan courts from the need to tackle the problems that have troubled English courts in this field.

Even though a contract for the sale of land will be enforceable by action if the foregoing conditions are satisfied, the purchaser acquires no interest in the land until the sale is registered; the vendor does not become trustee for the purchaser and the beneficial ownership of

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114. See e.g. Rawlinson v. Ames, [1925] Ch.96.

115. Steadman v. Steadman, [1974] 2 All E.R. 977, at p.981, per Lord Reid.

the land does not pass to the purchaser. At any rate, this seems to follow from the following provision of the Registered Land Act 1963:[116]

> No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge.

Provisions of this nature are found in most Acts relating to the registration of title to land and have given rise to problems of interpretation. Unfortunately the provision quoted above has never been discussed in the Kenyan courts, so heavy reliance has to be placed on cases from other jurisdictions, in particular from jurisdictions where the Torrens Registration system applies.

Under the Registered Land Act 1963 it is provided that, subject to the provisions of the Act, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered under the Act and interests therein.[117] Thus the doctrines of equity will apply insofaras they are not expressly or by implication inconsistent with the Act. Clearly, on a strict interpretation of s.38(1) of the Act, an enforceable contract of sale does not operate to give the purchaser an equitable interest in the land. This is also the view taken by the courts of East Africa in interpreting similar provisions in other statutes providing for registration of title.

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116. S.38(1).

117. Ibid., s.163 (emphasis added by the writer).

The fullest discussion arose in a Ugandan case which came before the East African Court of Appeal, Souza Figueiredo & Co. Ltd., v. Moorings Hotel Co. Ltd.[118] The appellant and the respondent had entered into an agreement for the lease of certain premises owned by the respondent. The agreement was registrable but never registered. The appellant entered into possession of the premises but soon fell into arrears with the rent. At first instance the respondent was successful in his action for the recovery of arrears of rent and on appeal a number of issues were raised before the court only one of which concerns us here. It was submitted for the appellant that since the agreement was not registered, it was ineffectual to create any estate or interest in land[119] and that therefore the covenant to pay the rent was unenforceable.

The court held that the effect of s.51 of the Registration of Titles Ordinance 1922 was that the intending lessee had no equitable interest in the land, as he would have done in England under the doctrine of Walsh v. Lonsdale,[120] but that there was nothing in that section to prevent an unregistered instrument operating as a contract inter partes;[121] therefore the arrears of rent were recoverable. In the

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118. [1960] E.A. 926 (C.A.).

119. The defence relied principally on the Registration of Titles Ordinance 1922, Cap.123 (Laws of Uganda 1951), s.51, which reads:
"No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Ordinance or to render such land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or (as the case may be) the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Ordinance declared to be implied in instruments of a like nature."

120. (1882), 21 Ch.D.9.

121. [1960] E.A.926, at p.931.

course of his judgment the President of the Court of Appeal relied heavily on Australian sources, quoting both from Australian cases and from Australian authorities on the Torrens system. He found ample support for his view that an agreement for a lease or an unregistered lease may operate as a contract inter partes and may confer on the intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease.[122]

This decision was subsequently approved in a Kenyan case[123] where the interpretation of the parallel provision in the Kenya Registration of Titles Ordinance 1919[124] was in issue. The court held that an unregistered agreement for a lease of land registered under the Ordinance operated as a contract inter partes and it seems to have been assumed throughout that such an agreement could not operate to create any interest in the land, though no argument on this point was raised. It would serve the interests of uniformity if section 38(1) of the Registered Land Act 1963 was interpreted in the same way.

Although it is well established in English Law that where there is a contract for the sale of land, the purchaser becomes the owner in equity of the land, it is a rather special kind of trust attended by a number of

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122. "So far as I can ascertain, it has been uniformly held in many, if not in all, jurisdictions subject to Torrens systems of registration of title, where the court has jurisdiction to apply equitable principles, that an agreement for a lease or an unregistered lease operates as a contract inter partes". [1960] E.A. 926, at p.935, per Sir Kenneth O'Connor, P.

123. K.T. Clarke trading as Shipping General Services v. Sondhi Ltd., [1963] E.A. 107 (C.A.).

124. S.32. Freehold land and Government land which have not been registered under the Registration of Titles Act 1919 or the Registered Land Act 1963 are governed by the Indian Transfer of Property Act 1882 (applied to Kenya by the East Africa Order in Council 1897, Art. 11(b)), s.54 of which provides specifically that a contract for the sale of immovable property"...does not, of itself, create any interest in or charge on such property".

difficulties and it is not surprising that other jurisdictions should refuse to follow the English Law in this respect. The Registered Land Act 1963 certainly provides that instruments declaring trusts are not to be registered;[125] equitable interests may therefore be created by unregistered instruments and they may be protected by the entry of a caution on the register.[126] However, the literal interpretation of section 38(1) of the Act, the existing case-law and general policy considerations all suggest that the purchaser under an enforceable contract of sale acquires no interest in the land, legal or equitable. His rights are purely contractual and he may protect them by lodging a caution. If he does not protect his rights in this way, he runs the risk that the vendor may sell the land to a third party. He will then be restricted to his action for damages against the vendor; having no interest in the land, he will be without remedy against the third party, whether that party had knowledge of the original agreement or not.[127]

In one case[128] a situation of this kind did arise. In pursuance of a written agreement between the plaintiff and the first defendant

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125. S.126(2).

126. Ibid., s.131(1)(a) provides that any person who "claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, that is to say, some defined interest capable of creation by an instrument registrable under this Act" may lodge a caution forbidding the registration of dispositions of the land, lease or charge concerned. The Chief Land Registrar specifically mentions the possibility of a beneficiary under a trust lodging a caution under this section. Ministry of Lands and Settlement, Chief Land Registrar, Practice Instruction (September 4th, 1969).

127. In suitable circumstances he might be able to bring a tortious action against the third party for inducing a breach of contract.

128. Mungai Mukiri v. James Njoroge and Samuel Mukiri Mukono, High Court of Kenya at Nairobi, Civil Case No.248 of 1971 (unreported).

for the sale of a piece of registered land, the plaintiff (the "purchaser") had paid the purchase price and entered into possession. However, the consent of the land control board was not obtained, the transfer was not registered nor had the plaintiff ever lodged a caution. Several years later, the first defendant sold the land to the second defendant and the land was registered in his (the second defendant's) name. The court held (wrongly, it is submitted, in the light of the foregoing argument) that the original agreement between the plaintiff and the first defendant gave rise to a trust, stating:

> The intention of the parties then was clear that the first defendant was to transfer the plot to the plaintiff and until such transfer he held the plot on trust for the plaintiff. In these circumstances the court would presume that a trust existed...129

As the second defendant had bought the land with notice of the breach of trust, he held the land on trust for the plaintiff and rectification of the register in the plaintiff's favour was ordered.

Section 38(1) of the Registered Land Act 1963 was not mentioned and it was a pity that the court did not see fit to analyse in greater detail the legal position of third parties in situations of this kind, assuming that a specifically enforceable agreement to sell land does give rise to a trust.

As in most registration systems, trusts are not entered on the register and for the purpose of registered dealings the trustee is

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129. Ibid., p.8, per Muli, J.

deemed to be the absolute proprietor of the land, "and no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust...".[130] Furthermore it is provided that "no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust."[131] The court decided as a fact that the second defendant had actual notice of the trust on which the first defendant held the land for the plaintiff and the court also found that there had been fraud on the part of both defendants which entitled it to make the declaration and order prayed for. It would have been more helpful if the court had discussed whether mere knowledge of the existence of the trust amounted to fraud and, if not, what did constitute fraud in this context. The laws of all Australian States provide that knowledge of the existence of a trust shall not of itself be imputed as fraud,[132] whereas in England, where (as in Kenya) no person dealing with a registered estate is affected with notice of a trust, it seems that "... a purchaser can scarcely be treated as having good faith when he knows he has bought as a result of a breach of trust and it is possible that rectification of the register might be ordered against him."[133] This seems also to have been the interpretation of the words

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130. Registered Land Act 1963, s.126(3).

131. Ibid., s.39(2).

132. See e.g. State of Victoria Transfer of Land Act 1958, s.43.

133. Ruoff and Roper on the Law and Practice of Registered Conveyancing (London, Stevens, 3rd ed., 1972), p.417.

"bona fide purchaser" adopted by Muli, J.[134]

The issue that arose in this case is likely to become increasingly important in view of the considerable body of litigation that is conducted in the Central Province. The writer examined all the land cases that had arisen recently both in the Resident Magistrate's courts in Muranga and Nyeri and in the High Court in Nyeri. The tables below drawn from an analysis of the entries in the High Court Civil Register indicate the number and nature of land cases that are filed there.

TABLE 7. Number of civil cases filed in the High Court, Nyeri.

Year:	1967	1968	1969	1970	1971	1972	1973	Total
Land cases:	12	19	16	17	31	25	52	172
Total civil cases:	69	91	77	77	127	81	161	683

TABLE 8. Analysis of land cases filed in the High Court, Nyeri, 1967-1973.

Type of dispute	No.	%
Actions by purchaser for damages or specific performance:	70	47%
Actions by vendor for price of land transferred:	2	1.5%
Actions by vendor for possession of land:	4	39 %
Actions by vendor for removal of caution:	1	0.5%
Disputes arising out of first registration:	57	39%
Miscellaneous (succession, limitation etc):	14	9%
Total:	148	100%

Source: Register of civil cases, High Court Registry, Nyeri. A breakdown of the land cases filed at the Resident Magistrate's Court, Muranga, is given supra, p. 161. Note: 24 of the 172 land cases were transferred to other courts.

134. His reasoning is a little obscure; at one point he seems to argue that the 2nd defendant holds the land on trust for the plaintiff, because he (the 2nd defendant) "could not have acquired more than what the 1st defendant had." This is clearly wrong.

It can be seen that the number of land cases is increasing, both absolutely and in proportion to the total number of civil cases filed. Particularly interesting is the fact that of 77 disputes arising out of agreements to sell land, 74 are instances of the seller reneging on his contract. This situation arises commonly in the law reports: an agreement for the sale of land is entered into by two parties, often in writing; the purchaser pays part or all of the purchase price and enters into possession; the sale is not registered nor approved by the land control board and the seller eventually refuses to complete either perhaps because his family has put pressure on him not to sell or, more likely, because he has found another purchaser who is willing to pay more.

If the sale has already received the board's consent, the court is likely to order specific performance of the contract and if the vendor still refuses to carry out his part, then the court may issue a vesting order or a rectification order or an order requiring the Registrar to sign the relevant forms on the vendor's behalf. Once the board's consent has been obtained it is rare in practice for problems to occur. However, one problem did occur in a case[135] whose facts in many ways resemble those of Mukiri v. Njoroge and another[136] and before the same judge, Muli,J. The defendant agreed to sell a piece of land to the plaintiff, the board's consent was obtained and the plaintiff paid the purchase-price and entered into possession. However the defendant subsequently refused to sign the transfer forms and sold the land (presumably with the board's consent) to one Mwangi. This sale was

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135. Josphat Gitungo Njau v. Mrs. Wairimu Kairu, High Court of Kenya at Nairobi, Civil Case No.953 of 1970 (unreported).

136. Supra.

registered. It is not clear from the report whether Mwangi knew of the previous agreement made with the plaintiff, but the judge was clearly incensed by the defendant's unscrupulous behaviour;[137] atating that the defendant held the land on trust for the plaintiff, he ordered specific performance of the original agreement against the defendant, seemingly regardless of the fact that Mwangi was now the registered proprietor. The decision is clearly wrong, but the case does serve to illustrate the sort of problems that arise.

Where the land control board's consent has not been obtained, specific performance may still be ordered and the order may be made "subject to the board's consent". However, in view of the possibility that the board may refuse its consent and perhaps in reliance on the principle that "Equity does nothing in vain", the courts are more prone to award damages for breach of contract.

Unfortunately the whole area of law under discussion, that is, the question of remedies for breach of contract to sell land, has been obscured by certain provisions of the Land Control Act 1967. The crucial section reads:[138]

> (2) An agreement to be a party to a controlled transaction becomes void for all purposes -
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> (a) at the expiration of three months after the making of the agreement, if application for the appropriate board's consent has not been made within that time;

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137. "This is a straight forward case, like many other cases which have come before this court where a party tries to rescind a transaction because he found another purchaser willing to offer more money for the same subject matter of the sale. If Courts were to agree with such parties then there would be utter chaos in the whole country. The Courts will not be a party to encourage these greedy parties." Njau v. Kairu, supra, p.3, per Muli, J.

138. S.6(2)(a).

It should be noted at once that in a large number of cases this provision is not brought to the court's attention and specific performance is ordered of agreements which have long ago become "void for all purposes".[139]

Where the provision is applied, the result is often to work great hardship on the purchaser in possession; he loses whatever interest he had in the land and the vendor can apply for the removal of any caution he may have lodged; he can neither apply for specific performance of the contract nor claim damages for breach of contract, since there is no contract in existence; he seems restricted to the limited right of recovery provided for in the Act:

> If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void by virtue of subsection (1) [i.e. for want of the board's consent], or under any agreement that becomes void by virtue of subsection (2), of section (6) of this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid...[140]

In any case, the courts have not been very successful in devising ways of avoiding the harsher consequences of these provisions, even though

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139. E.g. Hoseah Muraya Muthee v. James Meitamei Ole Mutii, High Court of Kenya at Nairobi, Civil Case No. 15 of 1973 (unreported) where in pursuance of an agreement to sell land, dated 28/2/67, the plaintiff paid the price and entered into possession. A year later, the defendant (vendor) changed his mind and refused to transfer the land. The plaintiff eventually applied for specific performance. This was granted by the court even though by then the original agreement was void.

140. Land Control Act 1967, s.7.

they enforce them without great relish.[141]

An interesting point arose in Joseph Kamau Kinuthia v. John Senewa Kaurai[142] where in an agreement dated March 5th 1967 the defendant had agreed to sell the plaintiff some land. The purchaser paid the purchase-price and went into possession of the land. The parties applied to the land control board on November 29th 1968 and the board purported to approve the sale on February 4th 1969. A dispute had subsequently arisen as to the size of the piece of land and the defendant had refused to execute the transfer; the plaintiff applied for specific performance. Although admitting that the Land Control Act "can readily enough be used as an engine of injustice" and making his order "without the slightest enthusiasm for the work in hand", the judge felt bound to refuse the order of specific performance on the grounds that there was, by virtue of s.6(2)(a), no valid agreement for the board to consider. "Where, as here, there is evidence that an agreement has become void before application was made, one does not question the board's decision but its jurisdiction to give it."[143] Such a harsh result could surely have been avoided. Certainly any attempt by either party to enforce the original agreement after June 5th 1967 must have failed, but equally the signing of the land control board application forms by both parties

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141. In one case, the respondent had sold his plot, entered into possession of the appellant's plot under an agreement for sale and paid the purchase price. His action for specific performance of the agreement failed as the agreement had become void under the Land Control Act 1967, s.6(2)(a). The court came to this conclusion with reluctance and expressed its concern "with the question of probable fraud on the part of some of these purported vendors of land who receive other people's monies and then evade and plead the provisions of the Land Control Act." Njoroge Mumira v. Njoroge Ngumi, High Court of Kenya at Nairobi, Civil Appeal No. 121 of 1970 (unreported), per Miller, J.

142. High Court of Kenya at Nairobi, Civil Case No. 404 of 1970 (unreported).

143. Ibid., p.5, per Trevelyan, J.

signified that a fresh agreement was in existence, an agreement to which the board had every right to give its consent.

An indication that the courts may favour such an approach is suggested by Rev. Daniel Mwangi Kigo v. Charles Kiarie Ngugi,[144] where the parties entered into a written agreement of sale, dated May 30th 1970, which subsequently became void for want of the board's consent. However a new document was executed by the parties by which the defendant confirmed the former agreement made with the plaintiff to the effect that he was selling his land to him by receiving the balance of the purchase-price. Within 3 months of the execution of this document, the board gave its consent. The plaintiff now sought specific performance of the agreement. The court held that the document did not merely confirm a nullity (as argued by the defence) but in fact constituted a new agreement since it made sense even if all reference to the previous agreement was omitted; therefore specific performance could be ordered.

Where the courts refuse to order specific performance of an agreement which has been avoided by s.6(2)(a), the question arises as to what remedy the purchaser may have. In one case, indeed, the court, after refusing specific performance, doubted the possibility of his recovering the purchase-money.

> "With respect to the alternative prayer for refund of purchase-money, the net result is that this part of the claim hinges on the first prayer. There being in effect no legal foundation upon which the plaint stands in respect of the land there can be no subsidiary relief which is to stand on a non-existing foundation."[145]

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144. High Court of Kenya at Nairobi, Civil Case No.1588 of 1970 (unreported).

145. Justin Mwago v. Kariuki Kariraga, High Court of Kenya at Nairobi, Civil Case No.1343 of 1971 (unreported), per Miller, J.

Clearly the learned judge is unaware of the right of action conferred by the Land Control Act 1967.[146] However, in another case he found no difficulty ordering the vendor to refund the purchase-money plus interest and even considered that "a prima facie case has been made out for the awarding of damages."[147]

Other judges have been less chary of awarding damages. In one case[148] the seller was ordered to pay sh. 14,000/- of which sh.6,500/- constituted the purchase-money paid by the purchaser and sh.7,500/- the amount by which the value of the land had increased in the meantime (i.e. it had more than doubled). In another case[149] the vendor was ordered to compensate the purchaser for the improvements he had made. It is hard to see how such awards can be justified, unless it is possible to raise some sort of estoppel. As soon as the three month period has elapsed, the purchaser remains in possession of the land as a mere licensee; he may have paid the purchase-price but this is recoverable at any time and meanwhile he enjoys the use of the land rent-free. If the owner of the land revokes this licence, the licensee has no right to emblements, let alone to damages or the cost of improvements undertaken.

It is true, of course, that in some cases the unscrupulous seller will exploit an unsuspecting purchaser's ignorance of the necessity for

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146. S.7. The purchase-money would also be recoverable in quasi-contract.

147. Njoroge Mumira v. Njoroge Ngumi, supra, per Miller, J.

148. Kinyanjui s/o Kabue v. Geoffrey Gichini Nyoro, High Court of Kenya at Nairobi, Civil Case No. 504, of 1973 (unreported).

149. Njenga Gathama v. Karera Njuguna, High Court of Kenya at Nairobi, Civil Case No.1544 of 1971 (unreported).

the consent of the land control board, but the courts in their desire to do justice to the innocent purchaser have all too often overlooked the legal relationship of the two parties once the agreement has become void for all purposes. An extreme example of this judicial concern is provided by Cyprian Muinde Mbuve v. Maingi Nzula[150] where an agreement for the sale of land had become void for all purposes; the court refused accordingly to order specific performance but ordered the vendor to refund the purchase money. Muli, J. then continued:

> "The defendant's [i.e. the vendor's] behaviour put the plaintiff into considerable expense which he stands to lose. It is equitable, therefore, that the plaintiff be offered the first option to purchase the said land at the current economic value. It is only after he fails to avail himself of the option that the defendant shall be at liberty to sell the said land to a third party. The Director of Settlements and the appropriate land control board shall have notice of this order."151

The court certainly has the power to order that an inhibition be registered in the land register inhibiting certain dealings[152] and this power could appropriately be used to protect the interests of a purchaser under a contract for sale; however in the instant case there was no longer any valid agreement in existence and the plaintiff had no rights which he could enforce against the defendant except his right to recover the purchase-money and the extremely limited rights of the bare licensee in occupation. It is hard, therefore, to justify the court order on legal grounds. Hard cases make bad law.

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150. High Court of Kenya at Nairobi, Civil Case No.26 of 1972 (unreported).

151. Ibid., per Muli, J.

152. Registered Land Act 1963, s.128(1).

No court ever seems to have doubted the purchaser's right to recover all the purchase-money which he has paid in pursuance of an agreement avoided by section 6(2)(a), even though he has received some benefit; however the question whether a lessee under an avoided agreement for a lease can recover all the rent he has paid has proved less easy to answer. The point arose in Chemelil Sisal Estate Ltd. v. Makongi Ltd.,[153] where there was a lease of land to which the Land Control Regulations 1961 applied. The lease became void for want of the consent of the Divisional Land Board and the respondent claimed the recovery of moneys paid under the lease, relying on regulation 9(3) which provided:

> Any money or other valuable consideration... paid in the course of any dealing, or under any agreement, which... becomes void under this regulation... shall be recoverable as a civil debt by the person who paid it from the person to whom it was paid.

It should be noted that the Land Control Regulations 1961, like all other pre-1967 land control legislation, expressly prohibited persons from dealing with land without the board's consent.[154] Thus an uncontrolled sale, for example, would be not only void but illegal, and according to the general principles governing illegal contracts of this nature the loss would lie where it fell, ex turpi causa non oritur actio. Without some such provision as that laid down in the Land Control Regulations 1961 the purchaser would be unable to recover any purchase-moneys paid; but such a provision seems totally unnecessary in the Land Control Act 1967, for under that Act an uncontrolled dealing is not illegal but

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153. [1967] E.A. 166 (C.A.).

154. Regulation 9(1).

merely void and moneys paid in pursuance of a void contract are usually recoverable on general contractual principles.

In the case under discussion,[155] all three judges of the Court of Appeal agreed that the purpose of regulation 9(3) was not punitive but merely designed to restore the parties to the status quo ante. It was pointed out that penalties could easily have been provided for and that, in any case, the effect of regulation 9(3) may well be merely to punish one party, where both are at fault. Nevertheless two of the judges held that regulation 9(3) created a cause of action which entitled the respondent to recover moneys paid under the void lease.[156] They both admitted the unfairness of the result, but felt that no other interpretation of the regulation was possible; the words "valuable consideration" could not be construed so as to entitle the appellant to set off the value of sugar cane and sisal harvested during the lease,[157] nor could the words "shall be recoverable" be construed as meaning "shall not be irrecoverable", as then the words "as a civil debt" would be hard to explain.[158]

Spry, J.A. (dissenting) held that the words "as a civil debt" merely negatived the possibility that a statutory penalty was being created and that the words "shall be recoverable" were capable of sustaining the interpretation "shall not be irrecoverable" and should be interpreted in that way. Unfortunately, neither of his interpretations is very persuasive and it is submitted that the only possible interpretation of the words "shall be recoverable as a civil debt" is that adopted by the majority of the court, however unfortunate the consequences.[159]

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155. Chemelil Sisal Estate Ltd. v. Makongi Ltd., supra.

156. Ibid., at pp.170,178.

157. Ibid., at p. 171, per Newbold, Ag.P.

158. Ibid., at p.178, per Duffus, J.A.

159. It is surprising that this point has never arisen before. In a Ugandan case, Fazal Visram Muman v. M.R. Lalani, [1963] E.A.425, the court seems to have assumed that a lessor could not recover arrears of rent due under a lease that was void for want of the Governor's consent.

It is a pity that the draftsmen of the Land Control Act 1967 made no attempt to deal with this problem. It seems as though section 7 of that Act was merely inserted because some such provisions had always appeared in previous land control legislation. However, since uncontrolled transactions are, though void, no longer illegal, the need for such a provision is doubtful. The Law of Contract Act 1960 provides that "save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity..., shall extend and apply to Kenya."[160] The general rule in English law is that money paid in pursuance of a void contract is recoverable as long as there has been a total failure of consideration;[161] thus in England the respondents in Chemilil Sisal Estate Ltd. v. Makongi Ltd.[162] would be unable to recover rent paid. The distinction between total and partial failure of consideration is not wholly satisfactory, but at least it avoids such harsh results.

A strong case could therefore be made for the repeal of section 7 of the Land Control Act 1967 and possibly its replacement by a provision giving the courts a broad discretion to adjust the positions of the two parties in order to restore the status quo ante. Moreover, in view of all the problems to which the interpretation of section 6(2)(a) has given rise in the courts and in view of the hardship that its strict application frequently causes, the question naturally arises as to whether its retention serves any useful purpose. It could be argued that it works as a sanction to induce the parties to an agreement to apply to the board without delay. It is however a particularly ineffective sanction. If

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160. S.2(1).

161. It is recoverable in quasi-contract. See Valentini v. Canali (1889), 24 Q.B.D. 166.

162. Supra.

both parties are aware of the law, they will usually ensure that their agreement receives the board's approval. If neither party is aware of the law, then the sanction cannot work. If, however, as is not infrequently the case, one party is aware of the law while the other party is not, then the former (usually the unscrupulous vendor in our examples) can exploit the law to his own advantage, while the latter is penalised by a law of whose existence he was ignorant. No more appropriate is the sanction provided for in section 22 of the Land Control Act 1967 which makes it an offence to pay or receive money or to enter into or remain in possession of any land in furtherance of a transaction avoided by s.6.[163] A concerted effort should be made to publicise the functions of the land control boards and to stress the necessity of obtaining its consent to a proposed transaction. Such an effort could suitably be linked with a campaign to encourage people to register dispositions and transmissions of registered land. Such a campaign would necessarily rely heavily on local officials, on chiefs and sub-chiefs, on agricultural and veterinary officers.

It is submitted, then, that s.6(2)(a) should be repealed. An agreement to be a party to a controlled transaction should not become void merely by reason of the fact that no application has been made to the appropriate board within a certain time. If this were done, many of the problems discussed above would never arise.

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163. The writer never came across an instance where this sanction was used.

4. Conclusion.

This chapter has attempted to describe the functioning of the land control system in certain areas of Kenya and to highlight the more important problems that have arisen. It is now proposed to evaluate the system in the light of the foregoing discussion.

Some of the problems analysed in the last section arose from certain statutory provisions whose strict interpretation may often have harsh consequences. In particular, the uncertain position of the purchaser under an agreement for the sale of land has been dwelt upon in some detail together with the efforts of the courts to alleviate his position. However, to the extent that these problems derive from the existence of unfortunate statutory provisions, they can be solved by suitable amendments and in the course of the argument recommendations were made in this regard.

In this concluding section, however, the whole basis of the land control system will be questioned and the possibility of the repeal of the Land Control Act 1967 will be canvassed. Land Control has existed in Kenya since 1944 in a variety of forms and nobody ever seems to have doubted that it served a useful purpose. Its adherents have been vigorous in its defence, eager to point out the diverse and often inconsistent objectives it can achieve, but none seems ever to have questioned its effectiveness. Yet the burden of proof lies on these adherents to justify its retention and research shows that such arguments are hard to find. The system restricts freedom of contract, it fetters the power of the registered absolute proprietor to deal with his land as he likes and yet one of the purposes of the registration of

individual title was to create a market in land and free the individual from the constraints of customary law. Moreover, the system costs a considerable amount both in time and money; the board members are paid fees and travelling expenses, applicants pay fees and often have to travel long distances too. It is doubtful whether the time and the money are well spent.

In terms of the declared objectives of the Land Control Act 1967, the system is clearly a failure. It has been seen that these objectives are primarily economic, designed to ensure the most efficient use of the land. In practice, however, the boards rarely take economic considerations into account and where they have done so, they have simultaneously devised ways which in effect enable the applicants to carry out their proposed transactions. The boards are influenced rather by social factors and this attitude will often result in a decision which would be hard to justify on economic grounds.

The system has failed then to achieve the purposes for which it was designed. This failure perhaps would not need to be underlined if it could be justified on other criteria, for example, its success in ensuring an equitable distribution of land or in preventing landlessness. Unfortunately the evidence suggests otherwise; indeed it demonstrates the boards' extreme reluctance ever to reject applications. It is hard to see what useful function is served by a board which grants its consent almost as a matter of course.[164] Moreover, even where a board rejects an application, there is no way it can enforce its decision and it is likely that the transaction will take place never-

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164. The boards attended certainly felt that they performed a useful function, particularly by protecting the interests of the applicants' dependants.

the less. Finally, the applications brought before the board do not represent a large proportion of all the transactions that occur, transactions that may be economically or socially undesirable, but which are never controlled, let alone registered. It could even be argued that many more transactions would be registered if the land control system were abolished and this extra, expensive, bureaucratic obstacle removed.

If the government really desires to ensure the most economic use of land by means of a system of land control, then the board should not be largely composed of local worthies with no agricultural expertise. Just as farmers are often required to draw up development plans for their farms as a preliminary to obtaining a loan, so perhaps should they be required to submit such a plan for the approval of a small expert committee (say, the agricultural officer, the veterinary officer and the sub-chief) before applying for registration of the transaction. The problem of enforcement, however, remains.

Whatever the objectives, social or economic, they cannot generally be attained by a system of land control; the problems, legal, social and economic, discussed in earlier chapters cannot be solved in this way. There is no general solution. Each particular objective must be defined and considered on its own, in isolation from other objectives. Each particular problem requires individual treatment. The land control system in Kenya was devised to solve a wide variety of problems. It could never have been wholly successful; in the event it has wholly failed.

CHAPTER VIII

GENERAL CONCLUSIONS

This study operates at various levels of generality and it is the purpose of this chapter to bring together and summarise the themes that have arisen in the foregoing pages. At its most specific this study has investigated the working of the land adjudication and registration programme and has attempted an assessment of the programme's success in terms of its declared objectives. The programme also illustrates features of official policy which are manifested in other areas of legislative activity, notably a faith in the power of legislation as a tool for engineering social change and a preference for the use of administrative bodies rather than the courts for the purposes of determining individual rights. Thirdly, and at its most general level, the study throws light on the processes of change which are at work in Kenya; indeed the land adjudication and registration programme may be seen as a paradigm of socio-economic developments in the country as a whole. It will be convenient to discuss these three themes in turn.

In terms of its declared objectives it can hardly be said that the programme has been an unqualified success. Although the introduction of a system of registration of title is commonly thought to make titles secure and to make conveyancing safe, simple and cheap, these claims are usually made with reference to jurisdictions where private conveyancing is practised. Different considerations apply where registration of title is designed to replace a system of land tenure based on customary law. In such a situation it is not clear

that the new system will provide simpler, cheaper conveyancing, nor will it give security of title where no insecurity existed beforehand. Moreover the efficacy of the system depends largely on the cooperation of those for whom it was designed, the landowners themselves or their legal advisers. It is hardly surprising, therefore, that in the rural areas of Kenya the registration system is breaking down. Where the use of lawyers is extremely rare, landowners are reluctant to go through the relatively expensive and cumbersome registration procedures when their customary procedures appear to them to work well. So it happens that dispositions of registered land and successions to registered land frequently take place off the register which increasingly fails to reflect the state of affairs on the ground.[1]

It is facile to say that the problem would be solved if landowners were sufficiently educated about the operation of the new system. The point is that the system is not seen to be necessary, that it does not respond to any real needs in small-scale societies where the parties to land dealings are still generally known to each other. However, it is not difficult to envisage the sort of complex disputes that will arise in the future. Where the land register is unreliable, the courts will be obliged to re-adjudicate titles and a lot of effort will have been wasted. The virtues of land consolidation are undeniable and land adjudication has undoubtedly put an end to boundary disputes, but the introduction of an alien system with new rules governing title to land

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1. This topic is discussed at length supra, ch.V.

and new conveyancing procedures will not necessarily earn the cooperation of people content with their own rules and procedures.

The programme may, however, have beneficial consequences of an indirect kind. Boundary disputes, as mentioned, seem to have disappeared and this is seen by most farmers as the major achievement of the programme. Nevertheless, it has been seen that while land adjudication may have made boundaries secure, it has also led to the emergence of a large number of disputes concerning the title and rights of the registered owner.[2] Litigation of this kind is likely to reach considerable proportions and to cause extreme bitterness, especially in the more populous agricultural areas. To some extent these disputes stem from inadequate adjudication[3] and in such cases the courts may be called upon to do the work of the adjudication authorities, but frequently they result from the inherent difficulty in enshrining the existing customary rules and procedures governing the acquisition, alienation, control and inheritance of land in legislation based on Western models.

Whatever the reasons for the increase in the number of disputes, it could be argued that it would be wiser to postpone land adjudication and registration in areas where customary law remains strong and where neither the adjudication authorities nor the inhabitants themselves can be relied upon to understand fully the working of the new system. Against this view it might be urged that for all its imperfections the programme constitutes a necessary break with customary law and that

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2. Supra, ch.IV.

3. Faulty adjudication resulted in the readjudication of many areas of Fort Hall District in 1960.

even though cases of injustice may occur in the course of its implementation and even though some form of readjudication may prove necessary in the future, these are merely the growing pains of a system which will substantially benefit the majority of those affected by it. In particular, the argument runs, the registered owner is given the power to deal commercially with his land, to sell, to lease and to mortgage it, powers which were virtually unknown to customary law, but which are necessary if farms are to be properly developed.

Some doubt has been cast on these arguments[4] and it has been suggested that the introduction of a system of registration of title does not necessarily create a land market where none existed before. Moreover, the landowner's power to charge his land as a security for loans does not appear to have had a significant effect on rural development; indeed the role of credit may have been over-emphasised. Family holdings become smaller and more fragmented and at a certain stage food-crops begin to replace cash-crops, processes which the new system is powerless to reverse. Moreover, it has been seen[5] that any hopes of implementing government policies through the land control system have not been fulfilled, largely due to the boards' reluctance to be bound by purely economic considerations.

The discussion of the land adjudication and registration programme can be seen in a rather broader context. It throws light on certain aspects of government policy and, in particular, the ambiguity of

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4. Supra, ch. VI.

5. Supra, ch. VII.

official attitudes towards customary law. Official rhetoric generally sees customary law as an obstacle to development. Modernisation is the watchword. The birth of a new Kenya is called for, free from outmoded institutions and systems of values, and education and legislation are seen to be the midwives of the new order. Several examples of the official faith in legislation as an agent of social change have been given in the course of this study and it has been suggested that in the absence of enforcement machinery on a scale unthinkable in Kenya today, such legislation is likely to be ineffective to the extent to which it does not respond to the needs of the people as they perceive them. If landowners are satisfied with customary conveyancing procedures, they may be reluctant to have their dealings controlled and registered. If membership of a group ranch is not seen to confer any special benefits, members are likely to continue traditional grazing practices. If effect is generally given to a person's informally expressed wishes as to the passing of his property on his death, few people will have the incentive to make use of the opportunities provided by the Africans' Wills Act 1961. If a statute is brought into operation which replaces the customary law of succession, marriage or divorce, it will be unenforceable to the extent that it diverges from the prevalent customary law. If a statute has the effect of abolishing the cutomary law governing tort and contract,[6] this will not prevent the de facto application of customary law where the persons concerned feel bound by it,

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6. This seems to have been the effect of the Magistrate's Courts Act 1967, ss. 2 and 10(1)(a). See Kamanza Chiwaya v. Manza Tsuma, High Court of Kenya at Mombasa, Civil Appeal No.6 of 1970 (unreported).

as they are likely to do in small-scale, close-knit rural communities.

In the towns, however, where Kenyans from different districts and tribal groups live and work together, the shortcomings of customary law and, in particular, the inadequacy of traditional sanctions become obvious. For example, it seems indisputable that certain commercial relationships should be governed by the same law, wherever they occur and whoever the parties are. Moreover, it is clear that as the urban population becomes larger and more settled, as inter-tribal marriage becomes common and the notion of private property takes root, customary law will become less capable of meeting the needs of Africans in Kenya. However, this stage has not yet been reached. Ninety per cent of Kenyans live in the rural areas and the majority of town-dwellers keep close links with their home areas. Inter-tribal marriage is extremely rare, commercial relationships are generally of the simplest kind and relatively few Africans own much property of a non-traditional nature. As should have become clear in the course of this study, it is only a tiny minority whose needs are not catered for by customary law, who want to make formal wills, to marry outside their tribal groups, to take out life insurance, to float companies and so forth. However, it is those people who determine policy and who see legislation as an effective modernising device.

At the same time it is usual for policy-makers to stress the importance of preserving communal values and to exalt the virtues of the traditional African way of life, which their policies appear designed to destroy. Thus Tom Mboya, one of Kenya's ablest political figures, admitted that the introduction of a system of registration of individual title in some parts of Kenya would undermine traditional

values, and concluded that the government had "... the challenge of finding a formula by which people could be given title without destroying the communal system."[7] More recently the government recognised the problems posed by the existence of heavy pressure on the land in some areas and low land utilisation in others and proposed "...to solve these problems utilising a variety of means, one of which is land adjudication, and subsequent reliance upon private incentives and African traditions to redistribute land in a socially desirable fashion."[8] These quotations illustrate the conviction that there is no necessary conflict between registration of title and customary values, between private incentives and African traditions or, more crudely, between individualism and communalism. It is hardly surprising that the policy-makers of Kenya should hold this view. After all, they have a foot in both worlds. Their success is not only due to an ability to manipulate modern institutions, but also due to the strength of the customary ties, based on tribe, locality and family, that link them with their constituency.

Their ambiguous attitude to traditional society has also been illustrated in the course of this study by the use of customary institutions in the implementation of land policies. The land adjudication process and the land control system are both run throughout by administrative bodies, bodies whose members are largely drawn from the districts in which they work. In spite of the importance of their work, seen in the light of the effect of their decisions both on individual rights and on government policies, it seems to be

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7. T. Mboya, Freedom and After (London, André Deutsch, 1963), p.170.

8. Republic of Kenya, Employment, Sessional Paper No.10 of 1973, para, 92.

considered more important that members know the area in which they work and that they enjoy local legitimacy rather than that they should have any expert understanding of official goals. Courts are seen as remote, expensive, essentially alien institutions whose procedures are unfamiliar and protracted, while the use of traditional land authorities seem likely to make official policies more acceptable to the people concerned and to save time and money at the same time.

The argument is not wholly convincing. In the first place, it assumes that in any given adjudication area the allocation and alienation of land are still controlled by the traditional land authorities and land disputes settled by them; yet in many areas, including the present writer's field-areas, this is not the case and, furthermore, it is arguable that land adjudication should not be started in areas where it <u>is</u> the case. Secondly, the argument assumes that the members of adjudication committees, arbitration boards and control boards will be drawn wholly or largely from the traditional land authorities, which again is not the case. Finally, it assumes that even where these committees and boards do contain representatives of the traditional land authorities, these representatives will be carrying out their traditional functions; however, apart from the fact that the committees and boards operate over a much wider geographical area than any traditional land authority would do, it is obvious that even though at first sight they appear to be carrying out the classic functions of the traditional land authority, allocating land, controlling land transactions and settling land disputes, in reality they are carrying out government policies and operating within a completely different legal framework.

The members' powers and duties are governed by statute and members are generally not intended to be bound by constraints that would traditionally have circumscribed their freedom of action. Insofaras the boards and committees are successful in carrying out government policies, this cannot therefore be attributed to any legitimacy which members might traditionally enjoy.

Since members are not carrying out traditional functions and are not subject to the complex system of checks and balances that would, at customary law, have determined the limits of their powers and since they are generally not qualified to understand their statutory duties or to appreciate the policies they are intended to promote, it is perhaps surprising that no provision is made at any stage of the land adjudication and land control processes for an appeal to the courts. It can hardly be argued that the local Resident Magistrate's Court, or even the High Court, is a more remote institution than the Central Land Control Board or the Minister hearing appeals from the Adjudication Officer. Nor is it clear that an appeal to the courts would be more expensive and time-consuming than an appeal to a central administrative body. After all, the adjudication of legal rights is the function of the courts and it is possible at present that unless they take a courageous attitude towards the scope of judicial review, abuses occurring in the course of the land adjudication and control processes may go unchecked.

In the preceding paragraphs a brief attempt has been made to consider the light which this study has thrown on official attitudes towards law and social change. The belief in legislation as a powerful instrument of social engineering is accompanied by an insistence on the importance of customary values, while modernising land policies

are entrusted to administrative bodies of a traditional type to the exclusion of the courts. If official attitudes appear ambiguous, there can be little doubt about the general direction in which rural Kenya is moving. Social and economic change in the present writer's field areas has been discussed above[9] and it is his purpose in these concluding paragraphs to put that discussion in a wider context. A study of land registration in Gathinja and East Kadianga inevitably tells a lot about socio-economic changes in those areas, which mirror in microcosm changes occurring at a national level.

It was argued in chapter six that with the introduction of new technology during the colonial period, with the considerable growth of market opportunities and the increasing demand for consumer products, land was transformed from a commonly shared subsistence base into a resource with commercial value. At the same time there was emerging a number of people who, for one reason or another, were able to manipulate the new institutions to their own advantage. It was they who supported the land adjudication and registration programme and it was they who derived the greatest advantages from it. Many of them had already begun to extend their holdings, to grow cash-crops and to hire labour; they thus had a definite interest in putting an end to traditional arrangements and obtaining legally sanctioned ownership of the land they farmed.[10] The whole of the process of land adjudication and consolidation tends to favour these people and insofaras land registration has resulted in the growth of a land market and increased access

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9. Supra, ch. VI.

10. Similar developments were noted in the range areas. See ch. III, supra.

to credit and services it is the same people who have exploited these new opportunities. The gulf between rich and poor widens further as changes in the distribution of resources and income-earning opportunities lead to changes in the pattern of political power.

The large majority of families living on registered smallholdings in Kenya "... must either exist in extreme poverty or must obtain income from sources other than their own farms by seeking work in the rural areas or in the towns."[11] While it is not known how many of these families do obtain income from outside sources, it is clear that the expansion of employment opportunities is not keeping pace with the growing number of people seeking employment. It seems as though rural families will become increasingly dependent on increasingly smaller holdings. No doubt their plight would be alleviated by a large-scale redistribution of land within Kenya,[12] but this is politically unlikely and in any case would only provide a temporary solution. Nor does there seem to be any likelihood of a reduction of the birth rate in the rural areas, even though the grant of individual titles to land is sometimes thought to make birth-control schemes more attractive. Largely deprived of the kind of supports that traditional society provided, the future of the "rural working poor"[13] is bleak. Some may find work as labourers on the larger farms and some may rent land. Indeed as the large farms get larger and the small farms smaller, the familiar pattern of rural stratification is likely to emerge; at the top there will be a relatively small number of large landowners, often absentees and invariably

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11. International Labour Office, op. cit., p.37.

12. Such a policy is recommended ibid., pp. 169-171.

13. This is the phrase which the I.L.O. used in its report, ibid., p.38.

owning other business interests; in the middle there will be a larger number of tenant-farmers operating under a variety of tenancy arrangements and at the bottom there will be a large number of virtually landless agricultural labourers.

Stratification along these lines has only reached a preliminary stage. Parochial loyalties remain strong, even though clientelist political structures are increasingly incapable of articulating the grievances of the "rural working poor." It is much easier to discern the gradual formation of a rural middle class, a small group of people united by their education, their role in the political process and their economic interest. Seeking to free themselves from traditional social obligations, they have an obvious interest in supporting a law-and-order state which protects private property and enforces contracts. Modernising policies strengthen the authority of the state by attracting the loyalty of those they benefit. Indeed one of the main objectives of such policies is to create a sense of national identity, to forestall any tendencies towards regionalism or separatism and to weaken traditional loyalties based on the tribe or kinship group. Insofaras these policies tend to favour the rich, national unity will only be achieved at the expense of creating a gulf between the rich and the poor, between the government and the governed. It is true that there are few signs of class-consciousness among the rural poor today and it is likely that it will be in Nairobi that a recognisable proletariat will first emerge. It is there that wealth differentials are most visible and it is there that the landless poor from all over Kenya are thrown together to share a common lot in the shanty-towns. For some time now there have been a few politicians who have taken up the cause of the urban and the rural poor and

it seems likely that appeals across tribal lines to a constituency based on shared socio-economic interest will become more common in the future.

This study of the land adjudication and registration programme has attempted to answer a number of questions. It has sought to assess the success of the programme in the light of its declared objectives, both legal and economic. In the course ofthis assessment it emerged that the strength and adaptability of customary law imposed certain limits on the effectiveness of legislation as an instrument of social engineering. Moreover it has been argued that the programme, like other modernising policies, has tended to favour the richer farmers at the expense of the poorer. The increasing wealth differentials noted in Gathinja and East Kadianga reflect what is happening throughout Kenya. Whether the land adjudication and registration programme has been successful in terms of its own narrowly-defined objectives or not, it will probably be seen in retrospect to have contributed to the stratification of Kenya along class lines and to the creation of a sense of national identity.

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