THE LAW AND PRACTICE OF THE REGISTERED LAND ACT 1963: A COMPARATIVE STUDY

by

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ABSTRACT

The purpose of this thesis is to determine whether the Registered Land Act 1963 of Kenya has established an effective system of law and practice governing titles to land registered under the Act. Several key issues are addressed. First, how effective has been the process of land adjudication which brings onto the register land that was formerly subject to customary law; moreover, how successful has been the process of converting land that was subject to one of the pre-existing systems of registration. Secondly, how effective is the conveyancing machinery provided by the Act. Thirdly, are the rights of registered proprietors, including those registered jointly or in common, as well as persons with third party interests in land adequately protected by the Act? Fourthly, to what extent have the provisions of the Magistrates' Jurisdiction (Amendment) Act 1981 undermined the provisions of the Registered Land Act 1963?

In answering these questions the relevant provisions of the Registered Land Act 1963 are compared with those of the English Land Registration Act 1925. This thesis considers the extent to which judicial interpretation of the provisions of the Land Registration Act 1925 can assist in solving some of the problems created by the provisions of the Registered Land Act 1963. It is contended that the Registered Land Act has failed to provide a truly effective system of registered land.

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CONTENTS

ABBREVIATIONS

A.C. - Appeal Cases

All E.R. - All England Law Reports

C.L.J. - Cambridge Law Journal

Ch. - Chancery Division

Conv. - The Conveyancer and Property Lawyer

Conv. (N.S.) - The Conveyancer and Property Lawyer (New Series)

Crim L.R. - Criminal Law Review

D.L.R. - Dominion Law Reports

E.A. - Eastern Africa Law Reports

E.A.C.A. - East Africa Court of Appeal Reports

E.A.L.J. - East African Law Journal

E.A.L.R. - East African Law Reports

E.A.R.J.D. - East African Journal of Rural Development

E.L.C. - Elders Law Case

H.C.C.C. - High Court Civil Case

H.C.M.C. - High Court Miscellaneous Case

J.A. - Judge of Appeal

J.A.A. - Journal of African Administration

J.A.L. - Journal of African Law

J.S.S.I. - Journal of Statistical and Social Inquiry of Ireland

K.D.L.R. - Kiambu District Land Registry

K.H.C.D. - Kenya High Court Digest

K.L.R. - Kenya Law Reports

K.N.A - Kenya National Archives

L.Q.R. - Law Quarterly Review

L.S.G. - Law Society Gazette

M.L.R. - Modern Law Review

N.I.L.Q. - Northern Ireland Legal Quarterly

N.L.J. - New Law Journal

N.Z.L.R. - New Zealand Law Reports

R.M.C.C. - Resident Magistrates' Court

S.R.M.C. - Senior Resident Magistrates' Court

W.L.R. - Weekly Law Reports

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Land Registration Act 1925

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Land Registration and Land Charges Act 1971

Law of Property Act 1922

Law of Property Act 1925

Law of Property Act 1969

Law of Property (Miscellaneous Provisions) Act 1989

Local Government (Miscellaneous Provisions) Act 1982

Local Land Charges Act 1975

Magistrates Courts Act 1980

Matrimonial Homes Act 1967

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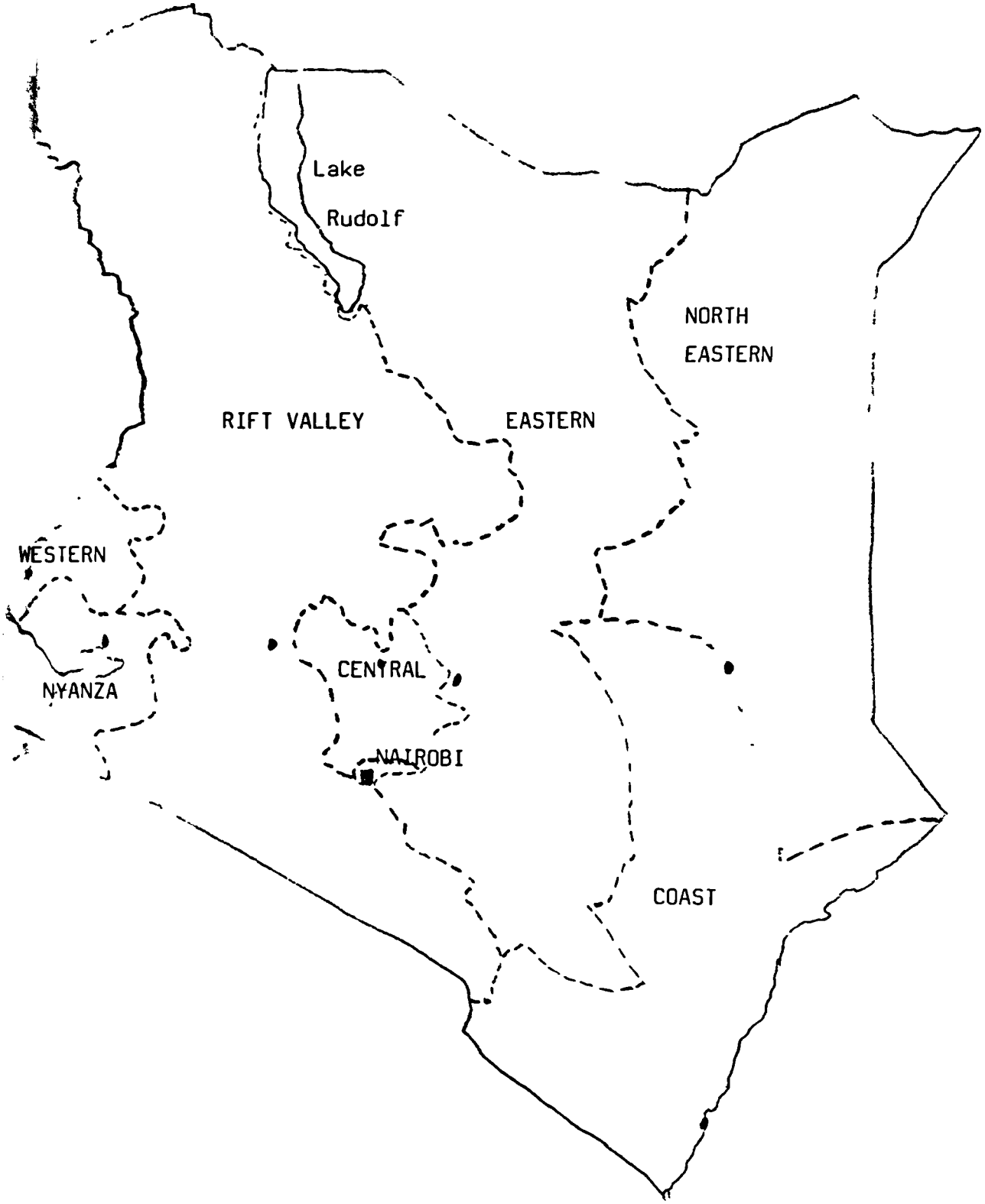

Chapter One

INTRODUCTION

I. Background

> "Are we encouraging the registration of titles under the Acts of 1875 and 1879? Well, what do you think? Are we likely to do anything that would bring about professional suicide? Don't you understand that when once a title is registered as 'absolute' all future conveyances will be effected without the aid of a solicitor ... No, no; we are doing our level best to thwart registration of title ... And if the registration of title in the present compulsory area is made as inconvenient, troublesome and expensive as possible, there will be little likelihood of the area being extended. Our view is, that every solicitor owes a duty to the profession, and also to the public, to throw every obstacle in the way of registration of titles."[1]

The welcome that was accorded by the English legal profession to the Land Registry Act 1862, which introduced land registration in England was, at best, lukewarm and insipid.[2] Despite the general consensus in the 19th century that the substantive law of property and conveyancing in England was in dire need of reform, there was no stampede to have titles registered under the one Act that was designed to reform conveyancing in England. The complacency and the reluctance amongst conveyancers to heartily embrace the new system was a by product of the deep seated attachment to the system of private conveyancing by the use of deeds. This method of conveying land had been in existence for

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1 Chats With a Young Solicitor, (1899) 16 Law Notes 341.

2 See Report of a Select Committee of the House of Commons on Land Titles and Transfer (1879), pp. iv, v, quoted in Second Report of the Royal Commission on the Land Transfer Acts (1911), Cd. 5483, para. 20.

centuries, and although it was anachronistic, the legal profession had enough vested interest in its continued existence.[3]

The disinclination by conveyancers to encourage voluntarily registration under the Land Registry Act 1862 meant that very few titles were registered under the Act. The failure of the Act was also a direct consequence of the inherent deficiencies of the Act itself. Despite the correction of these faults by the Land Transfer Acts of 1875 and 1897, there was no surge in the number of titles registered. Indeed, the introduction of compulsory registration by the Land Transfer Act 1897 provoked a level of histrionics and rhetoric from solicitors against this move, as illustrated in the quote above. This level of opposition played a role in preventing the rapid spread of land registration in England and Wales; even after the enactment of the Land Registration Act 1925, the extension of land registration was not expedited. Hence, it has taken close to 130 years for land registration to be extended throughout England and Wales.[4]

Of what relevance is this to land registration in Kenya? Simply put, the teething problems that were afflicting land registration in England during its formative

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[3] See the discussion in Avner Offer, Property and Politics, 1870-1914. Land Ownership, Law, Ideology and Urban Development in England, (Cambridge 1981), pp. 23-87.

[4] Compulsory registration was to extend to the last few remaining counties by 1 December 1990 - The Registration of Title Order 1989, S.I. 1347. Hereafter, the term 'England' will be used to refer to England and Wales, unless otherwise stated.

years, and the general opposition to the system, which prevented it from being quickly established and accepted in England, helps to explain why the British government did not initially apply the English model of land registration in Kenya when it established colonial rule there in 1895. Part of British colonial policy was to introduce English law in the territories it colonised; in Kenya, although the English common law and the statutes of general application in force in England were made to apply in the colony, the Land Transfer Act 1875 which was still in force in England was not made applicable, neither was the Land Transfer Act 1897. Instead the substantive property law was imported from India through the Indian Transfer of Property Act 1882 and made to apply in Kenya; further, an Act was enacted, known as the Registration of Deeds Ordinance 1901, which created a simple system of deeds registration. Later, land registration based on the Torrens system was introduced through the Registration of Titles Act 1919. Several parallel and competing systems of registration were introduced which resulted in a confusing and complicated system of registration.

In the meantime, land law in England was undergoing a revolution, culminating in the legislative reforms of 1925. The Land Registration Act 1925, the Land Charges Act 1925 and the Law of Property Act 1925 were the main pillars of that reform. The Land Registration Act 1925, essentially consolidating the Land Transfer Acts of 1875 and 1897, was to have a profound influence not only on land registration in England, but in other jurisdictions too.

The Land Registration Act 1925 had an important impact in Kenya; the Registered Land Act 1963, which was enacted to alleviate the confusion in land law and registration and to unify the disparate systems, was based on the 1925 Act. The Registered Land Act 1963 can be said to be one of the most important pieces of legislation in Kenya today; it has thoroughly revolutionised land law and conveyancing there as well as having been responsible for transforming in a remarkable way land tenure and custom among African societies within the country. Traditional methods of holding and conveying land amongst Africans have been swept away by the rapid spread of land registration. Indeed, Government policy can be said to be responsible for this swift metamorphosis, which has resulted in giant strides having been made in the spread of land registration in Kenya.

The Registered Land Act 1963 therefore set out to do three things: to unify the multifarious systems of land registration in Kenya; to convert land that was subject to African land tenure into the system of land law and registration that was introduced by the 1963 Act; and, eventually, to replace the Indian Transfer of Property Act 1882 and African customary Land law, with the substantive law of property contained in the 1963 Act.

It was the conversion of land subject to African land tenure that was to prove difficult and complicated. Amongst African societies, land was conveyed orally in the presence of witnesses. There were no documents to record these transactions, since reading and writing was not a feature

within African societies.[5] Hence, transfers of land were made in the presence of witnesses, their memory being relied upon to ascertain what the true position was at the time of the transaction. Objects such as an axe, spear, or even a goat or a ram were handed over as symbols of the act of transfer.[6] Since the proprietors of such land had no documents of title to prove their ownership to the land, nor did those who had third party rights to the land, the registration of such land under the Registered Land Act 1963 was to prove to be a challenge. What made this process formidable was the fact that African land tenure was being converted to a system based on English law, since the 1963 Act was modelled on the Land Registration Act 1925.

Therefore, the questions that this thesis addresses itself are these: first, how effective has the Registered Land Act 1963 been in uniting the systems of registration of land that have been in existence in Kenya, and in converting land that was formerly under customary tenure into the system under the Act? Secondly, how effective is the conveyancing machinery that is introduced by the Act? Thirdly, how effective are the provisions of the Act in

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5 Western type education started to be introduced amongst African societies in Kenya by missionaries towards the end of the 19th century and the beginning of 20th century. See J.N.B. Osogo, Educational Developments in Kenya 1911-1924 (with particular reference to African Education), Hadithi 3, edited by Bethwell A. Ogot, (Nairobi 1971), p. 103.

6 This process was similar to the method of transfer of land in England centuries ago known as livery of seisin, where transfer was effected by the symbolic act of handing a twig, stick or a piece of turf to the purchaser - see Sir Ernest Dowson & V.L.O. Sheppard, Land Registration, (London 1956), p. 4.; S.E. Thorne, Livery of Seisin (1936) 52 L.Q.R. 345.

protecting the rights of registered proprietors and those with third party interests in the land? In answering these questions, it will be seen whether the Registered Land Act 1963 does live up to its stated object, which is outlined in its preamble as being an Act designed,

> " ... to make further and better provision for the registration of title to land, and for the regulation of dealings in land so registered... ."

In answering these questions, this thesis compares the provisions of the 1963 Act against those of its model, the Land Registration Act 1925. The object is to identify the deficiencies within the provisions of the 1963 Act, against the background of the comparable provisions in the Land Registration Act 1925.

In determining how these deficiencies can be remedied, it will be shown the extent to which English common law and principles of equity can apply to fill the gaps that are found in the provisions of the Act, in view of the fact that section 163 of the 1963 Act specifically applies such law and equity subject to the provisions of the Act. Moreover it will be shown to what extent English caselaw on provisions of the Land Registration Act 1925 can be used to help interpret comparable provisions in the Registered Land Act 1963.

But what makes the system of registering titles to land far more advantageous than any other system of conveyancing generally? The Privy Council in Gibbs v. Messer[7] identified

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7 [1891] A.C. 248, at p. 254.

one important advantage. They highlighted that purchasers of registered land are saved,

> " ... from the trouble and expense of going behind the register in order to investigate the history of [the vendor's] title and to satisfy themselves of its validity."

Under unregistered conveyancing, a purchaser has to satisfy himself about the validity of the title offered by making a careful and detailed examination of the documents of title. Since land can be the subject of successive transfers over a period of time, the purchaser has to search to a good root of title, or a document which adequately identifies the land and shows a disposition of the whole legal and equitable estate. Successive purchasers of the land have to undertake the same elaborate and retrospective examination of the documents of title to ensure that they take free from the interests of third parties. Hence, this method of investigation is slow and repetitive. But in the system of registered title, the Land Registrar makes an examination of the documents of title to a good root, and once he is satisfied about the validity of the title, registers that title in a register of title and issues a registration number and a land certificate. The register becomes the final authority on the state of the title. The purchaser need no longer examine the documents of title, these now becoming redundant, and only needs to make a simple search of the register.[8] Therefore the problem whereby documents

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[8] Nevertheless, the existence of overriding interests, which are interests that need not be entered on the register, are a feature of land registration which can cause problems for purchasers. For the discussion of these interests, see Chapter Six.

of title become misplaced, lost or suppressed no longer arises.[9]

This factor also makes registration of title more advantageous than the registration of deeds; the registration of deeds does not eradicate the necessity of examining the documents of title because the registration of a deed does not confer validity on it, nor does it make it proof of title. Kenya still retains deeds registration which is found in the Registration of Documents Act 1901 and the Government Lands Act 1915, and a hybrid system of deeds and land registration found in the Land Titles Act 1908.[10]

Moreover, the effectiveness of the system of land registration is augmented by the fact that the State warrants or guarantees the register by undertaking to indemnify a person who suffers loss or damage by virtue of a mistake or omission on the register, or where loss is suffered as a result of a fraudulent transfer.

These factors make land registration or registration of title a superior system. It was for these reasons that registration of title was chosen as the system that would

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9 Although unregistered land in England is governed by a system of registration of charges under the Land Charges Act 1972, whereby charges and interests in unregistered land are registered in a register of charges and any that are not registered are not binding on a purchaser, the purchaser still has to examine documents of title to a root of at least 15 years - Law of Property Act 1969, s. 23.

10 See Chapter Two for a discussion of these Acts. England also had a system of deeds registration contained in the Yorkshire Registries Act 1703 and the Middlesex Registry Act 1708, establishing deeds registration in Yorkshire and Middlesex.

govern land in England and in other jurisdictions such as Kenya.

II. Research Objectives

There are four key objectives in pursuing this research into the Registered Land Act 1963 of Kenya:

1) To determine how effective the spread of land registration in Kenya under the Registered Land Act 1963 has been. This meant considering three areas: first, the process known as land adjudication. This process involves the adjudication of land that was formerly subject to African customary law, and the registration of such land under the 1963 Act. The process of land adjudication is governed by the Land Adjudication Act 1968. What is significant about land adjudication is the method that has been used to bring in this type of unregistered land onto the register, a process which involves the use of lay people making up the adjudication committees determining the rights and interests that exist over the land that is to be registered. The success of land adjudication has been crucial to the pace at which land registration under the Registered Land Act 1963 has been extended throughout the country.

Secondly, considering the conversion of those titles that are registered under the pre-existing registration systems in Kenya, that is, the Registration of Documents Act 1901, the Land Titles Act 1908, the Government Lands Act 1915, and the Registration of Titles Act 1919.

Thirdly, analysing the system that has been set up for the registration of flats and horizontal units in Kenya.

The extent to which land registration has been successfully extended in Kenya is measured against the progress that has been made in registering land in England under the Land Registration Act 1925.

2. The second objective is to determine how effective the conveyancing machinery introduced by the Registered Land Act 1963 is. This has meant looking at the organization of the register under the 1963 Act, the provisions on searching the register, and principally, how easy it is for a purchaser to undertake a transfer of land on his own behalf without the benefit of legal advice. This is important because in Kenya, the Government has encouraged people to undertake their own transactions, and it has meant that by and large, the majority of transfers of land registered under the 1963 Act are undertaken by parties to a transaction on their own behalf. Indeed, the fact that many people are registration literate is an important strength of land registration policy in Kenya, when compared with the position in England.

However, in determining how effective the conveyancing machinery under the 1963 Act is also depends on the safeguards that are provided by the Act in protecting a purchaser of land acting on his own behalf. It will be argued that many purchasers of registered land in Kenya acting on their own behalf are prejudiced by the lack of implied covenants for title under the Registered Land Act 1963, and that such covenants do play a role in registered land.

3. The third objective is to consider how effective the provisions of the 1963 Act are in protecting the rights of registered proprietors and those with third party interests in land. Four areas will be considered here.
First, in view of the process of land adjudication whereby land is converted from customary tenure, to what extent does the Registered Land Act 1963 give protection to those who held customary rights or interests in the land but, for various reasons, failed to have those rights protected on the register during land adjudication? This will involve the consideration of the mechanisms to restrain dispositions of registered land and the question of overriding interests.

Secondly, the provisions in the Act that set up the structure for co-ownership of land are examined and whether these provisions are really adequate for the multiple ownership of land registered under the Act.

Thirdly, the rectification and indemnity provisions in the 1963 Act are also considered. The prevention of rectifications of any first registration by the 1963 Act means that the title of a first registered proprietor is virtually unimpeachable. But this causes problems, particularly where the first registered proprietor has obtained title by fraud. It will be shown to what extent the courts in Kenya have sidestepped this prohibition in order to transfer titles to those who have been defrauded.
4. The fourth and last objective is to consider to what extent the creation of the panels of elders by the Magistrates Jurisdiction (Amendment) Act 1981 has undermined the provisions of the Registered Land Act 1963. These

panels are composed of lay members who determine certain disputes over land, but their jurisdiction also covers land registered under the 1963 Act. The question that needs to be answered is whether the creation of the panels of elders was indeed a big mistake.

The overall purpose of this thesis is to show that despite some of the strengths of land registration policy in Kenya, such as the decision to methodically and systematically bring in unregistered titles onto the register under the Registered Land Act 1963, resulting in a rapid spread of land registration in Kenya, together with the fact that people are registration literate, the provisions of the 1963 Act do not, in certain key areas, and when viewed against the comparable provisions in England, provide adequate protection for proprietors of registered titles, hence undermining the effectiveness of the Act.

The thesis identifies the problems that arise in connection with the Act and proposes remedies, which help to eliminate the problems if not cushion their impact. The length of this thesis would be considerable and interminable if one were to consider all the provisions of the 1963 Act which contain not only conveyancing provisions, but substantive law provisions as well. Hence, the provisions on leases[11] and charges[12] will not be analysed, although reference will be made to them where relevant. However, the failure to discuss these two areas for example, does not

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11 Registered Land Act 1963, Part V, Division Two.

12 *Ibid.*, Part V, Division Three.

detract from the attainment of the objectives outlined above, and it is felt that these provisions are sufficiently detailed to form the basis of further research.

III. Research Methods

In determining the effectiveness of the Registered Land Act 1963, a programme of research covering a period of three years was undertaken by the writer. Between September and October 1989 the writer was able to work in the Kiambu District Land Registry, the busiest land registry in Kenya. There, the writer not only observed first hand but was also personally involved in the processes of land registration. This included assisting parties involved in the sale of registered land by undertaking searches, making entries on the registers of title and issuing land certificates (referred to as 'title deeds'[13]). The writer also had the opportunity of accompanying the Land Registrar when proceeding to solve boundary and partition disputes over registered land and attending Registry hearings too. Extensive interviews were conducted with the District Land Registrar and other officials in the Land Registry. A wide ranging interview was also conducted with the Deputy Chief Land Registrar in Nairobi. The writer also spent time in the Land Adjudication Department in Nairobi observing the process of bringing land that was formerly under customary tenure onto the registers under the Registered Land Act 1963 and was able to interview officials in the Department.

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13 As to why see Chapter Four.

The Survey of Kenya, a Government department situated in Nairobi, plays a crucial role in the process of land registration by surveying the boundaries of the land to be registered. This is undertaken through a combination of aerial photography and ground surveys. The writer was able to observe how cartographers in the Department translate the information obtained from these surveys onto maps on which are drawn the boundaries of the individual plots of land, and which become the Registry maps.[14]

The writer also had the opportunity of working in the conveyancing section of a large law firm in Nairobi and was able to conduct transactions on behalf of clients as well as assisting in litigation involving registered land.

To compare the procedure used in registering titles under the Land Registration Act 1925, a visit was made to the Nottingham District Land Registry in England to observe the process of registering English titles and, while there, had the opportunity of interviewing a senior official of the Land Registry.

The analysis of decided cases from the law reports is a *sine qua non* of legal research and, *a fortiori*, for the purpose of this thesis. English caselaw is well documented in a series of up-to-date law reports while unreported cases can be obtained from LEXIS, the computer database and retrieval system. However, the history and development of law reporting in Kenya has not been altogether too happy. Since 1980 there has been no publication of the Kenya Law

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14 See Chapter Three, *infra*.

Reports, the official law reports of Kenya. This makes it difficult for a researcher to track down developments in the law and in discovering what the present state of the law is. Unfortunately, it also has the effect of creating conflict in the law, whereby a decision may be given *per incuriam* because the court and even counsel were unaware of an unreported case binding on the court. The writer therefore spent a considerable length of time in the High Court Library in Nairobi, and in the libraries of law firms and the University of Nairobi, in an attempt too uncover as many unreported cases as possible that had a bearing on the Registered Land Act 1963. However, there always exists the danger of an unreported decision lurking somewhere undiscovered which may put a different gloss on the law. The library of the National Assembly proved to be a fruitful source of material on Parliamentary debates on land registration in Kenya. Through the above research methods the writer was able to determine the strengths and failures of the system of land registration under the Registered Land Act 1963.

IV Organization of the Thesis

The organization of this thesis is based around the four objectives outlined earlier. Before the analysis of the Registered Land Act 1963 is embarked upon, the historical background of land registration in England and in Kenya is looked at in Chapter Two. The chapter is divided into two parts: Part I outlines the history of land registration in England from the enactment of the Land

Registry Act 1862 to the Land Registration Act 1925. The history of land registration in England was to have an indirect effect on the history of land registration in Kenya, a history that was wholly shaped by the influence of British colonial rule.

Part II of Chapter Two looks at the convoluted and chequered history of land registration in Kenya. Several differing systems of registration of deeds and of land were introduced in relatively quick succession by the colonial government in Kenya, which had the effect of bringing about confusion in the land law. This was compounded by the fact that the African societies already in existence in the country had differing customary laws governing the land they occupied. The method of conveying land among the Kikuyu is used as an example to illustrate the methods of conveyancing among African societies. However, the failure on the part of the colonial government to recognise African titles over the land they occupied, coupled with the refusal to introduce any of the systems of land registration in the lands that the Africans occupied, contributed to the outbreak of civil war in the 1950s and the introduction of another system of land registration. Each of the systems of registration introduced by the colonial government will be briefly considered as a prelude to understanding why the Registered Land Act 1963 was enacted. It will be shown that although the enactment of the Registered Land Act 1963 was heavily influenced by political and economic factors, it was more of an attempt to bring order to the chaos of land law and registration in Kenya.

Chapter Three considers the procedure of bringing in titles onto the register, showing how effective the Registered Land Act 1963 has been in extending registration to land in Kenya. It will be shown that the systematic registration of unregistered titles in Kenya has resulted in a rapid increase in the number of titles registered when compared with the method of sporadic registration in England. The method of land adjudication in Kenya has had an important bearing on the mapping of registered land and the preparation of the Registry Index Map. Although the method of systematically registering land has advantages, for example in the preparation of the Registry Index Map, it has generated problems. The land adjudication process is analysed and the problems created by the use of lay people on the adjudication committees to undertake the bulk of land adjudication in Kenya examined.

This chapter will show that the Registered Land Act 1963 has not been successful in unifying the disparate systems of land registration still in existence in Kenya. The last section of Chapter Three considers the registration provisions of the Sectional Properties Act 1987 which was introduced in Kenya to provide for the registration of flats and horizontal units. This is contrasted with the position in England where efforts are still being made to introduce similar legislation.

Chapter Four begins to consider the second objective, that is, the effectiveness of the conveyancing machinery introduced by the Registered Land Act 1963. The Kiambu District Land Registry is the focus of this chapter. This

involves looking at the organization of the register of titles, to what extent personal attendance by parties to a transaction is a feature of registered conveyancing, and the extent to which inspection of the register is open to the public. A surprising amendment to the Registered Land Act 1963 was the change that was made to land certificates; under the Act they are no longer termed as 'land certificates' but are now referred to as 'title deeds'. It will be shown whether this change has elevated the status of the document so that it can now be viewed as evidence of title thereby reducing the importance of the register.

Chapter Five will show that the conveyancing machinery is defective in several ways, and has the effect of prejudicing purchasers who are acting on their own behalf. This is noteworthy because many purchasers of land in Kenya do act without the benefit of legal advice. In particular, the absence of implied covenants for title may leave a purchaser without a remedy, in view of the limitations on rectification of the register. This situation is compared with the position under the Land Registration Act 1925 and to what extent English caselaw highlights the benefits of implied covenants for title.

A piece of legislation that is important where land is concerned in Kenya is the Land Control Act 1967 which provides a mechanism for the sanctioning of contracts for the sale of agricultural land; failure to comply with the provisions in the 1967 Act may result in such a contract being declared null and void. It will be shown to what

extent provisions of the Land Control Act 1967 do conflict with those in the Registered Land Act 1963.

Having discussed the problems which have been created by the process of land adjudication in Chapter Two, attention is turned in Chapter Six to a problem that continues to afflict proprietors of registered land, that is, the status of unregistered customary rights. Land adjudication was designed to identify all the customary rights claimed by individuals and have them protected on the register of title. However, many rights were ignored or undetected for a combination of reasons which are outlined in Chapter Two and, as a result, were never protected on the register. One line of thought is that these unprotected customary rights are extinguished for all time once the land is brought onto the register. However, it will be shown in Chapter Six that there is a category of customary rights that are not extinguished and indeed can be protected on the register by the entry of a caution, or subsist as overriding interests under section 30 of the 1963 Act, and the extent to which equitable principles are applicable to make this possible. Moreover, how can a purchaser ensure that he takes free from such overriding interests under the Act? It will be shown that additional mechanisms need to be inserted in the Registered Land Act 1963 to protect such a purchaser. Although the equitable doctrine of notice has generally no role to play in the law of registered land, it has a minor role to play under the Registered land Act 1963. This chapter will show the role the doctrine plays in the Act where licences are concerned.

Chapter Seven will show that the provisions on co-ownership of registered land under the 1963 Act are inadequate and fail to protect the interests of numerous joint owners. It will be argued that the Land (Group Representatives) Act 1968 which was enacted to fill the gap in the co-ownership provisions in the Registered Land Act 1963 and which set up a structure for the ownership of land by large groups of people is a failure. Several solutions are put forward in an attempt to find a remedy to this problem.

Section 143(1) of the Registered Land Act 1963 has the effect of severely restricting the power of the court and that of the land registrar to rectify the register. Although this has the effect of almost rendering the title of a first registered proprietor unimpeachable, it has caused enormous complications, particularly where titles have been obtained by fraud. How have the courts been able to circumvent this problem? This is addressed to in Chapter Eight. Moreover, when compared with the provisions relating to rectification under the Land Registration Act 1925, the rectification provisions in the 1963 Act may unduly prejudice an innocent registered proprietor in possession. The indemnity provisions are also restrictive and may have the effect of limiting the amount of indemnity a person can recover, if that person has suffered 'damage'.

Chapter Nine analyses the effect of the Magistrates Jurisdiction (Amendment) Act 1981 which confers jurisdiction on newly created panels of elders, made up of lay individuals, to hear certain disputes over registered land.

It is intended to show that the decisions of the panels of elders are tending to undermine the provisions of the Registered Land Act 1963 by the application of customary law to the provisions of the Act, and in this way may undermine the security of title offered by the 1963 Act.

Chapter Ten is the concluding chapter and considers the proposals for reform that have been considered by the Kenya Law Reform Commission to improve the system of land and law and registration in Kenya, as well as proposals considered by the Law Commission in England to overhaul the system of land registration in England.

All in all, although this thesis will highlight the deficiencies of the Registered Land Act 1963, the writer will show how these deficiencies can be eliminated or at least be minimised, thus making the Act more effective in regulating registration of title in Kenya.

Chapter Two

THE HISTORY OF LAND REGISTRATION IN ENGLAND AND KENYA

1. Introduction

"In all civilized countries ... there should be a General Register."[1]

Egypt may be credited as the nation which first introduced the concept of a registered title. Archaeological findings revealed that a form of land registration was in existence there around 3,000 B.C. A tomb of a certain high official showed that his property was registered in the Royal Registry of Egypt, while another tomb revealed information that the register was kept in duplicate, one in the Treasury and the other in the department of the granary of Pharoah.[2] Further information was uncovered which showed that there was a land court in which the Chief Minister of Egypt determined disputes over land ownership and titles that were certified as valid were registered, whereas unregistered claims were declared invalid.[3] This evidence shows that the concept of a title registered in a register maintained by the State, from which proof of title can be

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1 Second Report of the Royal Commission on Real Property (1830), p. 3.

2 Sir Ernest Dowson & V.L.O. Sheppard, Land Registration (London 1956), p. 3.

3 *Ibid.*

determined, originates way back in time. The system has spread and today there are many forms of land registration around the world.

This chapter initially discusses the problems that faced the early Land Registration Acts that were enacted in England, that is the Land Registry Act 1862 and the Land Transfer Acts of 1875 and 1897. The inherent difficulties with these Acts together with the sustained opposition by the legal profession to land registration in general meant that it took a long time before registration of titles became widely accepted in England.

These factors help to explain why the British Government did not introduce the English system of land registration when it established colonial rule there towards the end of the 19th century. Although the colonial administration introduced English common law and equity, as well as the statutes that were in general application in England' in 1897,[4] the Land Registry Act 1862 and the Land Transfer Acts of 1875 and 1897 were not applied. Instead, a system of deeds registration was adopted and which still exists today.

Part II of this chapter goes on to discuss the turbulent history of land registration in Kenya. It will be shown how the colonial government introduced two forms of deeds registration, a hybrid system of deeds and registered title and the Torrens system of

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[4] East Africa Order in Council 1902, art. 15(2) as amended by the East Africa Order in Council 1911.

land registration all in the space of 20 years. Amazingly, no attempt was made to phase out a previously established registration system when introducing a new one, a problem that was symptomatic of a lack of clear policy on land registration.

What aggravated the situation further was the government's policy towards the indigenous Africans. To facilitate European settlement in Kenya, the colonial government confined African societies, which had inhabited the country long before colonial rule was established, to certain areas known as Reserves, thereby providing more fertile land for European settlement. The imported English law and the systems of land registration did not apply in these Reserves. Instead, dealings in land among the Africans, for example, were to be governed by customary law. Part II of this chapter considers the nature of conveyancing among the Kikuyu and the types of interests created over land. The background on the customary land law of this tribe, as an example, helps one to appreciate the problems that were faced when land that was under customary tenure was brought onto the register. [5] Land registration was eventually introduced in the African lands as a result of the outbreak of the Mau Mau civil war. This war was a consequence of the pent up frustration and anger felt by Africans over the colonial government's land

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[5] See Chapter Three.

policy. A new system of land registration was therefore introduced in the Reserves or the 'Native Lands', as they were later called, designed to have registered titles issued to those who could prove rights of ownership under customary law.

As a result, there were five different systems of registration in Kenya by 1960. This unsatisfactory situation led to the move to simplify and unify land registration there, hence the enactment of the Registered Land Act 1963. This Act was far reaching because not only was it designed to convert titles registered under the other registration Acts, but it also provided for the extension of registration to areas that were still under customary tenure.

Part I

Initial Problems Facing Land Registration in England

The Land Registry Act 1862 which introduced registration of title nationally was enacted as a result of the recommendations of the Registration of Title Commissioners. In their 1857 Report[6] they considered at length the failings of the existing method of private conveyancing. They highlighted, for example, that the risk of fraud was high due to the

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6 Report of the Commissioners appointed to consider the subject of the Registration of Title with reference to the sale and transfer of land, 1857, C. 2215. (Hereafter 'Report of the Commissioners of Registration of Title.')

suppression or destruction of deeds, while there was always the possibility that deeds would get lost; all these factors contributed to insecurity of title.[7] Moreover, the investigation of the history of a title each time it was transferred caused "expense ... delay, annoyance and disappointment, sickening to both buyer and seller."[8]

Accordingly, the Commissioners recommended that a system of registration of title should be established, the object of which was to avoid the "retrospective inquiry into the former dealings and transactions" while at the same time simplifying title and the forms of conveyance and without at the same time impairing the security of trusts.[9] The registered ownership would only be subject to other registered interests while unregistered interests would have no effect, thereby excluding the doctrine of notice.[10] The result would be a title that was single, complete and indefeasible thereby making it marketable.[11]

The Land Registry Act 1862, according to its preamble, was designed "to give certainty to the Title to Real Estates, and to facilitate the proof thereof, and also to render the dealing with land more simple

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7 *Ibid.*, pp. 258-262.

8 *Ibid.*, p. 260.

9 *Ibid.*, para. XLII.

10 *Ibid.*, paras. LXII, LXXIII.

11 *Ibid.*

and economical". The Act established a Land Registry the business of which would be conducted by a Land Registrar.[12] An application could be made for the registration of a title as 'indefeasible' by any owner of a fee simple estate, such application being purely voluntary.[13]

However, the Act got off to a bad start; by 1868 only 507 applications for registration were made.[14] A Land Transfer Commission was appointed in 1868 to discover why the Act had failed. In their report[15] they identified two main problems which had afflicted the Act. First, they pointed out that the examination of titles by the Registrar was done too strictly and consequently only perfect titles were registered, with the result that many titles were failing the test due to defects in title.[16] Secondly, all boundaries to land had to be accurately defined and guaranteed.[17]

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12 Land Registry Act 1862, ss. 2, 108.

13 *Ibid.*, ss. 4. 5.

14 Report of the Royal Commissioners appointed to inquire into the operation of the Land Transfer Act, and into the present condition of the Registry of Deeds for the County of Middlesex, (1870) C. 20, para. 10, (hereafter 'Report of the Land Transfer Commission'.)

15 *Loc. cit.*

16 Section 5 of the Land Registry Act 1862 had provided that a title would be accepted for registration as indefeasible if it would appear "to be such as a court of Equity would hold to be a valid marketable title."

17 Section 10 of the 1862 Act had provided that the Registrar had power to ascertain the accuracy of the description and the quantities and boundaries of the land through such inquiries as he thought fit.

This was an expensive process and it discouraged many landowners from seeking to have their land registered under the 1862 Act.[18]

The Commission recommended that the principle of a possessory title should be included in a new Act so that minor defects in title should not be a barrier to registration.[19] The recommendations of the Commission were accepted and led to the enactment of the Land Transfer Act 1875. A new Land Registry in London was created and power given to the Lord Chancellor to create district land registries,[20] and the Registrar and other officials appointed under the 1862 Act were transferred to serve in the Land Registry created by the 1875 Act.[21] Although the Land Registry Act 1862 was not repealed no further registrations were to be made under it.[22] Significantly, the 1875 Act provided for the first time the division of titles into classes. Apart from absolute titles two new classes were created: possessory and qualified titles. A possessory title was subject to interests or rights subsisting or capable of arising at the time of

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18 Report of the Land Transfer Commission (1870), paras. 40-45, 53.

19 *Ibid.*, para.75.

20 Land Transfer Act 1875, ss. 106, 118.

21 *Ibid.*, s. 123.

22 *Ibid.*, s. 125. To this date the Land Registry Act 1862 has remained on the statute book.

registration.[23] A qualified title, which was granted if it appeared to the Registrar that the title could only be established for a limited period or that there were certain reservations to it, was not to "affect or prejudice the enforcement of any estate, right, or interest appearing by the register to be excepted."[24]

What was important was that defects in title would no longer be a barrier to registration. If the Registrar, when examining a title, was of the opinion that a title was open to objection, but was nevertheless a title, the holding under which would not be disturbed, he could approve of such a title.[25] Moreover boundaries were no longer meant to be accurately defined.[26]

However, despite these improvements, the Act turned out to be more of a failure than the Land Registry Act 1862. By 1886 only 113 titles had been registered under the Act with the Land Registry making a loss that exceeded £100,000.[27] A House of Commons Select Committee appointed in 1878 to inquire into the working of the 1875 Act identified the apathy and opposition of lawyers to registration of title as one

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23 Land Transfer Act 1875, s. 8.

24 *Ibid.*, s. 9.

25 *Ibid.*, s. 83.

26 *Ibid.*

27 Second and Final Report of the Royal Commission on the Land Transfer Acts (1911), Cd. 5483, para. 21.

of the main factors of the Act's failure. As they put it,

> "the public or their professional advisers have deliberately made up their minds that the advantages offered are too speculative and remote to compensate for the immediate and certain outlay and trouble."[28]

This apathy was caused by an "almost superstitious reverence for title deeds" and,

> "the preference which Englishmen, as a rule, feel for managing their own affairs in their own way, and the dislike of more or less stringent official scrutiny upon every fresh dealing with their property, aggravated in the case of applications for the registration of an Absolute Title by the fear of its resulting in the detection of a flaw in their title."[29]

However, the Committee identified that legislating for the registration without, as a preliminary step, simplifying the titles to be registered was "to begin at the wrong end."[30] But it was the failure to provide a method of compulsory registration of titles that contributed to the failure of the Act. As long as registration remained voluntary, the opposition of the legal profession would ensure that registration of title would never get off the ground because of their fears that registration would wipe out the conveyancing business

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28 Report of a Select Committee of the House of Commons on Land Titles and Transfer (1879), p. iv., quoted in Second Report ... on the Land Transfer Acts, *op. cit*, para. 20.

29 *Ibid.*, p. v.

30 *Ibid.*, p. vi.

the fees of which had been based on the length of deeds.[31] Interestingly, before the 1875 Act was passed, Bills had been brought before Parliament which introduced provisions for the compulsory registration of titles, but these were rejected.[32]

It was in the late 1880's that further attempts were made to introduce compulsory registration of titles. In 1887, 1888 and 1889, Lord Halsbury, the Lord Chancellor, introduced Bills which provided for the compulsory registration of titles but nothing became of them. In 1893 another attempt was made, this time by Lord Herschell, whereby he introduced a Bill which provided for the compulsory registration with Possessory Title on sale only, with power to the Privy Council to introduce compulsory registration to any district. Although the Bill was introduced before Parliament for three successive years it was not passed.[33]

Attempts to introduce provisions for compulsory registration were eventually successful when the Land Transfer Act 1897 was passed. The Act made numerous amendments to the Land Transfer Act 1875. Significantly, not only did it make provision for

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31 For an interesting discussion of the opposition of the legal profession to registration of title, see Avner Offer, Property and Politics, 1870-1914. Land Ownership, Law, Ideology and Urban Development in England, (Cambridge, 1981).

32 See Second and Final Report of the Royal Commission on the Land Transfer Acts (1911), Cd. 5483.

33 *Ibid.*, para. 22.

compulsory registration of title on a sale,[34] but it made provision for persons to be indemnified where they had suffered loss due to errors or omissions in the register.[35] However, the legal profession was implacably opposed to the Act because they feared that the introduction of compulsory registration would ruin their conveyancing business. Therefore they were determined to prevent the Act from becoming effective. The following quote from the editors of Law Notes in 1899 highlights the depth of hostility to the statute and the reason for such opposition:

> "As we have said over and over again in the interests of the public, it is the duty of the profession to make the registration of title so unpalatable to those who register in the parts where registration is compulsory that ... there will be no chance of the compulsory area being extended."[36]

However, the Act did not itself make registration compulsory in any part of the country but merely empowered the Privy Council to declare that in any specified county or part of a county registration of title should be compulsory on a sale. Compulsory registration was initially applied in London and was confined there for a number of years. County Councils had the power to introduce compulsory registration in their areas but none outside London did so.

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34 Land Transfer Act 1897, s. 20(1).

35 *Ibid.*, s. 7.

36 (1899) 16 Law Notes 335.

A Royal Commission was subsequently appointed to investigate the working of the Land Transfer Acts and to make recommendations for the amendment of the system. In its second report in 1911 the Commission made several and wide ranging recommendations to improve the system such as improving the rectification and indemnity provisions in the Land Transfer Act 1897.[37]

Due to the intervention of the First World War, no further consideration of the matter was made although parallel attempts were made to reform the law of real property and conveyancing such as the presentation of the Real Property and Conveyancing Bill 1915 by Lord Haldane which was not passed.

It was not until 1919 that the Acquisition and Valuation of Land Committee was appointed to consider, among other things.

> "the present position of Land Transfer in England and Wales, and to advise what action should be taken to facilitate and cheapen the transfer of land."[38]

The Committee was of the unanimous opinion that

> "the existing law of real property is archaic and unnecessarily complicated [and] that no great improvement in the existing systems of transfer of land, whether registered or unregistered, can be effected

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37 See Second and Final Report of the Royal Commission on the Land Transfer Acts (1911), Cd. 5483. Chapt IV.

38 Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales (1919), Cd. 424, (hereafter 'Fourth Report of the Acquisition and Valuation of Land Committee').

> *until the law of Real Property has been radically simplified.*"[39] (italics mine)

The Committee therefore requested Mr. B. L. Cherry, a conveyancing counsel of the Court, to prepare a Bill which would incorporate the suggestions made by Mr. Arthur Underhill, a Senior Conveyancing Counsel of the Court, on improving the law of real property in England.[40]

The Committee itself made numerous recommendations on improving land registration in England. For example, they recommended that registered possessory titles should ripen into absolute titles after a period of 15 years with the Registrar having the discretion to convert the title after this period; that all land charges affecting registered land should be noted on the register; that compensation or indemnity should not exceed, where the register is not rectified, the value of the estate or interest at the time when the error or omission which caused the loss was made; that registered land should be described by reference to a plan showing the general boundaries of the property.[41]

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39 *Ibid*, para. 23.

40 The suggestions made by Arthur Underhill were contained in a pamphlet entitled The Line of Least Resistance. An Easy but Effective Method of Simplifying the Law of Real Property. This pamphlet was attached to the Fourth Report of the Land Valuation Committee, *op. cit.* The suggestions contained in the pamphlet had a far reaching effect on the law of real property in England and Wales and were to form the basis of the Law of Property Act 1925.

41 Fourth Report of the Acquisition and Valuation of Land Committee, *op. cit.* para. 32.

The recommendations made by Arthur Underhill on improving the law of real property and the recommendations made by the Land Committee were incorporated into the Law of Property Bill drafted by B. Cherry. The Bill was massive and described as "the biggest Bill ever introduced into Parliament".[42] The Bill combined two principles; a simplified system of private conveyancing and a national register of title that was to be compulsory with its extension being controlled by central rather than local government. Tenure was simplified by the abolition of copyhold and other customary tenures. Legal estates were reduced to freehold and leasehold while trusts and other equitable interests were removed from the legal title.

The Bill was enacted in 1922 to become the Law of Property Act 1922 but before it came into force it was itself amended and sub-divided into the seven Acts of 1925, that is, the Law of Property Act, Settled Land Act, Trustee Act, Land Charges Act, Administration of Estates Act, Land Registration Act, and the University and College Estates Act. The extensive reforms of the 1925 legislation rationalised English property law significantly and still form the basis of English property law today.

The Land Registration Act 1925, part of the 1925 property registration, was a consolidation Act, consolidating the provisions of the Land Transfer Acts

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42 154 H.C. Debs. (5th ser.), 90 (1922).

of 1875 and 1897. Unlike the Kenyan Registered Land Act 1963, the 1925 Act is essentially a conveyancing Act, containing provisions facilitating the transfer of registered land and the protection of interests in such land while the substantive law on real property is contained in the Law of Property Act 1925.

The Land Registration Act 1925 not only was to have a tremendous influence on land registration in England but it had affect in other jurisdictions. Kenya was one country where it had an impact on the spread of land registration. The basic structure of land registration in the Registered Land Act 1963 identifies with the structure under the Land Registration Act 1925.

With the background of English land registration in mind, Part II of this chapter now proceeds to consider the historical background and the events that led to the introduction of the Registered Land Act 1963.

Part II

The Influence of Colonial Rule on Land Registration in Kenya

A. Establishment of Colonial Rule[43]

The advent of British colonial rule in Kenya was to have profound political, economic, social and legal consequences for the country and its inhabitants. Colonial rule began on 15 June 1895 when a protectorate was established by the British government over the East Africa Protectorate, most of which later became known as Kenya. The reason for the establishment of colonial rule in Kenya primarily lay in the international politics and diplomacy of the 19th century. At the heart of the 19th century European power struggle for the domination of the lucrative trade routes with India and the Far East was the need to control the Suez Canal. This meant that it was vital to achieve control over Egypt, through which the canal ran. Since the River Nile was Egypt's lifeblood, it was in turn thought expedient to maintain total control over the river which could be guaranteed if the river's headwaters in the south, in Uganda, were also in control of the power that ruled Egypt.

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[43] For a detailed account of the establishment of colonial rule in Kenya see Roland Oliver & Gervase Mathew, History of East Africa, Vol. I (London 1963); M.P.K. Sorrenson, Origins of European Settlement in Kenya (Nairobi, 1968).

Britain was firmly in the race to achieve such domination and succeeded in maintaining control not only over Egypt but also over Uganda. However, Uganda was deep in the East African hinterland, over 400 miles from the sea. The British government therefore found it necessary to annex all the land that lay between Uganda and the sea in order to secure access to Uganda, hence the establishment of the East Africa Protectorate in 1895, which is illustrated on the map on page 41.

To facilitate access and communication to Uganda, a railway was built from Mombasa on the coast to Kisumu, along the shores of Lake Victoria. However, the railway consumed a large amount of the British taxpayer's money and to recoup this cost it was considered vital that the railway should begin to pay for itself.[44] Revenues could be generated if there were sufficient raw materials that could be transported to the coast for export. However, Kenya was not blessed with an abundance of minerals nor was the agriculture practiced by the indigenous peoples of such large scale to enable the production of cash crops for export to the international markets.

It was Sir Charles Elliot, appointed Governor of the East Africa Protectorate in 1901, who advocated the policy of encouraging large numbers of Europeans

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[44] See J.W. Harbeson, Land Reforms and Politics in Kenya, 1954-70, (1971) J.M.A.S. 231 at p. 232; M.P.K. Sorrenson, *op. cit.*, pp 19-25.

to come and settle in the country and engage in large scale farming, growing cash crops such as tea, coffee, sisal and pyrethrum which could be exported, thereby generating income which would help pay for the railway. The highlands of the protectorate had a temperate climate favourable to Europeans. They covered a large swathe of land from the west, through the Rift Valley, and to the central parts of the country. They formed the most fertile part of the country and therefore were potentially very productive. Elliot saw the highlands as an area where Europeans could come and settle and engage in productive agriculture. In a report on the Protectorate he described the highlands as "pre-eminently a white man's country"[45] and the Protectorate as an area over which a white colony could be founded.[46] The official encouragement of European settlers resulted in the arrival of large numbers of people wishing to settle in Kenya, primarily from Britain and South Africa.

The arrival of the settlers was to sow the seeds of what became known as the dual policy,[47] a policy that was primarily based on race. Before the settlers

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45 Report on the East Africa Protectorate, (1901), Cd. 769 p. 8. The highlands were later dubbed the 'White Highlands.'

46 Sir Charles Elliot, The East Africa Protectorate, (London 1905), p. 103.

47 For a detailed discussion of the dual policy see M.R. Dilley, British Policy in Kenya Colony, 2nd ed. (London 1966), pp. 181-190.

arrival there was already in existence a large indigenous African population that had already settled in the country for hundreds of years. They had a culture that was distinctly different from European culture, social and political institutions that were dissimilar to European ones, and customary laws that were influenced by African culture and society.[48] However, the Africans were viewed as a primitive and uncivilized race;[49] even the British Foreign Office was of the opinion that they were "practically savages" who had not even developed an administrative or legislative system.[50] The doctrine of Social Darwinism was called in aid to support the belief that Africans were backward and inferior, in other words, that African societies were backward because they were in the early stages of human development and were, in effect, at the bottom rung of the evolutionary ladder

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48 For a general discussion of the culture and the social and political institutions of the various societies in Kenya, see B.A. Ogot (ed.), Kenya Before 1900, Eight Regional Studies, (Nairobi 1976).

49 See F.D. Lugard, The Dual Mandate in Tropical Africa (London 1922), p. 280. It is of interest to note the view of the Privy Council in Re Southern Rhodesia [1919] A.C. 211 at p. 233 where Lord Sumner, delivering the judgment of the Privy Council, said;

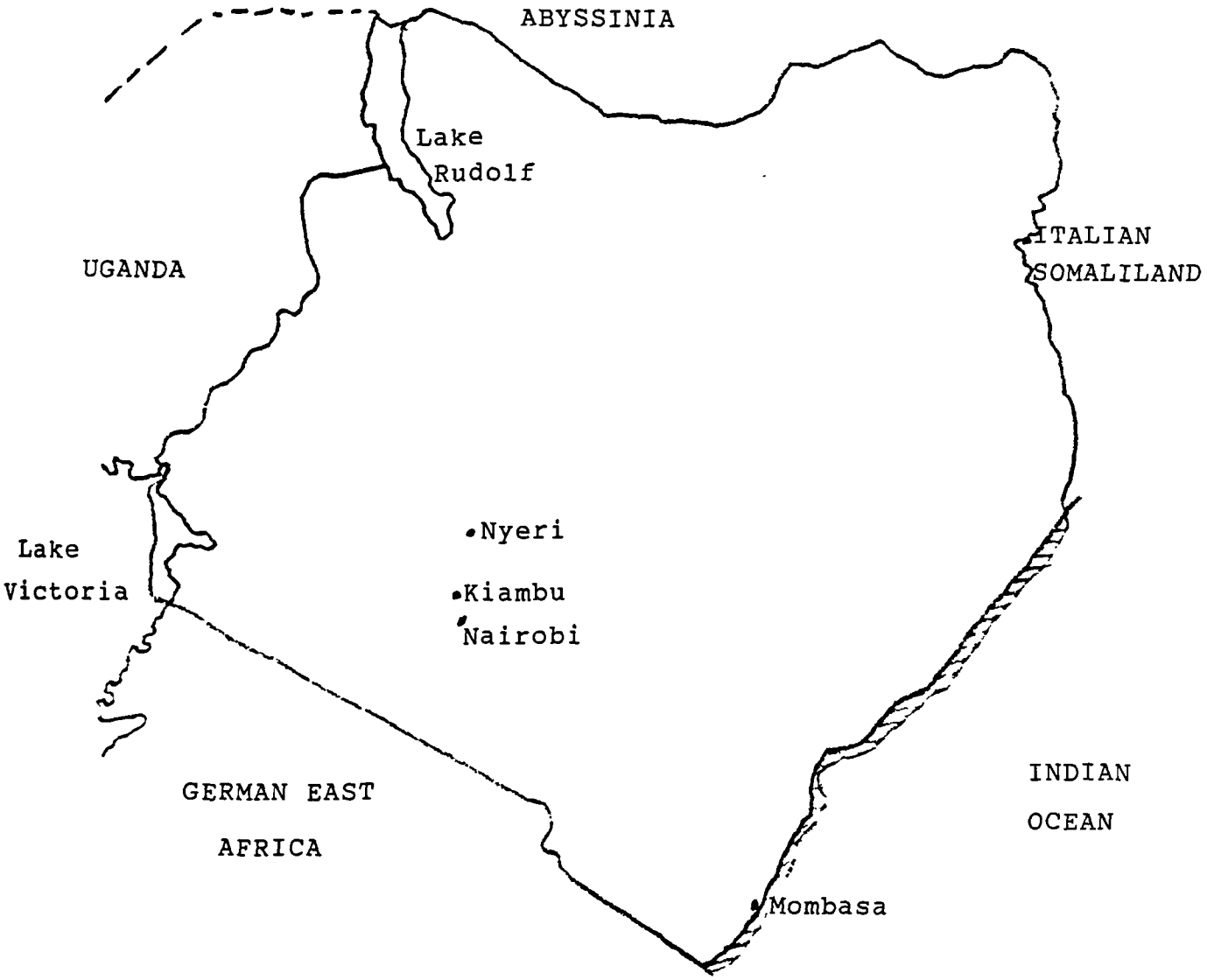
> "Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged."

See also Muhena bin Said v. The Registrar of Titles (1948) 16 E.A.C.A. 79 at p. 81 per Edwards C.J.

50 M.P.K. Sorrenson, *op. cit.*, p. 51.

THE EAST AFRICA PROTECTORATE

MAP 2



KEY

The 10 Mile Coastal Strip

of humans.[51] This view was due to a lack of understanding of African society and the preconceived ideas of many Western scholars. However, this view was to have an important effect on British policy in Kenya. It was felt by the British government that rather than integrate the Africans into European society or vice versa, the interests and structures of the Africans and those of the European settlers should be allowed to exist and develop separately, hence the dual policy, that is, separate policies for Europeans and Africans.

Consequently, the European settlers and the Africans were administered separately by the colonial government. For example, Africans were not allowed to become members of the Legislative Council and therefore could not vote in elections; only Europeans could be members of the Council and later Indians and Arabs.[52] African interests, on the other hand, were governed by a separate department known as the Native Affairs Department within the colonial administration. Moreover, there was a separate judicial system for Africans[53] and for Europeans,[54] separate labour laws[55]

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[51] B.A. Ogot, *op. cit.*, pp. vii & ix. See also H.H. Johnston, Britain Across the Seas: Africa (London 1910), pp. 12-13. It is for this reason that Africans were derogatively referred to as 'natives' to reflect their less civilized nature.

[52] It was not until 1944 that the first African was nominated as member of the Council.

[53] Native Tribunals (later referred to as African Courts) exercised jurisdiction among the Africans in accordance with the local customary law.

and a separate land policy.[56] It was the land policy that was partly responsible for the complex system of land registration in Kenya.

In order to facilitate European settlement the colonial government had to formulate a land policy that was attractive to incoming settlers. Nearly 75% of Kenya is comprised of arid or semi arid land which, at best, is suitable for ranching. Naturally this area was sparsely populated, with the bulk of the African population having settled in areas of the country that were fertile and productive, such as the highlands. It was this area that was found suitable for European settlement. But how could the colonial government issue secure titles over land that was already occupied by the Africans and to which they claimed title either through purchase,[57] or by virtue of their being the first occupants and having already

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54 The Supreme Court exercised jurisdiction over the Europeans in conformity with English common law and the statutes in force in England on 12 August 1897 - Kenya Colony Order in Council 1921, S.R.O. 1921, Art. 2(3).

55 See M.R. Dilley, *op.cit.*, pp. 213-238.

56 The dual policy is linked with the British doctrine of indirect rule under which traditional chiefs or traditional councils of elders were given judicial, legislative and executive powers by the colonial governments in order to continue to exercise authority over the Africans. However, the chiefs and the councils owed their allegiance to the colonial government - see Report of the East Africa Royal Commission on Land and Population, Cmd. 9745 (1955), para. 7, p. 348.

57 Such as the Southern Kikuyu who claimed to have purchased land from the Ndorobo.

cleared the land and putting it to use in accordance with the ancient principle which John Locke called acquiring property rights 'by mixing one's labour with the soil' and 'appropriating it from the state of nature'?

First, it was asserted that the Africans did not have a valid title to the land they occupied. Sir Arthur Hardinge, the first Commissioner of the Protectorate, expressed his view in a report that "the conception of absolute ownership of land and of the right to sell it, or exclude other cultivators ... *does not yet exist* ..." (italics mine), and it was only a few chiefs as distinct from their community who had the right to alienate any land.[58] This view was also reflected by the Foreign Office in an opinion to the Law Officers of the Crown, where they said that African occupation of land was merely seasonal and temporary and if there was any private ownership it was merely related to the crops that they grew on the land.[59] This view also found acceptance in the English courts when considering the nature of tenure in other African societies. For example, in Amodutijani v. Secretary, Southern Nigeria[60] the Privy Council was of the opinion that Africans had, at best,

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58 Report of Sir Arthur Hardinge on the Condition and Progress of East Africa Protectorate from its Establishment to the 20th January, 1897, Cmd. 8683, P.P. 1898, p. 263.

59 M.P.K. Sorrenson, *op. cit.*, p. 51.

60 [1921] A.C. 399 at pp. 402-404.

the mere right of enjoying the use of the land and its produce as opposed to having a title equivalent to that of a freehold owner. In the words of the court:

> "Such a community may have the possessory title to the common enjoyment of a usufruct with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession."

Such a view paved the way for the Crown to assert title to land in the East Africa Protectorate by the mere fact of having declared a protectorate.[61] This

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[61] Since the Foreign Jurisdiction Act 1890 had provided that the Crown could acquire jurisdiction over foreign territory by "treaty, capitulation, grant, usage, sufferance and other lawful means" (see preamble), it had been the practice of the British government to acquire rights over foreign land by making treaties with local rulers and indigenous chiefs. The aim was to have title of such land granted to the Crown through those treaties in return for certain stipulated benefits. An example was the agreement concluded between the British government and the Sultan of Zanzibar in 1895. The Sultan had maintained sovereignty over a strip of land that was ten miles wide and stretched along the whole of the East African coast (see map 2). The agreement provided that officers of the British government would, *inter alia*, have control over public lands and would regulate questions affecting land and minerals, and in consideration the British government was to pay the Sultan an annual sum of £11,000. For an account as to how the Sultan came to control the East African Coast and details of the agreement, see A. Salim, The Swahili Speaking Peoples of Kenya's Coast 1895-1965, (Nairobi, 1973).

However, no similar treaties could be made with local chiefs or rulers in the Kenyan interior because there was no form of centralised political authority through which the British government could deal with. Moreover, the numerous ethnic groups that occupied the interior had forms of decentralised political institutions so that no one individual could claim to be the ruler or representative of the group - see M.P.K. Sorrenson, *op.cit.*, pp. 47-52. The declaration of a protectorate therefore obviated any need to make agreements with people in the interior.

was made through the East Africa (Lands) Order in Council 1901[62] which defined Crown lands as "all public lands within the East Africa Protectorate which for the time being are subject to the control of his Majesty by virtue of any Treaty, convention or Agreement, or of His Majesty's Protectorate ..." The Commissioner was also empowered to sell or lease Crown lands on such terms as he thought fit. In exercising this power the Commissioner promulgated the Crown Lands Ordinance 1902 which provided that the Commissioner could make grants of land or leases for 99 years.[63] Significantly, the Ordinance provided that "in all dealings with Crown land regard shall be had to the rights and *requirements of the natives, and* in particular the Commissioner shall not sell or lease any land in the actual occupation of natives."[64] Through these provisions, the government gave itself a legal basis for acquiring for itself title to land in the Protectorate. Notably, Crown land included land in occupation of Africans, and their rights over such land were relegated to merely being rights of occupation. Although the Commissioner was empowered not to sell or lease land in the occupation of the Africans, this protection was slender as the Africans could merely be given notice to move from the land

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62 S.R.O. 661.

63 Section 10.

64 Section 30.

they were occupying if the Commissioner wanted to alienate such land.[65]

The assertion of title over land occupied by Africans would also prevent settlers from entering into transactions with Africans and purchasing land from them, as some early settlers had already done when they bought land from the Kikuyu living around Nairobi and the surrounding country.[66] It would ensure that the colonial government had control over all land and enable it to determine which land could be issued to the settlers.

To maximise the amount of land that could be granted to the settlers, the government created Reserves of land to which the Africans were confined. These Reserves had definite boundaries and were

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[65] A good example was the initial movement of the Masai by the colonial government from the land they occupied in the Rift Valley, which had been desired by the settlers, to Laikipia in the north. When the land in Laikipia was in turn desired by the settlers, the Masai were moved again, this time to Loita in the south. To prevent the movement to the south some Masai brought an action in the High Court. However, the action failed, the court holding that it could not intervene because the movement of the tribe was an Act of State that was not cognizable in a municipal court - Ole Njogo v. Attorney General 5 E.A.L.R. 70. For an illuminating discussion of the movement of the Masai by the colonial government see M.P.K. Sorrenson, *op. cit.*, pp. 190-209. Other groups that were moved from their land to pave the way for European settlement were the Kamba, some of whom were moved from the fertile Mua hills, and the Nandi - M.P.K. Sorrenson, *op. cit.*, Ch. XIII.

[66] See M.P.K. Sorrenson, Land Reform in the Kikuyu Country, A Study in Government Policy, (Nairobi 1967), p. 17; M.P.K. Sorrenson, Origins of European Settlement in Kenya, (Nairobi 1968), pp. 176, 177.

scattered around the country.[67] They were created in an attempt to confer some kind of security to the Africans in occupation of these Reserves and to prevent their land from being alienated to the settlers. When the Crown Lands Ordinance 1915 was passed, repealing the Crown Lands Ordinance 1902, its definition of Crown land included "all lands occupied by the native tribes of the Colony and all lands reserved for the use of the member of any native tribe"[68] The effect of this provision was discussed in Isaka Wainaina v. Murito wa Indagara[69] where it was held that Africans were merely tenants at will of the land they occupied. In the words of Barth C.J., "native rights, whatever they were ... disappeared and natives in occupation of such Crown land became tenants at will of the Crown."[70]

The policy of setting up Reserves for the Africans set the scene for the separate development of land law and registration in the colony. The land granted to the European settlers was to be subject to the system of land law and land registration that was not applicable in the Reserves. Land law and tenure

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67 The boundaries of these Reserves were outlined in the Official Gazette, 13 October 1925 (Special Issue), Government Notice No. 417, pp. 967-996.

68 S. 5. See also Art. 2(3) of the Kenya Colony Order in Council 1921 which repeated the definition of Crown lands in the 1915 Ordinance.

69 9 K.L.R. 102.

70 *Ibid*, at p. 104. Followed in Kahabu v. Attorney General, 18 K.L.R. 5.

in the Reserves would continue to be governed by African customary law. However, African dissatisfaction with the manner in which they were treated by the colonial government resulted in continuous agitation by them for secure titles, which the government at first refused to recognise. It was only much later that the government caved in and introduced a system of land registration in the African Reserves.

In the following discussion, the systems of land registration that were set up to regulate land owned by the Government and land granted by it on freehold or leasehold terms, and the peculiar situation in the Coast Province which resulted in the creation of a different system of land registration are now considered.

B. Creation of Systems of Registration Between 1901 and 1919

The first twenty years of this century saw the creation of four systems of registration of land in Kenya. An unsatisfactory feature of this development was the fact that these were competing though parallel systems and no attempt was made to phase out the previous system when a new one was enacted. These four systems of registration can be divided into three groups; the first group has two statutes which made provision for a system of deeds registration namely the Registration of Documents Ordinance 1901 and the

Crown Lands Ordinance 1915; the second group is comprised of the Land Titles Ordinance 1908 which established what can be termed as a hybrid system of land registration and deeds registration; the third group is comprised of the Registration of Titles Ordinance 1919 which established a 'Torrens' type system of land registration.

1. Deeds Registration

Registration of deeds can be described as a process where documents affecting land or interests in land are copied into a register. The principle underlying it is that registered deeds take priority over unregistered deeds or subsequent registered deeds. However, the deeds in themselves do not prove title but are records of transactions that have taken place. A person therefore has to ascertain the validity of the deed by retrospective examination of deeds to a good root of title.

In Kenya, there were two statutes that established deeds registration and it is these that we turn to.

a. The Registration of Documents Ordinance 1901[71]

Due to the initial doubts about whether the Crown had acquired title to the land in the Protectorate grants of freehold land were not at the outset issued to the European settlers. Instead, regulations known

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[71] This Ordinance is now referred to as the Registration of Documents Act 1901.

as the East Africa Land Regulations 1897 were issued, and under these the Commissioner offered certificates of occupation for a term of 21 years which could be renewed for a further term of 21 years if certain conditions were fulfilled. To provide for the registration of these certificates the East African Registration Regulations 1901 were passed. These registration regulations were adopted from Zanzibar where there had been established a simple system of registration of deeds.[72]

Once it was made clear that the Crown automatically acquired title to all land in the East Africa protectorate by the mere declaration of a Protectorate[73] the Crown Lands Ordinance 1902 repealed the 1897 Regulations and provided that grants of freehold and leasehold land could be made. The Registration of Documents Ordinance 1901 was passed and it established a simple system of deeds registration. Grants of freehold and leasehold land which were issued under the Crown Lands Ordinance 1902 were to be registered in the register created in the 1901 Ordinance and any document which conferred an interest in the land was to be registered.[74] Penalties were imposed if registration was not made

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72 Krishan M. Maini, Land Law in East Africa (Nairobi 1967), p. 23.

73 By virtue of the East Africa (Lands) Order in Council 1901.

74 Registration of Documents Ordinance 1901, s. 4.

within two months from the date of execution.[75] Registration was effected by filing a copy of the document or deed in the register and each copy numbered consecutively.[76]

However, the system under the Act was defective in several respects. For example, no provision was made for the priority of registered documents over unregistered ones or even subsequent registered documents. In addition, an unregistered document could have effect, although if it was being tendered as evidence in court, leave of the court had to be obtained.[77] Moreover, there was no means of identifying parcels of land since no provision had bee made for plans to be attached to the document evidencing the grant. Furthermore, registration of documents was haphazard and uncoordinated because the register did not have a separate folio that was devoted to each parcel of land that was granted. Since registration of the documents was not in itself proof of title investigation of the documents by a purchaser would prove to be a difficult process.

This coincided with a period of time when the Land Office in Nairobi was inefficient and understaffed. Inadequate surveys were made and settlers were often allowed to choose land that was as

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75 *Ibid.*, ss. 9,10.

76 *Ibid.*, s. 24.

77 *Ibid.*, s. 18.

yet unsurveyed.[78] This meant that African rights over the land were often overlooked or ignored and this was to cause difficulties later as the need to compensate those who were dispossessed arose.[79] It therefore became evident that new legislation was needed to establish a better method of land registration.

b. The Crown Lands Ordinance 1915[80]

This Ordinance repealed the Crown Lands Ordinance 1902. The purpose of the 1915 Ordinance, as stated in its preamble, was to "make further and better provision for regulating the leasing and other disposal of Crown land." It contained clearer provisions for grants of Crown land to individuals and the conditions which determined those grants. Provision was also made for the proclamation of Reserves for Africans. Importantly, the 1915 Ordinance established a new system of registration of deeds that was superior to that contained in the Registration of Documents Ordinance 1901. A new Registration Office, which would regulate the

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78 M.P.K. Sorrenson, Origins of European Settlement in Kenya (Nairobi 1968), p. 88. Memo from the Surveyor General to the Colonial Secretary: Organisation of the Survey Branch - Survey and Registration Department, 14 April 1928, K.N.A. Ref. No. BN.7/6.

79 For an account of the difficulties arising over compensation, see M.P.K. Sorrenson, Land Reform in the Kikuyu Country, A Study in Government Policy (Nairobi 1967), p. 18.

80 This Ordinance was renamed and is now referred to as the Government Lands Act 1915.

registration of Crown land under the Act, and a new register of Crown land were created.[81]

There were several improvements; for example, the register was of a better structure than under the 1901 Ordinance - it had a separate folio for each conveyance, lease or licence that was granted, making a search for the documents of title for a particular parcel much easier.[82] Provision was also made for identification of parcels of land. A document could not be registered unless it had a plan or a map which identified the property and which had an accurate description of the property and a clear and precise definition of the boundaries and their extent.[83] Moreover, clear provision was made for the priority of registered documents; unregistered documents were void[84] and could not be used as evidence in court.[85]

While these provisions were an improvement on those under the Registration of Documents Ordinance, the system was essentially one of registration of deeds.[86] Registration of a document was not proof

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81 Crown Lands Ordinance 1915, ss. 91, 97.

82 *Ibid*, s. 97.

83 *Ibid*, ss. 110,110.

84 *Ibid*, s. 101.

85 *Ibid*, s. 100.

86 Notably, an amendment in 1959 provided that a person could register a caveat against the land registered which would put a stop to dealings with the land until the caveat was withdrawn. See now Government Lands Act 1915, s. 116.

that the document was valid and a purchaser would have to investigate the documents going back to the grant of the land by the Crown in order to satisfy himself as to the validity of the title offered. Nevertheless, it was an advanced form of registration of deeds in view of the provisions for accurate definition of boundaries by survey.[87] Inexplicably, no provision was made for the repeal of the Registration of Documents Ordinance 1901, nor was there provision for the conversion of land on the register under the 1901 Ordinance to that under the 1915 Ordinance. Section 129 of the Crown Lands Ordinance 1915 merely stated that the Registration of Documents Ordinance 1901 was not to apply to land registered under the Crown Lands Ordinance. This meant that there were two competing systems of deeds registration. However, no new registrations of documents of land were to be made under the Registration of Documents Ordinance 1901, and the importance of the register under this Act decreased as other systems of registration were established.

2. The Hybrid System: The Land Titles Ordinance 1908

Prior to the enactment of the Crown Lands Ordinance 1915, a new system of land registration was

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87 See also Registration of Documents Act 1901, s. 4(vii).

established under the Land Titles Ordinance 1908[88] which was confined to land situated in the Coast Province. The Act created what can be classed as a hybrid system of land registration, that is, registration of titles combined with registration of deeds. How did this come about?

As mentioned earlier[89] the British government entered into an agreement with the Sultan of Zanzibar over the ten mile strip of land along the East African coast over which he exercised sovereignty. The agreement created, in effect, a lease whereby the British government would exercise executive and judicial administration over public lands in the strip and, in return, would pay to the Sultan a sum of £11,000 per annum.

The people who resided on this land were mainly Arabs who had settled on the land for hundreds of years as well as African tribes such as the Pokomo, Mijikenda, and the Giriama. People within the ten mile strip owed their allegiance to the Sultan and were governed on the basis of Mohammedan or Islamic law. Islamic law recognised the concept of individual ownership of land and title analogous to a freehold title in English law.[90] Accordingly there were many Arabs along the coast who held land as private owners

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88 Now referred to as the Land Titles Act 1908.

89 *Supra*, n. 61.

90 Mtoro Bin Mwamba v. Attorney General (1952) E.A.C.A. 108.

under Islamic law. When the British government acquired the lease of the ten mile strip, it intended to alienate public land to would be settlers. However, there was no way of distinguishing private from public land since the Sultan had not kept a record or a register of title. Moreover, many of those who claimed ownership of the land did not have documents to prove such ownership and often unfounded claims were made.[91] Although the British government had acquired jurisdiction over the strip, the *lex loci rei sitae* was to remain Mohammedan law.[92] Accordingly, if the British government was to alienate public land it had to ensure that there was no conflict with the rights of private owners, and this meant finding a way of distinguishing private and public land.

It was for this reason that the Land Titles Ordinance 1908 was enacted. As stated in its preamble, the Act was to "make provision for the removal of doubts that have arisen in regard to titles to land and to establish a Land Registration Court." The Land Registration Court was to be presided over by a Recorder of Titles whose function was to determine claims to land.[93] Therefore all persons "being or claiming to be proprietors" or having an interest in

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91 See A.M. Jivanjee v. Land Officer 6 E.A.L.R. 183.

92 Secretary of State v. Charlesworth, Pilling & Co. [1901] A.C. 373.

93 Land Titles Ordinance 1908, s. 6.

land were to bring their claims before the Recorder of Titles within a period of six months from the date of the application of the Act to the area where the land was situated.[94] The claimants, who could be represented by an advocate[95] had to satisfy the Recorder of Titles that they were the proprietors of the land in question, and if title to the land could be proved they were then issued with certificates of title.[96] A surveyor, who was attached to the court, would then accurately survey the land and place boundary marks showing the demarcation and the delimitation of the land and such boundaries would be shown on the plan.[97] A register of certificates of title was to contain copies of all the certificates granted with each certificate granted constituting a separate folio of the register.[98] Therefore all land that was the subject of a successful claim was registered in this manner, and the issue of a certificate of title merely confirming a pre-existing title. It was provided in section 17 that all the land for which no certificate of ownership had been granted was deemed Crown Land.

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94 *Ibid*, s. 15.

95 *Ibid*, s. 20(1).

96 *Ibid*, s. 20(1).

97 *Ibid*, s. 22.

98 *Ibid*, s. 26.

Interestingly, the full concept of land registration with all its ramifications was not introduced by the Act. The certificates of title were not declared by the Act to be indefeasible[99] and no provision was made for indemnity where there were mistakes, omissions or entries obtained by fraud that could not be rectified; this meant that the titles confirmed by the Act were not guaranteed by the State. The reason why these titles could not be guaranteed was because the government felt that the expense involved in setting up an insurance fund and employing officials of sufficient legal knowledge was too great and could never be recovered from the fees that could be charged from transactions.[100] Instead, a system of registration of deeds was introduced for dealings with the land.[101] All documents affecting the land were to be registered and these documents were to be accompanied by a plan which clearly described the property.[102] Initially, the Registrar had no power to inquire into the validity of the document and merely had it registered. It meant that a person wanting to purchase land registered under the Act had to make a retrospective search of all the documents registered

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99 But see Alibhai v. Alibhai (1938) E.A.C.A. 1, where it was held that the certificates of title issued under the Act were indefeasible.

100 S. Rowton Simpson, Land Law and Registration, (Cambridge 1976), p. 444.

101 Land Titles Ordinance 1908, Part III.

102 *Ibid*, ss. 57, 65, 66.

and examine their validity, and could not simply rely on the certificate of title.[103] Moreover, no provision was made for the priority of the documents that were registered[104] which created an anomalous situation whereby a subsequently registered document could have priority over a previously registered document.

These deficiencies were responsible for the enactment of the Registration of Titles Ordinance 1919 which introduced a more complete system of land registration based on the Torrens system in Australia, and which introduced the third group of land registration.

3. The Torrens System : The Registration of Titles Ordinance 1919[105]

The Torrens system[106] was first introduced in South Australia in 1858 by Sir Robert Torrens and the system rapidly spread to other parts of Australia and New Zealand. It had several distinguishing features.

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[103] An amendment to the Act in 1959 enabled the Registrar to inquire into the validity of the document presented for registration - see now s.64 of the Land Titles Act 1908.

[104] This was later rectified by an amendment to the Act- see now s. 60.

[105] Now referred to as the Registration of Titles Act 1919. .

[106] For works discussing the Torrens system see J.E. Hogg, The Australian Torrens System (1905); T.B.F. Ruoff, An Englishman Looks at the Torrens System (London 1957); S. Rowton Simpson, Land Law and Registration, (Cambridge, 1976).

In Australia, for example, the Crown granted land on the assumption that all land belonged to the Crown, a situation that was to be similar to that in Kenya when the Crown assumed title to all the land. In Australia all land that was granted was registered. Therefore, the Torrens register was composed of Crown grants that were registered automatically. Moreover, land that was the subject of a grant was accurately surveyed and the boundary demarcated by official marks that were placed on the ground, and in this way, the boundary became guaranteed.

In comparison, the English system was governed by the 'general boundary' whereby boundaries were marked by walls, fences or hedges which have no official status, and the precise line of the boundary may be unknown. The Torrens register was composed of bound volumes in folios containing all the entries from the time of the first registration thereby conserving the history of the title from the beginning, whereas the English register consisted of loose cards which were constantly updated *and entries no longer subsisting* could be removed with a new edition. Furthermore, a person with an interest in the registered land could register a caveat under the Torrens system which put a stop to all transactions affecting the registered land until it was removed, whereas the English caution merely entitled to the cautioner notice of a projected dealing. Such a cautioner had no power to put a stop to all transactions with the land.

The Torrens system was established in Kenya under the Registration of Titles Ordinance 1919. This Act was designed to remedy the deficiencies prevalent under the Land Titles Ordinance 1908 and in particular, as stated in the preamble, "to provide for the transfer of land by registration of titles". This was to be done by replacing the process of investigation of title with a simple search of the register. A new register of titles was created and forms were provided for the transfer of registered land.[107] Provision was made for rectification of the register including entries that had been obtained by fraud.[108] A person could recover damages from the Registrar where entries had been obtained by fraud or were the result of error.[109] A person with an interest in the registered land could register a caveat which put a stop to dealings with the land until it was removed.[110] New provisions were included concerning leases, charges and the disposition of land held upon trust for sale.[111]

However, the Act created a problem; it added a new registration system without providing for the repeal of the existing systems. Part III of the Act

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107 Registration of Titles Ordinance 1919, First Schedule, Forms F, G & H.

108 *Ibid*, ss. 59 & 60.

109 *Ibid*, s. 24.

110 *Ibid*, Part XI.

111 *Ibid*, Parts VII, VIII & XVII.

contained provisions for bringing land under the Act and was only to apply in the Coast Province where the Land Titles Ordinance 1908 was still in operation.[112] Section 6 provided that land which had been alienated by the government in fee or for years, or land in respect of which a certificate of title had been issued by the Land Registration Court under the Land Titles Ordinance 1908 could be brought under the operation of Registration of Titles Ordinance 1919. Land situated outside the Coast Province could only be brought under the Act if it had been granted by the government whether in fee, lease or licence.[113] This created an anomalous situation in the Coast Province whereby two competing registration systems were in existence. A person who was issued a certificate of title by the Land Registration Court under the Land Titles Ordinance 1908 had the luxury of deciding whether to have his title governed by the 1908 Ordinance or by the 1919 Ordinance. This situation created a recipe for confusion and uncertainty.[114]

This was aggravated by the fact that the Crown Lands Ordinance 1915 was also applicable in the Coast since land which was not the subject of a grant of a

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112 *Ibid*, s. 19(2).

113 *Ibid*, ss. 20 & 2.

114 This was alluded to in the Legislative Council where there was a debate on a motion on whether the Registration of Titles Ordinance 1919 should be repealed - Legislative Council, Proceedings, 2nd Session, Cols. 44-47, (22 August 1924).

certificate of title was deemed to be Crown Land under section 17 of the Land Titles Ordinance 1908 and therefore would come under the definition of Crown land in the 1915 Ordinance.

The mistake lay in not providing for the repeal of the Land Titles Ordinance 1908 and the conversion of all the titles created under that Act to the 1919 Ordinance and furthermore, providing for the systematic conversion of titles issued under the Crown lands Ordinance 1915 to be registered under the 1919 Ordinance.

However, the Registration of Titles Ordinance 1919 had other deficiencies. For example to obtain an indemnity, the person who was adversely affected by the fraud or error had to bring an action in court against the person who had caused the fraud or error. Only if he was dead, insolvent or not within the jurisdiction of the court, could the person bring an action against the Registrar.[115] This would naturally entail considerable expense for a person trying to make a claim, and failure could be costly. Moreover, it was doubted by the banking community as to whether a valid charge could be created under section 66 of the 1919 Act. That section provided that a lien could be created by the deposit of title deeds. The

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115 Registration of Titles Ordinance 1919, s. 24.

uncertainty meant that bankers were reluctant to create charges over land in such fashion.[116]

These deficiencies resulted in widespread calls for the repeal of the 1919 Ordinance. In the Legislative Council a motion for the repeal of the Ordinance was debated upon but was defeated. Instead, a Select Committee was established "to examine and report" on the Ordinance and to see how these deficiencies could be corrected.[117] The Committee recommended that a Bill should be drafted to meet these objections but nothing became of this Bill as it was rejected by the Law Society.[118] Another Committee appointed in 1927 under the Chairmanship of the Solicitor General reported that the 1919 Ordinance was unsatisfactory and it should be repealed. They suggested that the system under the Crown Lands Ordinance 1915 and the Land Titles Ordinance 1908 should either be revised or a voluntary system of land registration should be made to run alongside them; however, these proposals were never acted upon.[119]

Eventually the outcome of all these deliberations was the passing of a Bill which amended section 66 of the 1919 Ordinance, providing clearly that an

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116 See Legislative Council, Proceedings, 2nd Session, Cols. 44-47 (22 August 1924).

117 *Ibid*, Col. 52.

118 Legislative Council, Debates, 1925, Vol. II, Col. 793 (20 October 1925); K.M. Maini, Land Law in East Africa, (Nairobi 1967), p. 33.

119 K.M. Maini, *op.cit.* p. 33

equitable mortgage could be created by the deposit of documents of title.[120] This was something of a damp squib because although the Bill when passed removed the uncertainty which had been created by section 66 of the Ordinance, it did not address the wider problems which the Ordinance created and other inherent deficiencies in the Ordinance. Piecemeal amendments were made to the Ordinance over the years which tinkered with the basic structure but leaving it substantially the same, laying the Ordinance open to continued criticism.[121]

C. Summary

By 1920, therefore, there were four separate Acts that governed registration of land in Kenya. Clearly, this situation was unsatisfactory but it can be said that this scenario was due to the lack of a clear policy on land registration by the government. No committee was established to think through an effective and comprehensive system of land registration that would cover the whole country. Although fears were expressed in Parliament about the wisdom of having several parallel systems of registration[122] no effort was made to integrate the

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120 See Legislative Council, Debates, 1931, Vol. II, Col. 523 (26 November 1931); & 1933, Vol. II, Col. 695 (29 November 1933)

121 See for example, Adonia v. Mutekanga [1970] E.A. 429 at p. 433 per Spry J.A.

122 See Legislative Council, Debates, 2nd session, cols. 44-47 (22 August 1924).

system, or to phase out pre-existing systems. The Registration of Titles Ordinance 1919, despite its deficiencies, could have been used as a basis for extending land registration throughout the country. However, it received widespread opposition, especially from lawyers who felt that it would take business away from them since the forms provided under the Act meant that people could undertake their own conveyancing.[123] Half hearted attempts to remedy its inherent shortcomings only brought about limited improvement.

Nevertheless, its provisions were an improvement on the provisions of the Land Titles Ordinance 1908 concerning dealings with registered land. Furthermore, registration of title was clearly a better system than the system of registration of deeds which was contained in the Registration of Documents Ordinance 1901 and the Crown Lands Ordinance 1915. However, the Registration of Titles Ordinance 1919 merely ran alongside the Crown Lands Ordinance 1915 and this was evident because the former provided that only land that was granted as freehold by the Crown was to be registered under the 1919 Ordinance[124]

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[123] S. Rowton Simpson, Land Law and Registration, Cambridge (1976), pp. 445, 446. Interestingly, no opposition was expressed by the legal profession against the introduction of land registration in the African lands in the 1950's, which was deliberately designed to keep lawyers out of conveyancing - see Chapter Four, *infra*.

[124] Registration of Titles Ordinance 1919, ss. 1(3)(a), 20.

whereas grants for terms of years would continue to be governed by the Crown Lands Ordinance 1915. Since the Act did not attempt to convert grants of freehold land issued before 1919 and which were registered under the 1915 Ordinance, a situation was created whereby there were grants registered under the 1915 Ordinance and under the 1919 Ordinance. The situation was complicated further with regard to leases; by virtue of section 1(3)(a) and (b) of the Registration of Titles Ordinance 1919, leases granted by the Crown could not be registered under the 1919 Ordinance; these would be regulated by the Crown Lands Ordinance 1915.[125] This resulted in a state of affairs that was far from satisfactory and confusing, to say the least, since there was land registered under the 1915 Ordinance, and under the 1919 Ordinance with no provision being made for land registered under the Crown Lands Ordinance 1915 to be converted to the register under the Registration of Titles Ordinance 1919.

Meanwhile, despite the enactment of the 1919 Ordinance to correct the deficiencies of the Land Titles Ordinance 1908, certificates of title were still being issued under the latter Act although this came to a temporary halt in 1922 due to lack of funds and it was not until 1957 that the process was

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125 Crown Lands Ordinance 1915, s. 4.

resumed.[126] This meant that there were titles that were still subject to the Land Titles Ordinance 1908 and its provisions. Since the conversion of titles from the register created by the 1908 Act to the register created under the Registration of Titles Ordinance 1919 was purely voluntary,[127] it meant that there would always be titles registered under both sets and complete conversion would never take place.

II. Land Law and Conveyancing in the African Reserves

The official view that African societies in general did not have a system of private ownership of land because they were too primitive to understand such a system was erroneous.[128] This view was the product of inadequate research of African societies by anthropologists and a failure to understand their jurisprudence. Later studies showed that many African societies indeed had complex methods of conveying land and certainly did recognise private ownership of land. In Kenya, in particular, studies revealed that various African societies within the country, in particular the Kikuyu, Meru, Kamba and Luo among others, recognised private ownership and the assignment by land owners of subordinate interests in

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126 Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66 (London 1966), para. 119.

127 Registration of Titles Ordinance 1919, s. 6.

128 See Part II, section I, *supra*.

land to individuals. Moreover, these societies had advanced systems of conveying land. This was due to the fact that they were agricultural societies leading a relatively sedentary and stable existence and viewed land as a precious resource since it was the source of their wealth. This was in contrast to nomadic groups such as the Kalenjin, Maasai and Samburu who lived in arid or semi-arid lands with a harsh environment, which caused them to lead a peripatetic existence, migrating seasonally in a constant search for pasture and water for their livestock.

It is vital to consider the methods of conveying land and the rights that were recognised in these societies under customary law because it forms a background to understanding the problems that plagued the application of land registration when it was introduced in the African Reserves. It would be beyond the scope of this thesis to attempt to examine the nature of land tenure and conveyancing of all the societies in Kenya which number more than 40.[129] It is therefore intended to consider the example of the Kikuyu who were, and still are, the largest social group in the country, They had a well developed system of land tenure that has been documented extensively. The nature of their land tenure was one of the factors that led to the initial introduction of

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[129] For a work that deals with the nature of land tenure among some African societies in Kenya, see B.A. Ogot (ed.) Kenya Before 1900, Eight Regional Studies (Nairobi 1976).

land registration in the Kikuyu Reserve before it was introduced in other Reserves occupied by Africans.

A. Conveyancing and Acquisition of Subordinate Rights Among the Kikuyu

Oral traditions and sources indicated that the Kikuyu acquired title to some of their estates, which they termed *Ithaka*, by a process of settling on unoccupied land and clearing the bush and forest as well as purchasing land from a group of people known as the Ndorobo.[130] The Kikuyu had well defined methods of transferring land as well as conferring subordinate interests in land. When the colonial administration created Reserves to which the Africans were to be confined, they did not attempt to apply the Ordinances dealing with land registration to those areas. The Kenya Land Commission had recommended that African law and custom should continue to regulate land within the Reserves so long as these were not repugnant to any law in the colony.[131] This recommendation was made part of the Native Lands Trust Ordinance 1938 which created a structure for the

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130 See Jomo Kenyatta, Facing Mount Kenya,(Nairobi 1979), pp.20-30; L.S.B. Leakey, The Southern Kikuyu Before 1903 Vol I (London 1977), pp.93-108; M.P.K. Sorrenson Land Reform in the Kikuyu Country, A Study in Government Policy (Nairobi 1967), pp.7-9. But *c.f.* the Report of the Kenya Land Commission, Cmd. 4556 (1934), p. 93 where they rejected the view by the Kikuyu that they purchased land from the Ndorobo.

131 Report of the Kenya Land Commission, Cmd. 4556 (1934) paras. 1639, 1796, 2127.

regulation and control of the Reserves or 'Native Lands'. Therefore the law that was to continue to apply in the Reserves was customary law. The Kikuyu had two types of land transfer recognised by their customary law: absolute sale and redeemable sale.

1. **Absolute Sales of Land**

Such sales of land among the Kikuyu transferred title from the vendor to a purchaser (*muguri*) unconditionally in the way an English vendor could transfer his freehold title to a purchaser. This was in contrast to redeemable sales of land which are almost analogous to a mortgage. Absolute sales of land among the Kikuyu could be grouped into two: first, the sale by a vendor of land that he had privately bought from a previous vendor, and secondly, the sale by a vendor of land which he had received through inheritance. Outright sales were usually practiced by the Kikuyu of Nyeri and Kiambu whereas the Kikuyu of Muranga practiced a system of redeemable sale of land. Different rules governed these types of sale as described below.

a Sale of Privately Owned Land

A person had the right to sell land that he had previously purchased either from a fellow Kikuyu or from any other person, such as a Ndorobo. Although there were no controls that were imposed by custom on his power to sell such land such as the need to obtain

the consent of any individual,[132] such a person was morally obliged to consult his family to see if they had any objections, and the elders in the community (consultation of the elders was prudent since some of them were asked to be witnesses to the transaction).[133]

Since transactions were conducted orally, it was important that the transaction was well witnessed by several individuals; witnesses invariably included prominent members of the community such as elders. The presence of witnesses, such as elders, would deter future misunderstanding or the incidence of fraud. Both parties therefore arranged to have witnesses, who were meant to bring with them plants such as lily bulbs which would be used for marking the boundary of the land to be sold.[134] The parties to the transaction as well as the witnesses would then walk along the boundary and the bulbs would be planted along the line the new boundary would run. A ram was also slaughtered and the contents of its stomach sprinkled on some outstanding boundary markings such as rocks.[135] At times big stones were buried along the boundary in case at later periods, a subsequent

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132 L.S.B. Leakey, The Southern Kikuyu Before 1903, Vol.I., (London 1977) p. 105.

133 Jomo Kenyatta, Facing Mount Kenya, (Nairobi 1979), pp. 31-32.

134 L.S.B. Leakey, *op.cit.*, p. 107

135 *Ibid.*

owner dishonestly tried to move the boundary by replanting the bulbs. Since he would be unaware of the buried stones his dishonesty could be detected if a dispute arose.[136]

Once the boundary was marked the sale was ratified by the handing over of five objects used to validate the transaction; these were a sword, an axe, a branding iron, a small barrel for storing honey, and a virgin ewe.

These objects could be likened symbolically to the signing, sealing, and delivery of a conveyance in English law which formerly made such a conveyance valid.[137] In addition the purchaser had to provide a he-goat and the family that sold the land had to provide either a he-goat or an ox for slaughter. These sealed the new relationship between the purchaser and the vendor and their families. The purchaser was viewed as a relation-in-law (*muthoni*) of the family from whom he bought the land.[138] The price was payable in livestock which could be paid at once or in instalments.[139] The purchaser became the absolute owner of the land and could deal with it in

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136 L.S. B. Leakey, *op.cit*, p. 108. The belief that supernatural intervention would befall those who attempted to transfer the boundary acted as an effective deterrent.

137 See now Law of Property (Miscellaneous Provisions) Act 1989.

138 L.S. B. Leakey, *op.cit.*, p. 108.

139 *Ibid*, p. 104.

any way he liked. In the words of the Kikuyu, *'ekwigurira na aathinguria, na aagurariro; githaka kiu niu giake o kuria angienda kuhira kana kwendia* (he has bought it for himself, and completed the payment for it, and having had the transaction sealed and certified for him, the land is then his alone, and he may dispose of it and sell it as and when it pleases him).[140]

b. **Sale of Inherited Land**

It was very difficult to sell land that was inherited. Suppose a person, let us call him Kimani, became the owner of 50 acres of a *githaka* either because he cultivated it from virgin land or he bought it from a Ndorobo. He is married with two wives and has six sons and three daughters. If Kimani never sold the land in his lifetime and died, his eldest son was appointed *muramati* (titular head or trustee) in place of his father, in accordance with Kikuyu customary law. Kimani's land now belonged to his sons with each of them having a right to cultivate it.[141] The land became family or *mbari* land under the name of the original owner, the land now being referred to as

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140 *Ibid*, p. 108.

141 Daughters generally had no right to receive a share of the land. The widow normally received a life interest in a portion of the land - for a detailed discussion of the customary law of succession among the Kikuyu and other groups, see E. Cotran, Restatement of African Law, The Law of Succession, Vol. II, (London 1969).

githaka kia mbari ya Kimani (the land of Kimani's family group).[142] If the land remained undivided the *muramati* could not sell the land without the unanimous agreement of his brothers. However, if the land was divided up between the sons, and it was the custom for each son to get an equal share, one could not sell his share without the agreement of all the other brothers. Even if they agreed to the sale, the family members were first given an option to purchase before a person who was not a member of the family could do so.[143] The procedure followed during such a sale was the same as that of privately owned land.

2. Redeemable Sales

Land redemption was practiced by the Kikuyu in Muranga. This was the only type of sale that was recognised by them, as opposed to outright sales of land, the latter being practiced by the Kikuyu of Nyeri and Kiambu.[144] Land redemption was also practiced by societies such as the Meru[145]and the Kamba.[146]

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142 Jomo Kenyatta, op.cit., p. 32; L.S.B. Leakey, *op.cit.* p. 110.

143 The Kamba also had a similar procedure - see D.J. Penwill, Kamba Customary Law, (Nairobi 1951), p. 38.

144 A.J.F. Simmance, Land Redemption Among the Kikuyu of Fort Hall, [1961] J.A.L. 75.

145 J. Glazier, Land Law and Transformation of Customary Tenure, The Mbeere Case, [1976] J.A.L. 39, at p. 41.

146 D.J. Penwill, *op.cit.*, p. 42.

In this transaction, the process was initiated by the vendor who urgently needed some livestock to meet some customary obligation, such as the payment of bride price. The vendor would offer a portion of his land to a purchaser[147] for a number of goats, for example, on condition that the land would be redeemed by him on the repayment of the purchase price at any future date.[148] The transaction was comparable to a mortgage with the important exception that the vendor always retained the title to his land. The vendor could redeem the land at any time by paying back the exact goods and any natural increase that the livestock had. The purchaser's rights were therefore precarious; if, for example, he had any buildings on the land he was obliged to demolish them, although he had a right to harvest standing crops.[149] Nevertheless, the transaction was conducted on a friendly basis rather than a commercial one, with the purchaser accepting the land as security for a loan to a friend in need.[150]

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147 As in the case of inherited land the family of the vendor had the first option to buy the land on the redemption terms, and if no one within the family was interested, he would then look for an outside purchaser - A.J.F. Simmance, *op.cit.*, p. 76.

148 *Ibid,* p. 75.

149 *Ibid,,* pp. 76,77.

150 Report of the Committee on Native Land Tenure in Kikuyu Province, (Nairobi, 1929), para. 40.

3. Subordinate Rights in Land Subject to Customary Law

There were various types of subordinate rights that could be granted to other persons by landowners in several African societies. A common right was what could be described in English law as a tenancy. Among the Kikuyu there was what was known as a *muhoi*. This was a person who asked a land owner for permission to cultivate on his land, but did not normally live on it. Although the Kenya High Court described a *muhoi* as 'a poor person with no land of his own',[151] some *ahoi* had other land of their own on which they lived but which was not sufficient for cultivation.[152] A *muhoi* did not pay a fee for the right to cultivate, neither did he pay any rent to the landlord. However, he was obliged to present a portion of the harvest crop to his landlord, and if he brewed some beer he was also obliged to give some to his landlord. From time to time he was called upon to contribute a sheep or goat to the landlord whenever the latter was in need such, as when he had to pay bride price for a member of his family.[153] The absence of a periodic rent reflected the fact that the right was granted on a friendship basis as opposed to a commercial

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151 Wainaina v. Murai, (1976) Kenya L.R. 227, at p. 230.

152 L.S.B. Leakey, *op.cit.*, p. 117.

153 L.S.B. Leakey, *op.cit.*, pp. 117, 118; Jomo Kenyatta, *op.cit.*, p. 34.

arrangement. The rights of the *muhoi* were personal to him; he could not transfer them to a third party. When he died his family had to make a new agreement with the landlord to continue to have the same rights of cultivation. If the landlord sold the same land to a purchaser, the *muhoi* had to make a new agreement with the new owner if he was to keep his rights.[154] That the *muhoi's* rights were limited was reflected in the fact that he could be evicted at any time with reasonable notice, so that he had time to harvest his crops.[155]

Other societies had the equivalent of a *muhoi*. Among the Luo a person who was given similar rights of cultivation was known as a *jadak*. He could not transfer those rights to a third party and neither could his sons inherit them. His only obligation to the landlord was to show respect to him and if there were any disputes between the landlord and other individuals the *jadak* was expected to side with his landlord.[156] Among the Maragoli, the *omunenya* was granted the right to occupy and cultivate on land by the *omwene* or owner of it.[157] Again he paid no rent

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154 L.S.B. Leakey, *op.cit.*, p. 121.

155 Report of the Committee on Native Land Tenure in Kikuyu Province, (Nairobi, 1929), para. 88.

156 Report of the Working Party on African Land Tenure, 1957-8, (Nairobi, 1958), para. 91.

157 *Ibid.*

and his obligation was to support his landlord and occasionally give him presents.

The Kikuyu had another type of tenant known as a *muthami*. A *muthami* had more rights than a *muhoi* for he had the right to cultivate as well as to build.[158] He had a more secure right of tenure and could only be evicted if he had committed a serious offence, or the landowner needed the land to cultivate. Apart from being obliged to give to his landlord a nominal portion of his harvest, he paid a number of fees before he settled on the land, for example a fee (one goat) for grazing his livestock payable to the landlord, and a fee (one sheep and one goat) payable to the clan elders.[159]

B. Summary

The above discussion highlights the elaborate nature of land transactions among the Kikuyu and the fact that they had well recognised rights over their land that were accepted by all within the community. A remarkable feature of the customary land law system was its reliance on oral testimony to prove title to land. Hence the need for numerous witnesses to be present when a land transaction was made. Not surprisingly there were very few disputes since there were enough people who witnessed a transaction. The

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158 Jomo Kenyatta, *op.cit.*, pp. 22, 34.

159 L.S.B. Leakey, *op.cit.*, pp. 116, 117.

fear of supernatural retribution also played a part in preventing people from resorting to fraud, such as moving the boundaries by replanting the bulbs.[160]

This arrangement remained satisfactory and whenever a person and his family felt that the land they had was not enough and that they could not purchase surrounding land anymore they simply moved to an area which was unoccupied and cultivated the virgin land there and established a new home. However, when the colonial government established the African Reserves, such migration became impossible because the tribes could only move out of the Reserve to settle elsewhere on stringent conditions.[161]

As a result, the Reserves slowly began to become overcrowded, which in turn greatly contributed to the land becoming eroded and infertile due to the pressure on it by an increasing population together with poor agricultural practices. This brought about an increase in litigation as landowners began to eject tenants off their land and the latter sought to protect their interests in the African courts. Clearly this situation had to be ameliorated. But this was only one factor that led to the introduction of land registration in the Kikuyu Reserve. In the following section, the development of land

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160 Jomo Kenyatta, *op.cit.*, p. 39.

161 See Native Lands Trust Ordinance 1938, Part II.

registration in the African Reserves is now considered.

III. Factors and Events Leading to the Introduction of Land Registration in the African Lands

Although the initial official view was that Africans had no concept of private ownership,[162] it came to be accepted in certain quarters that they indeed did have such a concept. A notable example was Sir Percy Girouard, appointed Governor of the colony in 1909, who recognised as early as 1910 that private ownership was recognised by various African societies as opposed to communal ownership. This was compounded by studies in 1912 by M.W.H. Beech into Kikuyu land tenure, whereby he was able to discover that theø Kikuyu recognised individual land ownership.[163] Sir Girouard went on to recommend that 'a record of existing rights' should be prepared as a first step toward the Registration of individual African titles.[164] Although this was considered to be a good idea, the outbreak of the First World War prevented further consideration of the matter. In 1920, proposals were made by the Chief Native Commissioner, Sir John Ainsworth, which provided that the boundaries

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[162] A view that led to the subsequent alienation of their land, *supra*.

[163] See M.P.K. Sorrenson, Land Reform in the Kikuyu Country, A Study in Government Policy, (Nairobi 1967), p. 20.

[164] *Ibid*, p. 27.

of the various *ithaka* (estates) should be demarcated and that a register known as the Githaka Register be established;[165] however, the effect of the titles that were to be issued under this scheme was to make the owners licencees rather than owners of a freehold title.[166] Although a trial scheme of registering *ithaka* titles was started in Kiambu, it was abandoned in 1922.[167]

Political demands among the Africans continued to grow fuelled by the insecurity of their precarious titles. Their land was continually being alienated by the government. For example, after the First World War, a scheme was set up by the colonial government in conjunction with British government that land be set aside to settle soldiers who had fought for Britain during the war. A soldier settlement scheme was therefore set up and thousands of acres were alienated to them from the African Reserves.[168]

The demands for secure titles by the Africans led to the creation of two committees in 1929 to look into the question of African land tenure. The first was appointed to look into land tenure in North Kavirondo (now Western Kenya) and it recommended that boundaries

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165 *Ibid*, pp. 27, 28.

166 *Ibid*, p. 28.

167 *Ibid*.

168 Makhan Singh, The East African Association 1921-1925, Hadithi, Vol. 3, Bethwell A. Ogot ed., (Nairobi 1971) p. 121; M.P.K. Sorrenson, Origins of European Settlement in Kenya, (Nairobi 1968), pp. 289-290.

of land (*lugongo*) would be demarcated and *lugongo* registers set up.[169] The second committee was appointed to look into land tenure among the Kikuyu, and it recommended that *ithaka* should be registered and that rules should be drawn up for a register to be started in Kiambu.[170]

Nothing, however, came of these proposals because shortly after, the Kenya Land Commission was appointed to look into the question of the security of African land over the whole of the colony and to look into the grievances expressed by Africans over the way their land had been alienated by the government. The Commission recommended that the security of African land would be guaranteed if it was vested in a Lands Trust Board acting as trustee, and which would exercise administrative control over the land. In this way no alienation of African land could be made without the consent of the board and the Africans living on the land.[171] The Commission did not recommend the country wide introduction of a register of right holdings of African land as they thought that in many areas this would be premature due to their opinion that African tenure had not evolved to the

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169 Report of the Working Party on African Land Tenure, 1957-8 (Nairobi 1958), paras. 9,10. See also the Report of the Kenya Land Commission, Cmd. 4556, (1934), para. 1662.

170 Report of the Working Party on African Land Tenure, 1957-8 (Nairobi 1958), paras. 11,13.

171 Report of the Kenya Land Commission, Cmd. 4556, (1934) Chapter V.

point where individual titles were recognised.[172] However, they recommended the experimental introduction of a register in part of Kiambu District because they felt that the Africans in this area had customs and traditions of land holdings that recognised an individual form of tenure and that their aspirations needed to be fostered.[173]

The Kenya (Native Areas) Order in Council 1939 and the Native Lands Trust Ordinance 1938 were enacted to implement the recommendations of the Commission regarding the creation of a Lands Trust Board which was to have the land in the Reserves (called 'Native Lands' under the Act) vested in it, and whose function was to protect the land from alienation subject to various conditions.[174] However, no provisions were made for the registration of African land. The Law Society felt that the failure to provide for registration of African land would bring about chaotic conditions; therefore they recommended that it was vital that Committees be appointed to look into African customary laws on land transfer and inheritance and to codify such laws by statute and thereafter establish a system of registration of land titles and transactions.[175] Nevertheless, the

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172 *Ibid*, para. 1662.

173 *Ibid*, paras. 1664, 1665.

174 See Native Lands Trust Ordinance 1938, Parts II & III.

175 Report of the Working Party on African Land Tenure, 1957-8, (1958), para. 14.

government was of the view that the time was not yet ripe to introduce registration of titles. They realised that a tendency was developing in African lands towards a form of individual ownership and people were demanding title deeds but these demands ought to be discouraged and dampened because it would "lead to surveys, conveyances and legal action with *heavy expense and complications*"(italics mine).[176] Nevertheless, the British Secretary of State for the Colonies expressed his opinion to the Governor of Kenya that the question of recording African rights on a register had to be addressed as soon as possible because of the growing demand for titles and the changes that were taking place in the traditional methods of land holding among Africans.[177]

A Native Welfare Conference met to consider the comments that were made by the Secretary of State and at a meeting, recommended that an investigation should be undertaken into some of the problems that had arisen and were continuing to arise "in connection with the use, holding, transfer, registration and availability of land in the Central Province of Kenya

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[176] Report of the Sub-Committee of the Executive Council on Native Land Tenture, 20 March 1939, para. 2, K.N.A Lands 1/38. See also Circular letter by S.J. La Fontaine (Ag. Chief Native Commissioner) to all Provincial Commissioners, 1 Nov. 1938, K.N.A. Lands 1/38.

[177] Confidential Despatch from the Secretary of State for the Colonies to the Governor of Kenya, 29 Nov., 1939, K.N.A. lands 1/39.

as a result of economic and political development, the increase of population and the improvements in communications", and it was decided that the District of South Nyeri would be the most suitable place to conduct such an investigation.[178] Almost ten years were to pass before anything was done there.

Meanwhile, although some form of registration was introduced among the Kamba in their reserve centred around Machakos, this form of registration was confined to the registration of sale agreements. Concern had been expressed at the way family members were selling off family land without consultation and leaving family members landless. This was done by sons, who on receiving their inheritance of land from their father in accordance with customary law, would proceed to sell the land without consulting their family members and requiring their permission, and, in some cases, would even sell land belonging to their brothers.[179] To prevent this situation the registration of sale agreements was established in Machakos in 1945. Africans selling land in the Machakos area had to post a Notice of Intention to Sell on the land, at the Local Native Council Hall, and at the appropriate Native Tribunal Courthouse[180].

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178 The Native Welfare Conference, Report, 10 Jan. 1940, K.N.A. Lands 1/38.

179 D.J. Penwill, Kamba Customary Law, (Nairobi 1951), pp. 39-41.

180 *Ibid*, p. 41.

The Notice contained a description of the boundaries of the land and details as to its ownership, and also pointed out that anyone who objected to the sale could register his objection in Machakos. If there were no objections, an Agreement for Sale containing details as to boundaries, ownership and price was signed by the vendor and purchaser and witnessed by not less than six elders from the area where the land was situated.[181] This form of registration was merely to introduce publicity to sales of land and did not create a system of registered title. However, the scheme was a failure because not many people knew about it and, moreover, many Kamba lived far away from Machakos making it difficult for them to travel there to register sales.

Among the Nandi, in Western Kenya, attempts were made to introduce a form of land registration. Although the Nandi were a pastoral society, they were relatively sedentary as they engaged in farming. Grazing land for their stock was viewed as belonging to the community and so too was the land which was set aside for farming known as *Kokwet* land, which was allocated by elders to individuals for farming.[182] However, due to economic pressures and official encouragement individuals within the society began to enclose land by fencing it off with the idea of

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[181] *Ibid.*

[182] G.S. Snell, Nandi Customary Law (Nairobi, 1954), pp. 44-46.

farming the land profitably and having the power of disposing it as private owners without the fetters of customary controls such as requiring the consent of the elders to a disposition.[183] However, the local administration felt that it was necessary to clarify the legal position of the holders of individual estates since the land was ultimately vested in the Lands Trust Board, and, at the same time, providing them some security of tenure and forestalling uneconomic sub-division of land.[184] Accordingly, a local committee was appointed by the District Commissioner for the area to look into these aspects.[185]

In its report the Committee recommended that individual right holdings should be registered and a register of applicants for holdings in each *kokwet* to be compiled.[186] Once the holdings had been surveyed they were to be registered in a Locational Register maintained by the Chief's clerk and a Master Register to be maintained by the African District Council Secretary.[187] Once the applicant of the holding was able to undertake that he would reside habitually on

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183 *Ibid*, p. 109.

184 *Ibid*, p. 111.

185 *Ibid*.

186 Report of the Nandi District Land Tenure Committee, 1952, para.15. reproduced in G.S. Snell, Kamba Customary Law, (Nairobi 1954), Appendix.

187 *Ibid*, para. 25(ii).

his holding and farm it according to the rules of good husbandry he would be granted a special title.[188] The title, however, only conferred upon the holder rights of exclusive occupation and usage of the land for a period of twenty years from the date of registration which could be renewed for a similar period.[189]

Nevertheless, he would have the power of disposing the land by inheritance, gift, sale, or exchange.[190] In effect, the title was granting the holder a 20 year lease rather than a freehold title since the freehold reversion was vested in the Trust Board and provision was made for an annual rent to be paid to the locational council.[191]

These proposals were never put into effect because they were overtaken by events that took place in the Central Province at the beginning of the 1950's.

The outbreak of the Mau Mau Civil War in 1952 was a factor that shook the colonial government out of its complacency and inertia and brought about the rapid introduction of land registration over the whole of Central Province. The war, fought by Africans against the colonial government and the European settlers, was centered in the Central Province of Kenya where many

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188 *Ibid*, para. 21.

189 *Ibid*, para. 25(xviii)

190 *Ibid*.

191 Report of the Nandi District Land Tenure Committee, 1952, para. 25(xx).

Kikuyu, frustrated by the government land policy in favour of the European settlers, took to arms.[192] The root cause of the war was the deep seated feeling among many Africans that the colonial government had stolen their land. This feeling had developed over many years and several factors were responsible for the outbreak of the war, all stemming from the government's land policy.

First, were the consequences of the creation of a class of squatters amongst Africans. To stimulate settler agriculture, the government forced many Africans to provide cheap labour for European farmers. Many had no choice because they had been made landless through the alienation of their land by the government to the European settlers. Moreover, to be able to pay a poll tax which the government introduced, many had to find means of earning income to help pay the tax,

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192 It would be beyond the scope of this thesis to discuss the conduct of the war and the political repercussions. The reader's attention is drawn to some of the numerous works which discuss the war and the political consequences - see for example, D.L. Barnett & K. Njama, Mau Mau From Within (Nairibo 1966); Sir Michael Blundell, So Rough a Wind, (London 1964); C.G. Roseberg & J. Nottingham, The Myth of 'Mau Mau: Nationalism in Kenya, (Nairobi 1966); Jomo Kenyatta, Suffering Without Bitterness, (Nairobi 1969); O. Odinga, Not Yet Uhuru, (Nairobi 1968); O.W. Furley, The Historiography of Mau Mau, Hadithi Vol.4: Politics and Nationalism in Colonial Kenya, edited by Bethwell A. Ogot (Nairobi 1972); Maina wa Kinyatti (ed.) Kimathi's Letters: A Profile of Patriotic Courage (Nairobi 1986); B. Kaggia, Roots of Freedom 1921-1963, (Nairobi 1975); J.M. Kariuki, Mau Mau Detainee, (Nairobi 1963). For an official account see Historical Survey of the Origins and Growth of Mau Mau (F.D. Corfield), Cmd. 1030, (1960).

ending up working as wage labourers for the European farmers.[193]

Many Europeans allowed their African workers to cultivate and keep livestock on some of their unused farmland on condition that they continued to work for the farmer for a specified period. Through this arrangement, the Africans (who were termed 'squatters' since they had no rights on the land) were able to grow crops and keep livestock for subsistence purposes and were able to supplement their meagre incomes. However, with time, the squatters became prosperous and began to have large numbers of livestock and no longer found it really necessary to work for the Europeans. At the same time the settler farmers began to feel threatened by the burgeoning squatter livestock, arguing that the African livestock would spread diseases to their grade cows and wipe them out.[194] Consequently, they lobbied the District Councils to introduce a series of measures which would restrict the number of stock the squatters could keep.[195] This was done and bye-laws were passed which restricted the number of livestock a squatter could

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193 Tabitha Kanogo, Squatters and the Roots of Mau Mau 1905-63, (Nairobi 1987), p.9.

194 *Ibid*, pp. 40-44.

195 For accounts on how this was done see, Tabitha Kanogo, *op.cit.*, pp. 44-61; David Throup, Economic and Social Origins of Mau Mau 1945-53, (Nairobi 1988), Chapter Five.

hold. As a result, a large number of squatter stock was confiscated and destroyed.

The response of the squatters was to engage in resistance by engaging in strikes, refusing to sign on for the farmers, and at times resorting to violence.[196] As a result many were forced to leave the farms; some tried going back to the Reserve but found that there was no room for them due to overpopulation and land shortage there and therefore they ended up becoming a landless class. Although the government created the Olenguruone Settlement Scheme to absorb some of the squatters on land in the Olenguruone area, the farming conditions that were imposed by the government were so stringent that many squatters rebelled and ended up being forced out of the area by the government.[197] Many went to Nairobi to seek employment but found none. As a result of these developments, the squatters emerged as an embittered and landless group of people that became a focus for discontent and unrest.

A second factor was brought about by the introduction of farming practices by the government in the Kikuyu Reserve. The Reserve, comprised of Nyeri, Fort Hall (now Muranga) and Kiambu Districts, was hilly but fertile. However, an increase in the Kikuyu population eventually resulted in serious overcrowding

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[196] David Throup, *op.cit.*, p. 111.

[197] See Tabitha Kanogo, op.cit., pp. 105-116; David Throup, *op.cit.*, Chapter Six.

in the Reserve. The combination of intensive farming coupled with poor farming methods resulted in the land becoming seriously eroded. To prevent this the government introduced soil conservation measures to reduce erosion in the Reserve. The most notable was the terracing of the steep slopes which characterised the Reserve. The government empowered the local chiefs to mobilise the people to engage in communal labour and dig the slopes to create the terraces. The chiefs zealously enforced terracing in order to gain official approval and the rewards that came with it.[198] However, this work caused popular opposition among the peasants, who provided the labour, because the work was exhausting and it meant that they had less time to farm their own plots of land: the work also reduced the amount of land available for cultivation.[199] Many suspected that once terracing was completed the land would be alienated to the Europeans.[200] As a result opposition among the peasants against the administration was high and it resulted in the terracing work having to come to a complete halt. Government attempts to enforce the work only resulted in violence.[201]

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198 David Throup, *op.cit.*, p. 141.

199 *Ibid.*, pp. 142,240.

200 *Ibid*, p. 151

201 See generally David Throup, *op.cit.* pp. 151-162.

At the same time as this was going on, pressure on the land in the Reserve resulted in landowners attempting to acquire as much land as possible by buying land from poorer Kikuyu in order to maximise their own production. However, it had the unfortunate result of turning families against each other as individual members tried to grab land from each other.[202] It also resulted in many of the *ahoi* (tenants) being ejected from the land they occupied. Many *ahoi* refused to be ejected because they claimed that they had acquired rights of ownership over the land. Consequently, bitter disputes arose between the real owners and the *ahoi* as each asserted that they were the true owners of the land. This led to an increase of litigation in the African courts with heavy legal costs on both sides. Naturally, the poor peasants who could not support an action ended up losing their land.[203] In order to tap this discontent, political activists within the Kenya African Union, which was the dominant political party, began to mobilise the squatters, the peasants in the Reserves, the disposed *ahoi* and the unemployed in Nairobi against the colonial government through a series of oaths which demanded a commitment to

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202 M.P.K. Sorrenson, Land Reform in the Kikuyu Country: A Study in Government Policy, (Nairobi 1967), p. 79.

203 M.P.K. Sorrenson, *op.cit.*, pp. 79,80.

opposing the government.[204] The government had by this time realised that its agricultural policy had failed and that a change in thinking was necessary. Roger Swynnerton, appointed as assistant director of agriculture, spearheaded the change in policy. He realised that Africans would support the government conservation policy if the government allowed Africans to grow high value cash crops such as coffee, and if the government buried its opposition to the grant of individual titles to Africans. His plan to intensify African agriculture became the focus of the new government policy toward African agriculture and land tenure. In his plan[205] he made several recommendations notably:

1. That Africans must be provided with security of tenure by providing them with an indefeasible title which would in turn encourage them to invest their labour and profits into the development of their farms as well as enabling them to offer it as security for credit.[206]

2. Many African lands suffered from excessive fragmentation due to dense population and the

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204 David Throup, *op.cit.*, pp. 171,172; Tabitha Kanogo, *op.cit.*, pp. 5,116-117, 133-5; C.G. Roseburg & J. Nottingham, The Myth of Mau Mau: Nationalism in Kenya, (Nairobi 1966), p. 248; Maina wa Kinyatti (ed.) Kimathi's Letters: A Profile in Patriotic Courage, (Nairobi 1986) p. 133.

205 A Plan to Intensify the Development of African Agriculture in Kenya, (Nairobi, 1954).

206 *Ibid*, para. 13.

consequences of customary land tenure and inheritance. As a result people owned small fragments of land scattered over a wide area, which was not conducive to an economic system of farming. Therefore it was necessary to amalgamate or consolidate the fragments turning them into economic farming units, while at the same time ensuring that fragmentation did not take place by preventing sub-divisions of land below an economic level.[207]

3. To effect the above two recommendations it was necessary that accurate surveys of African lands be made for the registration of titles and the establishment of District Land Registries to maintain the registers.[208]

4. That Africans be allowed to grow high value cash crops thereby stimulating their income.[209]

The purpose of these recommendations was to create a stable middle class of Africans made wealthy by the adoption of these measures who would remain politically content and support the government.[210] Although some Africans did benefit from these measures, they came too late for the majority, many of whom joined the Mau Mau, a movement that was committed to armed struggle against the colonial government and

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207 *Ibid.*, para. 14.

208 *Ibid*, paras. 17-20.

209 *Ibid*, para. 25.

210 *Ibid*, para. 12

to bring to an end the exploitation of Africans by the Europeans. Acts of sabotage, violence and the murder of several European settlers by the Mau Mau resulted in the outbreak of the Mau Mau civil war and the declaration of a State of Emergency by the government on 20 October 1952.

The government took drastic measures to try and contain the war. Many political leaders, notably among them Jomo Kenyatta, were detained as were many Africans who were suspected of being members of the Mau Mau or who sympathised with the movement. Kikuyu peasants were confined to villages which had stockades built around them to prevent contact with the guerilla fighters and to enable the government to maintain control over them.[211] It was during this period that the government took the opportunity to rushing through the programme of land consolidation and registration in the Kikuyu lands. The detention of the political leaders and the confinement of the Kikuyu meant that there would be no opposition to the programme. Moreover, since the Kikuyu were taken off the land and confined to the villages it would be easier to survey the land and consolidate the fragments and have them registered.[212]

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211 M.P.K. Sorrenson, Land Reform in the Kikuyu Country: A Study in Government Policy, (Nairobi 1967), pp. 110-112.

212 See Chapter Three, *infra*.

Prior to the declaration of Emergency, land consolidation and registration of titles was already being undertaken in Nyeri due to a decision by Provincial Commissioners to grant individual titles to Africans in the Native Lands, a decision prompted by the inertia of Central government over the issue.[213] The Provincial Commissioner for Central Province went ahead with his own scheme to introduce registration in Nyeri District and had rules drafted. Under these rules, known as the Native Lands Trust (Rights of Occupancy) Rules, applicants for rights of occupancy had to show before a local land board that they would engage in good agricultural practices and to certify that they were the proprietors of the land either by purchase or through custom.[214] If no objections were made within a period of six months of the application, the applicant was granted a certificate of title regarded as indefeasible against all previous claims. All land transactions were to be registered although the local land board had to approve them. Each African court would keep a register of titles with the master register being kept by the District Commissioner.[215]

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213 Report of the Working Party on African Land Tenure, 1957-8, (Nairobi 1958), para. 16; see also M.P.K. Sorrenson, *op.cit.*, pp. 61-66.

214 M.P.K. Sorrenson, *op.cit.*, p. 66.

215 *Ibid.*, pp. 66,67.

Notwithstanding the advice of the Law Officers in Nairobi that the Rules were not valid under the Native Lands Trust Ordinance 1938 because the land registered under the rules would still be vested in Native Lands Trust Board, the provincial administration in Nyeri went ahead with its scheme and began to register land in Nyeri.[216] The outbreak of the Mau Mau war resulted in the District Commissioners of Kiambu and Fort Hall taking advantage of the situation to introduce land consolidation and registration in their Districts on the basis of the same rules.[217]

It was at this time, in 1953, that a Royal Commission was appointed to make recommendations, *inter alia*, on 'the adaptations or modifications in traditional tribal systems of tenure necessary for the full development of the land.'[218] The Commission recommended that provision should be made for scheduling areas for the adjudication of land and registration of titles to be carried out on a systematic basis and this to be undertaken by local officials.[219] It was further recommended that the interests that were adjudicated upon were then to be recorded in a Register of Rights maintained by central

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216 *Ibid.*, p. 67.

217 *Ibid.*, p. 114.

218 Report of the East Africa Royal Commission on Land and Population 1953-1955. Cmnd. 9745 p. ix.

219 *Ibid.*, paras. 17,18, pp. 351-352.

government on a district basis.[220] It was necessary that the land was accurately surveyed (aerial surveys being seen as an advantage) so that the boundaries could be identified.[221] The Commission saw the whole purpose of adjudication and registration as being that of increasing the economic use of land and therefore there was no need to introduce registration where there was little prospect of expanding economic production, such as in arid areas.[222]

The Commission's recommendations were accepted by the government in principle and in 1956 a conference met in Arusha to consider the recommendations of the Commission and the problems of African land tenure. The Conference produced detailed recommendations on a structure of land registration and adjudication to be applied in African lands.[223] They stated that negotiable titles should be granted only in areas where there was demand for individual titles.[224] To provide such a title it would be necessary to establish a properly contrived and efficiently conducted system of registration.[225] Moreover, though

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220 *Ibid.*, para. 19, p. 353.

221 *Ibid.*, paras. 20-23, p. 353.

222 *Ibid.*, para. 23, p. 353.

223 Report of the Conference on African Land Tenure in East and Central Africa, 1956, (1956) J.A.A. (Special Supplement).

224 *Ibid.*, para. 20.

225 *Ibid.*, para. 27.

registration was to be a function of central government, it should be decentralised so that the register relating to an area be made reasonably accessible to persons living and claiming title in that area.[226] The Conference also recommended that the grant of titles should be preceded by a process of adjudication so that "all rival claims to a given parcel of land can be properly considered and any subsidiary rights or interests held by persons other than the person to be registered as owner of the land can be ascertained and recorded."[227] Moreover, land should be surveyed and a programme of consolidation undertaken where land was excessively fragmented.[228]

The feeling therefore was that it was urgent to introduce legislation that would provide a structure for the consolidation, adjudication and registration of land. In the Central Province of Kenya, this process was being undertaken on the basis of rules which had no legislative sanction and therefore no legal force, a position that was clearly unsatisfactory. Due to the long delay by the Governor in appointing a working party to look into the form which legislation introducing registration would take, interim rules known as the Native Land Tenure Rules were drawn up in 1956 under section 64(1)(e) of the

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226 *Ibid.*, para. 31.

227 *Ibid.*, para. 36.

228 *Ibid.*, Parts V and VI.

Native Land Trust Ordinance 1938[229] which allowed the Governor to make rules "regulating any matter relating to the tenure of land in the native lands." The Rules provided for a committee of five lay members to be appointed by individuals from the district where the rules were applied, which would ascertain the ownership of or rights to land in each unit according to African law and custom. Claimants were to appear before the committee to state their claims, and once adjudication was completed, a Record of Existing Rights, which was a list of right holders, was made available for inspection for a period of thirty days. Provision was also made for the consolidation of fragments of land belonging to claimants whereby the claimant would be moved to a new holding approximately equivalent in area to the sum total of the area of the fragments of land he previously owned. Once this process was complete the claimant would be issued with a certificate which had details about the proprietor and the number of his holding as well as the interests that the land was subject to, these details being recorded in a register.[230]

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[229] M.P.K. Sorrenson, Land Reform in the Kikuyu Country: A Study in Government Policy (Nairobi 1967), pp.123-131; see also Report of the Working Party on African Land Tenure, 1957-58, (Nairobi 1958), para.27.

[230] However, the Rules did not define the nature of the rights of the certificate holders in view of section 68 of the Native Lands Trust Ordinance 1938. The section provided that every individual shall have all the rights which they enjoy "by virtue of existing native law and custom." The Government was advised that no rights which were unknown to the law and custome of the tribe concerned could be recognized or

These Rules regulated registration of land until the enactment of the Native Lands Registration Ordinance 1959. This Ordinance had been drafted by the Working Party on African Land Tenure which was appointed to recommend legislation which would take into account the recommendations of the Royal Commission and the Arusha Conference and which would provide for the adjudication of rights, consolidation and demarcation of holdings, registration of titles and transactions, types of title, creation of lesser interests in land, succession, bankruptcy, and provision for the creation of land registries.[231]

The Working Party first recommended in an interim report that once a holding was registered in the name of the owner, it should cease to be vested in the Native Lands Trust Board and become vested in the registered owner and that the Native Lands Trust Ordinance 1938 should cease to apply to it.[232] This recommendation was accepted and given effect by the Kenya (Native Areas) (Amendment) Order in Council 1958. Registered titles could now be vested in the registered proprietors rather than in the Trust Board.

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created by rules made under the Ordinance (e.g. a fee simple in possession) - Report of the Working Party on African Land Tenure 1957-1958, (Nairobi 1958), para. 27.

231 *Ibid.*, pp. 1-2.

232 Interim Report on Status of Land and Form of Title - in Appendix A, Report of the Working Party on African Land Tenure 1957-58, *op.cit.*

The Working Party produced a Bill containing provisions that would establish a system of land registration in the African lands. In drafting the Bill, the Working Party looked at various statutes from other jurisdictions which had introduced land registration, such as the Tanganyika Land Registration Ordinance 1953, the Sudan Land Settlement and Registration Ordinance 1925, the Uganda Registration of Titles Ordinance 1924, the Nigerian Registration of Titles Ordinance 1935 and the Singapore Land Titles Ordinance 1956, and the English Land Registration Act 1925.[233] However, it was the Sudan Land Settlement and Registration Ordinance 1925 that influenced the Working Party because it had introduced a land registration system in the Sudan that was well established and which had successfully brought about the registration of titles in African lands there. The provisions in the Sudan Ordinance were based on the English Land Registration Act 1925 the Ordinance thereby establishing land registration on the English model in Sudan. Since the Sudan legislation was already tried and tested, having been able to establish registration in lands under African tenure, the Working Party felt that it could use its provisions in their draft Bill.[234] Although the

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[233] Report of the Working Party on African Land Tenure 1957-58, (Nairobi 1957) para 39.

[234] Prior to the appointment of the Working Party a Kenyan official went to Sudan to see how the system worked and on his return recommended that it should be adopted in the African lands. Some of the

Working Party did look at the Registration of Titles Ordinance 1919 it was felt that it would be unsuitable for the registration of African titles and hence it would not apply.[235]

The Working Party claimed that they were satisfied that the rights enjoyed by Africans in many areas had evolved to something like full ownership and therefore should be recognised as such. However, they felt that it was inadvisable to attempt to confer title by way of grant, either by the Crown[236] or by the Trust Boards. Instead the adjudication committees "should list those persons whose rights they considered should be recognised as ownership and that subsequent registration *should convert that recognition into a freehold title which would vest in those persons an estate in fee simple*" (italics mine).[237] This was implemented when the draft Bill produced by the Working Party was accepted and passed by the Legislative Council and became known as the Native Lands Registration Ordinance 1959. Section 37 of the Ordinance provided that the registration of a

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recommendations were adopted into the Native Land Tenure Rules 1956 - M.P.K. Sorrenson, Land Reform in the Kikuyu Country, *op.cit.*, pp. 122-135. See also S. Rowton Simpson, Land Law and Registration, (Cambridge 1976), pp.198, 466.

235 S.Rowton Simpson, *op.cit.*, p. 446. In view of its deficient provisions (see above) it was not surprising that this view was taken.

236 This was the procedure under the Registration of Titles Ordinance 1919.

237 Report of the Working Party, *op.cit.*, para. 34.

freehold title vested in the registered proprietor an estate in fee simple.

The 1959 Ordinance was unique for it not only made provision for the adjudication and consolidation of land[238] but it also made provision for the organization and administration of land registries,[239] the procedure on a disposition of a registered title,[240] rectification and indemnity for errors and omissions on the register,[241] the recognition of overriding interests[242] and the protection of minor interests.[243] Significantly, the Ordinance contained provisions on substantive land law which would regulate land registered under the statute, such as provisions on leases, charges, easements and profits, prescription and co-ownership.[244]

The Native Lands Registration Ordinance 1959 was the fifth new form of land registration but which only applied in the African lands. The other four registration systems remained intact and would continue to apply in their respective areas. Shortly

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238 Part II. For discussion of land adjudication, see Chapter Three, *infra*,.

239 Native Lands Registration Ordinance 1959, Part III.

240 *Ibid*, Parts V, VI.

241 *Ibid*, ss. 88,89,90.

242 *Ibid*, s. 40.

243 *Ibid*, ss. 86,87.

244 *Ibid*, Part VI.

after, the Native Lands Registration Ordinance 1959 was renamed the Land Registration (Special Areas) Ordinance 1959 with its provisions unchanged.[245]

IV. The Registered Land Act 1963

By 1960, Kenya had five different systems of land registration which were applied to different parts of the country. Such an anomalous situation was the result of a haphazard land policy that failed to provide for a comprehensive system of land registration covering the whole country. There were three main factors that brought this about. First and most important was the desire of the colonial administration to stimulate European settlement at all costs, and to do this, the best land was set aside for them at the expense of the Africans who had already inhabited the land. This produced a dichotomous approach whereby European land was made subject to English law while land inhabited by Africans was subject to customary law. This meant that forms of land registration introduced in European lands were not applied in the African lands due to the overriding view that Africans were not yet ready to adopt such systems and, moreover, their institutions did not recognise freehold title. The outbreak of the Mau Mau

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[245] The change in name was probably as a result of a move to remove references in legislation that referred to Africans derogatively, in particular the term 'native'. The 'Special Areas' in the renamed Ordinance were those areas which up to then were referred as 'Native Lands.'

war, which was a result of African anger and frustration at the way they were treated, caused a rapid change of policy by the government toward the grant of titles to Africans and resulted in the creation of new system of land registration to apply in African lands which was designed to stimulate African agriculture.

A second factor was the quirk of history which affected land situated in the Coast province. The rule of the Sultan of Zanzibar had resulted in the application of Islamic law along the coast and the owners of land were regulated by such law. British acquisition of jurisdiction over this area meant that it became important to distinguish land that was privately owned and therefore subject to Islamic law from land that was held to unoccupied, and to this end a method of registering these titles was introduced in the Coast.

The third factor was the simple failure of the government to address itself to the issue of providing a unified structure of land registration that would uniformly cover the whole country. Successive registration statutes were passed without providing for the repeal of preceeding legislation and no thought was given on how titles registered under the Registration of Documents Ordinance could be converted to come under the Crown Lands Ordinance 1915, or how titles under the latter Ordinance or those registered

under the Land Titles Ordinance 1908 could be brought under the Registration of Titles Ordinance 1919.

As Kenya moved towards Independence from British colonial rule the question of how these systems of land registration could be replaced by a single system of land registration covering the whole country began to be addressed. In 1961 an unofficial committee looked into this question and came up with a draft bill which was to provide "for the practical needs of land owners in Kenya with respect (a) to security and proof of title and (b) a facility for creating and transferring interests in land".[246] In their commentary on the bill the committee pointed out how the Bill avoided the deficiencies found in the Registration of Titles Ordinance 1919. The committee had looked at various sources while drawing up the Bill, notably a Bill drawn up by a Working Party on Registration of Ownership of Land in Lagos to introduce registration of title in Labos, Nigeria.[247] The committee also analysed the English Land Registration Act 1925, the New South Wales Real property Act 1900, the Tanganyika Land Registration Ordinance 1953, the Victoria Transfer of Land Act 1954 and the Singapore Land Titles Ordinance 1956. By analysing these Acts the committee was able to adopt some of their provisions in the Bill. Undoubtedly,

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246 S. Rowton Simpson, *op.cit.*, p. 447.

247 *Ibid.*, pp. 447-449.

the committee was greatly influenced by the Land Registration (Special Areas) Ordinance 1959 which had been in force and which was seen to be successful in its application although it too had defects.[248] The Bill also contained a code of substantive land law that would apply to land registered under it.

The Bill was accepted by the new Kenya Parliament and was passed to become the Registered Land Act 1963. The Act had two principal objectives; first, to unify the system of land registration by converting the titles subject to the Land Titles Act 1908,. Government Lands Act 1915, Registration of Titles Act 1919, and the Land Registration (Special Areas) Act 1959 onto the register created by the 1963 Act; secondly, to facilitate the registration of land that was subject to customary law. Such land first underwent adjudication whereby all the customary rights affecting the land were recorded by ajudication committees, prior to such land being registered. This process had been provided for in the Land Registration (Special Areas) Ordinance 1959 but is now governed by the Land Adjudication Act 1968.

Significantly, the Act contained new substantive land law provisions that would regulate land registered under the Act. Land registered under the pre-existing registration systems was already subject

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[248] The National Assembly, House of Representatives, Official Report, Vol.1, Part I, Col. 781, (10 July 1963).

to the substantive land law contained in the Indian Transfer of Property Act 1882. The 1882 Act would cease to apply to land registered under the Registered Land Act 1963. Therefore, the 1963 Act would not only unify the system of land registration when all the titles already registered under the other systems were converted to the register under the Act, but would also unify the substantive land law because, eventually, the Indian Transfer of Property Act 1882 would cease to apply; moreover, customary land law would cease to apply to land which was subject to adjudication and brought onto the register.

The registration of land subject to customary tenure would complete an important transformation: the rights and obligations recognised by unwritten African customary law, to which land under customary tenure was subject to, would be transposed onto rights and obligations created by the statute and familiar to English law. Such a change would create new obligations for those with interests in registered land. Enforceability of such interests would now depend on whether they were registered or not. Unregistered interests would not bind a purchaser of land for example, unless they came within the category of overriding interests.[249] A purchaser would therefore have to search the register of title first

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[249] Registered Land Act 1963, s. 30.

before entering into a transfer to ascertain what interests were binding on the land.

The transfer of registered land would, undoubtedly be much easier than it was under customary law. No more would it be necessary to have a large number of persons witness a transfer of land, as was the situation under customary law. Such transfers now merely required the vendor and purchaser to sign the relevant transfer forms, with proof of the transfer and hence of title being the entry of the transfer in the register of title.[250] As it will be shown, personal attendance by parties to transactions at the land registries and the completion of such transactions there remains a significant feature of land registration practice.[251]

However, as was pointed out in Parliament when the Bill was being debated, the unification of land registration was not going to happen overnight but would take several years.[252] More than 25 years later this process is still continuing. Since the enactment of the Act, the emphasis has been placed on the registration of land formerly under customary tenure. With the exception of titles registered under the Land Registration (Special Areas) Ordinance 1959, which

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[250] However, as will be shown in chapter Five, there is more involved in a transfer than meets the eye.

[251] See Chapter Four, *infra*.

[252] The National Assembly, House of Representatives, Official Report, Vol.1, Part 1, col. 782, (10 July 1963).

were automatically converted onto the register under the 1963 Act,[253] the conversion of titles registered under the other registration Acts has been relegated into the background. It will therefore be a long time yet before unification of the systems of land registration in Kenya takes place.

V. Conclusion

Despite the fact that the system of private conveyancing was antiquated and discredited due to its inherent faults, it took many years before land registration became established in England and accepted as a system that was there to stay. As a result of the opposition of the English legal profession which had a vested interest in maintaining the system of private conveyancing which, though inherently deficient, was profitable to them, together with the failure of landowners to voluntarily register their titles, it meant that from the enactment of the Land Registry Act 1862 it took nearly a century before land registration really took hold in England. This would be a factor explaining why the British government did not initially introduce English land registration in Kenya, despite the fact that they had introduced English common law and the principles of equity as the general law, in addition to the imported law of real property from India, when colonial rule

[253] The Land Registration (Special Areas) Ordinance 1959 was repealed at the same time.

was established in Kenya at the end of the 19th century. Land registration was in its infancy in England and at that time was still viewed as a discredited system, and though remedies had been introduced by the Land Transfer Act 1897, these had not yet taken effect.

Neverthless, it was the reorganisation of the law of real property together with further improvements to the system of land registration in 1925 that began to change the indifference to land registration in England, and even outside England, in the colonies, it began to be perceived as an effective system.[254] It was to take more than 60 years from the establishment of colonial rule before the English model of land registration was introduced in Kenya through the enactment of the Registered Land Act 1963. By this time several forms of land registration had been experimented with in Kenya. The system of deeds registration introduced by the Registration of Documents Ordinance 1901 and the Crown Lands Ordinance 1915 was inadequate as titles had still to be investigated retrospectively by a purchaser, making the process of conveying land subject to the registration of deeds a difficult one. The hybrid system of land registration introduced by the Land Titles Act 1908 in the coast was only made to apply to

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[254] However, even after the reforms of 1925 it was to take a long time before land registration became well established in England, particularly outside London - see Chapter Three, *infra*.

that area due to the application of Islamic law which came about as a result of the rule of the Sultan of Zanzibar. Nevertheless, the system was expensive and was suspended for over 35 years due to lack of funds to administer it. Notably, the Registration of Titles Act 1919 which introduced the Torrens system of land registration was a failure. It was badly drafted and when enacted the opposition of the legal profession to the Act meant that it never was a success. Moreover, its failure can also be attributed to the fact that not only was it limited in its application (generally being confined to freehold titles), but, significantly, no attempt was made to convert the other existing systems onto the 1919 Act, which meant that the other systems continued to run parallel and in competition with the 1919 Act.

The separate treatment of the Africans by the colonial government in Kenya, a consequence of the dual policy, resulted in the application of customary land law in the African lands, which was different to the land law applied in the rest of the country. African titles were ultimately vested first in the Crown and subsequently in the Native Lands Trust Boards. The realisation among the Africans that they were not the real owners of the land brought about the demands for secure freehold titles and the return of land that had been granted to the European settlers. The colonial government's refusal to accede to such demands contributed to the outbreak of the Mau Mau

civil war. The response of the colonial government , albeit belated, was to introduce land registration and the grant of indefeasible titles in the African lands.

However, there was the realisation that the method of land holding among African societies in the reserves had to be altered before indefeasible registered titles could be issued. Land consolidation was seen as the panacea for the fragmentation of land, a problem which was brought about by overpopulation in the Reserves contributing to a land shortage, together with the customary rules of succession which caused land to be continually subdivided amongst families. Those persons who claimed rights of ownership over land as well as those who claimed customary rights over land had to have those rights ascertained and recorded, hence the programme of land adjudication.

Therefore, the enactment of the Registered Land Act 1963 was meant to bring cohesion to land registration in Kenya by uniting the disparate systems of land registration and, notably continuing the process of registering land in the areas under customary tenure. This latter task had particular significance because it was closely tied with the agricultural development of the African lands.[255] Land registration was therefore not only a measure to improve the method of conveying land simply, safely

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255 See R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, (Nairobi 1954).

and economically but was a measure that would bring economic' development to the region as farmers could use their registered titles to obtain credit for agricultural improvements and therefore boost their incomes.

Plainly, the emphasis of land registration was to improve dealings in land. The objective of the Land Registration 1925 was to eventually replace the laborious investigation of title which was a feature of private conveyancing, with a method of conveying land that was meant to be simple and safe. This was the same objective of the Registered Land Act 1963; the 1963 Act would eventually introduce a nationwide system of registration which would facilitate dealings in land. However, in doing this it had a bigger task than the English Land Registration Act 1925. It had to replace the pre-existing registration systems which were deficient and bring the titles registered under those systems to the new register under the 1963 Act; moreover, it had to extend registration to those lands that were under customary tenure and this was going to be no easy task because of the nature of customary law.

The procedure used in bringing land under customary tenure onto the register and the process of converting titles registered under the re-existing registration systems is discussed in the next chapter.

Chapter Three

Bringing Titles Onto The Register

I. Introduction

A huge task faced the Registered Land Act 1963 when it was enacted. Titles that were subject to the Government Lands Act 1915 and those registered under the Land Titles Act 1908 and the Registration of Titles Act 1919, were to be converted and transferred to the new register created by the Registered Land Act 1963. Secondly, land subject to customary tenure, the Trust Lands, was also to be brought onto the register. This latter task was to prove difficult because, as indicated in Chapter Two, owners of land under customary tenure could only prove their title and the extent of the boundaries to the land by relying on the oral testimony of the witnesses who had been present during the transfer of the land. Such a method had potential difficulties when, for example, the passing of successive generations meant that the exact nature of the original transfer was forgotten or nobody could remember the exact line of the boundaries to a portion of land. The identification of persons with rights of ownership and those with interests in the land, as well as the extent of boundaries was to prove to be a problem when land subject to customary law was being registered. It meant that before a person could be registered as the owner of a plot of land it was

necessary to ascertain such ownership through the testimony of local people such as adjacent land owners, local inhabitants or relatives who would have been aware of his right of ownership under customary law and the extent of the boundaries to his land.

It is this method of ascertaining such ownership that is referred to as land adjudication. Also included in the process of land adjudication is the identification of persons who hold customary interests in land. The rights and interests of all these persons were to be recorded; those with rights of ownership were registered as proprietors, while those with interests in the land had those interests protected on the register of title.

The introduction of land registration in the African lands was done not only for political reasons but also as an economic measure.[11] The Swynnerton Plan highlighted the fact that agricultural production in the African lands could be boosted by the consolidation of fragmented land. Fragmentation of land was brought about by the combination of the rules of customary succession, whereby all the sons in a family had to receive a share of their father's land, and an increase of the population in the Reserves. Plots of land that were initially large in size became progressively smaller. Since some of these plots of land were not sufficient to support a family, additional plots of

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1 See Chapter Two, Part II, *supra*.

land were bought within the vicinity to be used for subsistence agriculture. Consequently, a family could have numerous plots of land, all tending to have small acreage. According to the Swynnerton Plan, if these plots were brought into one consolidated unit the result would be an economic holding contributing to sound 'agricultural development', which would be accentuated if the titles to this land were declared indefeasible through registration.[2]

Therefore, land adjudication was combined with land consolidation in a process where interests in land and rights to own land were determined, before the fragments of land were surveyed and consolidated into one unit and subsequently registered. The process of land consolidation was mainly carried out in the Central Province in the 1950s because that was where the problem of land fragmentation was acute. The outbreak of the Mau Mau civil war enabled the colonial government to execute land consolidation in that area very quickly.[3]

Land adjudication and land consolidation form distinguishing and important features in the process of bringing titles onto the register under the Registered Land Act 1963. A significant feature is that the consolidation of land and the adjudication of interests

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2 R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, (Nairobi 1954), paras. 13,14.

3 See Chapter Two, Part II, *supra*.

is undertaken by committees composed of lay people assisted by administrative officials. This procedure is not governed by the Registered Land Act 1963 but by the Land Consolidation Act 1968 and the Land Adjudication Act 1968. This unique procedure is in contrast with the method of bringing titles onto the register under the Land Registration Act 1925. Before unregistered land can be brought onto the register under the 1925 Act, the Land Registrar is responsible for investigating the titles by examining the documents of title and, in doing this, he is assisted by experienced conveyancing counsel. However, the Land Registrar under the Registered Land Act 1963 takes no part in the investigation of titles of land subject to customary tenure. All the work is done by the committees mentioned above. The work of the Registrar is merely to register the titles that are adjudicated and investigated by the committees. This however, has created serious problems as will be shown.

Land consolidation in Kenya has almost come to an end and no longer has the importance it once had because almost all the land that was viewed as excessively fragmented has been consolidated. The most important procedure remains that of land adjudication governed by the Land Adjudication Act 1968.

This chapter briefly describes how land consolidation was undertaken then concentrates on the present method of land adjudication. Land adjudication has had several problems, notably the equating of

customary rights into rights recognised by the Registered Land Act 1963, the composition of the adjudication committees and, significantly, the protection of the rights of those who are absent when land adjudication was taking place. The latter was a serious problem in the 1950s when the Mau Mau civil war was at its height and many landowners were in detention. This chapter considers how effective the procedure of land adjudication is and how the problems presented by land adjudication can be solved.[4] Also considered is the method used in converting titles that were registered under pre-existing registration systems.

The process of land adjudication highlights an important aspect in the spread of land registration: the extension of land registration in a systematic manner. This is a distinguishing feature of land registration in Kenya compared to the procedure in England where registration is spread on a sporadic basis. Systematic registration is a methodical and coordinated registration of all the plots of land in a defined area within a period of time; sporadic registration, on the other hand, is the registration of

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[4] The reader's attention is drawn to the research carried out by Simon Coldham on land adjudication in Western Kenya. The researcher was able to go into detail, as a result of his research, on the merits and de-merits of land adjudication - see S.F.R. Coldham, Registration of Titles to land in the Former Special Areas of Kenya, unpublished Ph.D. thesis, University of London, 1977. For this reason, this chapter will briefly outline the procedure of land adjudication and the problems created.

titles within an area in an ad hoc and uncoordinated manner. The systematic versus the sporadic spread of land registration is discussed, the advantages and disadvantages of both methods considered and the reasons why each country adopted a different method.

The identification of a registered title by its plan is crucial to the effectiveness of a system of land registration. A plan identifies the extent of the boundaries of a registered title in relation to adjacent properties. The preparation of the Registry Index Maps which identify the extent of registered properties in a given area, and from which individual plans for registered titles are drawn, has to be done effectively if titles are to be adequately identified. The method of preparing Registry maps in Kenya is therefore an important aspect of the process of bringing titles onto the register. The methods used for the survey of land and the preparation of the Registry Index Map in Kenya are designed for the process of systematic registration of land. The method used in identifying land in Kenya is considered in the final part of this chapter and its effectiveness evaluated.

II. Sporadic Versus Systematic Registration

To describe the registration of titles in England as compulsory is a misnomer because nobody is forced to have their titles registered. It is more accurate to state that registration in England is inducive.

Section 123(1) of the Land Registration Act 1925 provides that in an area of compulsory registration a conveyance on sale of freehold or a lease of more than 21 years or with 21 years unexpired not registered within two months from the date of the conveyance is void. The effect of non-registration is therefore to vest the legal estate back to the transferee. The intended transferee suffers loss by having the legal estate divested from him, although he can recover it by making a fresh application.[5] Therefore, the effect of section 123(1) of the Land Registration Act 1925 is to induce transferees to register their titles and avoid the effect of non-registration, and the inconvenience of having to reapply for registration. No penalty is faced by a person who fails to register.

In contrast, land registration in Kenya can accurately be described as compulsory. Once an area is declared an adjudication area[6] all persons claiming title to, or interests in land must make their claims to the adjudication officials who have these claims recorded and eventually registered.[7] Once all claims have been adjudicated, recorded, all appeals dealt with, and the adjudication register handed to the Chief Land Registrar for registration under the Registered Land Act 1963, the register becomes final. Anyone who

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5 This issue is discussed further in Chapter Four, *infra*.

6 Land Adjudication Act 1968, s. 3.

7 *Ibid.*, s. 13.

has neglected to have his interest or title registered within the time period has that interest extinguished for all time as there can be no rectification of first registrations.[8] The consequences of non-registration are therefore severe. Moreover, once a title is registered, a failure to register a disposition results in the payment of penalty fees on an escalating scale and, in an extreme case, a criminal prosecution.[9] The consequences of non-registration and the nature of sanctions involved make the method of registration of titles truly compulsory.[10]

When it comes to bringing titles onto the register, the compulsory systems of registration in Kenya and England are essentially different. In Kenya, first registration of titles is undertaken on a systematic basis while in England the process of registering unregistered titles is conducted on a sporadic basis. In Kenya when an adjudication area is declared, every claim to title or an interest in land, as well as the definition of parcels is adjudicated upon and registered in a methodical and orderly manner. This means that all titles in an area are registered simultaneously and all this within a definite period. Therefore, as parts of the country are progressively

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8 Registered Land Act 1963, s. 143(1). The question of whether unregistered interests can still take effect is considered in Chapter Six, *infra*.

9 Registered Land Act 1963, ss. 40(i), 41.

10 See Chapter Four for the consideration of the effect of registration.

declared adjudication sections, all land within those areas is brought onto the register in a systematic and comprehensive manner.[11]

Although land adjudication in the Trust lands is being undertaken in a systematic manner, this method of registration has not yet been extended to the *conversion of* titles registered under the other registration systems. The emphasis has been placed on the registration of land formerly under customary tenure whereas the conversion of titles has not been viewed as urgent.[12] The Trust lands were to prove to be the most difficult areas to register because of the process of determining and adjudicating over customary rights.

The decision to have land adjudicated and registered systematically in Kenya was based on the recommendation of the East Africa Royal Commission. The Commission was influenced by the evidence submitted by Mr. V.L.O. Sheppard, an expert on land registration, who expressed his opposition to sporadic registration. He stated:

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[11] It is important to note that land subjected to adjudication is primarily land under customary tenure, now classified as Trust lands. These lands formerly vested in the Native Lands Trust Boards, are now vested in the County Councils of the areas concerned. Any land not classified as Trust land and not registered under the Registered Land Act 1963 will be governed by either one of the other registration Acts, that is, the Registration of Documents Act 1902, Land Titles Act 1908, Government Lands Act 1915 and the Registration of Titles Act 1919.

[12] See the discussion on the conversion of titles registered under the other registration Acts, *infra*.

> "Sporadic introduction of registration of title is vicious in principle, as it means that each property is given isolated consideration when it happens to come up for registration instead of conflicting claims of neighbours all being thrashed out at the same time. Uncoordinated work of this character is considerably less worthy of confidence, as well as being much slower and vastly more expensive than investigation and settlement of boundaries and titles systematically conducted plot by plot through the district."[13]

The Commission felt that considerable time and expense would be saved if the examination of all interests within an area selected for adjudication was done at once and those interests registered.[14] This could only be achieved if adjudication was done systematically. Nevertheless, the Royal Commission pointed out that systematic adjudication could not be rigidly adhered to and that there should also be a mix of sporadic compilation, especially in an area where there existed a few progressive African farmers. These were to have the benefit of registration so that other less progressive farmers in the same area would endeavour to emulate the more progressive, thereby warranting the subsequent introduction of systematic registration.[15]

However, the Working Party on African Land Tenure which reported three years after the Commission report,

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13 Report of the East Africa Royal Commission on Land and Population 1953-55. Cmnd. 9475, para. 17.

14 *Ibid,* para. 18.

15 *Ibid.*, para. 17. See also Report of the Conference on African Land Tenure in East and Central Africa (1956) J.A.A. (Special Supplement), para. 40.

rejected the notion that sporadic registration should be introduced in certain areas. They felt that it would not be practical or just to confer registration to a few applicants. Instead adjudication and registration should be applied equally to all in a systematic manner. This principle was accepted and was provided for in the Native Lands Registration Ordinance 1959. Sections 9-20 of the Ordinance outlined the procedure used in the systematic adjudication and registration of rights. Once an area was declared an adjudication section all claimants of land and interests in land were to present their claims before the adjudication committee, and once the claims were confirmed, they were to be recorded on a Record of Existing Rights which formed the Register of Title.

The adjudication procedure in the 1959 Ordinance was replaced by the procedure introduced by the Land Adjudication Act 1968 which was essentially the same as that in the 1959 Ordinance.[16] However, the systematic nature of the operation has been made more explicit. Section 3(1) of the 1968 Act lays down the criteria for the extension of land adjudication to a given area; it provides that the Minister[17] is responsible for applying the Act to an area of Trust land if:

> "(a) the county council in whom the land is vested so requests; and

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16 Discussed *infra*.

17 This comes under the portfolio of the Minister for Lands, Settlement and Physical Planning.

(b) the Minister considers it expedient that the rights and interests of persons in the land should be ascertained and registered; and
(c) the Land Consolidation Act does not apply to the area."

The provisions of section 3(1) of the Land Adjudication Act 1968 now apply to over half the country as the map overleaf shows. Only the northwest, northern, and northeastern parts of the country remain to be adjudicated and registered. These parts cover only a total of 9 out of 41 districts. The reason why these northern areas remain the last to be adjudicated is due to their arid and semi-arid nature. As a result they are sparsely populated, inhabited primarily by nomadic societies leading a peripatetic existence. Consequently, over many years, there never was demand for registered titles in these areas, hence it was not seen viable to extend land registration there. Nevertheless, over recent years there has been settlement and farming in small pockets of areas that are habitable, such as around Marsabit, and it is planned to extend adjudication and registration to these areas.[18]

The systematic registration of unregistered titles in Kenya contrasts with the method of sporadic registration in England. As mentioned earlier, unregistered titles in a

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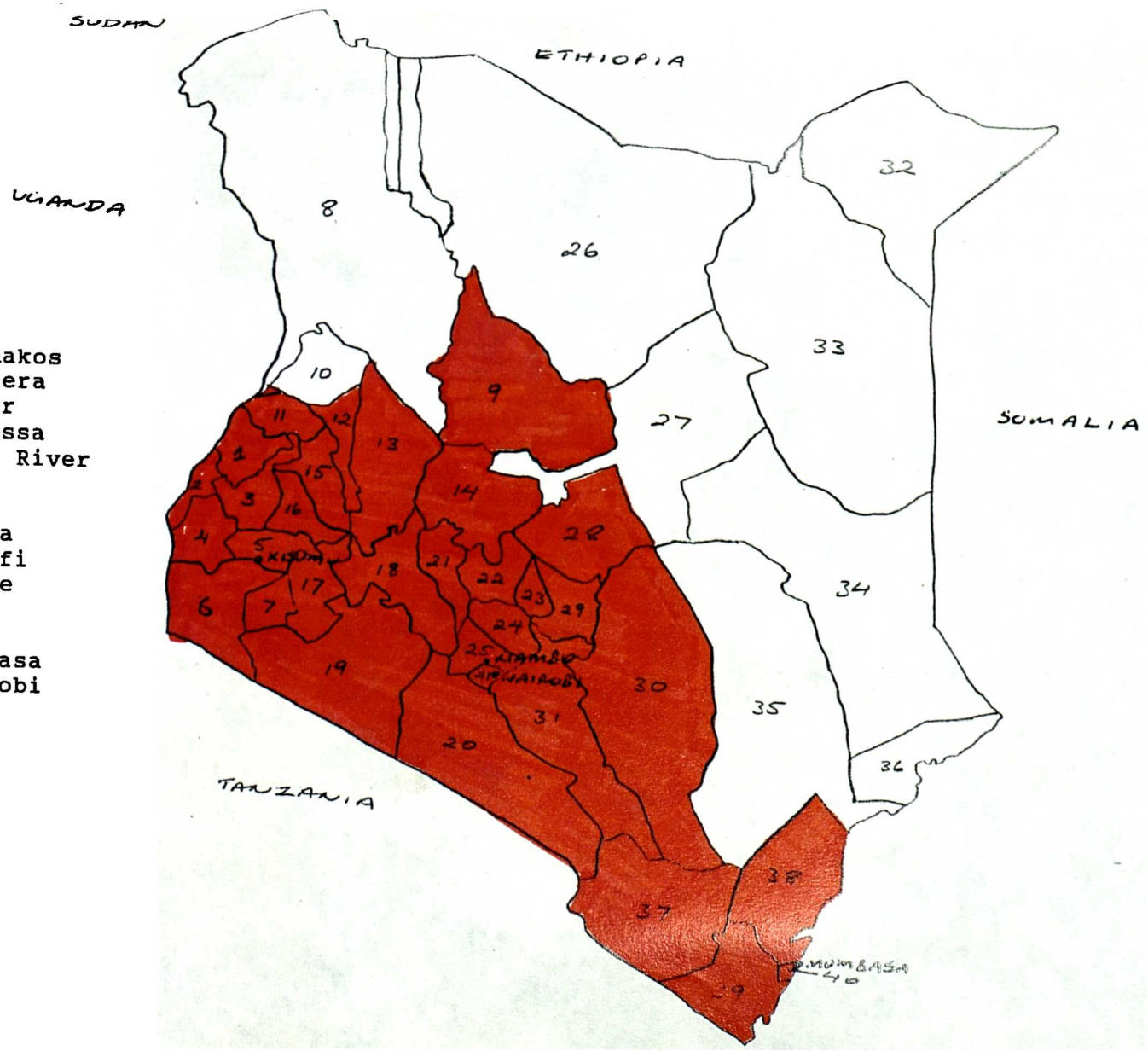
[18] Interview with Mr. J. Kibe, Land Adjudication Official, Land Adjudication Department, Nairobi, 3 October 1989.



Key to Districts

1. Bungoma
2. Busia
3. Kakamega
4. Siaya
5. Kisumu
6. South Nyanza
7. Kisii
8. Turkana
9. Samburu
10. West Pokot
11. Trans Nzoia
12. Elgeyo Marakwet
13. Baringo
14. Laikipia
15. Uasin Gishu
16. Nandi
17. Kericho
18. Nakuru
19. Narok
20. Kajiado
21. Nyandarua
22. Nyeri
23. Kirinyaga
24. Muranga
25. Kiambu
26. Marsabit
27. Isiolo
28. Meru
29. Embu
30. Kitui
31. Machakos
32. Mandera
33. Wajir
34. Garissa
35. Tana River
36. Lamu
37. Taita
38. Kilifi
39. Kwale
40. Mombasa
41. Nairobi

AREAS WHERE THE LAND ADJUDICATION ACT 1968 HAS BEEN APPLIED

MAP 3

compulsory area in England can only be brought onto the register when they are conveyed on sale.[19] Titles are therefore registered in piecemeal fashion and in an uncoordinated manner. The absence of a systematic method of registering titles means that each title that comes up for registration must be considered in isolation in relation to adjacent properties. Therefore, the length of time it would take to register all unregistered titles in a given area would be indefinite and undetermined.

The snail's pace in the extension of land registration in England can be attributed to the reactionary opposition by the legal profession to a new system of conveying land. The House of Commons Select Committee Report on the working of the Land Registry Act 1862 highlighted the strong attachment to the antiquated method of private conveyancing.[20] However, even prior to the opposition of the legal profession there never had been support for compulsory registration in official circles. For example, the Registration of Title Commissioners stated in their 1857 report that registration should be made compulsory in the sense that once land was "*voluntarily put on the register subsequent dealings ... should always be put on the register.*"[21] (italics mine) Their view

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19 Land Registration Act 1925, s. 123(1).

20 See Chapter Two, *supra*.

21 Report of the Commission on the Registration of Titles, (1857), C.2215, para. XLVII.

therefore was that landowners should have the option of deciding whether or not to have their titles registered.

That voluntary registration was a failure is indicated by the fact that between 1862 and 1895 there were only 4,236 registered titles, many of these being subdivisions of the original registered titles.[22] Repeated attempts in the late 1880's and early 1890s to pass bills introducing compulsory registration ended in failure.[23] When compulsory registration was finally introduced by the Land Transfer Act 1897, it was to be on an *ad hoc* basis, section 20(1) providing that in a compulsory area, a title was to be registered when conveyed on sale. Since sales of land can never be coordinated, registration of titles on this basis would always be haphazard. Initially, this form of compulsory registration was introduced in London by Order in Council. Outside London, county councils had the option of introducing registration but none did so. The Royal Commission on the Land Transfer Acts pointed out that the spread of Land Registration would be faster if registration was a national rather than a local question, in other words, central government rather than the county councils should be responsible for introducing registration to an area.[24]

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22 Second Report of the Royal Commission on the Land Transfer Acts (1911), Cd. 5483, para. 21.

23 See Chapter Two, *supra*.

24 Second Report of the Royal Commission ..., Cd. 5483, *op. cit.*, para. 95.

The Acquisition and Valuation of Land Committee agreed with the recommendation of the Royal Commission. However, they proposed that when a county council received an Order in Council they should hold a public enquiry to ascertain if there were any reasons why compulsory registration should not be extended to the county concerned. If an enquiry was held and a majority were in favour of registration, or after six months no demand for an enquiry was made, then Parliament was to approve of the draft Order in Council extending registration to the county.[25] This recommendation became part of section 120 of the Land Registration Act 1925. However, even after 1925, the extension of registration was excruciatingly slow. Between 1925 and 1951 registration had only been extended to the county boroughs of Eastbourne, Hastings, Middlesex, Croydon and Surrey, covering 14% of the population.[26] However, the next 38 years were to see a rapid extension of land registration over England and Wales. Registration has finally been extended to the whole of England and Wales, the Registration of Title Order 1989 having extended compulsory registration to the last ten remaining

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25 Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales (1919) Cd. 424, para. 47.

26 H.M. Land Registry, Explanatory Leaflet, No.9, (February 1989); H.M. Land Registry, Registrations of Title to Land, A Brief Guide, (London 1988) p.1.

counties.[27] Map 4 is reproduced from the Report on the work of H.M. Land Registry for the year 1989-90, which shows the progressive extension of compulsory registration in England Wales. The subsequent rapid spread of compulsory registration in England can be attributed to the removal by the Land Registration Act 1966 of the need to hold a public enquiry by the county councils concerned and the greater control by central government over the spread of land registration.

What are the merits of systematic and sporadic registration of titles? The systematic method as applied in Kenya has one important advantage: every title in an area is brought onto the register within a determined length of time. Map 5 for example, shows the parts in Kenya (shaded) where every adjudicated title is registered under the Registered Land Act 1963. In contrast, when one compares this map with the previous map showing the extent of coverage of land registration in England and Wales the previous map belies the fact that no one Borough has every title on the register. This means that in Kenya, the registration of every title will take place in the foreseeable future.

Initially it had been optimistically hoped that it would take 10 years from the enactment of the Registered Land Act 1963 before all land that was

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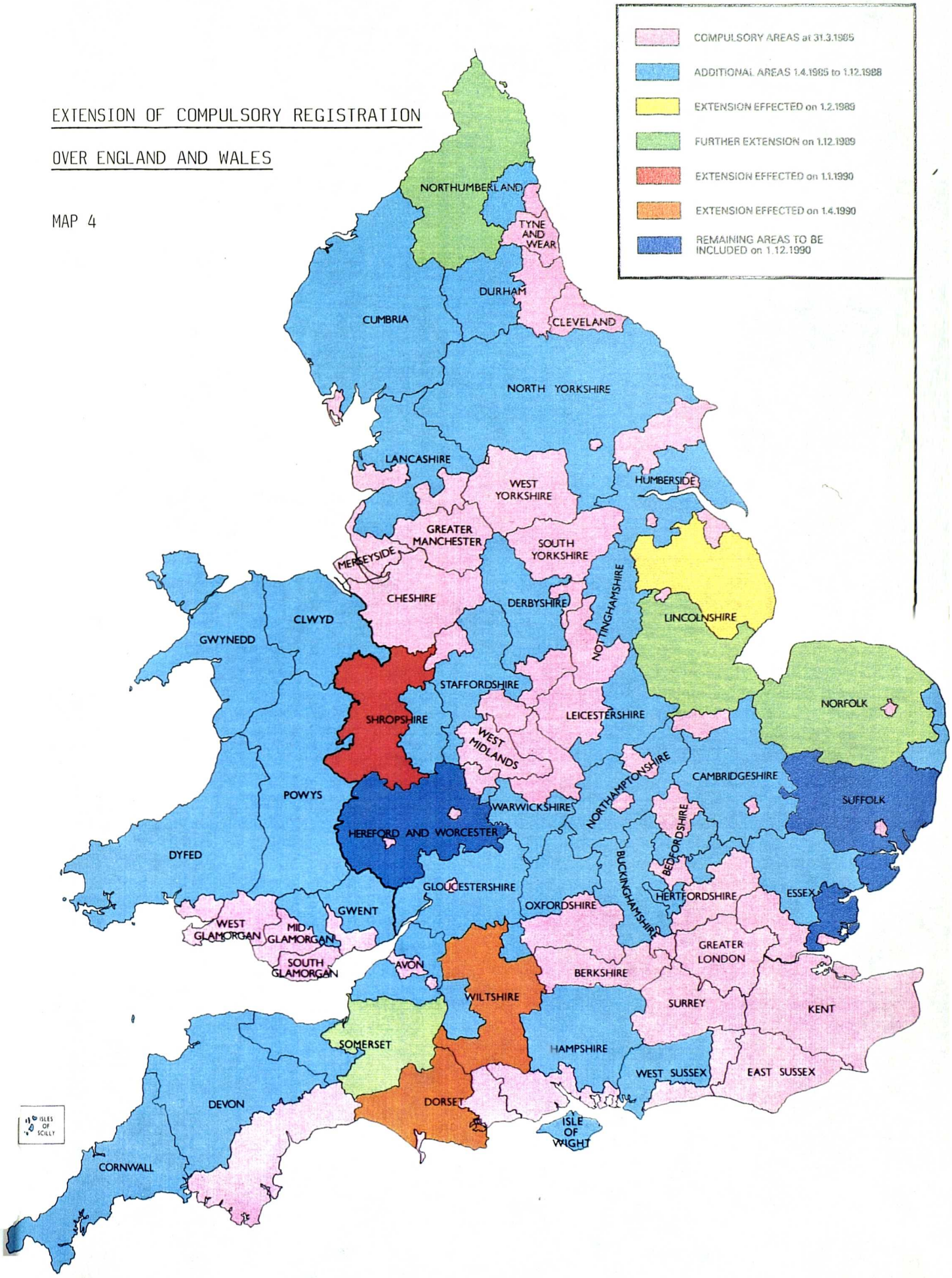
27 With effect from 1 December 1990.

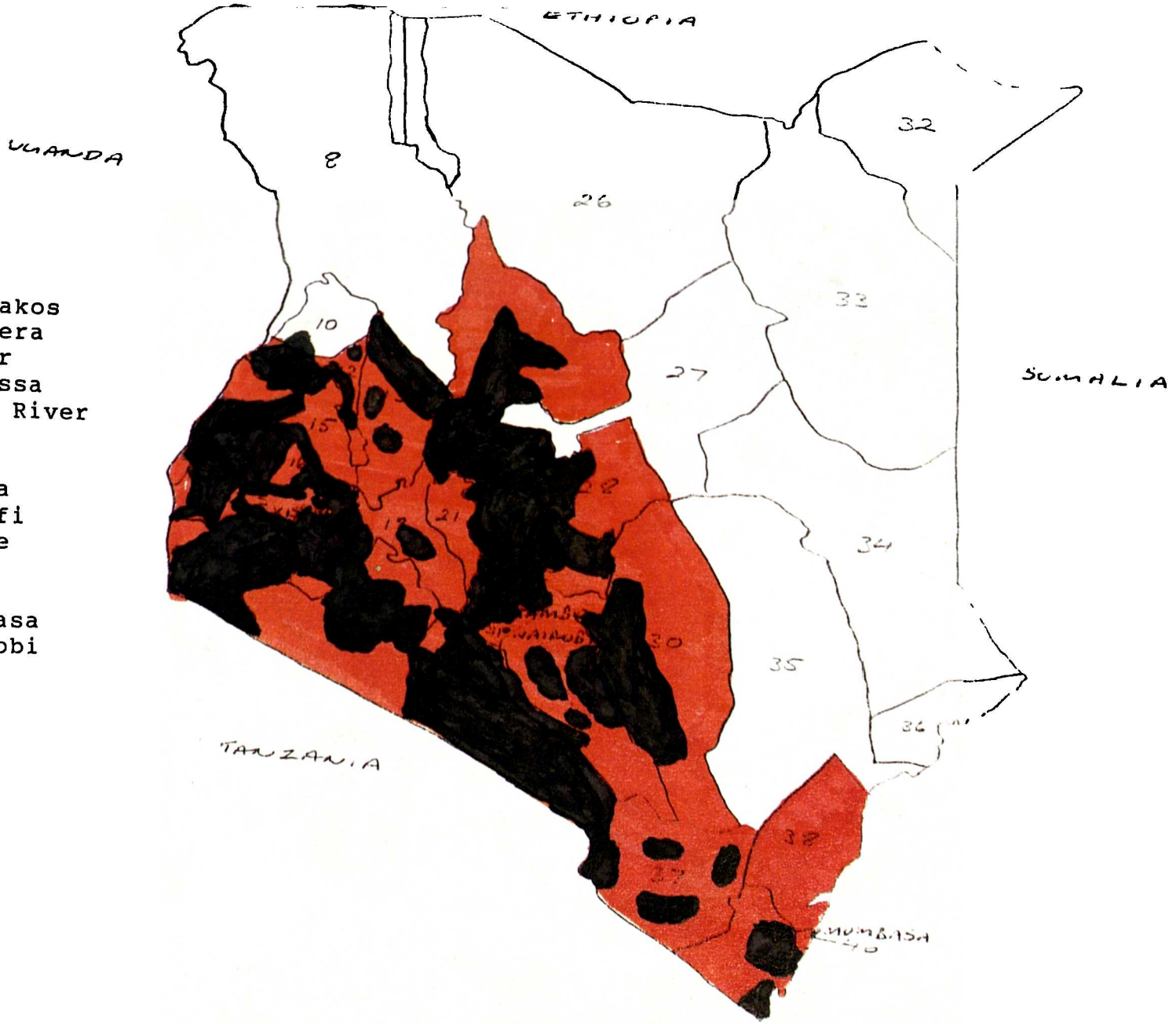
subject to adjudication was registered. However, the difficulty of adjudicating over customary rights and the expense involved has meant that the adjudication process has taken longer than expected and is in fact still going on. Nevertheless, the systematic compilation of the register has resulted in the dramatic spread of registration in Kenya. When maps 4 and 6 are taken together, it is evident that the spread of registration in Kenya is impressive in view of the fact that systematic compilation has been going on for more than 35 years.

The method of systematic adjudication meant that with time, the amount of land being registered would start to fall as each title was methodically registered, thereby proportionally reducing the amount of land left unregistered. Yet, in comparison, even though land registration has been established in

EXTENSION OF COMPULSORY REGISTRATION OVER ENGLAND AND WALES

MAP 4





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19. Narok
20. Kajiado
21. Nyandarua
22. Nyeri
23. Kirinyaga
24. Muranga
25. Kiambu
26. Marsabit
27. Isiolo
28. Meru
29. Embu
30. Kitui
31. Machakos
32. Mandera
33. Wajir
34. Garissa
35. Tana River
36. Lamu
37. Taita
38. Kilifi
39. Kwale
40. Mombasa
41. Nairobi

AREAS WHERE ADJUDICATION IS COMPLETE

MAP 5

England and Wales for a little under 130 years, there is no one area where all the titles are registered as a result of the sporadic compilation of the register. Registration of unregistered titles in England will therefore continue long into the foreseeable future.

Systematic registration enables resources and staff to be marshalled effectively and targeted at the area undergoing adjudication and registration. It also enables the survey of plots to be undertaken systematically as all the boundaries are determined at the same time. This remains a great strength of systematic compilation of the register as will be considered in the final part of this chapter.

However, the relative disadvantage of the systematic method is that outside the registration areas, a person cannot voluntarily seek to have his title registered. This is possible under sporadic registration outside the compulsory areas under the Land Registration Act 1925, albeit in certain limited circumstances. Before 1966, it was possible for anyone outside the compulsory areas to voluntarily have their titles brought onto the register. But, section 21(2) of the Land Registration Act 1966 provided that no voluntary applications for registration outside compulsory areas would be entertained except in such classes of cases as the Registrar would specify. He has now specified[28] the classes of titles which can be

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[28] Pursuant to a notice issued on 20 October 1987. See [1987] Conv.

registered voluntarily: where the title deeds have been destroyed by enemy action, natural disaster or criminal acts, or where they are lost while in the custody of a bank, solicitor, et al; where a building estate comprised of 20 or more houses is being developed; or an application by a local authority. Nevertheless, voluntary applications for registration have the disadvantage of making it impossible to ascertain and determine the frequency and rate of applications.

III Land Consolidation

Land consolidation has nothing to do with conveyancing. It is an agricultural reform measure designed to unify parcels of land scattered over a wide area, forming parts of one farm into a single unit. The aim is to enable the single unit of land to be farmed more effectively than if the farm had been fragmented into several pieces. By replanning the proprietary land units (usually averaging small acreages) and consolidating them into a single unit, the farmer is able to plan more effectively, for example in the use of machinery and farm inputs such as fertilizers and irrigation. The result is more agricultural output from the single unit than from several scattered units amounting to the same size. Land consolidation in Kenya was part and parcel of the process of bringing titles, onto the register, particularly in areas that had suffered from over population.

The Reserves in the Central Province of Kenya were an area that had been adversely affected by overcrowding. Natural population increase, together with the customary rules of succession resulted in the decrease in the size of land that an individual could hold. To illustrate this problem, suppose a family head called Kamau had 18 acres of land, and he had six sons. Under Kikuyu customary rules of succession[29] each son was to get an equal share of the land, in this case 3 acres, on the death of their father. If one son had a large family by this time, he may have felt that the 3 acres were not sufficient to maintain his family and at the same time earn an income. Therefore, he would usually purchase a plot of land elsewhere to supplement his existing plot and later, buy another plot to support his growing family and to provide an inheritance for his sons. If the other five brothers were each doing the same, there would come a time when they would be having several plots of land scattered within the locality. It was reported that some families had between 10 to 29 minute plots of land dispersed over a wide area.[30] The Swynnerton Plan recognised that such a system of land holding was not an economical system of farming because it would be

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29 See generally, E. Cotran, Restatement of African Law, Kenya : The Law of Succession Vol. II, (London 1969).

30 R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya, (Nairobi 1954), para. 14.

difficult to practice sound farming rotation, application of fertiliser, manage and feed livestock or tend cash crops effectively.[31] Therefore, before farmers could be granted indefeasible registered titles it was vital that these fragmented plots be consolidated or merged by a system of exchanging land so that farmers could have single units of land and be issued with one title.[32]

Meanwhile, in Nyeri, groups of farmers were proceeding to consolidate their holdings directed by the local administration. This process was undertaken under the aegis of the Native Lands Trust (Rights of Occupancy) Rules which had been drafted by D.J. Penwill, a Provincial Court Officer, but had no legal force.[33] The rules were superseded by the Native Land Tenure Rules 1956, followed by provisions in the Native Lands Registration Ordinance 1959, the Land Registration (Special Areas) Ordinance 1959 and the Land Adjudication Act 1964 which was later renamed the Land Consolidation Act in 1968.[34] A central feature of land consolidation is that the process is undertaken by a committee of lay people of not less than 25 appointed

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31 *Ibid.*

32 *Ibid.*

33 See M.P.K. Sorrenson, Land Reform in the Kikuu Country : A Study in Government Policy, (Cambridge 1967), pp. 113, 114.

34 For convenience this Act will be referred to as the Land Consolidation Act 1968.

by the Adjudicating Officer.[35] The committee is assisted by a Demarcation Officer whose function is to measure all the fragments of land in the area. The number and sizes of the fragments or parcels of land belonging to an individual are recorded in the Record of Existing Rights.[36] The function of the Committee was then to coordinate the exchanging of land amongst the landowners. The essence was that a farmer would give up one or more of his parcels of land in exchange for a parcel of land adjacent to his remaining plot, to form one single unit. Eventually, the size of the single unit was to equal the sum of all the fragments of land which the farmer had owned. Generally there was to be "equality of exchange" so that the land that the farmer received was to be of the same quality in terms of soil fertility and drainage as the land which he gave up, and moreover, if he had any interests in the land that he gave up, those interests were transferred to the land he received.[37] The Demarcation Plan prepared by the Demarcation Officer shows what each landowner should receive when the land is reallocated.[38] The boundaries of the new holdings are

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35 Land Consolidation Act 1968, s. 9. The minimum number of committee members was set at a high level to minimise corruption - Legislative Council Debates, Official Report, Vol. LXXX, (1959). Part I, col. 72 (Minister for African Affairs, Mr. Johnston).

36 Land Consolidation Act 1968, s. 15.

37 *Ibid.*, s. 21(2).

38 *Ibid.*, s. 24.

set out on the ground by the Demarcation Officer, normally in the presence of the committee members and the landowners.[39]

The consolidation process was operating at the same time as the adjudication of customary rights. The adjudication procedure will be considered in the next section. Land consolidation in Kenya is now virtually complete and at the present time is being undertaken in Meru, Baringo and Taita.[40] It has only been undertaken in limited areas where, as a result of dense population and good fertility, land has been excessively fragmented.

Land consolidation in Kenya can be contrasted with the Inclosure movement in England in the 18th and 19th centuries. Although both were agricultural reform measures, the essential difference was that land consolidation in Kenya is closely tied with registration of titles. Once land is consolidated and adjudicated, it as registered. However, the inclosure of land in England had nothing to do with registration of title; in fact it was undertaken well before land registration was established in 1862. Inclosure was purely an agricultural reform measure. Prior to the 20th century land was farmed in an open field system. Land surrounding a village, for example, was divided into two or three unenclosed or open fields. The

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39 *Ibid.*, s. 23.

40 Interview with Dr. Aruka, Land Adjudication Department, Nairobi, 12th September, 1989.

fields would be divided into strips of about an acre, each villager having been apportioned several scattered strips in order to cultivate on soils of different quality. However, this type of farming was unproductive and wasteful, and a farmer would not be able to farm his fragments as efficiently as he would a single unit.[41] Through inclosure, these plots were rationalised and farmers of scattered strips received a single plot and granted a single freehold title.

Before 1801 inclosures were mainly initiated by private Acts of Parliament, promoted by various Lords of Manors.[42] Since this was expensive, the Inclosure (Consolidation) Act 1801 simplified the procedure by creating Commissioners who considered petitions for inclosure. They took evidence from those who either opposed or approved the petition. If they made an award, they granted to each person a self contained freehold estate in place of the scattered strips and any rights of common he would have possessed. The 1801 Act was replaced by the Inclosure Act 1845 which created a central body known as the Inclosure Commissioners. The 1845 Act was eventually replaced by

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41 Typical recitals in Private Acts of Parliament were to the effect that the several lands and grounds of the proprietors in the open fields lay inter-mixed and dispersed in small parcels, and that their cultivation was difficult and expensive because of their inconvenient situation - see Co-operative Wholesale Society v. The Parish Council of Twin Rivers, 16 March 1987, LEXIS Transcript (unreported).

42 4,000 were passed in the 18th and 19th centuries. For a brief history see Searle v. Wallbank, [1947] A.C. 341, at pp. 347-349, per Viscount Maughan.

the Commons Act 1876. The responsibility undertaken by the Commissioner now lies with the Secretary of State for the Environment.[43] Inclosures are rare in England today due to the strong case a petition to inclose must make. The growth of towns necessitated the setting aside of recreational areas for the inhabitants at the expense of inclosing the land for cultivation. The rationale was that common lands should be opened to the public rather than allocated amongst private individuals.[44]

The inclosure movement is primarily responsible for giving the English countryside its chequerboard appearance with its numerous fields enclosed by stone walls or hedges. However, as in Kenya, where land consolidation is on the wane, inclosure is no longer important as it once was. Nevertheless, land consolidation in Kenya operated together with the programme of land adjudication. Apart from the conversion of titles from existing registration systems, land adjudication is the most important stage in bringing unregistered titles under the provisions of the Registered Land Act 1963. This process is considered in the next section.

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[43] The Secretary of State for the Environment Order 1970.

[44] Societies such as the Common Preservation Society have highlighted the need for land for recreational purposes.

IV Land Adjudication

Land adjudication procedure is not contained in the Registered Land Act 1963 but is governed by a separate Act, the Land Adjudication Act 1968. Prior to the enactment of the 1968 Act, provisions governing land consolidation, adjudication, and registration together with the law on registered land was initially contained in the Native Lands Registration Ordinance 1959. Later the 1959 Ordinance was reorganised with the enactment of the Registered Land Act 1963. The registration provisions of the 1959 Ordinance became part of the Registered Land Act 1963, whereas the consolidation and adjudication provisions of the 1959 Ordinance were grouped together and became the Land Adjudication Act 1964. However, the Lawrance Mission[45] recognised that the process of consolidation and adjudication could not be applied in every part of the country. There were many areas where the problem of land fragmentation was not serious and therefore warranted only the adjudication of customary rights. Accordingly they proposed the enactment of a new Land Adjudication Act which would only deal with adjudication of customary rights.[46] Meanwhile the existing Land Adjudication Act 1964 would continue to operate in those areas where land fragmentation was

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45 Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966). The mission was chaired by Mr. J.C. D. Lawrance.

46 *Ibid*, Chapter XI.

still a serious problem necessitating consolidation prior to adjudication.[47]

The draft Land Adjudication Bill drawn up by the Mission was subsequently accepted with some amendments and enacted as the Land Adjudication Act 1968. Although the Land Adjudication Act 1964 was renamed the Land Consolidation Act by the 1968 Act, its provisions remained intact. The Land Consolidation Act 1968 retained the provisions on consolidation and, significantly, provisions on adjudication for the land that was consolidated. This section is primarily concerned with the adjudication procedure under the Land Adjudication Act 1968.[48]

A. The Stay on Land Suits

An important corallary of the process of systematic adjudication under the Land Adjudication Act 1968 is the stay imposed on land suits when an area is declared an adjudication section under section 5 of the Act. Section 30(1) of the Land Adjudication Act 1968 provides:

> "Except with the consent in writing of the Adjudication Officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest i land in an adjudication section until the adjudication register for tht adjudication

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47 *Ibid.*,

48 Although the adjudication procedure under the Land Adjudication Act 1968 now plays a far greater role than the adjudication procedure under the Land Consolidation Act 1968, reference will be made to the procedure under the latter Act where there are significant differences.

> section has become final in all respects under section 29(3) of this Act.

This sub-section had its origins in the African Courts (Suspension of Land Suits) Ordinance 1956. This piece of legislation had been enacted to prevent the litigation over land that was taking place in the Trust Lands from undermining the land consolidation and adjudication process. This litigation, prevalent mainly in the Central Province of Kenya, was a consequence of political and economic factors. As described in Chapter Two, many European settlers in Kenya were allocated fertile land that had formerly belonged to Africans. To prevent the former African landowners from encroaching on the land farmed by the settlers. Reserves were created to which the Africans were confined. In areas such as the Central Province where population was dense, the pressure on the limited land available in the African Reserve became acute, resulting in an increase in litigation over title to land. The disputes were over who were the real owners of plots of land, the arguments founded on details of past oral transactions, the details of which had been shrouded in uncertainty over time. There were cases between those who had always lived in the reserve and those who were forced to come back and live in the reserve as a result of their landlessness.[49] For those who were wealthy and had large plots of land in the

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[49] See M.P.K. Sorrenson, Land Reform in the Kikuyu Country: A Study in Government Policy, (Nairobi 1967), p. 79.

Reserve, the increase in population in the Reserve meant that it became more difficult to purchase additional land, and to maximise on the agricultural production from their existing plots, many of them began to evict *ahoi* who had been residing on their land; naturally the latter brought suits against their landlords in the African Courts.[50]

Since adjudication was to enable land rights and titles over the area to be ascertained, confusion would reign if the jurisdiction of the Adjudication committees competed with that of the courts. Moreover, the speed at which land could be systematically adjudicated would be hampered as the machinery in the African Courts was too slow to deal with the determination of rights.[51]

Moreover, it was felt that,

> " ... it was of the utmost importance that the occupier should be left in undisturbed security to develop his holding on a properly planned basis - this being the main reason why he had agreed to consolidation in the first instance - and this would not be the case if decisions of the Committee had been open to challenge in the African courts."

The African Courts (Suspension of Suits) Ordinance 1956, certainly had the desired effect by "placing a heavy clog on litigation concerning the rights of native lands"[52] thereby speeding up the consolidtion

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50 *Ibid.*, p. 78.

51 Report of the Working Party on African Land Tenure, 1957-58 (Nairobi 1958), para. 28.

52 The District Commissioner, Kiambu v. R. ex parte Ethan Njau [1960] E.A. 109 at p. 128, per Gould J.A.

and adjudication process. However, the combination of the African Courts (Suspension of Suits) Ordinance 1956, and section89(1) of the Native Lands Registration Ordinance 1959 which prevented the rectification of first registrations, had the effect of completely pulling the carpet from under land suits in the area subject to adjudication. The prevention of rectification of first registrations meant that land suits could not be continued if ultimately the determination of the suit involved the rectification of the register.[53] Moreover, the adjudication committees determined many of the disputes that had been at the core of the suits before the courts, as a result of the adjudication procedure which is described below.

The African Courts (Suspension of Suits) Ordinance 1956 was eventually replaced and its provisions transferred to what ultimately became section 30 of the Land Adjudication Act 1968, while section 88(1) of the Native Lands Registration Ordinance 1959 is now section 143(1) of the Registered Land Act 1963. The effect, however, is still the same, as the determination of rights by an adjudication committee under the Land Adjudication Act 1968 has the effect of determining some of the disputes which were at the core of the

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[53] Government Officials had been concerned that Ethan Kjau's application was an attempt to go round the stay on litigation imposed by the 1956 Ordinance. The fear was that if his case had succeeded before the Court of Appeal, it would have broken open the flood gates of litigation which had been dammed up by the 1956 Ordinance - M.P.K. Sorrenson, *op.cit.*, p. 204.

suits, and if one of the parties to the original land dispute feels that adjudication has not solved the dispute, then that party is effectively prevented from having the register rectified.[54]

The above procedure is in direct contrast to the position in England when unregistered land is subject to registration under the Land Registration Act 1925. If a plot of unregistered land is the subject matter of a dispute between the title holder and another party and the title holder wishes to sell the land, it can be said that in general, no prudent purchaser aware of the suit would wish to purchase the land. The purchaser would probably have been alerted by the registration of a pending land action in the register of pending actions under the Land Charges Act 1972.[55] The consequence of such an entry is that the prospective purchaser is deemed to have 'actual notice' of the contentious issues relating to the land he wishes to purchase.[56] If, on the other hand, there is a failure to register the pending action, then it is ineffective against the purchaser if he is "without express notice of it."[57] Alternatively, if there is a writ or order

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54 But see Chapter Eight, *infra*, for the methods used by the Courts to evade section 143(1) of the Registered Land Act 1963.

55 Section 5(1). A pending land action is defined as "any action or proceeding pending in court relating to land or any interest in or charge on land" - *Ibid.*, s.17(1).

56 Law of Property Act 1925, s. 198(1).

57 Land Charges Act 1972, s. 5(7).

affecting the land, it may be registered in the register of writs or orders.[58] However, non registrtion of a writ or order affecting the land is non-effective against the purchaser.[59]

Consequently, if the purchaser is aware of the pending action, or a writ or order affecting the land, but, nevertheless, decides to go ahead with the purchase of the unregistered title, then the title, having been conveyed on sale,[60] would be subject to examination by the Registrar in order to be registered on the register of title.[61] If the writ, order or pending action was protected as an incumbrance under the Land Charges Act 1972, then they may be protected by a caution against dealings under section 59(1) of the Land Registration Act 1925.[62]

Hence, unlike the position under the Land Adjudication Act 1968, the registration of a pending land action under the Land Charges Act 1972 does not prevent the land affected from being disposed of and registered in the name of the purchaser on a first

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58 *Ibid.*, s. 6.

59 *Ibid.*, s. 6(4).

60 Land Registration Act 1925, s. 123(1).

61 *Ibid.*, s. 13.

62 If the land was subject to a charge securing a debt, a creditors notice or a bankruptcy inhibition may be entered - *ibid*, s. 59(1) whereas a charging order may be protected by notice instead of a caution - *ibid*, s. 49(1)(g).

registration under the Land Registration Act 1925.[63] In reality, however, a pending land action has the effect of preventing a landowner from selling the land to a purchaser since no prudent purchaser would want to be saddled with a lawsuit or a proprietary right,[64] thereby preventing it being brought onto the register.

The contrast between the position in Kenya under the Land Adjudication Act 1968 and that in England under the Land Registration Act 1925 and the Land Charges Act 1972 reflects indeed the contrast between the systematic and sporadic methods of compiling the register in Kenya and England respectively.[65] The next section goes on to consider the composition of the adjudication team and the procedure followed when adjudicating land.

B. **The Adjudication Team**

The adjudication team responsible for determining and recording customary rights is responsible for determining first, those individuals within the adjudication sections who are landowners, and secondly,

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63 See Calgary and Edmonton Land Co Ltd v. Dobinson [1974] 1 All ER 484 at p. 489 where Megarry J. pointed out that what is registered as a pending land action is *"not an action merely claiming that the owner should be restrained from exercising his powers of disposition* (italics mine)", but an action which claims some proprietory right in the land.

64 See for example, Allen v Greenhi Builders Ltd [1979] 1 WLR 156.

65 *Supra*.

those who have interests in land. The team is composed of the following:

1. The Adjudication Officer

He is a public officer in overall charge of adjudication in the area concerned and has power to appoint subordinate officers to assit him.[66]. He is appointed by the Minister of Lands who has the power to appoint additional adjudication officers if the situation so requires.[67] The duties and powers of the adjudication officer are extensive. He is responsible for appointing the adjudication committee,[68] hear and determine complaints in respect of work done by the other officers, that is the survey, recording or demarcation officers,[69] determine objections to the register,[70] make corrections to the adjudication register before it is complete,[71] and make a claim or act on behalf of someone who is absent or is under a disability.[72] In general, the adjudication officer exercises general supervision and control over the adjudication process.[73]

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66 Land Adjudication Act 1968, ss. 4(1).

67 *Ibid.*, ss. 4(1), (2).

68 *Ibid.*, s. 6(1). See *infra*.

69 *Ibid.*, s. 9(2)(a).

70 *Ibid.*, s. 9(2)(b).

71 *Ibid.*, s. 11(b).

72 *Ibid.*, s. 11(c).

73 *Ibid.*, s. 9(1).

2. The Recording Officer

This official records the rights of individuals, whether these are interests in land or whether they are ownership claims to land.[74] The recording officer is responsible for compiling the adjudication record. He compiles a record for each parcel of land on a farm (see a copy of the adjudication record overleaf).[75] In determining the claims, the recording officer determines persons as owners of land where, under customary law, those persons have exercised rights in or over land which should be recognised as ownership,[76] or a person entitled to an interest in land not amounting to ownership, including a "lease, right of occupation, charge or other encumbrance whether by virtue of recognized customary law or otherwise,"[77]

3. The Demarcation Officer

His function is to identify and demarcate the boundaries to land, those boundaries having been pointed out to him by the landowner who, at the same time, would have made his claim of ownership to the recording officer.[78] The demarcation officer has the power to lay a fresh boundary if he considers that the

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74 *Ibid.*, s. 13(1).

75 *Ibid.*, ss. 19(1), 23(1).

76 Land Adjudication Act 1968, s. 23(2)(a).

77 *Ibid.*, s. 23(2)(c).

78 *Ibid.*, s. 13(1).

10-1

Fig. 1

ORIGINAL

REPUBLIC OF KENYA

THE LAND CONSOLIDATION/ADJUDICATION* ACT A 453940
(*Cap.* 283/No. 35 of 1968*)

ADJUDICATION RECORD

1. District _____

2. Adjudication area _____

3. Adjudication section _____

4. Parcel No. _____ 5. Approximate area in hectares _____

6. Name of Landowner _____

_____

_____

7. Residential particulars, address, etc. _____

_____

_____

8. Any other information required by section 23/24* of the Act _____

_____

_____

_____

9. I, the above-named landowner, have been informed of the contents of this form, and accept the details as correct.

_____
Signature or Thumb-print

10. Certified that the signature at (9) was made in my presence.

_____
Signature of the Witness

Name _____

Address _____

_____

11. Certified that the particulars contained in this form are acceptable to the Committee.

_____
Chairman

Date _____

12. Certified that I have caused the contents of this form to be explained to the landowner*.
Certified that I am satisfied with the accuracy of the details recorded on this form*.

_____
Executive Officer

Date _____

13. Certified that the landowner *cannot be traced to sign the form.
*has withheld his signature.

existing boundary is irregular or inconvenient,[79] to demarcate a right of way for a parcel to have access to a road or water, and to realign parcels adjoining a public road.[80]

4. The Survey Officer

He is an officer from the Survey of Kenya, the government department responsible for the survey of land in Kenya. The Survey Officer is responsible for preparing the demarcation map of the adjudication section showing the position of all the parcels of land within the adjudication section which are identified by numbers.[81] The demarcation map is prepared by plotting the sketches of the parcels onto an aerial photograph, and this map is eventually known as the Registry Index Map.[82] As the functions of the demarcation and the survey officers do overlap, they are sometimes carried out by one person.

5. The Adjudication Committee

This committee is made up of local residents within the adjudication section. They are appointed by the adjudication officer in consultation with the District Commissioners of the district within which the

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79 *Ibid.*, s. 18(1)(a).

80 *Ibid.*, ss. 18(1)(b)(c). See also s. 18(1)(d).

81 *Ibid*, s. 16.

82 For a further discussion, see *infra*.

adjudication section lies.[83] The members normally consist of prominent individuals within the locality, many of them having their own farms.[84] Under the section 6(1) of the Land Adjudication Act 1968, the committee should not consist of less than ten members.[85] This means that the number of committee members may vary in size. Significantly the members are nominated by members of the public resident in the location at public meetings or *barazas* convened by administration officials, particularly by the chief of the area.[86] Many of these members are also traditional clan elders who have been involved in resolving land disputes in their societies. They are well versed in customary law hence their appointment to the committees.[87]

The function of the committee is to consider and adjudicate in accordance with customary law any

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83 Land Adjudication Act 1968, s. 6(1).

84 See S.F.R. Coldham, Registration of Title to Land in the Former Special Areas of Kenya, unpublished Ph.D. thesis, University of London, 1977.

85 The adjudication committee appointed under section 9(1) of the Land Consolidation Act 1968 consists of not less than 25 members. The number was set high to daunt landowners from attempting to bribe the members in order to get a decision in their favour - see n.35, *supra*.

86 See Report of the Working Party on African Land Tenure 1957-58, (Nairobi, 1958), para. 24.

87 See Simon Coldham, The Effect of Registration of Title Upon Customary Land Rights in Kenya, [1978] J.A.L. 91 at 96, et. seq.: Simon Coldham, The Settlement of Land Disputes in Kenya - an Historical Perspective, (1984) 22 J.M.A.S. 59, at p. 63, et.seq.

question referred to it by the demarcation and recording officers,[88] and to advise the adjudication officer where the latter has sought its guidance.[89] Moreover, the committee can act on behalf of absent members or those under a disability, and generally assist in the adjudication process.[90]

The adjudication committee therefore acts in an advisory role, deciding questions for example where there are conflicting claims.[91] Nevertheless, the committee members play an active role in the adjudication process. Some members normally accompany the recording, demarcation and survey officers when recording the rights and boundaries over a parcel of land. Each committee has an executive officer whose role is that of a secretary, recording the decisions of the committee.[92]

C. Appeals

Suppose two parties who have had an ownership dispute over a plot of land subject to adjudication, each claims before the recording officer that they are the owners of the land. The recording officer may submit the dispute to the adjudication committee to

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

89 *Ibid.*, s. 20(b).

90 *Ibid.*, ss. 20(c)(d) & (e).

91 *Ibid.*, s. 19(2).

92 *Ibid.*, s. 6(2).

consider and determine it.[93] Proceedings before the committee tend to be informal and inquisitorial, the committee not being bound by rules of evidence or procedure.[94] Since the committee will determine the issue on the basis of customary law, the disputing parties, who invariably will represent themselves,[95] will have to show how they each acquired the land under customary law. A party dissatisfied with the decision of the adjudication committee may appeal to the Provincial Arbitration Board.[96] The members of the Board are appointed by the Provincial Commissioner of the Province in which the adjudication area lies, appointing not less than six and not more than 25 persons resident within the district; from this panel, the adjudication officer appoints not less than five persons to form the arbitration board to hear a particular dispute.[97] The members of the Board are, like the adjudication committees, comprised of lay

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93 *Ibid.*, s. 19(2).

94 Simon Coldham, The Settlement of Land Disputes in Kenya - an Historical Perspective, (1984) 22 J.M.A.S. 59 at p. 64.

95 Lawyers are not involved in the adjudication process. As to why see Chapter Four, *infra*.

96 Land Adjudication Act 1968, ss. 21(3),(4), 22.

97 Land Adjudication Act 1968, s. 7(1). If the land is situated near the boundary of a district and both persons claiming an interest in the land come from different districts, the Minister may appoint a special arbitration board of 8 persons to hear the dispute - *ibid*, s. 7(1)(ii). *C.f.* section 10(1) of the Land Consolidation Act 1968 under which the Minister is responsible for appointing the arbitration board under that Act.

persons.[98] No further appeal lies from the arbitration board.

Any further objections lie when the adjudication register is complete. Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete may object to the adjudication officer in writing within 60 days from the date of completion of the adjudication register.[99] The adjudication officer can either alter the register if the objection is valid, or if he considers that altering the register would "incur unreasonable expense, delay or inconvenience" may recommend to the Minister that compensation be paid to the objector.[100] A person aggrieved by the determination of the objection, such as the level of compensation for example, may appeal to the Minister within 60 days.[101] In determining the appeal, the Minister is assisted by assessors who advise him on the customary law of the area. The proceedings are conducted informally without legal representation for the parties; in reaching a

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98 Land Adjudication Act 1968. See also Simon Coldham, The Settlement of Land Disputes ..., *op. cit*, p. 65.

99 Land Adjudication Act 1968, s. 26(1).

100 *Ibid.*, s. 27(2). It was disclosed to the writer that compensation is rarely awarded, if at all, because of a lack of funds - interview with Dr. Aruka, Land Adjudication Department, Nairobi, 12 September, 1989.

101 *Ibid.*, s. 29(1). Under s. 19 of the Land Consolidation Act 1968, no further appeal lies from the determination by the Adjudication Officer.

decision, the Minister is not bound to follow previous decisions.[102]

Once all objections have been dealt with and the time for appeals has expired, the adjudication officer sends the adjudication register - which consists of the demarcation plan and the adjudication record - together with particulars of all the objections which have been determined, to the Director of Land Adjudication who is then responsible for forwarding the adjudication register to the Chief Land Registrar together with a list of appeals that are before the Minister.[103]

It is at this stage that the Land Registry becomes involved in the process of registering the titles that have been adjudicated. Under section 11(2A) of the Registered Land Act 1963 the Chief Land Registrar towards the adjudication register to the Land Registrar or his assistant in charge of the relevant district who,

> " ... shall prepare a register for each person shown in the adjudication record as an owner of land, and every person shown in the adjudication record as being entitled to an interest which does not amount to ownership of land shall be registered as being so entitled ..."

Once a person is registered as proprietor, registration vests in him "the absolute ownership of

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102 Makenge v. Ngochi (1979) Kenya L.R. 53. The power of the Minister to hear and determine appeals has been delegated to special District Commissioners. This delegation was made as a result of a colossal backlog of appeals which the Minister was unable to reduce.

103 Land Adjudication Act 1968, s. 27.

that land together with all rights and privileges belonging or appurtenant thereto".[104] Thus, the transition from customary land tenure to a title registered under the Registered Land is complete.

D. **Land Adjudication - A Critique**

A remarkable feature of land adjudication in Kenya is its committee system. Its uniqueness lies in the fact that it is wholly composed of lay members of the public who are responsible for resolving disputes that arise during the adjudication process. The provincial arbitration boards which hear appeals from the adjudication committees are also made up of lay members. Nevertheless, the members tend to be well versed in customary law. This is particularly important because they have to identify the customary rights and interests held by individuals. Since these rights and interests have generally not been documented, and can only be determined by oral means[105] individuals claiming such rights have to prove their claims to ownership by calling witnesses who were present when those rights were acquired and who are aware of their validity. By cross examining the witnesses, the adjudication committees are able to ascertain the rightful ownership of the land and those with interests in it.

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

105 See Chapter Two, Part II, *supra*.

This process is not an easy task when compared with the task of the English Land Registrar when examining unregistered titles prior to their registration. According to rule 20 of the Land Registration Rules 1925 the following documents must be submitted with an application for first registration:

> i) original deeds and documents relating to the title, including opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies and other like documents.[106]
> ii) sufficient particulars, by plan or otherwise to enable the land to be fully identified on the Ordinance map or the Land Registry General Map.
> iii) a list in triplicate of all documents delivered.[107]

The applicant and his solicitor or licensed conveyancer may be required to make an affidavit or declaration that to the best of their knowledge and belief all documents and incumbrances have been disclosed.[108] Thus the function of the Land Registrar in this regard is to examine the documents of title. If in the course of examining title exceptional and difficult questions

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[106] The production of original documents is not usually required if they are in the custody of a mortgagee under a subsisting mortgage entered into prior to the conveyance to the applicant, or they affect also other land, or their production would entail the applicant having to pay a fee to the holder.

[107] See further H.M. Land Registry, Practice Leaflet No. 5., January 1987, p. 3.

[108] Land Registration Act 1925, s. 14(1). If the solicitor or licensed conveyancer failed to disclose an encumbrance, which becomes unenforceable against the registered proprietor (unless it falls within the class of overriding interests in section 70(1), Land Registration Act 1925), he may be liable in damages against the encumbrancer - see Midland Bank Trust Co. Ltd., v. Hett, Stubbs & Kemp (a firm) [1979] Ch. 384.

of title arise, the Registrar may refer the matter for the opinion of special conveyancing counsel.[109] Nevertheless the task of the English Land Registrar is simplified by the existence of documents of title.

It has been pointed out that the provisions of the Land Adjudication Act 1968[110] lead to the questionable assumption that it is possible to equate customary land rights with the rights recognised by the Registered Land Act 1963 and it was concluded that it only leads to the making of "spurious correlations."[111] This is indeed a serious problem that has continued to face the land adjudication teams, and has only led to people being granted greater or lesser rights than they previously had. For example, as indicated earlier, Kikuyu customary law recognised several subordinate rights in land, such as those held by a *muhoi*:[112] A *muhoi* though his period of occupation on the land was indefinite, could be evicted at any time under customary law.[113] However, a tenancy at will is not capable of protection under the Registered Land Act 1963. The only tenancy capable of protection is a

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109 Land Registration Rules 1925, r. 26. See also r. 303(1).

110 See for example s. 23(2)(e).

111 Simon Coldham, The Effect of Registration of Title Upon Customary Land Rigths in Kenya [1978] J.A.L. 91 at p. 98.

112 See Chapter Two, Part II, *supra*.

113 *Ibid*, Kimani v Gikanga [1965] E.A. 735: Wainaina v Murai (1976) Kenya L.R. 227.

periodic tenancy, Section 11(3) of the Registered Land Act 1963 provides that a right of occupation under customary law recorded in the adjudication register is deemed a tenancy from year to year. This would mean that a recording officer could only record the right of a *muhoi* as a right of occupation on the adjudication record. However, this would mean that a *muhoi* would be getting a greater right than he already had because a tenancy from year to year may be determined by not less than six months notice expiring at the end of a year of the tenancy, whereas a tenancy at will can be determined at any time no notice to quit being necessary.[114] Under customary law, a *muhoi* could have been evicted at any time; under the 1963, if his right is protected on the register, he receives a minimum of six months notice.[115]

What about the redeemable sale?[116] *Prima facie*, it has the appearance of a mortgage or charge. But there is a significant difference because the vendor of land subject to a redeemable sale *retained* the title to the land and could redeem it at any time. To record such a right as a mortgage would fundamentally alter

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[114] Sidebotham v Holland [1895] 1 QB 378 at 383. Crane v Morris [1965] 1 WLR 1104 at 1108. See Registered Land Act 1963, s.163. The same argument would apply in relation to the *jadak* under Luo customary law - see Chapter II, Part II. *supra*.,

[115] One could counter by arguing that under the 1963 Act the *muhoi* receives greter protection, since a minimum notice period is created than he would have had under customary law.

[116] See Chapter II, Part II, *supra*.

the nature of the customary right because a mortgagee or chargee under the Registered Land Act 1963 retains the legal title to the land.[117] Therefore, if the vendor was registered as chargor, he would, in effect, be receiving a lesser right than he had.

These illustrations highlight a fundamental problem: that it is extremely difficult to equate customary rights with the rights recognised by the Registered Land Act 1963. Applying English law terminology to rights recognised under a totally different system only results in inaccurate equivalents which either have the effect of conferring on some people more extensive rights than they had while depriving others of some of their rights.[118] Even legal commentators are divided on how to equate some of these rights. For example, G. Wilson equates a *jadak* to a sub-lessee.[119] With this in mind, such complex legal questions are, with respect, beyond the ability of the adjudication committees to cope with. They are ill-equipped to handle this task in view of the fact that many on the committees are poorly educated and often semi-literate. Even the recording officer is not a trained lawyer and to expect the members of the team

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117 Registered Land Act 1963, ss. 76,77.

118 See other examples given by Simon Coldham, The Effect of Registration of Title Upon Customary Land Rights in Kenya [1978] J.A.L. 91, at p. 98 et.seq.

119 G.M. Wilson, Luo Customary Law and Marriage Law Customs (Nairobi 1961), p. 57; K.M. Maini, Land Law in East Africa (Nairobi 1967), p.11.

to distinguish sophisticated legal concepts would be expecting a lot.

Not surprisingly, the Lawrance Mission reported that committees were neglecting to record lesser interests in land, and that, for instance not much use was being made of section 22 of the Land Adjudication Act 1964.[120] Consequently, an adjudication register presented for registration under the Registered Land Act 1963 is, at times, seriously inaccurate. Clearly, the situation cries out for an official who is a trained lawyer to assist the recording officers and the Adjudication committee in making these correlations. However, when the writer put this solution to a senior official of the Land Adjudication Department in Nairobi, he rejected the idea on the ground that this would slow down the process of adjudication and increase the cost at the same time.[121] While this may be true, it is respectfully submitted that it is better to slow down the process and add the extra expense of having trained lawyers to ensure the adequate protection of the rights of individuals, since, in any event, this is the ultimate aim of land adjudication.

There are other serious problems which face the committees. Tribalism is one of them. Since most of

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[120] Now s. 22 Land Consolidation Act 1968. Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966). para. 163. Section 22 provides for the protection of interests not amounting to ownership.

[121] Interview with Dr. Aruka, Land Adjudication Department, Nairobi, 12th September, 1989.

the adjudication areas cover areas occupied by one tribe, naturally most, if not all the committee members, will be members of one particular tribe. The problem arises where a landowner within the adjudication area belongs to another tribe. It has been the case that the interests of these are not recorded or are given to someone else. The Lawrance Mission reported that this had been a serious problem in Ngong, Kajiado District. There, some Kikuyu had exercised rights of ownership over land. However, despite this, ownership of the land was adjudicated in favour of members of the Masai, the dominant tribe in the area. Others found part of their farms adjudicated in favour of Masai.[122] This resulted in many having to buy their farms back from those who were allocated the same land.[123] It is most unfortunate that land adjudication would come to this and it highlights the danger of appointing committee members who all come from one tribe.

Corruption has been an endemic problem. A good example is what took place in Fort Hall (now Muranga) in the late 1950's. It was discovered, when consolidation and adjudication were complete in that area, that individuals had acquired bigger portions of land as a result of bribing the recording and survey

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122 Report of the Mission on Land Consolidation, *op. cit.*, para. 161.

123 *Ibid.*

officers.[124] This meant that the whole of Fort Hall had to be readjudicated at vast expense.[125] However, rather than amend section 89(1)(a) of the Native Lands Registration Ordinance 1959 - which provided that first registrations should not be rectified - it was decided instead to enact the Lands Registration (Fort Hall District) (Special Provisions) Act 1961.[126] Two safeguards, that is, having large committees[127], and providing that any committee member who has a direct or indirect interest in a matter before the committee should disqualify himself from taking part of the deliberations,[128] have not helped much. A probable reason is that for many years the committee members were not paid for their work. The Lawrance Mission considered that paying the members, even a small allowance, would considerably increase the cost of adjudication; instead they recommended that committee members should continue to work unpaid.[129] The

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[124] Legislative Council Debates, Official Report, Vol. LXXXVI, cols. 1052-1055 (Mr. Wainwright).

[125] About £75,000 was wasted as a result of having to start all over again - *Ibid.*, col. 1054.

[126] To have allowed rectification of first registrations would have caused an avalanche of claims from those who lost out. See further Chapter Eight, *infra.*,

[127] Land Consolidation Act 1968, s. 9(1); Land Adjudication Act 1968, s. 6(1).

[128] Land Consolidation Act 1968, s. 14(1); Land Adjudication Act 1968, s. 8(1).

[129] Report of the Mission on Land Consolidation and Registration in Kenya, 1965-1966. (London 1966), para. 170.

rationale for this view is based on the fact that people pay a small count in fees to have their land adjudicated and registered. The Government bears the bulk of the cost of land adjudication and, therefore, the adjudication committees should not expect a salary.[130] This shows that land adjudication has been undertaken very cheaply by the Government, and its success partly lies in the fact that landowners pay very little to have their titles registered, hence their enthusiasm for the scheme. However, the absence of renumeration for the committees means that they will always be susceptible to bribes under the guise of hospitality.[131] It also creates a lack of motivation among the committees when undertaking the work. It was pointed out to the writer that it is difficult at times to convene the committees to determine cases, which in turn contributes to delay.[132]

It is significant that neither the courts nor lawyers are involved in land adjudication. The whole process is controlled by administrative officials assisted by the lay members on the committees. This was a deliberate policy on the part of the Government, primarily to speed up the spread of land adjudication. It was felt that the courts would not be able to cope

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130 Interview with Dr. Aruka, Land Adjudication Department, Nairobi, 12 September 1989.

131 This was conceded by the Lawrance Mission, see Report, *op. cit.*, para. 170.

132 Interview with Dr. Aruka, *op. cit.*

if they were involved in the land adjudication programme because they already had a large backlog of cases, and, moreover, the existing rules of evidence and procedure would have been disposed of.[133] It has also been suggested that another reason why the courts were avoided was to prevent political agitators and their lawyers from gaining access to the courts during the Mau Mau Civil War who would have used the courts as a forum for exposing the Government's policy of detaining activists and herding the Kikuyu community into villages in order to rush through land consolidation and adjudication.[134] Committees on the other hand, unencumbered by rules of evidence and procedure could quickly deal with objections, avoiding delay. However, as discussed above, the committee system is not without its problems. A significant problem is the inadequate identification and protection of subordinate interests. Once the adjudication register is final, there can be no further redress since rectification of a first registration is precluded.[135] This is prejudicial to a person who failed to have his interest registered because he was not present during adjudication, or neglected to

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133 Simon Coldham, The Settlement of Land Disputes in Kenya - an Historical Perspective (1984) 22 J.M.A.S. 59 at p.63.

134 *Ibid.*, at pp. 63, 64.

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

register his claim for some other reason.[136] The Lawrance Mission reported that this situation is 'unsatisfactory' and 'dangerous' because there is no power of putting right what can be proved wrong.[137] Accordingly they recommended and made provision in the draft Land Adjudication Bill that any person aggrieved by a final entry in the adjudication record may apply to the High Court for its revision "in such manner as may be prescribed."[138]

However, this recommendation was rejected. The Government felt that the High Court should not be involved in considering such applications; rather, the Minister for Lands would be the appropriate forum to determine such appeals.[139] Although no reason was given for the rejection of this recommendation, it is

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136 Although the adjudication officer and the adjudication committees can act on behalf of absent persons (ss. 11(c), 13(4) Land Adjudication Act 1968), a frequent claim in the 1950s and 1960s was that the interests of persons who were detained by the colonial government for being Mau Mau sympathizers were ignored, and their land was adjudicated in favour of others. Despite claims that every effort was made to protect the interests of such persons (see R.G. Wilson Land Consolidation in the Fort Hall District of Kenya (1960) J.A.A. 144 at 147 et. seq. See also Legislative Council Debates, Official Report, Vol. LXXX (Part I) 1959, col. 65 (Mr. Johnston, Minister for African Affairs), it was conceded that the rights and interests of ex-detainees were indeed ignored - Report of the Mission on Land Consolidation .., *op. cit.*, paras. 176, 273.

137 *Ibid*, para. 176.

138 Report of the Mission on Land Consoldiation ..., *op. cit.*, para. 176.

139 National Assembly, Official Report (1968), Vol. XIV, col. 1943.

in line with the policy of preventing the judiciary from being involved in the adjudication process.

V. Conversion of Titles

In the context of the Registered Land Act 1963, the conversion of titles relates to the transformation of titles subject to the Land Titles Act 1908, the Government Lands Act 1915 and titles registered under the Registration of Titles Act 1919, into titles registered under the Registered Land Act 1963. There are presently two methods of converting such titles under section 12(1) of the 1963 Act.

The first relates to titles registered under the Registration of Titles Act 1919. Section 12(1)(a)(i) of the Registered Land Act 1963 provides that "the grant or certificate of title shall be deemed" to be a 'title deed' and the folio of the register of titles kept under section 25 of the 1919 Act shall be deemed to be a register under the 1963 Act. The effect of this provision is to automatically convert all titles registered under the 1919 Act into titles registered under the 1963 Act whenever the 1963 Act is applied to any area.140 This deeming provision, however, belies the reality; the title is to be viewed as if it is already registered under the Registered Land Act 1963, even though no actual conversion has taken place. However, the proviso to section 12(1)(a)(i) states that the Registrar

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

> "may at any time prepare a register ... showing all subsisting particulars contained in or endorsed on the folio of the register of titles ... and substitute such register for such folio and issue to the proprietor a title deed or certificate of lease as the case may be ..."

The problem, however, is that in areas where the 1963 Act has been applied, the deeming provisions have not in any way altered the practice of conveying and dealing with land registered under the Registration of Titles Act 1919. While attached to the conveyancing department of a large law firm, the writer observed that titles which would have been deemed to have been registered under the 1963 Act, were still being treated as if they were registered under the Registration of Titles Act 1919, and continuing to be conveyed on that basis. Moreover, certificates of title are still being issued by the Registrar of Titles under the 1919 Act rather than under the 1963 Act.[141] Certificates of title are still being issued under the 1919 Act rather than under the 1963 Act.

More significantly, even though section 12(1)(a)(ii) of the Registered Land Act provides that the 1919 Act shall cease to apply to a parcel and instead the 1963 Act will apply thereto, there are examples of court decisions which continue to apply the Registration of Title Act 1919 to titles which, by

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[141] For example, the copy of the plan *infra* is part of a certificate of lease that was issued under the Registration of Titles Act 1919 and yet is in an area that comes under section 12(1)(a) of the Registered Land Act 1963.

virtue of sections 12(1) and 2 of the Registered Land Act 1963, are meant to be subject to the Registered Land Act 1963. A good example is the Court of Appeal decision in Kiseu Maweu v. Kiu Ranching & Co-operative Society Ltd[142] The land which was the subject matter of dispute in that case, lay in an area to which the Registered Land Act 1963 applied.[143] The land, however, was registered under the Registration of Titles Act 1919. One of the issues was whether the certificate of title should have been interpreted subject to the Land Titles Act 1908 or the Registration of Titles Act 1919. It was held that the certificate should be read subject to sections 23 and 36 of the Registration of Titles Act 1919. Section 23, for example, provides that the certificate of title issued under the 1919 Act is conclusive evidence of proprietorship but the proprietor is "subject to the encumbrances, easements, restrictions and conditions contained therein ... and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

In such a case, if the title is being treated as if it was still subject to the Registration of Titles Act 1919 rather than being deemed subject to the Registered Land Act 1963, it would mean that the court

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142 Civil Appeal No.2 of 1983 (unreported).

143 By virtue of section 2(c) of the Registered Land Act 1863.

did not appreciate the significance of section 12(1) of the 1963 Act. There are other cases where the courts have not applied the provisions of the 1963 Act to titles registered under the 1919 Act even though the title would have come under the deeming provision of section 12(1)(a)(i) of the Registered Land Act 1963.[144] This can only mean either one of two things:

i) conveyancers and the judiciary are not aware of the deeming provisions in section 12(1)(a)(i) of the Registered Land Act 1963, or have not appreciated the significance of the provision or,

ii) the Land Registry does not intend section 12(1)(a)(i) of the Registered Land Act 1963 to take effect until the Registry is ready to start to prepare registers for titles registered under the 1919 Act.

The latter view represents the position ever since the enactment of the Registered Land Act 1963. Due to the emphasis that has been placed on registering land formerly under customary law through the Land Adjudication Act 1968, little priority has been given to the conversion of titles registered under the Registration of Titles Act 1919 or those subject to the Land Titles Act 1908 or the Government Lands Act 1915. The Lawrance Mission even decried the slow pace of conversion of such titles.[145]

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[144] See for example Mayers v Akira Ranch (No.3) [1973] E.A. 431; Moya Drift Farm v Theuri [1973] E.A. 114.

[145] Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966), para. 238.

Nevertheless, the conversion of titles registered under the 1919 Act does take place when registered proprietors voluntarily bring them for conversion at the Land Registry. The procedure is simple; a new green card is prepared for the title,[146] with the entries on the folios of the register of titles kept under section 25 of the Registration of Titles Act 1919 are transferred to the green card. The grant or certificate of title is handed in at the Registry and marked with the words "Title brought under the RLA 1963 (Cap.300). No further entry to be made. Now see Title No ..." The grant or certificate is not destroyed but placed in the parcel file of the new title, which already has a new registration number.[147] A new 'title deed' or certificate of lease, as the case may be, is then issued to the proprietor.

Section 12(1)(a) of the Registered Land Act 1963 does not state on what basis the converted titles are to be registered, that is, whether to be registered under the 1963 Act when there is a sale as is the case under section 123(1) of the Land Registration Act 1925, or whether they are to be systematically registered as are titles subject to customary law. It is the intention of the Land Registry to prepare registers for titles previously registered under the Registration of

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[146] Individual titles registered under the Registered Land Act 1963 are represented on green cards. For a copy, see Chapter Four *infra*.

[147] Practice Instruction: Chief Land Registrar to all Land Registrars, 11th March 1982.

Titles Act 1919. The pace however, has been slow, particularly in Nairobi where there are a large number of titles registered under the Registration of Titles Act 1919.

The second type of conversion relates to titles registered under the Government Land Act 1915 and the Land Titles Act 1908. Section 12(1)(b) of the Registered Land Act 1963 provides that where the Act has been applied to an area the titles to which are registered under the 1908 and the 1915 Acts, then the Registrar shall -

(i) as soon as conveniently possible, cause the title to be examined:
(ii) prepare a register in the prescribed form showing all subsisting particulars affecting the parcel which are capable of registration under [the 1963] Act;
(iii) serve on the proprietor ... a notice of intention to register; and
(iv) issue to the proprietor if he so requires a title deed or certificate of lease ..."

Titles under the 1908 and 1915 Acts have to be examined because such titles are unregistered. The 1908 and 1915 Acts establish a deeds registration system.[148] Consequently, registration of the documents of title under those Acts is not in any way proof of title. The Registrar therefore has to examine the registered deeds back to a good root, usually back to the grant in relation to titles subject to the Government Lands 1915, and for titles subject to the Land Titles Act 1908, back to the initial first

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148 See Chapter Two.

registration. In contrast, no such examination is carried out for titles registered under the Registration of Titles Act 1919. Such titles are indefeasible once registered, and the fact of registration and the issue of a certificate of title is proof of title.[149]

As in the case of titles registered under the 1919 Act, there is no systematic conversion of titles subject to the Land Titles Act 1908 and the Government Lands Act 1915, into titles registered under the Registered Land Act 1963. Since there is no provision for the registration of these titles when there is a sale, then conversion can mainly be undertaken when proprietors voluntarily subject them for registration.

The conversion of titles registered under the 1919, 1915 and 1908 Acts, into titles subject to the Registered Land Act 1963 conveys benefits on them not available under the other Acts. For example, for a title converted from the 1919 Act, a proprietor has the advantage of obtaining an indemnity from the State for mistakes or omissions on the register, apart from mistakes or omissions on a first registration;[150] under the Registration of Titles Act 1919 he would have had to bring an action in damages against the person causing the mistake or error, or against the Registrar as nominal defendant.[151] Such a cause of action would

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149 Registration of Titles Act 1919, s. 23(1).

150 Registered Land Act 1963, s. 144(1).

151 Registration of Titles Act 1919, s. 24.

have entailed expense on the part of the applicant: if the latter was penurious, it would have been difficult to bring such an action. For land formerly subject to the Land Titles Act 1908, and the Government Lands Act 1915, such titles, once registered under the 1963 Act become guaranteed by the state; therefore, no further examination of title is necessary since the register of title replaces the documents of title; moreover, a proprietor suffering damage from mistakes and errors in the register may claim an indemnity from the State.[152]

However, for a title converted from the 1919 Act to the 1963 Act, there may be disadvantages. For example, under the Registration of Titles Act 1919, unregistered interests are not binding on a proprietor.[153] However, under the Registered Land Act 1963, the class of interests known as overriding interests are binding on a proprietor, notwithstanding their non-registration.[154] Moreover, a first registration cannot be rectified by virtue of section 143(1) of the Registered Land Act 1963, whereas such registrations are rectifiable under the Registration of Titles Act 1919.155

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152 Registered Land Act 1963, s. 144(1).

153 Registration of Titles Act 1919, ss. 23,32.

154 Registered Land Act 1963, s. 30. For the significance of overriding interests, see Chapter Six, *infra*.,

155 S. 60(1).

Under the Land Registration Act 1925, a registered title can be graded into four possible classes: an absolute title, which can be awarded to an applicant with the full legal fee simple absolute in possession156 or to an applicant for first registration of a leasehold estate157; a good leasehold title158; a possessory title[159] and; a qualified title.160 Conversion, in relation to the 1925 Act relates to the upgrading of such titles into higher classes. For example, an absolute title is the highest form of title that can be obtained. However, if an applicant for first registration with freehold title cannot produce enough documentary evidence of title because, for example, he has obtained title through adverse possession, then the Registrar may grant a possessory title to the applicant. Such a title is of a lower quality than an absolute title because it is subject to all adverse interests affecting the land which may be shown to have been in existence at the date of first registration.161 However, the Registrar may, and on application of the proprietor of the possessory title, shall convert the title to an absolute title if he is

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156 Land Registration Act 1925, s. 5.

157 *Ibid.*, s. 8(1).

158 *Ibid.*

159 *Ibid*, ss. 6, 8(1).

160 *Ibid.*, s. 7.

161 *Ibid.*, ss. 6,11.

satisfied as to the title or if the land has been registered with possessory title for 12 years and the proprietor has been in possession.162 The same applies if a qualified title has been awarded to the proprietor with his consent.163 Such a title is insecure because it is subject to adverse interests which were in existence at the time of first registration. Nevertheless, it can be converted to an absolute title if the Registrar "is satisfied as to the title".164

In Kenya, the conversion of all the titles registered under the Registration of Titles Act 1919, the Land Titles Act 1908 and the Government Lands Act 1915 will take an undetermined length of time. Only when all such titles are registered under the Registered Land Act 1963 will there be a unified registration system. It is submitted that it may have been prudent to insert a provision in the Registered Land Act 1963 that the conversion of titles subject to the 1908, 1915 and 1919 Acts would take place when there was a transfer, whether voluntarily or for value, of the land. This compares with the requirement of registration for unregistered titles in compulsory registration areas under section 123(1) of the Land Registration Act 1925, whenever there is a sale of such a title.

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162 Land Registration Act 1925, s. 77.

163 *Ibid.*, see s. 7(1).

164 *Ibid.*, s. 77(3). If the land is leasehold then it can be converted to a good leasehold title.

VI Identification of Registered Land

A register of title is effective if each title can be identified without ambiguity. Boundaries on the ground naturally delimit the extent of the land. However, how accurate should the plans that show the extent of the boundaries be? The answer depends on what registration system has been adopted. In this respect, the Kenyan experience is of interest. Under the Torrens system of registration boundaries are accurately and precisely defined by survey. Boundary pegs are emplaced at the turning points of the boundary, the actual boundary being a line joining these corners. On the plan, the exact extent of the boundaries can be drawn to scale using the computed data. This is the method of title identification that was adopted by the Registration of Titles Act 1919. The plan overleaf illustrates the precise extent of boundaries of a parcel of land registered under the Registration of Titles Act 1919. Such boundaries are therefore guaranteed since they have been fixed.

Interestingly, the Registered Land Act 1963 did not adopt this method of boundary identification. Rather the general boundaries rule in use in England under the Land Registration Act 1925 was adopted. Section 21(1) of the Registered Land Act 1963 provides in part that,

FILED PLAN OF LAND REGISTERED UNDER THE REGISTRATION OF TITLES ACT 1919

105776 New Grant

REPUBLIC OF KENYA

DISTRICT OF KILIFI

Locality North Of Mtwapa Creek

Reference Map South · A · 37 / V · IV · d 4

Bearings °	Distances Metres

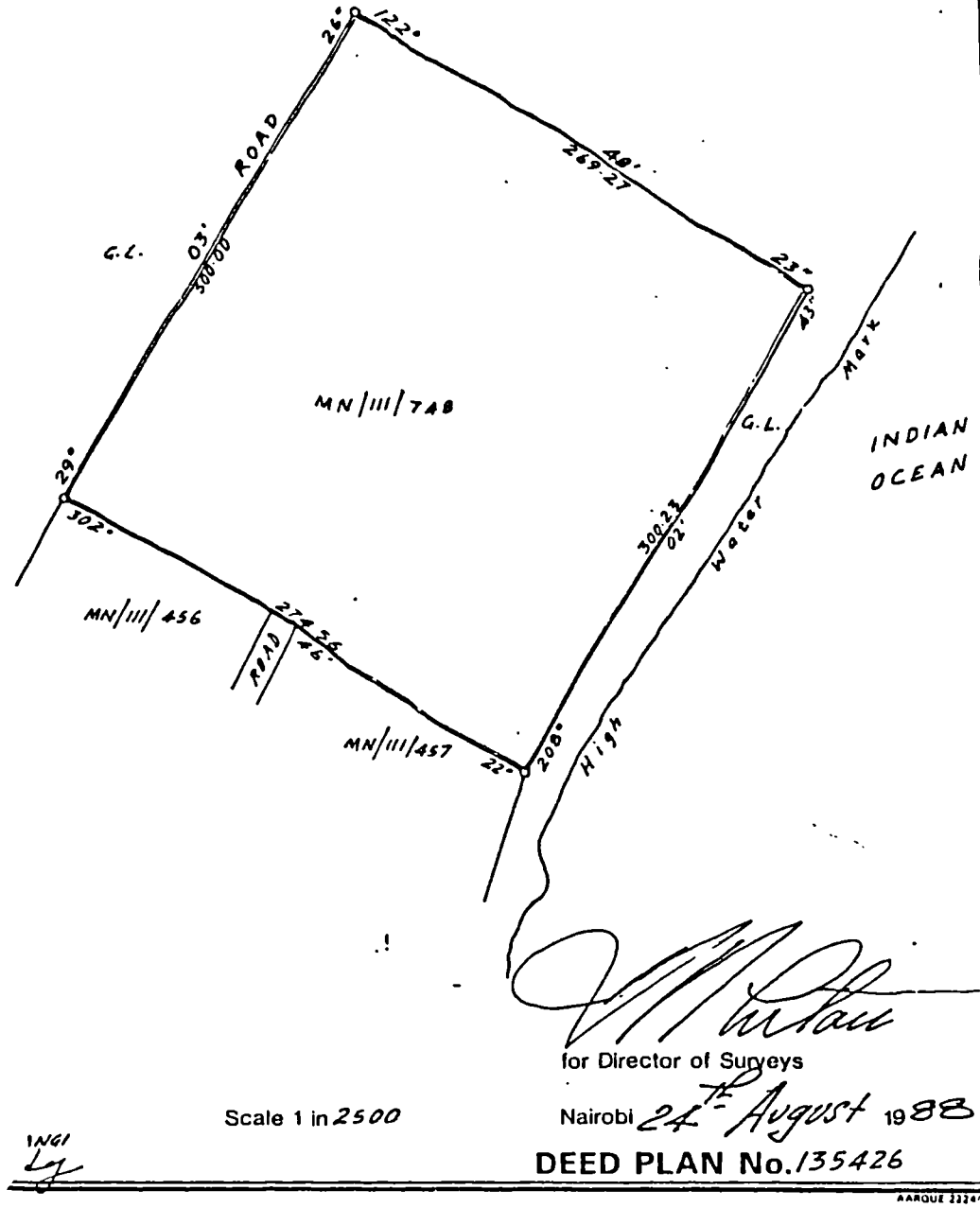
Land Reference No._____

(Orig No._____

Sub division No. 748 (Orig No._____

of Section No. III Mainland North

Area = 8·138 Ha. (Approx.)



for Director of Surveys

Scale 1 in 2500

Nairobi 24th August 1988

INGI

DEED PLAN No. 135426

AARQUE 2324/84

Fig. 2

> " ... the registry map and the filed plan shall be deemed to indicate the *approximate boundaries* and the *approximate situation* of the parcel." (Italics mine.)

Although the phrase 'approximate boundaries' is not defined within the Registered Land Act 1963, an explanation is supplied by section 15 of the Land Adjudication Act 1968 while defining the duties of the demarcation officer. It states:

> "Provided that where the boundary of a piece of land is already demarcated by a physical feature *it need not be determined whether the exact line of the boundary runs along the centre of the feature or along its inner or outer wide.*" (Italics mine.)

A major factor accounting for the adoption of the approximate boundaries rule was cost. It was considered that the accurate plans required under the Registration of Titles Act 1919 would have been too expensive to adopt as a method of identifying titles during the land adjudication process.[165] Instead, the method used in mapping parcels which were registered was to prove to be unique. The East Africa Commission had recommended that cadastral survey on the basis of aerial photography should be tried out.[166] This method was tried and the results were positive, and was subsequently used to form the basis of mapping land that was undergoing adjudication.

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165 Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966) paras. 246, 247.

166 Report of the East Africa Commission on Land and Population, Cd. 9475, paras. 20,21.

The Registry map is prepared from a combination of ground and aerial survey by the Survey of Kenya. On the ground, the demarcation officer and his assistants plot the position of boundaries on sketches, having had their extent pointed out to them by the landowners. Land owners are then encouraged to grow hedges along the boundaries so that these may be visible on air photographs.[167] Once demarcation is complete, the whole area is photographed from the air by a specially equipped aeroplane. Photos are taken from the air on a scale of 1:50,000. The photograph overleaf is an aerial photograph taken over Waswete adjudication section in Migori District, Western Kenya, on a scale of 1:50,000. On the ground, the photograph is enlarged to a scale of 1:2,500, which is sufficient to identify the property boundaries clearly.[168] Cartographers of the Survey of Kenya trace these boundaries on the enlarged photo, and from this, the Preliminary Index Diagram, in effect the Registry map, is prepared. A copy of part of the Registry map drawn from this photo is in the Appendix.[169] As the map shows the plot

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[167] See Report of the Mission on Land Consolidation, *op.cit.*, para. 206.

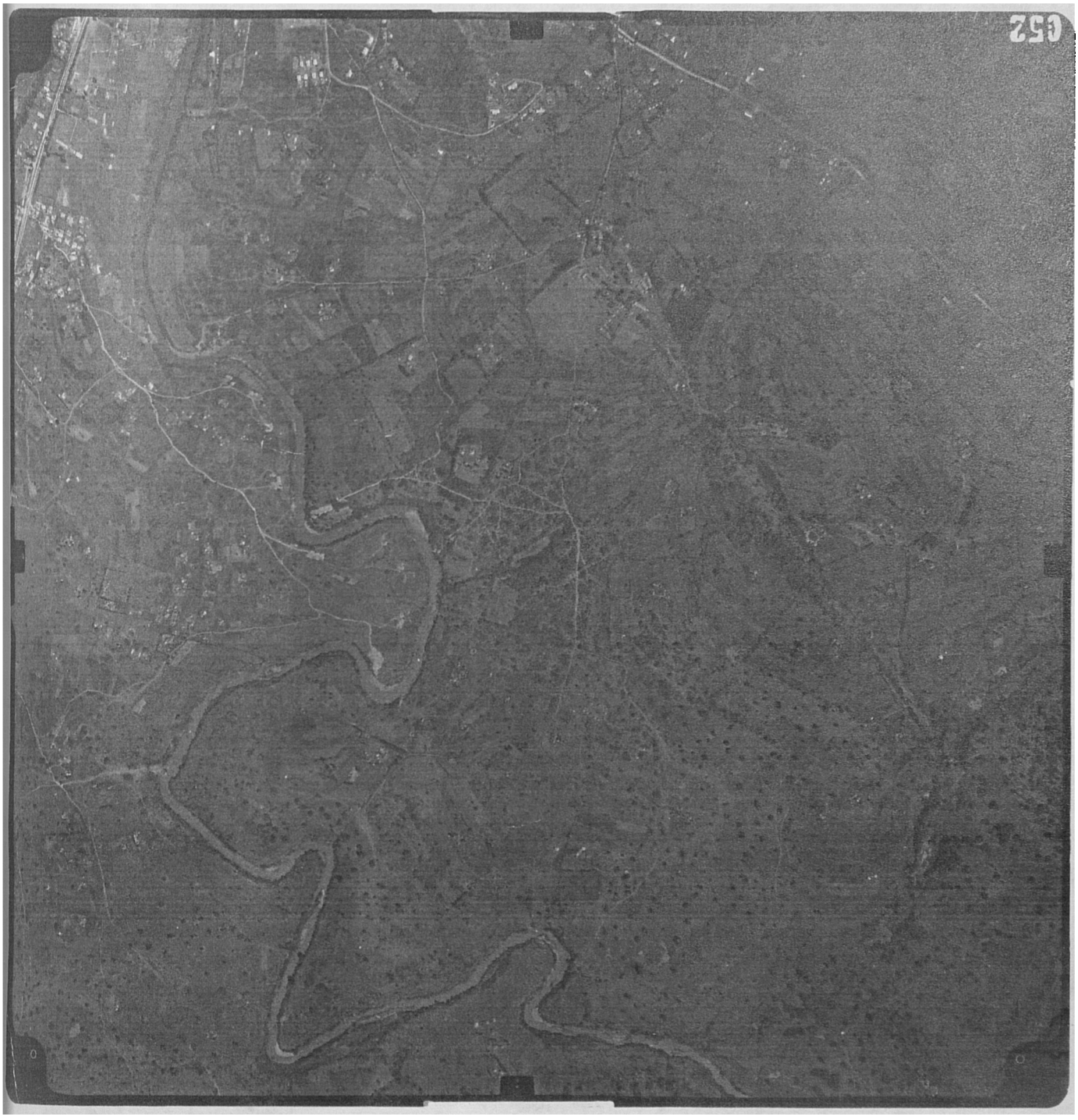
[168] Initially, the photographs were reduced to a scale of 1:12,500. However, the Mission on Land Consolidation and Registration, *op.cit.*, felt that this scale was too small resulting in inaccurate maps. They recommended, in response to a proposal from the Survey of Kenya, that the scale of photo-enlargements should be reduced to 1:2,500 - paras. 210,211.

[169] Unfortunately, the copy of the Registry Index Map was too large to be reproduced on this page.

AERIAL PHOTOGRAPH OVER WASWETE ADJUDICATION

SECTION

Fig. 3



numbers of all the parcels are indicated and, from this map, the plot of a registered proprietor is easily identifiable. However, unlike the plan shown on the previous page, the precise definition of the boundaries is not shown on the map, a consequence of the above method of survey.

Two criticisms can be made against the Registry map maintained under the Registered Land Act 1963. First, the map is often inaccurate. This was pointed out by the Chief Land Registrar in a Practice Instruction where he warned Land Registrars not to place undue reliance on the Registry Index map because the map was "not an authority on boundaries" as it was inaccurate due to discrepancies between the map and the aerial position on the ground.[170] A District Land Registrar said that this was often a frequent cause of boundary disputes.[171] On occasion, a proprietor on obtaining a copy of the Registry Index Map would find that it did not agree with the position on the ground, especially if the map showed him as having more land than he actually did and he set out to correct this having the boundary resurveyed. This could occasionally spark off a dispute with the neighbouring proprietors, particularly if the latter were of the

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[170] Practice Instruction: Use of Registry Index Maps in the Determination of Boundary Disputes and the Role of Surveyors in the same, from Chief Land Registrar to all Land Registrars, 8th March 1985.

[171] Interview with the Kiambu District Land Registrar, Miss R.N. Mule, Kiambu Land Registry, 19th September 1989.

view that the former was acquiring the land unscrupulously. In consequence, an application to the Registrar to determine the suit would result.[172] Accordingly, in determining the dispute the Registrar has to rely on the direct evidence of persons who knew the position of the boundary such as neighbours or even surviving members of the Land Adjudication committee, as well as obtaining the original photo enlargements of the area.[173] What started off as a basic error becomes an involved problem taking a long time to solve.

A second criticism is that no individual title plans are prepared for registered proprietors from the Registry Index maps. A proprietor has to obtain, on the payment of a fee, a large copy of a section of the Registry Index Map showing the position of his plot from the Survey of Kenya in Nairobi.[174] The land certificate or 'title deed' has no title plan which identifies the property. In contrast, a land certificate issued under the Land Registration Act 1925 contains a title plan prepared from the Ordnance Map, showing the extent of the registered parcel in red

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[172] Registered Land Act 1963, s. 21(2). See for example Rahab Njeri Kinuthia v. Nganga Kirogo, H.C.C.C. No. 404 of 1982 (unreported). For a discussion of this case, see Chapter Nine.

[173] Practice Instruction: Use of Registry Index Maps ... *op.cit.*, Between 1988 and 1989 the Kiambu District Land Registrar received 74 applications to hear disputes of a similar nature.

[174] For a copy of the Registry Index map, see Appendix.

edging.[175] The lack of a title plan means that a purchaser, for example, will be unaware of the extent of the registered land unless he applies for a copy of the Registry Index Map showing the extent of his property.[176]

However, the unavailability of title plans is attributable to the fact that the present Registry Index Maps are only interim being, in reality, the Preliminary Index Diagrams prepared from the aerial photographs. The Survey of Kenya intends in the near future to replace the present series of Registry maps with more accurate maps. These will be prepared by what is known as 'refly', a term used to denote the aerial re-photographing of the areas which had been subjected to aerial survey during adjudication. The purpose of the refly procedure is to enable the discrepancies between the ground and the registry maps to be corrected. However, this undertaking is subject to the availability of funds and personnel.[177]

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[175] A person may also obtain a plan issued on request with the result of an official search of the public index map. This plan is based on the Ordnance Survey Map - H.M. Land Registry Applications for Official Searches of the Index Map, Practice Leaflet No.15, June 1988, para.11. See also Land Registration Rules 1925, r. 286.

[176] This is an extremely large copy. See Appendix for the illustration of the copy that a person would obtain.

[177] See A.K. Njuki, Cadastral Surveys in Kenya, The Nairobi Law Monthly, September 1987, 13, at p. 17.

The method of preparing the Public Index Map maintained under the Land Registration Act 1925[178] showing the extent of all registered land in England and Wales is at variance with the Kenyan method. The Public Index Map is based on the Ordnance Survey map which is a large scale topographical map prepared for the whole country representing physical details such as fences, walls and hedges, and other physical features in a standard form. In contrast, the Registry Index Map maintained under the Registered Land Act 1963 is an example of a cadastral map. This is, a map showing the units of land rather than physical features such as rivers, valleys, ridges, and so on, unless such features, such as a river, happens to form part of a boundary.

The Public Index Map, maintained by H.M. Land Registry does not show the precise line of boundaries, but merely the general boundaries of the registered titles.[179] This rule was adopted as a result of the failure of the method of parcel identification initiated by the Land Registry Act 1862. The Act required a map or plan to be deposited as part of the description of a registered title showing the exact position of the boundaries.[180] This requirement made registration very expensive. The exact line of many

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178 Land Registration Rules 1925, r. 8.

179 Land Registration Rules 1925, r. 278.

180 Ss. 3, 10, 16, 25(3).

boundaries was often unknown. A proprietor wanting to register his title under the 1862 Act therefore had to issue notices to neighbouring proprietors in order to determine the line of the boundary. If a proprietor's boundaries adjoined several properties, determining the position of one's boundaries was an expensive and protracted business. The 1870 Royal Commission appointed to inquire into the working of the 1862 Act highlighted that one of the main reasons for the failure of the Act was the requirement of plans showing the precise lines of boundaries.[181] As a result, the Land Transfer Act 1875 reduced the requirement of precision fixing, section 83(5) providing that the registered description should be as accurate as possible but should not be conclusive as to the boundaries or to the extent of registered estates.

Nevertheless, both the Registered Land Act 1963 and the Land Registration Act 1925 provide for applicants to have their boundaries fixed. Rule 276 of the Land Registration Rules 1925 provides that if a proprietor desires to have indicated on the Index Map or the General map the precise position of the boundaries, notice is given to the owners of adjoining properties of the intention to ascertain and fix the boundary. The corresponding provision in the Registered Land Act 1963 is section 22. Interestingly,

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[181] Report of the Royal Commissioners appointed to Inquire into the operation of the Land Transfer Act .., c. 20, pp. 1870, Vol. XVIII, 595, para. 45.

the Registrar under section 22 has power to order the fixing of a boundary on his own motion. During this reserach, it was noted that although in the Kiambu District Land Registrar, received no applications to fix boundaries between 1988 and 1989, it was observed that the determination of boundary disputes for the Registrar under section 21(2) of the Registered Land Act 1963 often resulted in the precise fixing of boundaries. During these disputes, the Registrar travels to the location of the disputed boundary together with a surveyor from the Survey of Kenya. In determining the dispute, the parties are cross examined, together with their witnesses and other individuals who would have witnessed the demarcation of the boundary during adjudication. Using other evidence such as the Registry Index Map and the original photo enlargements of the area, the surveyor is able to fix the position of the boundary accurately.

VII The Registration of Flats

A significant legal development in Kenya in recent years is the enactment of the Sectional Properties Act 1987. This Act provides for the registration of flats or 'sectional properties' and the creation of a structure to provide for the establishment of corporations to manage such flats on behalf of the owners. According to the preamble, the Act is:

> "to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned

> by proprietors of the units as tenants in common and to provide for the use and management of the units and common property and for connected purposes."

This Act is analogous to the type of legislation found in North America dealing with the ownership of flats, popularly known as 'condominiums'. Similar legislation is found in Hong Kong, Malaysia and Australia.[183] In Kenya, the 1987 Act was enacted in response to the ever growing needs of a rising population. Escalating land values in recent years meant that people could no longer afford to build or buy their own houses. Consequently, property developers began to construct an increasing number of flats and high rise tower blocks. However, the individual units of these buildings were invariably leased or rented to individuals while a developer or the landlord retained the freehold titles to the land on which the buildings stood. Parliament felt that it was necessary to make provision for individuals to purchase flats; this would make the purchase of a freehold title affordable in contrast to the high prices commanded by houses.[184]

The issuing of freehold titles in flats raises important questions; for example, who owns the common

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[183] See Multi-Storey Buildings (Owners Incorporation) Ordinance 1970; Malaysian National Land Code 1965; New South Wales Strata Titles Act 1973.

[184] See Hansard, Unpublished Transcripts of Parliamentary Proceedings, Vol. LXXIII, 1 December, 1987, (Minister for Lands and Settlement).

parts of the property, such as the stairs, lifts, rubbish areas and the land on which the building stands? How should the flats be maintained, particularly the outer structure, and who should bear the cost? Moreover, who should represent the flat owners if, say, a lift falls killing a passenger and legal proceedings are brought against them.

In Kenya, as is the case in England, no legislation existed which provided a legal framework for the ownership of flats. Although the definition of 'land' in section 3 of the Registered Land Act 1963 includes buildings[185], therefore making it theoretically possible for freehold titles to be issued to individual flat units, in reality, the provisions of the Act made it impractical to do so. For example, the Act merely provides that restrictive agreements noted on the register are binding on proprietors of land and their successors in titles,[186] but is silent on whether agreements in the nature of positive covenants in English law are binding on successors in title. Therefore, this merits the application of English Common law to fill the lacuna.[187]

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185 However, section 3 does not expand on the nature of buildings, unlike section 3(viii) of the Land Registration Act 1925 which provides that 'land' "includes, buildings *or parts of buildings (whether the division is horizontal, vertical or made in any other way)* ..." (Italics mine.)

186 Registered Land Act 1963, s. 95.

187 *Ibid.*, s. 163.

However, under common law the burden of a positive covenant (such as an undertaking to contribute to the upkeep of a road or maintain a wall) cannot run with servient land as to bind subsequent owners[188] even if the covenant is noted on the register.[189] Hence, it would be difficult to have covenants to maintain the common parts of flats, for example, to bind successors in title under the Registered Land Act 1963. Legislation was therefore necessary to provide a legal framework for the effective management and control of flats and other buildings by unit owners.

Accordingly, the Sectional Properties Act 1987 was passed, making it not only possible to enfranchise existing leasehold flats, but also enabling newly built flats to be directly bought with freehold titles. Section 2 of the 1987 Act therefore provides that the Act applies to land held on freehold title[190] or on a leasehold title where the unexpired residue of the term is not less than 45 years. Part III of the 1987 Act made provision for the creation of corporations made up of all the owners of the units, which would be responsible for the control of the common property and

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188 Austerberry v. Corporation of Oldham, (1885) 29 Ch.D. 750 at pp. 781-785.

189 Cator v. Newton [1940] 1 K.B. 415.

190 This would cover land that is about to be developed with the construction of flats, such land held on a freehold title. Consequently, the completed flats would be bought with freehold titles.

management of the flats outlined in the sectional plan.[191]

Part II of the Act provides for the method of registering units in sectional properties. The registration of units in sectional properties is on the basis of the sectional plan.[192] The plan, which must describe two or more units in it,[193] contains several particulars of and concerning the units registered; these include the delineation of the external surface boundaries of the parcel and the location of the building in relation to them[194], a description of particulars necessary to identify the title to the parcel[195], a drawing illustrating the units and defining their boundaries,[196] as well as the approximate floor area of each unit.[197]

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191 The English Law Commission proposed a similar arrangement, whereby a 'commonhold association' would be responsible for the management of flat units with control of the common property - Law Commission, Report of a Working Group on Commonhold: Freehold Flats and Freehold Ownership of Other Interdependent Buildings, Cm. 179, Part VIII.

192 Sectional Properties Act 1987, s. 3(1), 4(1).

193 *Ibid.*, s. 4(2)(a).

194 *Ibid.*, s. 9(1)(b).

195 *Ibid.*, s. 9(1)(c).

196 *Ibid*, ss. 9(1)(d), (e). Such boundaries are described by reference to a floor, wall or ceiling - *Ibid.*, s. 10(1)(a).

197 *Ibid.*, s. 9(1)(f). Before the plan can be registered it must be endorsed with or accompanied by a certificate of a surveyor, and a certificate of approval by the local authority of the area in which the land is located. *Ibid.*, s. 11(1).

Once the sectional plan is presented for registration, the Registrar is meant to close the register of all the land on which the building or sectional property is constructed and open a separate register for each unit described in the plan.[198] The title to a unit is then deemed to have been issued under the Registered Land Act 1963.[199] A special certificate, known as the certificate of sectional property is issued in respect of each unit.[200] The register includes particulars of the share in the common property apportioned to the owner of the unit.[201] 'Common property' is the property which does not form part of any unit but is used communally by the owners of the units within the building.[202] These include areas like the staircases, lifts, rubbish areas, and so on. Section 6(2) provides that the common property shall be held by the owners of all the units "as tenants in common in shares proportional to the unit factors for their respective units." The rights attaching to the common property and each unit, necessary for enjoyment by the owner include rights of support, shelter and protection, and easements of water

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198 *Ibid.*, ss. 5(1)(a),(b). The Registrar is required to submit to the local authority of the area in which the parcel is situated a copy of the registered sectional plan.

199 Sectional Properties Act 1987, s. 5(5).

200 *Ibid.*, s. 5(1)(c).

201 *Ibid.*, s. 6(1).

202 Equivalent to the common law term 'common parts'.

passage, sewerage, drainage, gas, electricity, garbage, telephone television and radio services by the use of pipes, cables, wires or ducts.[203] Also reserved for each unit and the common property is the right to the free, full and uninterrupted access and use of light to or for any windows, doors or other apertures existing at the date of registration of the plan.[204]

The effect of registration of a flat or sectional property is to make it subject to the Registered Land Act 1963.[205] Although the title is deemed to have been issued under the Registered Land Act 1963 in reality, the registration is made under the Sectional Properties Act 1987. The 1987 Act creates a new register that only applies to sectional properties. Since the sectional property title is deemed to be issued under the 1963 Act the registered proprietor of a unit, if the title is freehold, is vested the absolute ownership of the unit and his rights are not liable to be defeated except as provided in the Registered Land Act 1963, but subject to encumbrances shown in the register and overriding interests.[206] It would also mean that the first registration of a sectional title would not be capable of rectification.[207]

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203 Sectional Properties Act 1987, s. 7(1).

204 *Ibid.*,s. 7(2).

205 Ibid., s. 5(5).

206 Registered Land Act 1963, ss. 27(a),28. For leases see *ibid.*,s. 27(b).

207 Ibid., s. 143(1).

The registration of flats is another mammoth task that faces the Kenya Land Registry. Consequently, the Sectional Properties Act 1987 will not be brought into force until the Land Registry is ready to undertake such registrations. At present, the Land Registry is not yet prepared to undertake this task. A lot of work remains to be done. The statutory forms have to be printed, and the registers for the sectional properties have to be prepared together with the certificates. This has proved to be an expensive undertaking and the lack of sufficient funds has meant that it will be a while yet before the Land Registry starts the Registration programme.[208]

The Sectional Properties Act 1987 has also implications for the conversion of titles. Land which is already subject to the Land Titles Act 1908, the Government Lands Act 1915 or the Registration of Titles Act 1919 is capable of conversion and registration under the Registered Land Act 1963.[209] However, if such land contains flats, and it is desired that they be registered under the 1987 Act, it is unclear whether the parcel of land itself, which is registered either under the 1908 or 1919 Acts or is subject to the 1915 Act, should first be converted to be registered under section 12(1) of the Registered Land Act 1963 and then

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[208] Interview with the Deputy Chief Land Registrar, Land Registration Department, Nairobi, 2 October 1989.

[209] Registered Land Act 1963, s. 12(1). See Section V, *supra*.

registers made for the units in the sectional plan, or whether registers can be made for the units directly under the 1987 Act without the title to the parcel having to be necessarily converted first under the 1963 Act. It would appear, by virtue of sections 5(1)(a) and (b) of the Sectional Properties Act 1987 that it would be possible to directly convert the title to a parcel into registers made under the Sectional Properties Act 1987. This is done by merely closing the register of the parcel and then opening a separate register for each unit. However, if the former was subject either to the Land Titles Act 1908 or the Government Lands Act 1915, then the title would have to be examined first before the register can be closed.[210] Titles subject to the Registration of Titles Act 1919 need not be examined due to the fact that they are already registered and therefore their conversion can take place directly.[211]

Although legislation similar to the Sectional Properties Act 1987 has not yet been passed in England, there does exist some protection for the tenants of flats. For example, the Landlord and Tenant Act 1987 confers on such tenants rights of first refusal on disposals by the landlord,[212] the right to apply to court for the appointment of a manager in respect of

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210 See Section V, *supra*.

211 *Ibid*.

212 Part I.

the block[213] certain rights of compulsory acquisition of the landlord's interest[214] and protection in relation to the service charge.[215]

Nevertheless, recommendations have been made for 'strata' legislation to be adopted in England. A committee set up to consider positive covenants affecting land looked at the 'special problems of blocks of flats and other multiple units', and studied the system introduced in New South Wales by the conveyance (Strata Titles) Act 1961[216] They came to the conclusion that such a system would supply "a ready made and effective scheme for implying all necessary easements and covenants and for providing an effective machinery of management and enforcement" and a similar system should be made available by statute.

Twenty two years were to pass before another report was published, this time by the Law Commission, which recommended the creation of a new system of land ownership known as commonhold.[217] Under this system

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213 Part II.

214 Part III.

215 Part V.

216 Report of the Committee on Positive Covenants Affecting Land, Cmnd. 2719.

217 Law Commission Report of a Working Group on Commonhold: Freehold Flats and Freehold Ownership of Other Independent Buildings, Cm.179. In 1984 the Law Commission published the Report on Positive and Restrictive Covenants (Law Comm. No. 127) where they set out proposals for reforming the law of positive and restrictive covenants. However, in that report the Commission recognised that 'condominium' legislation has advantages but decided not to enact comprehensive

the owner of a unit within a block of flats for example, would be the freeholder with exclusive ownership of the unit but with a proportionate share of the site itself.[218] The emphasis of the commonhold is on co-operation between the owners of the unit. To this end once the commonhold is registered at the Land Registry a management or commonhold association would be created, the members being the unit owners, which would own the common parts of the property and be responsible for their maintenance and repair.[219]

For the purposes of registration, only an absolute title could be available to a commonhold. The Working Group designed a register that would be identical to that normally issued under the Land Registration Act 1925 in that it would be subdivided into three registers: the property, proprietorship and charges registers;[220] a commonhold declaration would also be registered which would contain information on the votes, ownership shares and contributions of the proprietor of a unit.[221]

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condominium legislation: instead they thought it preferable to provide a legal framework "within which people can in effect create condominium regimes of their own" (para.22.13). However, it was subsequently seen as necessary to put forward a scheme which would form the basis for condominium legislation in England - Preface, Report of a Working Group on Commonhold, *supra*.

218 *Ibid.*, paras. 1.10,1.18.

219 Report of a Working Group on Commonhold ..., *op. cit.*

220 *Ibid.*, Appendix B, Form IV.

221 *Ibid.*, Form I(a).

The proposals of the Working Party have not yet been implemented. The Lord Chancellor stated that although the Government had no plans to introduce legislation on commonhold in the 1989 Parliamentary session, the Law Commission was preparing a draft bill.[222]

VIII Conclusion

That the land registration programme in Kenya is ambitious goes without saying. The systematic adjudication of land formerly subject to customary law has been extended to cover half the country and has resulted in the registration of over 1.5 million titles covering more than 6.6 million hectares of land. As map 5 shows, large sections of the country have had all the titles systematically registered.

Consequently, the cost of the land registration programme has been huge, running into millions of pounds.[223] As a developing country, there is no way the Kenya Government would have borne the cost of land registration without having to seek external sources

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[222] Parliamentary Debates, (H.L) 5th ser., Vol. 513, col. 841, written answer (5 December 1989). In the House of Commons, a Bill was presented to the House by Mr. Dudley Fishburn M.P. entitled 'The Leasehold Reform (Commonhold) Bill'. The Bill provided for the conversion of all leasehold flats into commonholds and enable unit owners to have freehold titles of their units. The Bill was presented to speed up the process of providing legislation to provide for commonholds. However, nothing became of this Bill - Parliamentary Debates (H.C.) Official Rep., 6th ser., Vol. 15, col. 341 (19 April 1988).

[223] Exact figures are unavailable.

of finance. The British Government, primarily, has contributed a significant amount of finance towards the programme.[224] Although it may have been prudent to recoup the cost of adjudication by setting high fees, this would have been counterproductive, particularly in view of the fact that virtually all landowners whose land was being adjudicated were experiencing registration for the first time, hence the public campaign on the part of the Government to increase awareness. Therefore, to encourage support for adjudication of land, the registration fees were pitched low.[225] It must also be remembered that land adjudication was initially introduced at the height of the Mau Mau Civil War in the mid 1950's by the colonial government in an attempt to redress the social and economic imbalances which contributed to the outbreak of the war. In view of its forceful introduction, landowners were naturally resentful at the whole idea, suspiciously viewing it as a plot by the colonial government to take away their land. Hence, it would have been imprudent politically to have set a high fee at all. The suspicions began to abate when the benefits of adjudication began to trickle through.[226]

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[224] See Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966), paras. 2-4.

[225] See Registered Land Act 1963, Fifth Sched.

[226] See Chapter Two, *supra*. See generally M.P.K. Sorrenson, Land Reform in the Kikuyu Country, A Study in Government Policy, (Nairobi, 1967).

In the post-independence era, the low adjudication and registration fees makes registration attractive and affordable for the majority of landowners engaged in subsistence farming whose disposable incomes are low.

However, major savings in registration costs have been made by the use of the lay adjudication committees responsible for the examination of titles initially subject to customary law. The members of the committees, who have undertaken the work unpaid, have borne the burden of the adjudication process. Nevertheless, the policy of not paying the committees has created serious problems. Corruption is evident and has resulted in people giving some members favours in return for favourable decisions. Although the committees were deliberately created to be large in order to deter people from trying to influence or corrupt members, this has not necessarily been an effective deterrent. The lack of a salary or some payment of a fee to the committee members has had an effect on the motivation of many committees. Since the members usually have their own farms or businesses to run, there is often reluctance to attend committee hearings; the result is a backlog of objections and appeals that continue to build up. This in turn reduces the pace of adjudication because no land can be registered under the Registered Land Act 1963 until all the objections have been dealt with.[227]

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[227] Land Adjudication Act 1968, s. 27(3); Registered Land Act 1963, s. 11(2).

The solution therefore would seem to lie in providing that a fee for services rendered be paid to individual committee members. This would go a long way towards eliminating the temptation to receive a bribe and, moreover, would boost the motivation of those serving on the committees. However, those who oppose the payment of fees would argue that the system, as it is, has been successful, in any event, since the committees have been responsible for assisting in the spread of registration of title systematically to nearly half the country in only 35 years. While this is true, it is also arguable that the process can be speeded up even more if members are paid.

The other problem - the failure adequately to correlate customary rights with rights recognised by the Registered Land Act 1963 - can be partly attributable to the fact that the committee members have no legal training. However, it is submitted that the problem may be more fundamental. The real problem lies with the failure of the framers of the Registered Land Act 1963 to create rights that would comfortably substitute the rights recorded on the adjudication register. Customary rights are not accurately represented by the existing rights created under the 1963 Act. It is arguable that new types of rights could have been imaginatively created to reflect the nature of customary rights. For example, a new type of tenancy known as a customary tenancy could have been created. The rights of the customary tenant would

depend on the nature of the right that he held under customary law. Therefore a person who was a *muhoi* prior to registration would be registered as a customary tenant, the tenancy being terminable at will with reasonable notice. A *muthami* on the other hand could be registered as a customary tenant, the tenancy terminable on the failure to fulfil certain conditions, with reasonable notice.

Such a scheme, however, poses its own problems. Firstly, there is the danger that it would perpetuate customary law which the Registered Land Act 1963 is trying to replace. If there is a dispute it causes one to have to look at the customary law to determine what were the rights of such a tenant. Secondly, the multiplicity of tribes in Kenya means that there are customary rights with differing obligations and it would be difficult to represent them all on the register.

To overcome these objections, it would be easier to create several categories of customary tenancies which would broadly reflect the variety of customary rights that are in existence. It would, however, entail the compilation of all the customary tenancies excercised by all the tribes within the country, in order to create effective categories of tenancies which would be recognised by the Registered Land Act 1963. This is not as difficult as it sounds since the customary laws of succession and marriage of the major

tribes in Kenya have already been compiled.[228] Such a scheme would come closer in accurately portraying the customary rights that are being recorded during the adjudication process.

The prime advantage of systematic registration is the speedy registration of titles in orderly fashion throughout the country. By contrast the sporadic compilation of the register in England means that the spread of registration has been slow and uncoordinated. The success of systematic registration has been partly aided by the sanctions that affect proprietors who fail to register. First, the failure to have one's land adjudicated within the statutory period results in a person losing his title to land for all time. Once the adjudication register is handed to the Land Registar and registers prepared for the titles, no rectification of the first registration can take place.[229] Many proprietors lost their titles in this way during the 1950's when, as a result of the Civil War, many were absent when their land was undergoing adjudication. Consequently, their titles were adjudicated in favour of others, mostly family members, who had themselves registered as first proprietors.[230] No rectification,

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[228] See E. Cotram, Restatement of African Laws Kenya : Vol. I, The Law of Marriage and Divorce, Vol. II; The Law of Succession, (London 1969).

[229] Registered Land Act 1963, s. 143(1).

[230] However, it is argued in Chapter Six that the rights of these ones can be capable of binding the registered proprietor notwithstanding their non-registration.

despite the fraud, could be made.[231] To have allowed rectification of such registrations would have undermined the whole registration programme.[232]

The Government, however, solved the problem by re-settling thousands of landless proprietors on settlement schemes. These schemes were comprised of land which the Government purchased from European farmers who left the country at Independence as well as land which had been abandoned by farmers who left in a hurry. It also included land already owned by the Government.[233]

The second sanction is criminal. Any person who, without reasonable excuse, neglects or refuses to demarcate his land or assist in the adjudication process when required to do so may be found guilty of a criminal offence.[234] During the *barazas* or public meetings where individuals within the locality are informed about the importance of having their land adjudicated, they are made aware of the consequences of the failure to register. The threat of criminal

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

232 See further Chapter Eight, *infra*.

233 The most notable settlement scheme was the Million Acre Programme. Under this scheme 40,919 families were settled on 484,567 hectares or nearly a million acres of land. Other schemes are the Harambe, Haraka, Shirika, Ol'Kalou and the Stateland and Trustland settlement schemes primarily to re-settle landless people - Department of Settlement Annual Report 1983, (Nairobi 1983).

234 Land Adjudication Act 1968, s. 33.

sanctions upon those who fail to cooperate has acted as an additional deterrent.

These sanctions are draconian. People are robbed of the freedom of choice as to how they want to deal with their land. On the other hand, these measures have contributed to the cooperation that landowners have provided during the adjudication process. Interestingly, the enthusiasm that many people have had for registration particularly after Independence has meant that hardly any prosecutions have been brought under these provisions.[235] In Kenya, systematic compilation of the register has also facilitated the mapping of land subject to registration. Mapping is done systematically thereby making it economical. The use of aerial photographs undoubtedly makes it easier to draw the Registry Maps. However, such maps can be accurate if the boundaries to the land can be properly identified from the air. Many of these boundaries cannot be identified adequately, either because the hedges have not grown and fences not erected properly, or because the boundaries have been destroyed by various causes. Consequently, the Registry maps are often seriously inaccurate and cannot be relied upon where there is a boundary dispute. The solution lies in re-mapping the areas which is the intention of the Survey of Kenya. However, the cost is prohibitive and

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[235] Interview with the Kiambu District Land Registrar, Miss R.N. Mule, 2 October 1989.

the lack of finance means that it will be a long time before the task is undertaken.

As all available resources have been directed at registering land under customary law, no programme of converting titles registered under the Land Titles Act 1908, the Government Lands Act 1915 and the Registration of Titles Act 1919 has yet been laid down. Such conversion will require all the titles under the 1908 and the 1915 Acts to be first examined before they can be registered under the Registered Land Act 1963. This will be a mammoth job which will require the Land Registry to recruit teams of lawyers to assist in such examination.[236] However, such recruitment may be difficult in view of the fact that many lawyers are unattracted by Government service. Alternatively, such work could be contracted out to certain private practitioners specialising in conveyancing, as is the case in England where the Land Registrar can refer to one of the special conveyancing counsel the whole or any portion of the examination of a title.[237]

The enactment of the Sectional Properties Act 1987 in Kenya is a significant development, and an illustration of the progress land registration has made in Kenya. However, once again, the unavailability of adequate resources means that the Registry is still

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[236] A similar suggestion was made at a Law Reform Seminar - See Briefings: M. E. Aronson, Law Reform Seminar on Land Law Reform, The Nairobi Law Monthly, September 1987, 20 at p. 21.

[237] Land Registration Rules 1925, ss. 26, 303.

unprepared for the registration of such properties. Hence it is unknown when the Act will come into force. Nevertheless, at least there exists an Act on the statute book which provides the framework for the registration of flats. In England, the pace of reform has been excruciatingly slow in this area, despite the urgent need for such legislation. Nearly 25 years since the first report recommending the adoption of similar legislation, no legislation yet exists. Nevertheless, the preparation of a draft bill by the Law Commission means that such an Act may be in place in the not too distant future.

Chapter Four

THE REGISTER

I. Introduction

In a system of registered title "the register is everything".[1] Consequently, proof of title to registered land can only be established by inspecting the register of title. However, for the register to accurately reflect the state of a title it must be effectively maintained. In Kenya the register is maintained by the Land Registry and administered by the Chief Land Registrar.[2] The Land Registry however, is decentralised, and each registration district has a land registry, the registration districts more or less corresponding with the administrative districts of the country.[3] In total there are 27 District Land Registries in Kenya.[4]

This Chapter looks at the organisation of the Kiambu District Land Registry, the largest and busiest district land registry in the country. Also analysed is the structure of the individual register of title

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1 Waimiha Sawmilling Co. v. Waione Timber Co. [1926] A.C 101 at p. 106. But see the problem caused by overriding interests, Chapter Six, *infra*.

2 Registered Land Act 1963, s. 7(1), H.M. Land Registry is responsible for maintaining the registers of title in England, and administered also by the Chief Land Registrar - Land Registration Act 1925, s. 126.

3 Registered Land Act 1963, ss. 5,6(1); Registered Land (Districts) Order 1981, Schedule.

4 This compares with 18 in England and Wales.

maintained by the Registry. The Kiambu District Land Registry lies in an area where land adjudication and registration of unregistered titles is complete. Consequently, the majority of registrations dealt with by the Registry are connected with dealings in land. Of interest, therefore, is the procedure that is normally followed when a plot of land is transferred. Significantly, transfers and dealings in general are undertaken at the registry by parties on their own behalf without employing the services of lawyers. Many landowners are aware of the importance of land registration and the need to register transfers of land. Unlike the large majority of landowners in Britain who remain unaware of land registration procedure, public awareness in Kenya has been heightened by several factors. One of these is the fact that public access to the register remains unrestricted. In contrast the English register has remained closed to the public for many years and it is only recently that provision was made to open the register to the public.[5]

What role should the land certificate have in a system of registered title? An interesting development in Kenya was the change brought about by the Registered Land (Amendment) Act 1987. That Act amended section 32 of the Registered Land Act 1963 by providing that the

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5 Land Registration Act 1988. The Act was brought into force on 3 December, 1990 by the Land Registration Act 1988 (Commencement) Order 1990, S.I. 1359.

land certificate issued under section 32 of the Registered Land Act 1963 should be replaced by a 'title deed'. The reason for this somewhat startling amendment is noteworthy and reflects the effect public opinion can have in modifying registered land practice. However, what is the practical effect of having such a change? *Prima facie*, the issuing of a title deed may justify the application of unregistered law principles. It may also encourage the dispositions of titles off the register. If such consequences do take place then such a change signifies a dangerous development, for it lays the foundation for the undermining of registered land law. In reality, however, such fears may be unjustified. The effects of this change are considered.

Land registration does not come without its problems. The biggest problem facing the land registries in Kenya and in England is finance. This is ironic considering that large surpluses from fee income are produced by all the registries. The problem is more acute in Kenya where government control has prevented the income from being invested, for example in the building of better facilities, modernising the system generally and improving staff motivation by increasing salary scales. If land registration is to be effective then the key may lie in reducing the level of government control.

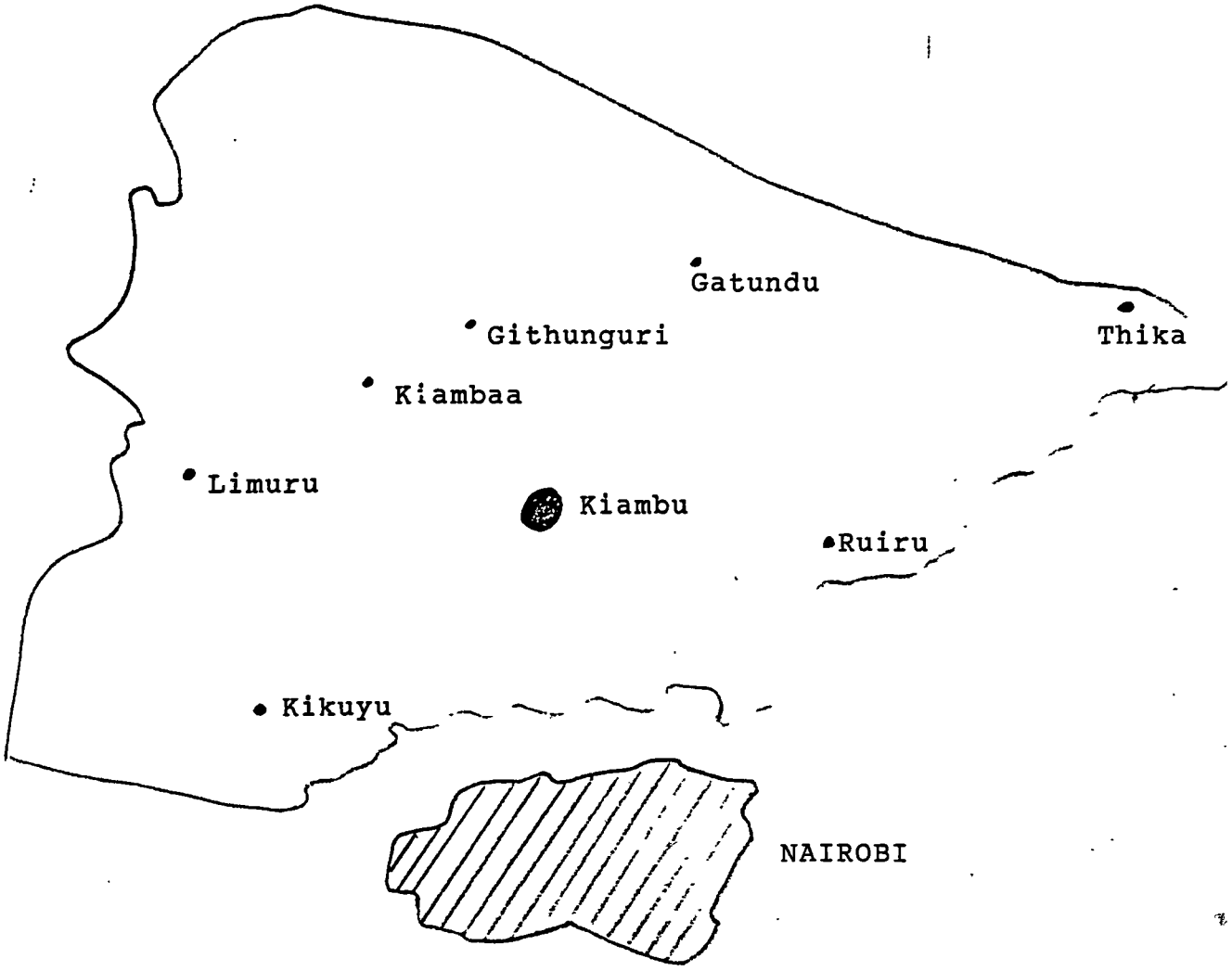
II The Kiambu District Land Registry

Situated in Kiambu town about ten miles from Nairobi, the Kiambu District Land Registry serves the whole of Kiambu District. The illustration overleaf is a map of Kiambu District showing the principal towns with Kiambu as the District capital.

With an estimated population of over 800,000 Kiambu District ranks as one of the most densely populated Districts in the country. It is a very fertile area making agriculture the mainstay of the local economy. Consequently a large section of the population are engaged in farming and many have their own plots of land. The dense population has meant that land holdings are small, on average about 1.2 ha per farmer. Kiambu ranks as one of the first Districts to complete the systematic adjudication of land, this having been achieved by the early 1960s. Therefore, a large percentage of the land is registered under the Registered Land Act 1963. New registrations, however, still take place, these primarily being mainly subdivisions of existing registered plots. There are also some pockets of Government land and Trust land owned by the County Council which is in the process of being issued to landless individuals and consequently being brought onto the register. Over 95,000 titles are now registered and maintained by the Land Registry.

KIAMBU DISTRICT

MAP 6



The Kiambu District Land Registry occupies a small building that has virtually outlived its usefulness.[6] The staff is comprised of the District Land Registrar, three Assistant Land Registrars, the District and Assistant District Land Valuer, six clerks whose function is to search and make entries on the Register and maintain the parcel files and three clerks who serve at the public counter, one whose function is to note on the Presentation Book the documents that are presented for registration, one to make bookings for land control board meetings, and the third to assist members of the public by answering their queries and generally advising them on procedure.[7] Although the District Land Registrar was the only member of staff with a law degree, the members of staff generally have accumulated a lot of experience, most of them having worked at the Registry for many years.

A. The Register

What can be described as the global register for the whole of Kiambu District is kept in over 200 Kalamazoo metal binders, each binder containing several hundred cards, with each card being the register for an

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[6] The District Land Registrar stated that the Registry desperately needs additional space as the existing facilities have become too cramped. However, a lack of funds has prevented any expansion programme - interview with the District Land Registrar, Miss R.N. Mule Kiambu District Land Registry, 2 October 1989.

[7] Support staff include a telephone operator, a messenger and several cleaners.

individual title.[8] Freehold titles are represented by green cards while leasehold titles are on white cards. Illustrated in Figure 4(a) and 4(b) is a copy of the actual register of a freehold title registered under the Registered Land Act 1963. As it indicates, it is divided into three sections; the property, proprietorship and encumbrances sections. This division is similar to the English register with the exception that the divisions in the latter are also referred to as 'registers'.[9] Figures 5(a) and 5(b) illustrate by way of comparison a copy of the English freehold register of title.

As the Kenya register shows, the property section contains particulars of the title such as the registration section, the parcel number, the approximate area of the title, easements in favour of the land, i.e. easements over a servient tenement, and the Registry Map Sheet number. The latter helps one to identify the title on the Registry Index Map kept in the land registry. A significant difference between the property section and the property register on the English register is that the latter contains a filed

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[8] A frequent complaint by some members of staff was that these binders were so heavy that they could easily sprain one's back when lifting them! In contrast the register maintained by the Nottingham District Land Registry, the largest in England, is arranged on shelves numbered in sequence. Each card representing an individual register is placed on the shelf making it easier for a member of staff to remove any card or cards whenever they are required.

[9] The English register is also larger in size. See *infra*.

EDITION:

OPENED:

PART A - PROPERTY SECTION

REGISTRATION SECTION	EASEMENTS ETC.	NATURE OF TITLE
		ABSOLUTE
PARCEL NUMBER		
APPROXIMATE AREA Ha.		
REGISTRY MAP SHEET No.		

PART B - PROPRIETORSHIP SECTION

ENTRY No.	DATE	NAME OF REGISTERED PROPRIETOR	ADDRESS AND DESCRIPTION OF REGISTERED PROPRIETOR	CONSIDERATION AND REMARKS	SIGNATURE OF REGISTRAR

Kalamazoo
767038-611

TITLE BELOW THIS LINE

	REGISTRATION SECTION	PARCEL No.	
TITLE NUMBER			

REGISTER OF A FREEHOLD TITLE (R.L.A. 1963) (FRONT)

Fig. 4(a)

PART C - ENCUMBRANCES SECTION

ENTRY NO.	DATE	NATURE OF ENCUMBRANCE	FURTHER PARTICULARS	SIGNATURE OF REGISTRAR

REGISTER OF A FREEHOLD TITLE (R.L.A. 1963) (BACK)

Fig. 5(a)

H.M. LAND REGISTRY

Edition opened TITLE NUMBER *This register consists of pages*

A. PROPERTY REGISTER

containing the description of the registered land and the estate comprised in the Title

COUNTY DISTRICT

The Freehold land shown and edged with red on the plan of the above Title filed at the Registry

B. PROPRIETORSHIP REGISTER

stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposing thereof

TITLE ABSOLUTE

Entry number	Proprietor, etc.

TITLE NUMBER

Printed in the United Kingdom for Her Majesty's Stationery Office by Multiform Printing 8089909 2/88 1507

Model III

Any entries struck through are no longer subsisting

Fig. 5(b)

Page 2 TITLE NUMBER

C. CHARGES REGISTER

containing charges, incumbrances etc., adversely affecting the land and registered dealings therewith

Entry number	The date at the beginning of each entry is the date on which the entry was made on this edition of the register	Remarks

Any entries struck through are no longer subsisting

plan with the title edged in red.[10] Although this plan is not drawn to scale, it shows, at a glance, the position and extent of the registered land. On the other hand, the Kenya register contains no such plan. The only option for a person wishing to have a copy of a plan showing the extent of the registered land is to obtain a copy of the relevant Registry Index Map.[11] However, as pointed in Chapter Three, it is intended to resurvey all the land that was surveyed during adjudication in order to produce more accurate and permanent Registry Index Maps. Although it has not been stated whether filed plans for each registered title will be produced, once the new Registry Index Maps are made, they will form a better basis for the production of filed plans.[12]

The proprietorship section on the Kenya register contains the name and address of the proprietor together with a note of any entry such as a caution, inhibition or restriction which affects his right of disposition. The encumbrances section contains a note

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10 See *infra*. Land Registration Rules 1952, r. 3.

11 As the map in the Appendix shows, a copy can be huge.

12 Section 10(2) of the Registered Land Act 1963 provides that the property section may contain a reference to a filed plan. Titles converted from the Registration of Titles Act 1919 already have their own filed plans drawn to scale because this was a feature under the 1919 Act. See the example of the filed plan in Chapter Three *supra*, which is part of the register under the 1919 Act.

of every encumbrance, such as a charge, and every right adversely affecting the land.[13]

B. B. Inspection of the Register

Section 36 of the Registered Land Act 1963 provides that any person may inspect the register and the registry map or obtain an official search of the register.[14] Public inspection of the registers of title is indeed a feature of land registration in Kenya.[15] Public inspection of the register under the Registered Land Act 1963 has facilitated personal attendance by parties to a transaction at the land registries in order to conduct their transactions there.[16] Many of the persons in attendance at the Kiambu District Land Registry were present to apply for official searches of the register and, on average, 25 applications were made per day.[17]

In contrast, the English register has always been shrouded in secrecy ever since its inception in 1862.

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13 *C.f.* the English register in Figure 6(a) and 6(b).

14 This is through application on forms R.L. 25 or R.L.26, Registered Land Act, 3rd Sched.

15 See Land Titles Act 1908, s. 31; Government Lands Act 1915, s. 127; Registration of Titles Act 1919, s. 79.

16 See *infra*.

17 Although provision is made for anyone to make a personal inspection of the register (*Ibid*, s.36(1), Form R.L.25), persons are encouraged by staff to obtain official searches because these confer greater protection on the applicant. But, see Chapter Five, *infra*., for the problem this creates.

This is directly related to the English obsession with secrecy about the ownership of land and property and many consider it rude to find out such details. A columnist described it as equivalent as trying to "find out the colour of a person's knickers"![18] The Registration of Title Commissioners pointed out that the reason for this obsession lay in "the fear of unnecessary and uncalled for disclosures" because "no man likes to make his private affairs public; and one man has no right to pry into the affairs of another, except for some object, in which the latter has given him an interest."[19] Consequently, the Land Registry Act 1862 provided in section 15 that the register should only be opened to inspection by the registered proprietor or under an order of the court. Such a provision was ironic in view of the fact that in earlier times, the ownership of land was never made secret - witness conveyancing by livery in seisin; moreover, the Domesday survey in the 11th century to enable all land in England to be valued for taxation purposes was registered in the Domesday Book and open for public inspection;[20] furthermore, Parliament endeavoured to remove the scourge of secret

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18 Kevin Cahill, The Strange Secrets of Who owns What, The Independent On Sunday, 11 February, 1990, p. 57.

19 Report of the Registration of Title Commissioners, 1857, C.2215, para. XX.

20 This can be inspected in the Public Records Office in London.

conveyancing undertaken by lawyers to prevent the King from recovering feudal dues and taxes by enacting the Statute of Uses and Enrolments.

Nevertheless, the secrecy principle was carried into the Land Registration Act 1925, section 112(1) providing that a person could inspect the register but only on the authority of the registered proprietor or by an order of the court.[21] The Law Commission, however, was able to consider the issue of whether it was really necessary to keep the register closed to the public.[22] On the one hand the main argument put forward by those who opposed an open register was that it would be an invasion of privacy.[23] Outsiders would be able to find out whether the land was mortgaged or what rent was payable under a lease, while there may be those wishing to inspect the register to ascertain the identity of the proprietor in order to send unsolicited commercial ('junk') mail.[24] Still others, such as journalists, may wish to discover the personal details of a landowner in order to publicise them in a gossip column, while a terrorist may want to discover the

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21 For the other limited circumstances under which the register could be inspected, see Land Registration Act 1925, ss.112(2), (3), 112A, 112AA, 112B, 112C.

22 The Law Commission, Second Report on Land Registration: Inspection of the Register, Law Comm. No. 148, para.16.

23 See Parliamentary Debates, (H.L.), 5th Ser. Vol. 490, col. 683 (Lord Templeman).

24 The Law Commission, Second Report..., *op. cit.*, para.16(iii).

identity of a landowner in order to murder or commit arson.[25]

However, the Law Commission considered that the arguments in favour of an open register outweighed those against.[26] For example many countries operating registers of title do not restrict public access to the register; moreover, in England there are numerous other registers which are not restricted to the public, such as the companies register, electoral roll, registers dealing with, probate, wills and births.[27] Furthermore, an open register would assist those engaged in historical research or the study of planning and estate management or to ensure "the preservation of footpaths or ancient buildings."[28] It would assist tenants in identifying immediate and superior landlords, and significantly, assist in the simplification of house transfer. The latter would be achieved in several ways, first the formality of obtaining the vendors written authority to inspect the register would be removed; it would follow that the vendor's title could be verified earlier in the process; computerisation of the register could mean that in the future, a person with a computer terminal

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25 *Ibid.*

26 In the House of Lords, Lord Templeman, pointed out that there is no great stigma in having it known that one has mortgaged a property - Parliamentary Debates, *op. cit.*,

27 Second Report, *op. cit.*, para. 18.

28 *Ibid.*

could inspect the register directly from his home or office; furthermore, a purchaser could inspect the register and filed plan of adjoining properties to discover the burden of restrictive covenants or the routes or rights of way.[29]

Consequently, the Land Registration Act 1988 was enacted to amend section 112 of the Land Registration Act 1925, section 1(1) providing that any person may, on the payment of a fee, inspect and make copies of and extracts from entries on the register and documents referred to in the register. The Act was a victory for those supporting an open register. However, it was not brought into force immediately because the Registrar argued that the Land Registry was unprepared administratively for the Act.[30] This was due to the massive backlog of applications for registration which built up as a result of the property boom of the 1980's.[31] The 1988 Act was subsequently brought in force by the Land Registration (Open Register) Rules 1990.

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29 *Ibid.*

30 Parliamentary Debates, House of Lords, 5th Ser. vol.490, col. 684.

31 Kevin Cahill, *op. cit.*, p. 57.

C. Personal Attendance at the Registry

The first thing a visitor to the Kiambu District Land Registry will notice is that the Registry is always full of people. Many of these are parties to land transfers who come to have their transfers registered, or those who have come to obtain official searches while others are present to collect their 'title deeds'. Indeed, personal attendance at the registry is a remarkable feature of registered land practice in Kenya, characterised at the same time by the conspicuous absence of lawyers. Individual proprietors and purchasers of land alike act on their own behalf throughout the whole transaction.[33] Interestingly, many transactions are completed at the Registry itself.

Where a transfer of registered land was being undertaken, it was observed that a purchaser would normally come first to obtain an official search of the register. Although a search should not take more than ten minutes, at times an applicant would finally receive the certificate of search one or even two days after the date of his application. For an applicant who had travelled a long distance to the registry this

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[33] In a period of two weeks the writer observed that there were 14 transfers of registered land for value at the Kiambu registry and in every case, without exception, the parties to the transfers conducted the transfers without the benefit of legal representation. Registry officials also confirmed that generally most individuals attending the registry undertake their transfers without legal representation.

was extremely frustrating and wasteful of time.[34] If the search was clear the purchaser would collect the requisite forms. These would include the form of transfer (form R.L. 1), the application for registration (form R.L. 28) and, if the land is agricultural, the land control board consent form.[35] At times when both the vendor and purchaser were present at the registry, the forms would be filled on the spot and they would then be advised to have execution verified at the offices of a local advocate.[36] If the land was agricultural the parties would then have to attend the Land Control Board which meets several times a month. Only when the Board granted consent could the parties proceed with registration of the transfer.[37] Once registration fees were paid at the office of the District Commissioner[38]

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[34] Although staff at the registry were often busy, there was no real reason why it took so long to make a search. However, the writer was reliably informed that poor salary scales has brought about a lack of motivation among staff, resulting in a corresponding reluctance to expedite the process. To speed up the registration process some individuals have resorted to paying a small 'goodwill' fee to some of the staff. It is this practice that lays the foundation for corruption.

[35] See Appendix for copies of these forms.

[36] For the procedure on verification, see Chapter Five.

[37] For the significance of Land Control Board consent, see Chapter Five.

[38] All government revenue within the District is collected by this office. At the time of writing the registration fee had gone up to 100 Kenya shillings which is payable together with stamp duty on the purchase price which amounts to 5% per every 1,000 Kenya shillings.

the registration documents would then be presented to the clerk in charge of the Presentation Book. The clerk made a note in the book of all the documents received, which were then handed to either one of the three Assistant Land Registrars who would check that the details on the documents were correct before stamping them. The name of the transferee would be inserted on the register of title for the land concerned and that of the transferor deleted. The transferor's land certificate or 'title deed' which would have been handed in with the transfer documents, is then cancelled and a new 'title deed' issued in the name of the transferee.

The policy of personal attendance at the Registry, whereby people conduct their own transfers in the Registry without having to use lawyers, was a deliberate policy encouraged by the Government. The idea was discussed at length by the Conference on African Land Tenure. The Conference was of the opinion that personal attendance assisted in the maintenance of the register because:

i) it avoided correspondence which in turn would minimise the clerical work involved;

ii) this would result in the volume of work in relation to total transactions being kept to a minimum, "thus making the registry less prone to falling into arrears of work":

iii) consequently opportunities for errors and oversights by clerks would be minimised;

vi) payment of fees would be facilitated;

v) the output of work by clerks is increased because they can "overlook a letter but cannot overlook a landowner in person";

vi) delay through a failure to use the prescribed forms or follow the prescribed procedure would be avoided; and

vii) landowners could be advised on procedure by the Registry clerks or by the Registrar.[39]

The Working Party on African Land Tenure went further and pointed out that Africans should be encouraged to use the Registry whenever they dealt with their land because land registration was something 'entirely new' to them, the benefits of which they would not entirely appreciate at the outset.[40] To facilitate this Registries were to be decentralised so that they were never too far away from the people as to make it unreasonable to insist on personal attendance.[41]

These aims have been largely fulfilled. It is noteworthy for example that the Registry staff play a major role in advising proprietors of land of the

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[39] Report of the Conference on African Land Tenure in Ease and Central Africa, (1956) J.A.A. (Special Supplement), para. 32.

[40] Report of the Working Party on African Land Tenure, 1957-58. (Nairobi, 1958), para.41.

[41] *Supra*.

procedure to follow when engaging in any transaction and on numerous occasions even help parties fill their forms. Personal attendance has also meant that problems are attended to on the spot without the delay that correspondence entails. As an example, the use of the wrong form can contribute to delay in completing a transaction if the forms have been sent through the post. But, personal attendance means that this problem can be corrected immediately. Moreover, it was observed that the Registry deals with less correspondence since few applications to search are made through the post, resulting in less paperwork for the Registry staff to deal with.

Personal attendance in Kenya is in direct contrast to the position in England. There the bulk of conveyancing, whether of registered or unregistered land, is undertaken by solicitors or licensed conveyancers, despite the fact that, where registered land is concerned, land registration was meant to simplify the process of transferring land, making it possible for a person to undertake the transfer of his own land without having to engage the services of a lawyer. Not surprisingly, the legal profession was able to maintain a sustained campaign of opposition to land registration[42] and, in particular, to the introduction of compulsory registration. In order to gain the support of the legal profession concessions

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[42] A factor which contributed to the failure of the Land Transfer Act 1862. See Chapter Two, *supra*.

were made to them; for example, compulsory registration was delayed for a period of ten years, while the scale fees were actually increased.[43] Thus, successful lobbying by the profession ensured that they did not lose their conveyancing market as a result of land registration. At the same time there never has been any campaign to inform the English public of how simple it is to transfer registered land. The public have therefore remained ignorant and mystified about land transfer procedure. The Law Society has also played a big role in fostering this state of affairs. A graphic illustration of this is what took place in the 1970s. In 1976 Michael Joseph, a solicitor, published a book entitled, The Conveyancing Fraud. He showed how the public was being taken for a ride by the legal profession when it came to conveying land. The profession had made out that conveyancing was a very complicated business, and yet, as he showed, conveyancing was in reality very simple, especially where registered land was involved. the book became an instant best seller. In response, the Law Society in 1977 engaged in an expensive advertising campaign in the press which advised the public, 'don't listen to Whatsisname, see a solicitor.[44]' In a well publicised case a person, who changed his name from Reynolds to

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[43] A. Offer, The Origins of the Law of Property Acts 1910-1925, (1977) 40 M.L.R. 505 at p. 521.

[44] See A. Offer, Property and Politics 1870-1914. Landownership, Law, Ideology and Urban Development in England, (Cambridge 1981), p. 87.

Whatsisname, and who had tried to undertake his own cheap conveyancing, was taken to court by the Law Society and fined.[45] The Law Society has continued to stress to the public the necessity of seeing a solicitor first before moving house. This was evident when the Law Society in March 1990 launched TransAction, a national conveyancing protocol designed to help solicitors speed up the conveyancing process and save costs.[46] For example, a feature of the protocol was for a local search to be made by the seller's solicitor at the cost of the seller, and the result provided free of charge to the buyer's solicitor.[47] This would save the buyer costs and time if, as a result of a search which revealled a defect in the property, the purchase was aborted.[48] The Law Society used this as an opportunity to impress upon members of the publich, the need to see a solicitor first before deciding to move house. Indeed, a massive advertising campaign was undertaken all over the country to acquaint the public with the new procuedures.[49] Consequently, in the public mind,

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45 This was for being in breach of section 22 of the Solicitors Act 1974.

46 News:TransAction gathers momentum, (1990) 12 L.S.G. 4.

47 Richard Dresner, National conveyancing protocol : search validation insurance (1990) 4 L.S.G. 20.

48 *Ibid.*

49 See Marketing the new conveyancing Protocol, (1990) 8 L.S.G. 16.

conveyancing whether of registered or unregistered land, is something that should be undertaken by lawyers.

It is not surprising therefore that the Royal Commission on Legal Services pointed out that it is only a small proportion of transactions that the vendor or purchaser acts on his own account.[50] A recent survey undertaken by the National Consumer Council in 1990 showed that only 13% of people who had been involved in house purchase had done the conveyancing themselves. In contrast 84% of those in the survey used solicitors in their survey while 3% used a licensed conveyancer. These figures reflect the fact that solicitors continue to play a huge role in the conveyancing business and it looks to be the case for many years to come.

Nevertheless, Consumer Associaitons such as *Which* have endeavoured to encourage house buyers to do their own conveyancing. For example they published an action pack entitled, *'Do Your Own Conveyancing'* which outlines the procedure to be undertaken when a person is purchasing registered freehold propety. Relevant Registry forms are also included in the pack.

The emphasis placed in Kenya on the need for people to undertake their own registered land conveyancing can be viewed as part of a wider colonial administrative strategy to shield Africans from

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50 Royal Commission on Legal Services, Final Report, Vol.1, Cmnd. 7648, para.21.28.

lawyers. The exclusion of lawyers from appearing in the Native Tribunals, later the African Courts,[51] on behalf of Africans, and their exclusion from the land adjudication and consolidation process all formed part of this strategy.[52] Lawyers were viewed with hostility, as people who would foment corruption due to a desire to make money, as well as being obsessed with technicalities, which resulted in delay.[53] However, the legal profession in Kenya can also be blamed for failing to protect its own vested interests. Unlike the legal profession in England which was successful in protecting its own interests and therefore maintaining a large slice of the conveyancing cake, the legal profession in Kenya lacked cohesion. The profession failed, as a whole, to seek to play a role in the land registration process in African lands. This is partly attributable to the fact that there was only a tiny number of African lawyers.[54] The profession, mainly

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51 See Chapter Nine, *infra*.

52 The Magistrates Jurisdiction (Amendment) Act 1981 which handed to tribunals composed of elders jurisdiction over certain disputes over land, was also designed to prevent lawyers from handling such disputes - see Chapter Nine, *infra*.

53 See Y.P. Ghai, Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations, in Lawyers in the Third World: Comparative and Developmental perspectives, Edited by C.J. Dias, R. Luckham, D.O. Lynch, J.C.N. Paul (Uppsala 1981), 144. It is of interest to note that many lawyers in Kenya today complain that the present Government has continued to maintain this hostility to the profession, with the result that lawyers are constantly vilified by politicians - see Nairobi Law Monthly, March 1990.

54 By 1960 for example there were only five African lawyers - Y.P. Ghai, *op. cit.*

European and partly Asian, was concentrated in Nairobi, serving European commercial and industrial interests. African interests had rarely been served by the profession and consequently when registration was introduced in the African lands for the first time the profession's complacent attitude meant that the Government was not lobbied to ensure that the profession would play a role in land registration in the African lands. It is possible that had there been a greater number of African lawyers at the time the outcome may have been different. In the face of no opposition, it was therefore easy for the administration to ensure that lawyers were generally shut out from the registration process.[55]

Nevertheless, personal attendance has incurred significant benefits for landowners. A consequence has been to make people registration literate. For example, many individuals attending the Registry were aware of the significance of an official search and how to interpret the certificate of search; others were aware of what a caution was and what effect it had when registered against a title. Many were also aware of the importance of registering a transfer of land under the Registered Land Act 1963. When one considers that many of these people are not well educated, it reflects the high level of awareness that ordinary people have

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[55] See Y.P. Ghai, *op. cit.*, pp. 150,151,

of land registration and its significance.[56] This is also an indication of how successful the public campaign by the Government to make people aware of the importance of land registration and its benefits has been, a campaign that was started with the introduction of land registration in the 1950s. The result of this is that it is now normal for the Registry to become the focus of dealings and many transactions are actually completed there.

The second benefit is undoubtedly financial. Many landowners are able to save legal fees by undertaking their own transactions. This is a significant benefit in view of the fact that the average landowner in Kiambu is not wealthy.[57] It means that the cost of conveying registered land is cheap. On the other hand such a situation is decidedly to the disadvantage of the legal profession!

III **The Certificate of Title**

As the register of title "is everything" no additional documents are required to prove title to registered land. However, land certificates are a

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56 The same cannot be said for many homeowners in England. See Williams & Glyn's Bank v. Boland [1979] Ch. 312, at 328, per Lord Denning.

57 If parties to a transaction undertake it on their own behalf, then only fee payable to lawyers is for verification of execution - see Registered Land Act 1963, s.110 & 4th Sched.

feature of land registration.[58] The land certificate, however, is not meant to be proof of title but merely evidence of the state of the register. It is meant to contain the entries that are on the register and therefore must be updated every time there is a dealing with the land.[59] Proof of title can only be obtained by making an official search of the register. In reality, unless one actually inspects the register itself, it is the certificate of official search which is closest to being proof of title, and often the contents of this certificate determine whether a transfer of land is to proceed or not.[60] Nevertheless, the role accorded to the certificate of title in England is in direct contrast to the certificate under the Registered Land Act 1963, as the following discussion highlights.

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[58] With the exception of Continental systems such as in Germany and Switzerland - S.Rowton Simpson, Land Law and Registration, (Cambridge 1976), 165.

[59] Section 64(1) of the Land Registration Act 1925 provides that the land certificate must be produced to the Registrar on dealing with the land. This is also a requirement under section 33(1) of the Registered Land Act 1963 but only if a 'title deed' has been issued.

[60] An applicant who suffers damage or loss as a result of errors or omissions on the certificate of search may be indemnified - s.144(1)(c) Registered Land Act 1963.

A. The Land Certificate in England

In England the land certificate has been viewed to a large extent as replacing the title deeds in unregistered land.[61]

The following pages contain copies of two types of specimen land certificates that are produced by the Land Registry. Land Certificate A is an example of the certificate produced for registered proprietors from the non-computerised Land Registries, while Land Certificate B is a type produced by computerised Land Registries.[62] An important feature of these certificates is the inclusion of a filed plan edged in red, though not drawn to scale. Such a feature does not form part of the 'title deed' under the Registered Land Act 1963 as shown below. This view that the land certificate is equivalent to a title deed is reinforced by section 66 of the Land Registration Act 1925 which provides that a proprietor may create a lien by the deposit of the land certificate. Such a lien is in effect, an equitable mortgage created in a similar manner to an equitable mortgage of unregistered land through the deposit of title deeds.[63] The elevation of

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[61] David J. Hayton, Registered Land, 3rd ed., (London 1981), p. 20.

[62] H.M. Land Registry, Registration of Title to Land, A Brief Guide (1988), p. 3. The certificates are reproduced fromAppendix C of the Guide.

[63] Land Registration Act 1925, s.66; Barclays Bank v Taylor [1974] Ch.137, 144. Thames Guaranty v. Campbell [1985] Q.B. 210. See Shaw v. Foster (1872) L.R. 5 H.L. 321 at 339-340. It is also the practice under the Land Registration Act 1925, s.65, that when a mortgage or charge is created the land certificate shall be

the status of the land certificate to a role almost equivalent to that of a title deed is a reflection of the 'superstitious reverence for title deeds'.[64]

There is the question, however, whether the Law of Property (Miscellaneous Provisions) Act 1989 has destroyed the creation of equitable mortgages by the deposit of title deeds and, by extension, the creation of a lien by the deposit of a land certificate under section 66 of the Land Registration Act 1925. The deposit of title deeds had been recognised in equity as a sufficient act of part performance in the absence of writing.[65] However, section 2(8) of the 1989 Act repealed section 40 of the Law of Property Act which recognised the law of part performance. The general academic consensus is that by virtue of section 2(8) of the 1989 Act, equitable mortgages created by the deposit of title deeds are no longer valid[66]. There is

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deposited at the registry. In comparison, the Registered Land Act 1963 provides in section 33(3) that where a similar charge is created the 'title deed' shall be delivered to the chargee. It has been pointed out that it is undesirable to allow a chargee to retain the land certificate because it results in the chargee having a hold over 'unsophisticated proprietors' - S.Rowton Simpson, *op. cit.*, p. 166.

64 Report of a Select Committee of the House of Commons on Land Titles and Transfer, 1879, p.V.

65 Russel v Russel, (1983) 1 Bro. C.C. 269; Featherstone v Fenwick (1783), 1 Bro. C.C. 270; Hurford v Carpenter (1783) 1 Bro. C.C. 270. Thames Guaranty v Campbell [1985] Q.B. 210.

66 Jean Howell, Informal Conveyances and Section 2 of the Law of Property (Miscellaneous Provisions) ACt 1989 [1990] Conv. 441 at p. 444; Lionel Bently and Paul Coughlan, Informal dealings with land after section 2 (1990) Legal Studies 325, at p. 341.

LAND CERTIFICATE 'A'

Fig. 6(a)

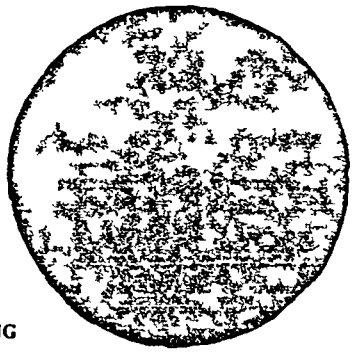
HM LAND REGISTRY

LAND REGISTRATION ACTS 1925 to 1971

LAND CERTIFICATE

THIS IS TO CERTIFY THAT THE land described in the property register and shown on the official plan of the title numbered as stated on the back page of this certificate is registered at HM Land Registry with the class of title stated in the proprietorship register. There are annexed to this certificate office copies of the entries in the register and of the official plan and, where so indicated in the register, of documents filed in the Land Registry.

Under section 68 of the Land Registration Act 1925 and rule 264 of the Land Registration Rules 1925, this certificate shall be admissible as evidence of the matters contained herein and, under section 64 of the said Act, must be produced to the Chief Land Registrar on every entry in the register of a disposition by the registered proprietor of the land and on every transmission thereof.



WARNING

1. No endorsement, note, notice or entry made in this certificate other than those officially made at HM Land Registry shall have any operation.

2. All persons are cautioned against altering, adding to or otherwise tampering with this certificate or any document annexed thereto.

The most recent date entered below is the latest one on which this land certificate was made to agree with the register.

A land certificate may be sent at any time to the appropriate district land registry to be brought up to date in any respect that may be necessary. This service is provided free of charge and is usually completed within a day or two of the receipt of the certificate. By this means, a registered proprietor is provided with conclusive evidence of the current state of the register.

Although the copy of the title plan in the certificate will correspond with the title plan filed at the Land Registry on the latest date specified below, a later revision of the Ordnance Survey Map may have taken place and in this connection your attention is drawn to the General Information Notes below concerning 'Inspection of the Land', 'Revision of the Ordnance Survey Map' and 'Boundaries of Registered Land'.

Dates when this land certificate was made to correspond with the register.			
COMPARED WITH H. M. LAND REGISTRY 20 MAY 1988 MARKING OFFICIAL CANCELLED REGISTER			
COMPARED WITH 14 DEC 1988 REGISTER			

GENERAL INFORMATION

OFFICE COPIES OF THE REGISTER

A registered proprietor may obtain from the appropriate district land registry an office copy of the registered title by applying on printed form A44 and paying the prescribed fees according to the scale for the various items set out on that form. Form A44 (like all other printed Land Registry forms) may be purchased from any branch of HM Stationery Office or through a law bookseller or stationer. Any other person may, with the written authority of the registered proprietor, likewise obtain an office copy of the register. Office copies are usually prepared and despatched within two days of the receipt of the application.

SEARCHES OF THE REGISTER

An intending purchaser, lessee or mortgagee who holds the written authority of the registered proprietor to inspect the register may apply to the appropriate district land registry for an official search to ascertain whether any entries have been made in the register since the date of issue of the office copy or, alternatively, the date on which the land certificate was last made to correspond with the register. The issue of the official certificate of the result of search will automatically confer upon the purchaser, lessee or mortgagee priority for a full period of thirty working days for the lodging of the application to register the disposition. If the disposition is of the whole of the land in the registered title, application should be made in printed form 94A but, if it affects only a part of the land in the registered title printed form 94B should be used. The official certificate of the result of search will be issued in most cases by return of post.

The above is a general outline of the procedure for obtaining an official certificate of search as laid down by the current land registration rules relating to official searches. The effect of these rules is explained in Practice Leaflet No. 2 which is obtainable free of charge from any district land registry. This deals with the procedures of searching in much greater detail than can be given here: It also explains how an application for official search without priority can be made and how solicitors can make official searches by telephone or teleprinter. Before applying for official searches, applicants are strongly recommended to refer to the current land registration rules relating to official searches or to Practice Leaflet No. 2.

INSPECTION OF THE LAND

Intending purchasers should inspect the land for the purpose of ascertaining its precise boundaries and discovering whether there are any rights of way, light, drainage or other overriding interests to which it is subject (see the inside back page of this cover sheet). Enquiries should also be addressed to any person in occupation of the land or buildings thereon as to their rights of occupation and to whom rent (if any) is paid.

REVISION OF THE ORDNANCE SURVEY MAP

The title plans prepared by H.M. Land Registry are based on the large scale maps of the Ordnance Survey. The Ordnance Survey Map is revised from time to time and a new title plan based on a later revision may be substituted for the plan filed at the Land Registry. If this occurs, an entry to that effect will be made in the register and the copy of the title plan in this certificate will be replaced when the certificate is next lodged at the Land Registry.

ADDRESS FOR SERVICE

The address of any person as entered in the register shall, unless he otherwise directs, be his address for service (Land Registration Rules, 1925, rule 315). Registered proprietors should notify the appropriate district land registry of any change of address and forward the land certificate for amendment. No fee is charged for making the alteration.

Fig. 6(b)

Fig. 6(c)

H.M. LAND REGISTRY

Edition 3 opened 1.5.1988 TITLE NUMBER 00002 *This register consists of* 2 *pages*

A. PROPERTY REGISTER

containing the description of the registered land and the estate comprised in the Title

COUNTY	DISTRICT
BLANKSHIRE	BROXMORE

The Freehold land shown and edged with red on the plan of the above Title filed at the Registry registered on 12 October 1934 known as 2 Moon Street

B. PROPRIETORSHIP REGISTER

stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposing thereof

TITLE ABSOLUTE

Entry number	Proprietor, etc.
1.	JOHN SMITH, Printer and WILLIAM BROWN, Engineer, both of 4 Moon Street, Broxmore, Blankshire, registered on 1 May 1988.
2.	RESTRICTION registered on 1 May 1988:- No disposition by one proprietor of the land (being the survivor of joint proprietors and not being a trust corporation) under which capital money arises is to be registered except under an order of the registrar or of the Court.
3.	CAUTION in favour of Jesse Turnbull of 30 Park Way, Newtown, Blankshire, Electrical Engineer, registered on 7 October 1988.

Demand No. 8304616 4/82 W & W Ltd. 1314

del III

Any entries struck through are no longer subsisting

C. CHARGES REGISTER

containing charges, incumbrances etc., adversely affecting the land and registered dealings therewith

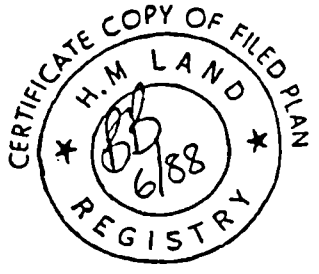
Entry number	The date at the beginning of each entry is the date on which the entry was made on this edition of the register	Remarks
1.	1 May 1988 - A Conveyance of the land in this title dated 30 September 1934 and made between (1) Mary Brown (Vendor) and (2) Harold Robins (Purchaser) contains the following covenants: "The Purchaser hereby covenants with the Vendor for the benefit of her adjoining land known as 27, 29, 31, 33 Cabot Road to observe and perform the stipulations and conditions contained in the Schedule hereto. THE SCHEDULE before referred to 1. No building to be erected on the land shall be used other than as a private dwellinghouse. 2. No building to be erected as aforesaid shall be converted into or used as flats, maisonettes or separate tenements or as a boarding house. 3. The garden ground of the premises shall at all times be kept in neat and proper order and condition and shall not be converted to any other use whatsoever. 4. Nothing shall be done or permitted on the premises which may be a nuisance or annoyance to the adjoining houses or to the neighbourhood."	H.M. LAND REGISTRY
2.	1 May 1988 - LEASE dated 25 July 1935 to Charles Jones for 99 years from 24 June 1935 at the rent of £45.	Lessee's title *registered* under 00003 H.M. LAND REGISTRY
3.	1 May 1988 - NOTICE of Deposit of Land Certificate with Mid Town Bank Limited of 2 High Street, Broxmore, Blankshire, registered on 1 May 1988.	H.M. LAND REGISTRY

Any entries struck through are no longer subsisting

H.M. LAND REGISTRY

	TITLE NUMBER	
	00002	
DNANCE SURVEY AN REFERENCE: SF 6205	SECTION C	Scale 1/1250
UNTY BLANKSHIRE DISTRICT BROXMORE		© Crown copyright 1980

Fig. 6(e)



BIRKENHEAD

HALDANE

HALSBURY

CAIRNS

SELBORNE

WESTBURY

HM Land Registry

Land Certificate

This is to certify

that the land described within and shown on the official plan is registered at HM Land Registry with the title number and class of title stated in the register.

There are contained in this certificate office copies of the entries in the register and of the official plan and, where so indicated in the register, of documents filed in the Land Registry.

Under section 68 of the Land Registration Act, 1925 and rule 264 of the Land Registration Rules, 1925 this certificate shall be admissible as evidence of the matters contained herein and must be produced to the Chief Land Registrar in the circumstances set out in section 64 of the said Act.

HM LAND REGISTRY

HM LAND REGISTRY

DIEU ET MON DROIT

Fig. 7(a)

HM Land Registry

TITLE NUMBER : CS72510

Fig. 7(b)

Edition date : 15 July 1988

Entry No.	A. PROPERTY REGISTER containing the description of the registered land and the estate comprised in the Title
	COUNTY: CORNSHIRE — DISTRICT: MARADON
1.	The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 9 Summers Street, Looe.
2.	The mines and minerals together with ancillary rights of working are excepted.

Entry No.	B. PROPRIETORSHIP REGISTER stating nature of the Title, name, address and description of the proprietor of the land and any entries affecting the right of disposing thereof TITLE ABSOLUTE
1.	(2 October 1987) Proprietor(s): GROUP CAPTAIN JOSEPH ALLEN MBE of 62 Cadogan Place, London, SW1 and THOMAS ALLEN of 26 Moor View, Liskeard, Cornwall.

Entry No.	C. CHARGES REGISTER containing charges, incumbrances etc. adversely affecting the land and registered dealings therewith
1.	A Conveyance of the land in this title and other land dated 17 November 1975 made between (1) The National Trust for Places of Historic Interest or Natural Beauty (Vendor) and (2) John Edward Charles Brown contains covenants details of which are set out in the Schedule of restrictive covenants hereto.

Item No.	SCHEDULE OF RESTRICTIVE COVENANTS
1.	The following are details of the covenants contained in the Conveyance dated 17 November 1975 referred to in the Charges Register. "The Purchaser with the intent that the burden shall bind the property hereby conveyed and each and every part thereof HEREBY COVENANTS with the Vendor for the benefit of adjoining land retained by the Vendor and under and by virtue of Section 8 of the National Trust Act 1937 to observe and perform the covenants and stipulations set out in the Fourth Schedule

Continued on the next page

HM Land Registry

TITLE NUMBER : CS72510

Fig. 7(c)

Item No.	SCHEDULE OF RESTRICTIVE COVENANTS (continued)
	hereto FOURTH SCHEDULE RESTRICTIVE COVENANTS AND STIPULATIONS 1. Not to erect or permit to be erected any building exceeding two storeys in height nor any building having a flat roof provided that this covenant shall not prevent the erection of garages with flat roofs 2. Not to erect or permit to be erected any building having at any point a height greater than ten feet above the height of the ground on the northern boundary of the property nearest thereto 3. Not to erect any flats hotels shops or cafes on the property or use or permit the use of any buildings to be erected thereon for such purposes 4. Not to erect or permit to be erected any building other than buildings constructed of materials compatible with existing developments in the neighbourhood."

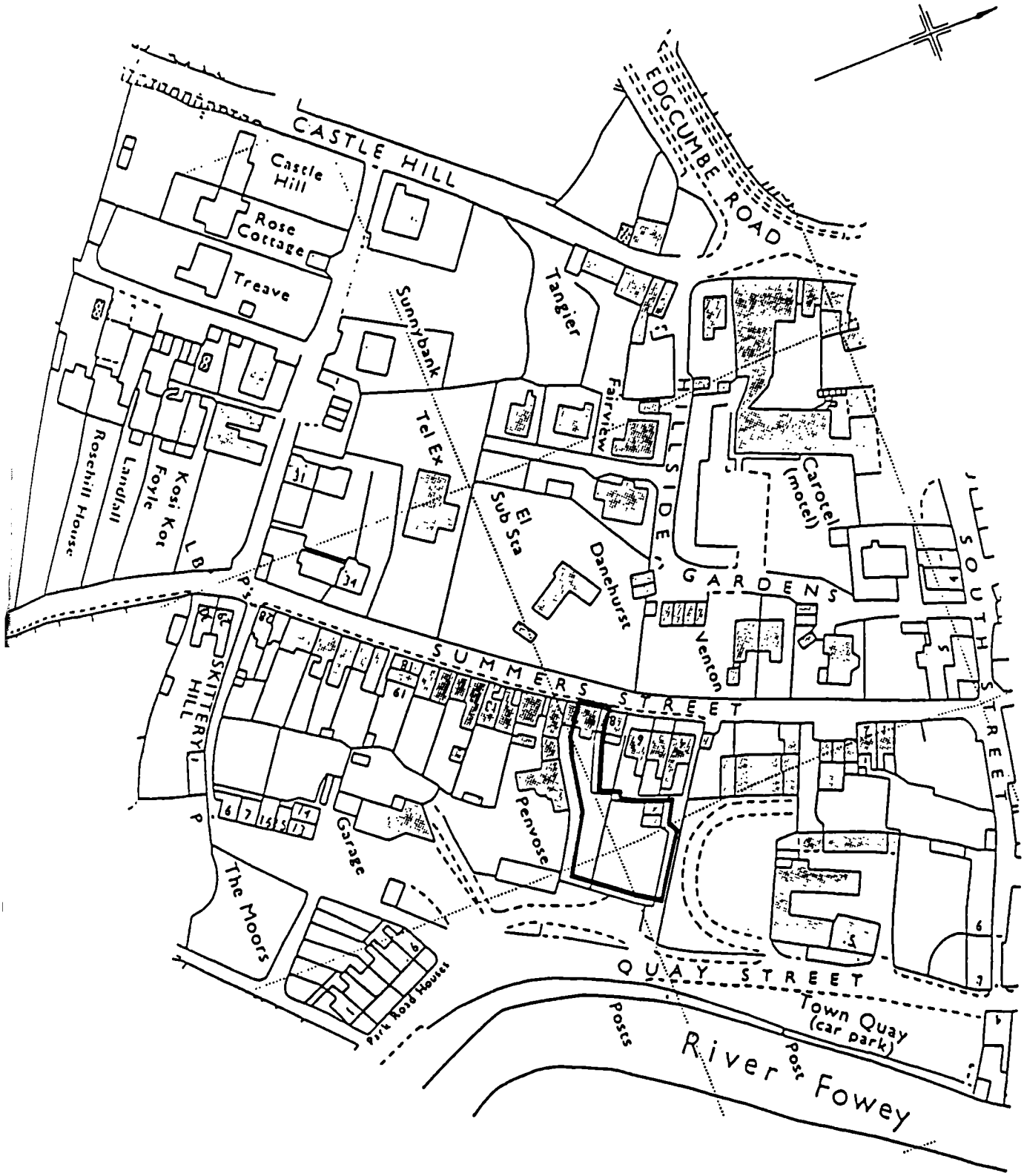
***** END OF REGISTER *****

NOTE A: A date at the beginning of an entry is the date on which the entry was made in the Register.

NOTE B: This certificate was officially examined with the register on **15 July 1988.** This date should be stated on any application for an official search based on this certificate.

Fig. 7(d)

H.M. LAND REGISTRY		TITLE NUMBER CS72510	
ORDNANCE SURVEY PLAN REFERENCE	SX 3264	SECTION E	Scale 1/1250 Enlarged from 1/2500
COUNTY CORNSHIRE	DISTRICT MARADON		© Crown copyright 1979



no evidence that this was Parliament's intention - indeed the Law Commission in their report[67] did not advert to the fact that the abolition of part performance would destroy the creation of equitable mortages by the deposit of deeds - for if it was, section 66 of the Land Registration Act would have also been repealed.[68]

Nevertheless, even where unregistered land is concerned, the position is still doubtful in view of the fact that section 13 of the Law of Property Act 1925 provides that the Act,

> "shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land ..."

Had Parliament intended to abolish the creation of equitable mortgages by the deposit of the documents of title, then section 13 would have been amended by the 1989 Act.

Where registered land is concerned, the question is whether section 66 should be read subject to section 2(1) of the 1989 Act so that a deposit of the land certificate with the mortgagee should be accompanied by a memorandum incorporating the terms of the contract and signed by both parties, in view of the abolition of

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67 Transfer of Land: Formalities for Contracts for Sale etc. of Land, Law. Com. No. 164.

68 See Lionel Bently and Paul Coughlan, *op. cit.*, at p. 341, who argue that by not amending section 66 of the Land Registration Act 1925, Parliament did not intend to affect the creation of equitable mortgages by the deposit of title deeds.

part performance by section 2(8) of the 1989 Act;[69] in the alternative, whether a lien can still be validly created by a simple deposit of the land certificate without more.

How should this apparent conflict be resolved? The view has been expressed that "the role of the judge is not to reconcile legislative provisions unless it is reasonable to infer that this is what the legislator intended."[70] Since no intention can be inferred either from the statutory provisions or from the comments of the Law Commission, that section 66 of the Land Registration Act 1925 and section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 are to be read together, it would follow that the formalities in section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 need not be complied with if a lien is created under section 66 of the Land Registration Act 1925. This interpretation would be in accord with the decision of the House of Lords in Re v Barnet London Borough Council ex p. Nilish Shah[71] where

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69 An argument can indeed be raised as to whether the law of part-performance has been abolished by section 2(8) of the 1989 Act, Section 40(2) of the Law of Property Act 1925, which was repealed by section 2(8) of the 1989 Act, the doctrine of part performance which had, in any event, been well established and recognised, irrespective of statutory recognition. Therefore, the repeal of section 40 of the 1925 Act, arguably, may not have affected the law relating to part performance. The words used in section 2(8) of the 1989 Act could have been more explicit in destroying part performance.

70 Cross, Statutory Interpretation, 2nd ed. by Dr. John Bell and Sir George Engle (London 1987), p. 94.

71 [1983] 2 A.C. 309.

it was considered whether section 1(1) of the Education Act 1962 should be read subject to the Immigration Act 1971. The Court held that section 1(1) could not be read subject to the 1971 Act. Lord Scarman expressed the view that,

> "It cannot be permissible in the absence of a reference (express or necessarily to be implied) by one statute to the other to interpret an earlier Act by reference to a later Act."[72]

Even if it is accepted that a lien can be created over registered land following the deposit of the land certificate with the mortgagee under section 66 of the Land Registration Act 1925, without having to comply with section 2(1) of the 1989 Act, it is submitted that section 66 belies the true status of a land certificate in registered land. A land certificate is not conclusive evidence of title. It is the register which is conclusive as to the state of the title and therefore, in accord with general registered land law principles, only the register should form the basis of transactions. Section 66 is therefore an anomaly in a system of registered title. It is indeed ironic that while section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 was designed to introduce formality in the dispo sition of land and interests in land, section 66 of the Land Registration Act 1925 retains the informality in a system of land

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[72] *Ibid.*, at pp. 349-349.

registration that was itself, designed to eliminate unregistered land law principles.

B. The 'Title Deed' in Kenya

In Kenya, during the colonial period, the strong demand for land[73] was also coupled for a demand for 'title deeds', because, apparently, this was the way they saw the European landowners prove their title to land.[74] Consequently, when land registration was introduced in the Trust Lands, the land certificates issued under the Native Land Tenure Rules 1956, followed by the Native Lands Registration Ordinance 1959 and subsequently by the Registered Land Act 1963 were constantly referred to as 'title deeds'. As the Attorney General pointed out in Parliament, the phrase 'title deed' was so synonymous with the land certificate to the extent that mention of the land certificate would elicit the response, "You mean the title deed"?[75]

In response, the President of Kenya, issued to the Attorney General's office a directive stating that since the majority of people refer to the land certificate as a 'title deed, the land certificate issued under the Registered Land Act 1963 should be withdrawn and replaced by a document called a 'title

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73 See Chapter Two, *supra*.

74 S.R. Simpson, *op.cit.*, p.167.

75 The National Assembly, Unpublished Transcripts of Parliamentary Proceedings, Vol. LXXI, 1 April 1987, Col. R.1

deed'.[76] As a result, Parliament passed the Registered Land (Amendment) Act 1987 to amend section 32 of the Registered Land Act 1963. References in section 32 to the 'Land Certificate' were to be deleted and replaced with 'title deed'.[77] A new document to replace the land certificate headed 'title deed' was issued.[78] Illustrated overleaf is a copy of the land certificate that was formerly issued to proprietors under section 32 of the Registered Land Act 1963 as well as the new 'title deed'. The land certificate containes the details that are on the property, proprietorship and encumbrances sections of the register. However, as the copy of the new 'title deed' shows, the main change is in the heading of the document. The only other change is in that the 'title deed' on the front page, has details of the approximate area of the land and the Registry Map Sheet number of the title, such details contained inside both documents in any event. Unlike the land certificate issued under the Land Registration Act 1925, the 'title deed', as was the case with the former land certificate before 1987, contains no filed plan. As was explained in Chapter Three, the Registry Index Maps, drawn on the basis of aerial photographs and ground surveys during land consolidation and adjudication, were very inaccurate and could not be

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76 *Ibid.*, Col. Q.2.

77 1st Sched.

78 2nd Sched.

relied on conclusively to determine the exact position of boundaries. It is intended to resurvey all the areas that were adjudicated and subsequently brought onto the register.[79] It is uncertain whether the new Registry Index Maps would be used to draw individual filed plans for the certificates of title, as is the case under the Registration of Titles Act 1919.[80]

What is the practical effect of naming the land certificate a 'title deed'? *Prima facie*, it may appear to create a fundamental change in the practice of registered land in Kenya. For example, since a title deed is a document which confers or is proof of title to land[81] there is the danger that purchasers of land will come to accept the 'title deed' as proof of title without undertaking a search of the register. Such a transaction off the register would create serious problems for the purchaser since he may find himself subject to adverse registered interests. Such transactions have the potential of increasing the incidence of fraud considerably. Moreover, there is also the danger that the courts may be lulled by such a change into applying unregistered land law principles in order to protect innocent purchasers who have

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79 A.K. Njuki, Cadastral Surveys in Kenya, The Nairobi Law Monthly, September 1987, 13 at p. 17.

80 See Chapter Three, *supra*.

81 See Osborn's Concise Law Dictionary, 7th ed., by Roger Bird, (London 1983) p.324.

REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(Chapter 300)

Land Certificate

REGISTRATION DISTRICT ..... TITLE NUMBER .....

This is to certify that .....

.....

.....

.....

is (are) now registered as the absolute proprietor(s) of the land comprised in the above-mentioned title, subject to the entries in the register relating to the land and to such of the overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land.

GIVEN under my hand and the seal of the

..... District Land Registry

this ..... day of ....., 19.....

.....

Land Registrar

(To be completed only when the applicant has paid the fee of Sh. 50)

At the date stated on the front hereof, the following entries appeared in the register relating to the land:

EDITION:

OPENED:

PART A—PROPERTY SECTION

REGISTRATION SECTION	EASEMENTS, ETC.	NATURE OF TITLE
PARCEL NUMBER		
APPROXIMATE AREA		ABSOLUTE
——— Ha.		
REGISTRY MAP SHEET No.		

PART B—PROPRIETORSHIP SECTION

ENTRY NO.	DATE	NAME OF REGISTERED PROPRIETOR	ADDRESS AND DESCRIPTION OF REGISTERED PROPRIETOR	CONSIDERATION AND REMARKS	SIGNATURE OF REGISTRAR

PART C—ENCUMBRANCES SECTION

ENTRY NO.	DATE	NATURE OF ENCUMBRANCE	FURTHER PARTICULARS	SIGNATURE OF REGISTRAR

....
Land Registrar

REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(Chapter 300)

Title Deed

Title Number .....

Approximate Area .....

Registry Map Sheet No. .....

*This is to certify that*_____

.....

.....

.....

is (are) now registered as the absolute proprietor(s) of the land comprised in the above-mentioned title, subject to the entries in the register relating to the land and to such of the overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land.

GIVEN under my hand and the seal of the

.....District Land Registry

this.....day of_____, 19___

.....

Land Registrar

(To be completed only when the applicant has paid the fee of Sh. 50)

At the date stated on the front hereof, the following entries appeared in the register relating to the land:

EDITION:	
OPENED:	

PART A—PROPERTY SECTION

REGISTRATION SECTION	EASEMENTS, ETC.	NATURE OF TITLE
PARCEL NUMBER		
APPROXIMATE AREA		ABSOLUTE
——— Ha.		
REGISTRY MAP SHEET No.		

PART B—PROPRIETORSHIP SECTION

ENTRY NO.	DATE	NAME OF REGISTERED PROPRIETOR	ADDRESS AND DESCRIPTION OF REGISTERED PROPRIETOR	CONSIDERATION AND REMARKS	SIGNATURE OF REGISTRAR

PART C—ENCUMBRANCES SECTION

ENTRY NO.	DATE	NATURE OF ENCUMBRANCE	FURTHER PARTICULARS	SIGNATURE OF REGISTRAR

Land Registrar

transacted off the register by, for example, introducing the doctrine of notice.

However, such fears are, at present, groundless. There is no evidence so far that this is taking place. The 'title deed' has not in fact changed normal practice. Parties attending the Kiambu Registry were aware of the need to register dispositions of land notwithstanding the proprietor having a 'title deed'. Moreover, as an important safeguard, it was noted at the Kiambu Registry that title deeds were not updated whenever there was a transaction or an entry made on the register. In fact it was not the practice to update the 'title deeds' at all, notwithstanding the fact that section 33(1) of the Registered Land Act 1963 provides that on every dealing with the land a note shall be made on the title deed.[82] Land certificates in England, in contrast, are continuously updated every time a transaction affecting the title is made, and the requirements in section 64 of the Land Registration Act 1925 rigidly adhered to. Kiambu Registry practice, which is also followed in other registries, amounts to an important safeguard even though not complying with section 33(1) of the 1963 Act, because it has enabled people to come to rely more on the certificate of search than the title deed as evidence of title. Furthermore, there is no evidence as yet that the

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82 Nevertheless a new 'title deed' is issued every time there is a transfer of land.

courts have begun at all to introduce the doctrine of notice as a result of this change.

The transformation of the land certificate to 'title deed' is therefore merely a change in form rather than substance. Such a change, however, is an indication of the effect the views of the layman can have in altering standard registration practice.[83] It reminds one of the warning made by Dowson and Sheppard that land certificates, particularly if they were ornate and impressive looking, may end up being treated as title deeds among an 'unsophisticated and illiterate' population.[84] Kenya is a good illustration of what can happen when the majority form such a misconception.

VI CONCLUSION

Personal attendance is a remarkable feature of registered land practice in Kenya and has been made possible by several factors. Primarily, the public campaign by the administration to enable members of the public to be aware of land registration, its effect and its benefits, has enabled landowners to have the confidence of undertaking their own transactions without having to obtain the services of a lawyer. The public campaign was part of the process of systematic land adjudication; before land was adjudicated the

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83 See *supra*.

84 Sir Ernest Dowson & V.L.O. Sheppard, Land Registration, 2nd ed. (London 1956). p.79.

residents and landowners within the adjudication section were informed through public meetings or *'barazas'* of the intention of the administration to introduce land registration in that particular area, and how registration would increase security of title which customary law was failing to do.[85] Public awareness of land registration however, meant that lawyers ended up with an exiguous amount of conveyancing business related to the Registered Land Act 1963 particularly in the rural areas. Unlike the average landowner in England and Wales who is generally unaware of the procedures involved in transferring his land, largely due to the mystification of conveyancing by the legal profession, the average landowner in Kenya displays remarkable aptitude in undertaking his own transfer.

The Land Registries in Kenya are able to cope with the personal attendance by landowners and interested persons primarily because the volume of transfers, searches and applications for first registration are relatively low. Kiambu District Land Registry for example has on its register, a little over 95,000 titles. Between 1988 and 1989 the Registry registered 3,912 first registrations of titles, 4,742 transfers of land and made 6,489 official searches.[86] In contrast,

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85 See Report of the Working Party on African Land Tenure 1957-58, (Nairobi 1958), para.24.

86 Kiambu District Land Registry, Monthly Returns, July 1988-July 1989.

during the same period, the Nottingham District Land Registry registered 70,188 first registrations of title, 283,145 transfers and 675,870 searches of the register.[87] The difference in figures between the two registries is all too obvious. The Nottingham Registry would be unable to cope if individuals involved in land transactions were all to undertake their transactions at the Registry as is the practice in the Kiambu Registry. At present the Nottingham District Land Registry is barely able to cope with the avalanche of dealings in land it has been receiving in the 1980's. Staff there are kept continually busy; the pressure of work there has increased the need for more staff to be deployed at the Registry.[88]

The large volume of dealings with land in England facilitated the introduction of making searches of the register by telephone or telex[89] and also by facsimile

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87 Report on the Work of H.M. Land Registry 1988-89, (H.M.S.O. 1989).

88 Interview with Mr. Brown, Senior Land Registrar, Nottingham District Land Registry, 5th July 1989. The need for more staff to be deployed at the land registries in England to cope with the increasing backlog of registrations has been a frequent demand, in view of the fact that the Land Registry has been generating large surpluses from fee income. However the latest report from the Chief Land Registrar for the year 1989-1990 indicates that the slump in the property market has caused a decline in the number of first registrtions. The Nottingham District Land Registry recorded 61,311 first registration, a fall of 8,877 - Report on the work of H.M. Land Registry for England & Wales 1989-90, (H.M.S.O. 1990).

89 See now Land Registration (Official Searches) Rules 1990, S>I. 1361, r. 12.

transmission.[90] An application for an official search with priority can be made using one of these mediums, so long as the requirements in rule 3(3)(b) of the Land Registration (Official Searches) Rules 1990 are complied with. Alternatively, a search without priority can be made by telephone or telex.[91] These means help to cut down the time spent in making a search of the register, thereby speeding up the conveyancing of registered land. Even greater advances will be made when the register is fully computerised; a person with a computer terminal will be able to make a direct search of the register itself when the register if fully open to the public - such a feature would undoubtedly reduce the time it takes to register a transfer.[92]

Personal attendance on the other hand can be extremely wasteful of time. Parties attending Kiambu District Land Registry often travelled long distances by public transport to reach the registry. Since searches were not often completed in a day, it meant that a person would have to make several visits to the Registry to speed up matters. If the land was

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90 *Ibid*, r. 3(3)(b)(ii). See also the Land Registration (Open Register) Rules 1990, S.I. 1362, r. 10.

91 Land Registration (Official Searches) Rules 1990, S.I. 1361, r. 12.

92 Computerization has been extended to the Plymouth, Gloucester and Swansea District Land Registries. It has enabled applications to be processed faster as the information relating to the title is available on screen at the touch of a button.

agricultural, the parties would have to attend the land control board meetings, which were not held at the Registry, before returning to the Registry to register the documents of transfer. Consequently, the cost of transport and other expenses would inexorably rise, thus increasing the overall transaction costs for vendor and purchaser. Although searches by telephone would save a person time, there are no plans at present to introduce such a facility. Nevertheless, searches of the register have been facilitated by unrestricted public access to it. The time taken to complete a transaction is reduced, as the need to obtain the written authority of the proprietor, as has been the case in England is obviated. Such an advantage will be evident in England when the Land Registration Act 1988 is brought into force.

The modernisation of the land registries in Kenya is hampered by the lack of finance. Like the Land Registry in England whose fee income goes into the coffers of the Treasury[93], the fee income produced by the Land Registry in Kenya goes to the Government[94]. The Kiambu Registry, for example, is able to generate a large surplus[95] but hardly anything is ploughed back to improve services. The facilities are run down and

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93 H.M. Land Registry made a surplus amounting to £84 million in 1985/86 and £25 million in 1986/87.

94 The exact figures were not made avalable.

95 Interview with Kiambu District Land Registrar, 2 October 1989.

dilapidated. The increase in the number of titles registered has reduced the amount of storage space available, and consequently the register binders are piled up on top of each other without any semblance of order. The official vehicle for the Registrar is constantly broken down, with the inevitable result that the Registrar has to cancel trips to resolve boundary disputes for example. A senior official confided that at times there is even no money to buy new binders for the register, due to the shortage of finance.

This situation is deplorable in view of the income generated by the Registry. However, similar Government controls over the fee income produced by the Land Registry in England and Wales has resulted in demands for the Government to reduce the financial control it has over the Registry and enable it to invest the money it generates.[96] The response to these demands has been significant. The Lord Chancellor's Department announced that H.M. Land Registry would become an executive agency from 2nd July 1990. According to Lord Mackay, the Lord Chancellor, the resulting management flexibilities together with the Registry operating a trading fund would provide overall improvement to the performance of the Registry.[97] This initiative is part of a trend by the present Government to hive off parts

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[96] See National Audit Office, Review of the Operations of H.M. Land Registry, July 1987; Parliamentary Debates, House of Lords, 5th Ser., vol. 490, cols. 686-7.

[97] (1990) 134 S.J. 409.

of the civil service in line with its 'Next Steps' initiative to improve management within the civil service. Although such a step need not necessarily be taken with the Land Registry in Kenya, it needs to be allowed to have control over some of the fee income it generates.

The amendment introduced by the Registered Land (Amendment) Act 1987 replacing the land certificate with a 'title deed' is unprecedented in the Commonwealth. The potentially damaging consequences of such a change are twofold: first, it may encourage dispositions of land off the register, for example, there may be the tendency to create equitable mortgages by depositing the 'title deeds' with the chargee, without having them registered, such deposit made possible by section 33(3) of the Registered Land Act 1963; secondly, it may encourage the courts to introduce unregistered land principles into the Registered Land Act 1963. However, there is no evidence that this has taken place. The change was merely one of form rather than substance, designed to bring to reality the fiction in people's minds that the land certificate was a title deed. However, the prudent practice by the Registry not to make entries on the 'title deed' every time there is a dealing with the land, has eliminated the danger on people relying on the 'title deed' as proof of title rather than the register.

In England, the land certificate is virtually accorded the status of a title deed, particularly made evident by section 66 of the Land Registration Act 1925, which allows the creation of an equitable mortgage by the deposit of the certificate with the mortgagee. Doubt has, however, been cast upon this method of creation by section 2(8) of the Law of Property (Miscellaneous Provisions) Act 1989. Where unregistered land is concerned, the rule in Russel v Russel[98] may have been qualified by section 2(1) of the 1989 Act so that an equitable mortgage by the deposit of title deeds would have to be accompanied by a memorandum in writing signed by both parties, and incorporating the terms of the contract. But does section 2(1) of the 1989 Act extend to the creation of liens over registered land under section 66 of the Land Registration Act 1925? It was argued earlier that section 66 of the Land Registration Act 1925 should not be read subject to section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. Nevertheless, such a construction creates an anomaly between registered and unregistered land in England. It is submitted that the best result would be to repeal section 66, so that focus is laid on the register itself as the basis for all transactions, despite the fact that a repeal of section 66 would prevent a convenient method of creating mortgages.

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98 (1783) 1 Bro. C.C. 269.

Although it is remarkable that many individuals undertake their own conveyancing without the benefit of legal advice in Kenya, the next chapter shows the dangers of transferring land registered under the Registered Land Act 1963 without the benefit of legal advice.

Chapter Five

TRANSFERS OF REGISTERED LAND

I. Introduction

One of the advantages of the system of registered title, it is claimed, is that it provides for a 'simple' system of land transfer.[1] The Registration of Title Commissioners stated that the simplicity of transferring a registered title would be facilitated by the provision of simple transfer forms.[2] Registration of title would obviate the "wearisome and intricate" process in unregistered land whereby a purchaser had to undertake retrospective examination of title originating from a satisfactory root of title of at least 15 years on each successive transfer.[3] A purchaser proposing to buy registered land on the other hand would simply obtain proof of title by obtaining an office copy of the register and the title plan "without normally any problems arising from defects in the title or in the identity or extent of the land."[4] Although

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1 H.M. Land Registry, Registration of Title, A Brief Guide, 1988 Ed., p. 1.

2 Report of the Registration of Title Commission, 1857, C.2215, para. LXXXIX.

3 Williams & Glyns Bank v. Boland [1981] A.C. 487 at p. 511, per Lord Scarman. See Law of Property Act 1969, s. 23. However, such claims have not prevented defects in the extent of registered land conveyed - see A.J. Dunning Ltd. v. Sykes Ltd. [1987] 1 All E.R. 700 - discussed *supra*.

4 H.M. Land Registry, Explanatory Leaflet No.1., para. 8.

this may be so, registered title is subject to overriding interests which are not registered and which may not be easily discoverable.[5] Nevertheless, in England, it is evident that the main purpose of establishing a system of land registration was to simplify conveyancing. It is therefore not surprising that solicitors in the late 19th and early 20th centuries were virulently opposed to the introduction of registered titles since it was felt that it would do away with their skills.[6]

Significantly, one of the aims in establishing the system of land registration under the Registered Land Act 1963 was not to chiefly simplify conveyancing of unregistered land under the Land Titles Act 1908 or the Government Lands Act 1915[7] but more of an attempt to remove the uncertain methods of land transfer under customary law, replacing them with the comparatively easy methods of land transfer under the 1963 Act. Since this new method of transferring land would be alien to the Africans, who were only familiar with the customary methods of land transfer, it was proposed that the procedure for effecting a sale or other dealing should be kept as simple as possible to "enable parties to a transaction to conduct their business themselves in the Registry with the help of registry

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5 See Chapter Six *infra*.

6 See Chapter Two, *supra*.

7 Although this came later, see Registered Land Act 1963, s. 12.

staff."[8] The Land Registries were therefore to be made accessible to the people to enable dealings to be registered on personal application only, a design that was to keep lawyers out of registered conveyancing.[9]

To a large extent this is one of the most remarkable aspects of land transfer under the Registered Land Act 1963, in that lawyers are generally not involved in acting on behalf of vendors or purchasers in conveying land registered under the 1963 Act because the system is simple enough for parties to undertake their own conveyancing.[10]

However, one should ask whether it is really simple to transfer registered land in Kenya? This chapter discusses the formalities and the pitfalls involved in the transfer of registered land under the Registered Land Act 1963 and viewed in the context of the Land Registration Act 1925.[11] These include the

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8 Report of the Mission on Land Consolidation and Registration in Kenya 1965-66 (London 1966), para. 243. See also Report on the Conference of African Land Tenure in East and Central Africa 1956, (1956) J.A.A. (Special Supplement), para. 85.

9 See Chapter Four, *supra*.

10 This was evident from observation of the procedure followed in land transfers in the Kiambu District Land Registry between September and October 1989. In a period of two weeks there were 14 transfers of registered land for value, and in all these cases the parties to the transfers conducted the transactions at the land registry without the benefit of legal advice. The writer was also attached to the conveyancing department of a large law firm in Kenya and it was significant that very few transfers of land registered under the Registered Land Act 1963 were dealt with on behalf of individuals by the firm.

11 This chapter is principally concerned with the transfer of freehold land.

significance of a contract in writing for the sale of registered land and, in this connection, whether section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 does indeed abolish the doctrine of part performance in England; the relevance of implied covenants for title in registered conveyancing and the significance of the fact that the Registered Land Act 1963 does not imply such covenants; the procedure involved in searching the register of title and other searches that a purchaser of registered land should make; the unusual procedure under the Registered Land Act 1963 whereby the execution of instruments must be verified by the Registrar or other persons; and finally the significance of obtaining land control consent in Kenya under the Land Control Act 1967, especially where the transfer involves registered land.

In view of the formalities discussed above what are the lurking dangers that may affect an unsuspecting individual acting on his own behalf without the benefit of legal advice, when transferring land registered under the Registered Land Act 1963? The absence of implied covenants for title under the Registered Land Act 1963 may limit the protection of such an individual in view of the limits on rectification of the register and indemnity;[12] moreover, such an individual may be severely prejudiced if the procedure for obtaining land

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12 See Chapter Eight, *infra*.

control consent is not observed. These matters and related issues are discussed.

II. Formalities in the Transfer of Registered Land

A The Contract

Land registered under the Registered Land Act 1963 can only be transferred in accordance with the Act.[13] Transfers of land are performed in accordance with form R.L.[114] A purchaser is registered as proprietor of the land when he submits a completed form applying for the registration of the transfer[15] together with the transfer form.[16] The transfer is completed when the Registrar enters on the register of title the transferee as proprietor of the land transferred. In view of the fact that the statutory transfer forms must be used for registration to be effective, what is the relevance, where registered land is concerned, of the requirement in section 3(3) of the Law of Contract Act 1961[17] that contracts for the sale of land must be in

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13 Registered Land Act 1963 s. 38(1) *C.f.* Land Registration Act 1925, s. 69(4).

14 Registered Land Act 1963, s. 108(1), Registered Land Rules 1963, Third Schedule. For a copy of the form, see Appendix. Transfers of registered freehold land under the Land Registration Act 1925 are done in accordance with form 19 - Land Registration Rules 1925, r 98.

15 Registered Land Rules 1963, Third Schedule, Form R.L. 28. For a copy of the form see Appendix.

16 A form that should also be submitted is the Divisional Land Control Board consent. For a discussion of land control consent, see *infra*.

17 *C.f.* Law of Property (Miscellaneous Provisions) Act 1989, s. 2(1). Section 3(3) of the Law of Contract

writing? In theory there is no need for the vendor and purchaser to enter into an express contract for sale.[18] They can simply make an oral agreement regarding the price to be paid and thereafter sign the transfer form,[19] which contains a description of the property, the parties, and the consideration paid,[20] apply for land control consent if the land falls within the Land Control Act 1967, and subsequently send the form off, together with the other relevant forms, to the land registry to have the transfer registered. A similar view had been expressed by Brickdale and Stewart-Wallace who reckoned that a contract was not really necessary in the transfer of land registered under the Land Registration Act 1925. In their words:-

> "A purchaser of land with an absolute title ... has ordinarily only three things to do; namely (1) to find out who is the registered proprietor of the land; (2) to obtain a transfer ... from that proprietor; and (3) to procure his own registration ... Where the parties have confidence in one another, and desire to save expense and delay, there is no difficulty and practically no risk in combining the first two of these operations in one. The vendor produces his land certificate, the purchaser peruses it, and if

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Act had formerly been part of section 39(2) of the Registered Land Act and, therefore, it had only applied to land registered under the 1963 Act. However, section 39(2) was repealed and re-enacted in the Law of Contract (Amendment) Act 1968. It now applies to the sale of all land, rather than merely land registered under the 1963 Act.

18 See I.R. Storey, Conveyancing, 2nd Ed., (London 1987) p. 25.

19 Once the relevant searches are made, see *infra*.

20 The transfer form would fulfill the requirement of writing.

> satisfied, pays the purchase money at once in exchange for a duly executed instrument of transfer, and the land certificate."[21]

Until the transfer form is registered it may operate as a contract between the parties.[22] However, the transfer form contains only the bare terms that the parties will have agreed to, that is, the price and the description of the property to be conveyed by reference to the title number.[23] The parties may have agreed upon certain other terms and obligations which, if not expressly stated in a contract, may not be enforceable if a party is in breach. For example if a sale included chattels, fittings or other separate items the vendor may warrant that he is entitled to sell them free from any charge or lien. Other conditions may include the method of payment for the purchase price, penalties for late payment, as well as covenants for title.[24] A written contract therefore confers protection on the parties because if one of them is in breach of the terms of the contract then the other

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21 The Land Registration Act 1925, 3rd ed., (London 1927) p. 28. However, the practice stated by the learned authors should be qualified in one important respect: the purchaser should inspect the register rather than the land certificate since the latter may be out of date. Unless the parties are preparee to go down to the Land Registry to personally search the register and complete the transaction there, it would be to the purchasers advantage to obtain an official search. For a discussion of the latter, see below.

22 Registered Land Act 1963, s.38(2).

23 See form R.L. 1, Appendix. A contract containing such terms is termed an open contract - Cheshire & Burns Modern Law of Real Property, 14th ed. by E.H. Burns (London 1988), p. 106.

24 For a discussion on covenants, see *infra*.

party would be entitled to sue him or rescind the contract. For example in the English case of Re Stone and Saville's Contract[25] the purchaser entered into an open contract for the sale of registered land and paid a deposit. After entering into the contract, she discovered that the charges register referred to a restrictive covenant, which, unknown to her at the time, had been released. She successfully rescinded the contract and had her deposit returned.

The effect of section 3(3) of the Law of Contract Act 1961 is that an oral contract for the sale of land will not be void, but simply unenforceable.[26] The requirement of writing in section 3(3) is almost identical to the provision in the now repealed section 40 of the Law of Property Act 1925 which required contracts for the sale of land to be evidenced in writing.[27] However, the proviso to section 3(3) of the Law of Contract Act 1961 goes on to define what acts of part performance will be effective for a purchaser to enforce an oral agreement.[28] It states that the

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25 [1963] 1 W.L.R. 173.

26 See for e.g. Leroux v. Brown (1852) 12 C.B. 801; Britain v. Rossiter (1879) 11 Q.B.D. 123; Maddison v. Alderson (1883) 8 App. Cas.467, on the effect of section 4 of the Statute of Frauds 1677.

27 See now section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

28 In comparison, section 40(2) of the Law of Property Act 1925 had simply provided that subsection (1), which required writing, did not "affect the law relating to part performance." It was left to the common law to fill in the elements relating to part performance.

absence of writing will not be fatal to a suit if the intending purchaser or lessee who is willing to perform part of his contract:

> "i) has in part performance of the contract taken possession of the property or any part thereof; or
> ii) being already in possession, continue in possession in part performance of the contract and has done some other act in furtherance of the contract."

The requirement of writing in sections 3(3) of the Law of Contract Act 1961 and section 40(1) of the Law of Property Act 1925 had been derived from the Statute of Frauds 1677 which had been designed to prevent disputes over oral dealings in land and in particular, to prevent fraud which was possible when contracts for the sale of land could be alleged on oral testimony.[29] However, the possibility had been open for persons to repudiate a genuine contract on the ground that there was no memorandum as required by the Statute, thereby opening the way for it to be used as an instrument of fraud.[30]

The equitable doctrine of part performance was therefore "an invention of the Court of Chancery"[31]

Sir Robert Megarry & H.W.R. Wade, The Law of Real Property, 5th ed., (London 1984) pp. 589 *et. seq.*

[29] Tudor Jackson, The Law of Kenya, 3rd Ed., (Nairobi 1988), p. 146; Kevin Gray, Elements of Land Law, (London 1987), p. 210; Sir Robert Megarry & H.W.R. Wade, The Law of Real Property, 5th Ed., (London 1984), p. 587.

[30] See Maddison v Alderson (1883) 8 App. Cas. 467, at p. 474 per Earl of Selbourne L.C.

[31] Steadman v Steadman [1976] A.C. 536 at p. 540 per Lord Reid.

resting upon the principle that "Equity will not permit the statute to be made an instrument of fraud."[32] Selborne L.C. went on to explain that the

> "defendant is *really 'charged' upon the equities resulting from the acts'* done in execution of the contract and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."[33] (Italics mine).

Entry into possession was viewed as a sufficient act of part performance[34] and so was the deposit of title deeds with a mortgagee as security for a loan.[35] Upon proof of the act of part performance equity allowed a party to give parol evidence of an agreement that would have had to comply with the requirement of writing. Nevertheless, despite the entrenchment of the doctrine there were some judges who were perturbed by its growth and application.[36] Section 40(2) of the Law of Property 1925 statutorily recognised the law of part performance, the section simply stating that the requirement of writing in ssection 40(1) "does not

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32 Maddison v Alderson (1883) 8 App. Cas. 467 at p. 474 per Earl of Selborne L.C.

33 *Ibid.*

34 Morphett v Jones (1818) 1 Swan 172; Brough v Nettleton [1921] 2 Ch. 25; Kingswood Estate Co. Ltd. v Anderson [1963] 2 Q.B. 169.

35 Russel v Russel (1783) 1 Bro. C.C. 269; Shaw v Foster (1872) L.R. 5 H.L. 321 at pp. 339-340.

36 See for example, Lord Eldon in Ex p. Whitbread (1812) 19 Ves. 209, Ex p. Hooper (1783) 1 Bro. C.C. 270, and Lord Blackburn in Maddison v Alderson (1883) 8 App. Cas. 467 at pp. 488-489.

affect the law relating to part performance." It is therefore important to note that section 40(2) of the 1925 Act was simply recognising what was already well established, and that section 40(2) was not the foundation of part performance. Any future abolition of part performance would therefore have to be explicit.

It is therefore, at this juncture, of interest to compare section 3(3) of the Law of Contract Act 1961 and section 40(2) of the Law of Property Act 1925. Section 3(3) clearly defined the limits of the doctrine of part performance. A party could either have *'taken possession'* in part performance of the contract or if he was already in possession, *continue in possession in part performance of the contract and [do] some other act in furtherance of the contract.* (Italics mine)." Possession was therefore an important element of part performance in Kenyan land law. In contrast section 40(2) of the Law of Property Act 1925 left it, in effect, to equity to develop and fashion the law realting to part performance. This is evident looking at the high point of the development of part performance in the House of Lords decision in Steadman v Steadman[37] where the mere payment of a sum of money was held to amount to a sufficient act of part performance. Moreover, the preparation of and sending the deed of transfer to the wife was also a sufficient

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37 [1976] A.C. 536.

act of part performance as it was sent "in discharge of any obligation that rested on the [husband] by virtue of the contract."[38]

The Law Commission felt that as a result of this decision, the doctrine of part performance was left in an uncertain state because it would appear on the one hand that a purchaser could unilaterally enforce an oral contract for sale since there was no discussion in Steadman as to whether the dependant should have knowledge of, and acquiesce in, the plaintiff's acts amounting to part performance.[39] The uncertainty was further heightened by an argument that Steadman had simply lowered the standard of proof allowing the payment of money to be an act of part performance.[40]

This led the Law Commission to conclude that part performance should no longer have a role to play in contracts relating to land.[41] Their recommendations were incorporated in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2(1) of the Act provides that a contract for the sale or other disposition of an interest in land must be in writing,

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38 *Ibid.*, at p. 554 per Viscount Dilhorne. See also Lord Simon at p. 563 and Lord Salmon at p. 573.

39 Law Commission, Transfer of Land: Formalities for Contracts for Sale etc. of Land, Working Paper No. 92 (1985), paras. 3.23, 3.24.

40 M.P. Thomson, The Role of Evidence in Part-Performance [1979] Conv. 402.

41 Law Commission, Transfer of Land: Formalities for contracts for Sale etc. of Land, Law. Com. No. 164, para. 4.13.

incorporating all the express terms of the contract in one document or each of two or more documents, which is signed by both parties. Failure to comply with these requirements would render the contract void.[42]

Hence an important difference now between section 3(3) of the Law of Contract Act 1961 and section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 is that under the former, an oral contact is unenforceable but still valid, whereas under the latter, an oral contract is simply void. Moreover, section 2(8) of the 1989 Act repeals section 40 of the Law of Property Act 1925, thereby, abolishing part performance. Thereby, while part performance is still part of the law of Kenya within the limits prescribed by section 3(3) of the Law of Contract Act 1961, it is no longer part of English law.

But it is doubted by the writer whether section 2(8) of the 1989 has explicitly abolished the law relating to part performance.[43] As noted earlier, section 40(2) of the Law Property Act 1925 was statutory recognition of an equitable doctrine that was created in the 17th century, and which was well established by 1925. it is highly likely that had section 40(2) not been enacted, the courts would simply have continued to apply the doctrine of part

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[42] P.H. Pettit, Farewell Section 40 [1989] Conv. 431 at p. 441.

[43] See the doubts expressed in Chapter Four in relation to the creation of equitable mortgages by the deposit of title deeds or land certificate.

performance. Therefore, part performance, not being a statutory creature, would need explicit terms to abolish it. It is submitted that section 2(8) of the 1989 Act is not explicit enough to abolish part performance.

In answer to this argument, it may be said that part performance has no role in view of section 2(1) of the 1989 Act which invalidates all contracts for the sale of land which do not comply with the requirements therein. If, however, there is doubt as to whether part performance has not been completely abolished, especially where equitable mortgages are concerned, then there would be nothing to prevent a court from introducing part performance through the back door in an attempt to prevent the 1989 Act from being used as an instrument of fraud,[44] although it is unlikely that the courts may go this far.

Such doubts about the effect of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 can only be settled either by judicial interpretation or by further legislation.[45]

However, where registered land is concerned, the execution by the vendor and purchaser of a contract for

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[44] See the novel approach taken by Hoffman J in Spiro v Glencrown Properties (1990) 140 N.L.J. 1754 where he held that the grant of an option to purchase land is" the contract for the sale or other disposition in land" within the meaning of section 2 of the 1989 Act because an option is *sui generis*.

[45] See a similar conclusion reached by Gregory Hill, Law of Property (Miscellaneous Property) Act 1989, Section 2, (1990) 106 L.Q.R. 396 at p. 402.

the sale of the land is not effective to effect a transfer of title.[46] The written contract only renders the agreement enforceable between the parties. This can be important not only before registration of the transfer but, *a fortiori*, post-registration, especially where the vendor covenants in the agreement that he has the power to convey the property and that there are no adverse interests or incumbrances affecting it. The vendor may be liable in damages if the purchaser subsequently discovers that the vendor had no right to convey the land,[47] and the register is rectified against the purchaser in favour of a third party, or if the purchaser (now registered as proprietor) subsequently discovers the existence of undisclosed overriding interests that are binding on him.[48]

However, as indicated earlier[49] many vendors and purchasers of registered land in Kenya conduct the transactions themselves and without the benefit of legal advice. Consequently, many do not have the benefit of a written contract for sale, and if they do have one, it will be very informal containing mainly

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46 See Registered Land Act 1963, s. 38(1); *c.f.* Land Registration Act 1925, s. 69(4).

47 It must be stressed, however, that in registered land it is immaterial that the transferor may have had no power to convey the land. Registration itself confers the legal title so that even a forged transfer from an impostor will, if registered, make the transferee the legal owner - see Argyle Building Society v. Hammond (1985) 49 P & C.R. 148.

48 See the discussion *infra*.

49 See Chapter Four, *supra*.

the bare details as to price and the extent of the land to be conveyed. In view of this, it would be expected that the law would imply certain covenants for title to confer protection on the purchaser, just as the law in Kenya, through the Sale of Goods Act,[50] confers protection on a purchaser of goods from a seller by implying certain terms. However, does the Registered Land Act 1963 imply covenants for title if they are not expressly included in a contract? In any event, are covenants for title of any benefit where land is registered? These matters are considered in the next subsection.

1 Covenants for Title

While a purchaser of land is subject to the rule *caveat emptor* he has always had a remedy against the vendor for certain defects in title. In English medieval times he had the benefit of the law of warranty which originated from the feudal lord's duty to protect his tenant in exchange for his services.[51] It became customary for a vendor to give an express warranty of title when tenure between vendor and purchaser of a fee simple was abolished by the Statute Quia Emptores 1290. If there was any defect in the title, such as someone claiming a superior title, then the purchaser could sue the vendor in damages.

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50 Cap. 31, *C.f.* the English Sale of Goods Act 1979.

51 Sir William Holdsworth, A History of English Law, Vol. III, 5th Ed., pp. 159-161.

However, partly because of the inconvenience of the procedure available to enforce a warranty the law of warranty fell out of use and was replaced by the practice of giving express covenants for title.[52] During the 16th and 17th centuries covenants for seisin, the right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance became the usual covenants on a conveyance of land.[53]

However, it was in 1881 that the Conveyancing Act introduced implied covenants into any conveyance. Section 7(1)(A) introduced four covenants that would be implied in a conveyance for valuable consideration, other than a mortgage, namely; the right to convey, quiet enjoyment, freedom from encumbrance, and further assurance. These covenants were implied in conveyances of land registered under the Land Transfer Act 1875.[54] However, the Land Transfer Act 1897 limited the implication of covenants for title allowing vendors of possessory and qualified titles to imply covenants for title but not vendors of absolute titles.[55]

Covenants for title are now implied in a conveyance of freehold under section 76 of the Law of Property Act 1925, and by extension to registered

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52 *Ibid.*, p. 161.

53 *Ibid.*

54 Conveyancing Act 1881, s. 17.

55 Land Transfer Act 1897, s. 16(1).

land.[56] If a vendor of registered land expresses to execute the land with the use of the phrase "as beneficial owner"[57] four covenants are implied by him,[58] which are:

1. That he has a good right to convey;
2. Covenant for quiet enjoyment;
3. Freedom from incumbrances;
4. Covenant for further assurance, that is, that the vendor will do anything else to vest the property in the purchaser.

According to rules 77(1)(a) 7 (b) of the Land Registration Rules 1925 any implied covenant for title takes effect as though the dispositions were expressly made subject to all charges and other interests appearing or protected on the register at the time of the execution of the disposition and affecting the covenantor's title and subject to any overriding interests of which the purchaser had notice and subject to which it would have taken effect had the land been unregistered.

However, under the Registered Land Act 1963 no covenants for title are implied. In contrast several

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[56] Land Registration Act 1925, s. 38(2); Land Registration Rules 1925, rr. 76, 77. The distinction made in section 16(1) of the Land Transfer Act 1897 between vendors of possessor and qualified titles being able imply covenants for title but not vendors of absolute titles, (*supra*), was not maintained in the Land Registration Act 1925.

[57] Land Registration Rules 1925, r. 76.

[58] Law of Property Act 1925, s.76(1)(A), Second Schedule, Part I.

covenants for title are implied where land subject to the Indian Transfer of Property Act 1882 is conveyed. Section 55 of the 1882 Act contains a list of these covenants which are implied in the absence of express terms to the contrary; for example, the seller is bound to, *inter alia*, disclose to the buyer any material defect in the property of which the seller is aware; to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession; to discharge all incumbrances on the property then existing except where the property is sold subject to them; and to covenant that he has the power to convey the property. These covenants, however, cannot be implied where land subject to the Registered Land Act 1963 is being conveyed because the 1963 Act expressly excludes the application of the Indian Transfer of Property Act 1882 to land registered under the 1963 Act.[59]

Nevertheless, section 38(3) of the Registered Land Act 1963 provides that the Minister, after consultation with the Law Society may prescribe terms and conditions of sale which shall apply to contracts by correspondence, unless otherwise stipulated, and which may be made to apply to any other case for which the terms and conditions are made available, where express reference is made to those terms and conditions.[60]

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[59] Registered Land Act 1963, s. 164.

[60] This provision is comparable with section 46 of the Law of Property Act 1925 where it is provided that the Lord Chancellor may publish forms for contracts and

Although the Minister has yet to prescribe the conditions of sale,[61] the Kenya Law Society has prepared a *pro forma* contract known as 'The Law Society Conditions of Sale and Agreement for Sale' the terms of which may be incorporated by the parties to a contract for the sale of land.[62]

While the purchaser and vendor in Kenya may have the benefit of legal advice, resulting in their contract for sale referring to the Law Society's Conditions of Sale, no protection, through implied covenants, is given to parties who transfer their land without the benefit of legal advice.[63] Such parties would undoubtedly be unaware of the advantage of incorporating the Law Society's Conditions of Sale or

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conditions of sale of land which apply to 'contracts by correspondence.' The Lord Chancellor did this in 1925 - S.R. & O. 1925, No. 779/L. 14. Other forms of conditions have been drawn up such as the Law Society's Conditions of Sale and the National Conditions of Sale.

61 P.L. Onalo, Land Law and Conveyancing in Kenya, (Nairobi 1986), p. 233.

62 *Ibid.* For a copy of some of the conditions (12-17) see Appendix. There is no statutory definition of the phrase 'contracts by correspondence' either in the Registered Land Act 1963 or in the Law of Property Act 1925 where it appears in section 46. However, the phrase with reference to section 46 was considered in Stearn v Twitchell [1985] 1 All ER 631, where Warner J. held that it referred to an exchange of letters. Therefore, it did not include a contract arising out of the acceptance by letter of an oral offer to buy or sell land (even where that oral offer refers to a written document not itself a letter), since a single letter does not constitute 'correspondence'. Similarly, an oral acceptance of an offer made by letter will not, without more, constitute a contract by correspondence.

63 The benefits of implied covenants for title in registered land are discussed below.

any similar conditions. It would appear therefore that in these cases the parties do not have the benefit of any covenants implied by law because no such covenants are implied by the Registered Land Act 1963 or any other local enactment.

2. Benefits of Covenants for Title

In view of the fact that the Registered Land Act 1963 does not imply covenants for title in a transfer of registered land,[64] does a purchaser who contracts with the vendor on the basis of the transfer form suffer any disadvantage? It is submitted that such a purchaser may suffer detriment by the lack of implied covenants for title, in particular where the vendor has conveyed land to him to which he had no title, or where the purchaser is bound by undisclosed overriding interests.

Academic opinion in England has long been divided as to whether covenants for title are of benefit in registered conveyancing. There were those who felt that such covenants were not necessary and, in any event, would not be effective in the case of an undisclosed overriding interest because a transferor can only transfer what he possesses and is registered

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64 A vendor expressed to transfer land registered under the Land Registration Act 1925 'as beneficial owner' implies the covenants for title. These words are usually included in the forms for the transfer of freehold land -
Curiously, however, the forms of transfer prescribed by rule 98 of the Land Registration Rules 1925 omit any reference to the vendors capacity.

with; since the transferee is registered with a fee simple subject to any overriding interests affecting the land, he cannot complain under the implied covenants for title because there is nothing upon which the covenants can bite.[65] On the other hand there were those who felt that they were necessary in registered land transfers,[66] and although in the vast majority of transactions they will prove not to have been needed, there are exceptional and unpredictable occasions when their inclusion will have been justified.[67]

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[65] See H. Potter, Covenants for Title and Overriding Interests, (1942) 58 L.Q.R. 356; J. T. Farrand, Contract and Conveyance, 2nd Ed., pp. 347-352; D.G. Barnsley, Conveyancing Law and Practice, 1st ed. (London 1973) pp. 600-602; David J. Hayton, Registered Land, 2nd ed., (London 1981) pp. 72-74. See also The Law Commission, Transfer of Land: Implied Covenants for Title, Working Paper No. 107 (H.M.S.O. 1988), paras. 2.30, 2.31; Meek v Clarke (1982) LEXIS transcript. David Partington, Implied Covenants for Tite in Registered Freehold Land , [1989] Conv. 18 - although the author personally feels that they are of benefit as 'a longstop remedy' (at p. 19), his conclusion is that on the basis of Meek v Clarke, *supra*, they are redundant.

[66] R.E. Megarry, Review of Key & Elphinstone's Precedents in Conveyancing, (1941) 57 L.Q.R. 564; Key & Elphinstone's Precedents in Conveyancing, Vol. 3, 1954, ed., T.U.. Caswell, p. 128; M.J. Russell, Covenants for Title: Registered Land, [1982] Conv. 145; P.H. Kenny, Overriding Interests and Implied Covenants, [1981] Conv. 32.

[67] T. B. F. Ruoff, R. Roper & E. J. Pryer, Registered Conveyancing, 5th Ed. (London 1986), p. 337. Interestingly, in their 4th edition (London 1979) p. 270, the learned authors were of the opinion tht implied covenants in registered land were unnecessary and ineffective in the case of undisclosed overriding interests. However, in their 5th edition, they reluctantly admit that implied covenants can be beneficial. See also Meek v. Clarke (1982) C.A. Lexis Transcript per Oliver L.J. (*obiter*).

The recent English decision in A.J. Dunning Ltd. v. Sykes Ltd[68] illustrates the justification for including implied covenants for title in a transfer of registered land. In that case the defendants were the registered proprietors of a certain plot of land. In 1969 they sold part of the land but a portion of the land sold (described in court as the 'yellow land' because on the plan it was edged in yellow) was mistakenly fenced in with the land retained by the defendants. In 1978 the 'yellow land' was included in a transfer of part of the retained land (the 'red land') from the defendants to the plaintiffs. When the plaintiffs came to register their title under the transfer they discovered that they had no title to the 'yellow land' because the defendants in turn had no title to it. Since the 'yellow land' was essential for the plaintiff's purposes they purchased it from the true owners. The plaintiffs then brought an action against the defendants claiming, *inter alia*, damages for breach of the covenants for title implied by section 76 and Schedule 2 of the Law of Property Act 1925. The defendants argued that the transfer could only refer to so much of the 'red land' as was comprised in the title number, and therefore it was not a registered disposition of the 'yellow land' because the defendant's had no title to the 'yellow land'. Consequently the beneficial owner covenants could only

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68 [1987] 1 All ER 700.

be implied *qua* the land which was effectively transferred, i.e. the 'red land', and not *qua* the 'yellow land'.[69]

However, the majority of the Court of Appeal rejected this argument. Dillon L.J. held that it was plain from section 76 of the Law of Property Act 1925 that the implied covenants apply not merely to the property conveyed by the conveyance referred to, but to the whole of the subject matter expressed to be conveyed by it.[70] The plaintiffs could not be expected to inspect the register of the proprietor of the 'yellow land' and had no authority to do so because the reference in rule 77(1)(a) of the Land Registration Rules 1925 to charges and other interests appearing or protected on the register could not extend to matters the subject of entries which the plaintiffs as purchasers could not have inspected; 'the register' referred to in rule 77(1)(a) did not refer to the global register of all registered title, but to the register of the individual title.[71] Therefore the defendant was in breach of the implied covenants and was liable in damages to the plaintiff.[72]

This case illustrates the relevance of the implied covenants for title. The case arose because a mistake

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69 *Ibid*, at p. 706.

70 *Ibid*.

71 *Ibid*, pp. 706, 707.

72 In the words of Dillon L.J. "The implied covenant for title bites", *ibid*, at p. 708.

had been made in the filed plan, and that mistake was discovered too late.[73] As a result of this error the defendant convenanted that he had the power to convey not only the 'red land' but also the 'yellow land' in dispute. But since he had no title to the 'yellow land' he could not have had the power to convey that land and therefore he was in breach of this covenant.

However, this case was concerned with rule 77(1)(a) and not rule 77(1)(b) of the Land Registration Rules 1925, the latter providing that any implied covenant for title takes effect as though the disposition was expressly made subject to "any overriding interests of which the purchaser has notice and subject to which it would have taken effect, had the land been unregistered." The latter rule brings into question the effect of the covenant relating to freedom from incumbrances with respect to undisclosed overriding interests. If the plaintiff had discovered a hitherto undisclosed overriding interest in the 'yellow land', would the defendant have been in breach of the covenant of freedom from incumbrances? Arguably he would have been in breach and liable in damages. Dillon L.J. stated that the covenants implied under section 76 did not merely apply to the property conveyed by the conveyance, "*but to the whole of the subject matter expressed to be conveyed by it*" (italics

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[73] In reality the fault was that of the solicitors who should have been alerted to this error.

mine).[74] Since overriding interests, whether disclosed or undisclosed would form part of the subject matter being conveyed, it would follow that the purchaser, although bound by all overriding interests, would be entitled to sue the vendor in respect of undisclosed overriding interests.[75]

This remedy is particularly important where a purchaser takes the land subject to undisclosed rights of persons in actual occupation.[76] Since an indemnity is unavailable under the Land Registration Act 1925 in respect of overriding interests,[77] the only remedy available to the purchaser would be to sue the vendor for breach of the covenant.

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74 A.J. Dunning Ltd v. Sykes Ltd [1987] 1 All ER 700 at p. 706.

75 Professor Barnsley, who initially was one of those who had expressed doubts as to the effectiveness of implied covenants vis a vis overriding interests (see n.65), is now of the opinion that "the arguments advanced by those denying the effectiveness of the covenants for title in this situation are no longer sustainable in the light of Dunning". - D.G. Barnsley, Conveyancing Law and Practice, 3rd ed. (London 1988) p. 612). See also T.B.F. Ruoff, R. Roper & E.J. Pryer, Registered Conveyancing, 5th ed. (London 1986) p. 342. The Law Commission in their Working Paper (No. 107, *op.cit.*, para. 2.31) felt that there was still a measure of uncertainty. However, a purchaser who had notice of an overriding interest would clearly be unable to sue on the convenants by virtue of Land Registration Rules 1925 r. 77(1)(b).

76 Under section 70(1)(g) of the Land Registration Act 1925.

77 See Re Chowood's Registered Land [1933] Ch. 574. However, the Law Commission recommended that an indemnity should be payable to persons bound by overriding interests - Third Report on Land Registration, Law Com. No. 158. See clause 45(1)(c) of the draft bill in the Fourth Report on Land Registration, Law Com. No. 173.

But can Dunning be reconciled with the previously, though unreported, decision of the Court of Appeal in Meek v Clarke?[78] In that case the plaintiff agreed to purchase from the defendant his plot of registered land with absolute title. The defendant, in the transfer, conveyed as beneficial owner "all the land comprised in the title." The title, as it appeared in the register, included the benefit of a right of way. Unfortunately, the right of way was included as a result of an error made by the Registry. When the plaintiff attempted to make use of it, the error was unearthed and a third party successfully applied to have the reference to the right of way deleted.

Undoubtedly, the plaintiff would have successfully obtained an indemnity from the Registry under section 83 of the Land Registration Act 1925, limited to the value of the right lost, but he wanted to go further and claim substantial damages against the defendant for breach of all or any of the covenants for quiet enjoyment, freedom from incumbrances and good right to convey. The Court of Appeal held that the vendor was not liable on the covenants. The plaintiff's main claim rested on the covenant for good right to convey. But the court rejected this claim on the ground (per Oliver L.J.) that since, as is the case in unregistered

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78 (1982) LEXIS Transcript. See David Partington, Implied Covenants for Title in Registered Freehold Land [1989] Conv. 18, where this case is discussed. Unfortunately, the learned author makes no reference at all to Dunning. But see Editorial Note, [1989] Conv. 26.

land, the vendor does not warrant or guarantee that he has good title to land[79] but merely that since the last investigation of title, neither the vendor not those claiming under him had done anything which prevented the vendor from conveying the estate described in the transfer, and since the defendant never had the right of way nothing he did had prevented him from transferring it.

Secondly, since the effect of registration was to vest that which was described in the registered entry in the defendant in fee simple, there never was any question of the defendant not having the power to convey the estate expressed to be conveyed. In the words of Oliver L.J., since "the registered entry itself imports the right to dispose of the registered estate," there was "very little room for the operation of a covenant for good right to convey in the case of an absolute title."

But this reasoning is distinct from that applied in Dunning v Sykes. In Dunning one of the defendant's arguments was that they had never undertaken to the plaintiffs to pass to them more than whatever title they might have had (the 'red land') because the defendants never purported to transfer more than whatever they actually had. But Dillon L.J. with whom Croom-Johnson L.J. agreed, rejected this argument, holding that the defendants had indeed purported to

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79 David v Sabin [1893] 1 Ch. 523.

transfer the fee simple in the 'yellow land' because the transfer treated the yellow land as part of the red land. Therefore, in the words of Dillon L.J. "the implied covenant for title bites."

There does indeed appear to be conflict between the decisions in Dunning v Sykes and Meek v Clarke on the effect of the covenant of a good right to convey.[80] Meek v Clarke concluded that this covenant had no effect in the circumstances and, in effect, generally where registered land was concerned. But Dunning v Sykes decided the converse, concluding that in facts similar to those in Meek v Clarke,[81] the same convenant had effect and could bite! Nevertheless, the Law Commission accepts, without argument, the decision in Dunning v Sykes, and concluded that the covenant of the good right to convey did have effect in registered land.[82] It is submitted that the decision in Dunning v Sykes is to be preferred. Nonetheless, this is an area

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80 Meek v Clarke was not cited to the Court in Dunning v Sykes probably because the former was unreported.

81 In Meek v Clarke, the error was made by the Land Registry, whereas in Dunning v Sykes someone (not apparent from the report who it was but certainly not the registry) moved the fence between the two portions of land into the wrong place and the error was compounded by the solicitors failure to notice the discrepancy on the plan. Therefore, in Meek v Clarke the defendant already had an unanswerable claim against the Registry for an indemnity, whereas in Dunning v Sykes the plaintiff's only remedy was against the vendor on the basis of the covenants.

82 The Law Commission, Transfer of Land. Implied Covenants for Title, Working Paper No. 107 (1988), para. 2.30.

of English law that could benefit from further clarification and remove the uncertainty.

The Dunning case highlights the danger facing a purchaser of registered land in Kenya who is not protected by implied covenants for title. It may be the case that the register is rectified, as a result of an error or a double conveyance, against a purchaser who has been registered as proprietor but is not yet in possession,[83] but because the registration is a first registration no indemnity is payable.[84] Since no covenants for title are implied the purchaser would not be entitled to sue the vendor for breach of the covenant of the power to convey, and would therefore be without a remedy. Moreover, even if a purchaser is able to obtain an indemnity, the amount payable is only limited to the value of the land at the time the mistake was made.[85] This may be inadequate if the value of the land has risen considerably since the purchase. In any event, the purchaser would not be able to sue the vendor on the basis of the covenants for the residue.

B. Searching the Register of Title

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83 As in Natwarlal Chauhan v. Zakaria Omagwa, Civil Appeal No. 12 of 1980 (unreported). See also T.B.F. Ruoff, R. Roper & E.J. Pryer, Registered Conveyancing, 5th ed. (London 1986) pp. 337-338.

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

85 *Ibid.*, s.145, *Cf* Land Registration Act 1925, s.83(6).

The legal maxim *caveat emptor* (let the buyer beware) means that a purchaser of land takes the land as it is and it is his responsibility to ascertain what faults exist in the property, and what interests bind the property. However, a vendor of registered land would be well advised to disclose overriding interests[86] since, as indicated above, the purchaser may bring an action against the vendor under the implied covenants for title in respect of overriding interests of which he had no notice.[87] Apart from making enquiries of the vendor and making a physical inspection of the land, a purchaser needs to search the register of title to discover what interests bind the land.[88] He can either search the register personally or obtain what is known as an official search.

1. Searches Under the Registered Land Act 1963

Anyone can make a personal search of the register under the Registered Land Act 1963[89] Such a search is not official since it is conducted by the individual personally, and therefore confers no priority.[90]

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86 Especially the rights of those in actual occupation - Land Registration Act 1925, s. 70(1)(g); *cf.* Registered Land Act 1963, s. 30(g).

87 This right of action is not available to a purchaser of land subject to the Registered Land Act 1963, unless the covenants were express terms in the contract.

88 For a discussion of how the register of title is kept, see Chapter Four.

89 S. 36(1).

90 See section 43(1), Registered Land Act 1963.

Nevertheless, the written consent of the registered proprietor is not required when a personal search is made.

In contrast although section 36(2) of the Registered Land Act 1963 provides that any person may obtain an official section, section 43(1) of the Act provides that a person proposing to deal with registered land and who wants to have an official search which confers the benefit of the suspension period - whereby the registration of any interest is postponed for 14 days - must have obtained the written consent of the proprietor. The 1963 Act therefore makes a distinction between those who do not require the benefit of the stay of registration and who have made a personal search of the register, and those, primarily prospective purchasers, who require the benefit of the stay of registration the former need not obtain the written consent of the proprietor while the latter. In view of the advantage accorded by a stay of registration to a prospective purchaser under section 43 of the 1963 Act, it is arguable that the requirement of obtaining written consent from the registered proprietor is justified. The purchaser has an advantage over other parties who are endeavouring to register third party interests over the same land.[91]

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[91] It was observed by the writer at the Kiambu District Land Registry that applicants for official searches were not supplied with the statutory application form (R.L. 26) for official searches which specifies the requirement of written consent from the registered proprietor, such forms requesting priority under section 43(1) of the 1963 Act (see Appendix).

2. Searches Under the Land Registration Act 1925

The enactment of the Land Registration Act 1988 was an important milestone in the history of land registration in England, for it opened for the first time, the register to everyone. Written authority from the registered proprietor was no longer necessary in order to make a search, as had been the case prior to the Act. Section 1(1) of the 1988 Act provided a new section 112 for the Land Registration Act 1925 substituting the former sections 112 to 112C. The new section provided in part:

> "(1) *Any person* may, subject to such conditions as may be prescribed and on payment of any fee payable, inspect and make copies of and extracts from
> (a) entries on the register ... ..."

Two sets of rules, the Land Registration (Official Searches) Rules 1990[92] and the Land Registration (Open Register) Rules 1990[93] have been prescribed and outline in detail the procedure on making a search. A distinction is made by the Land Registration (Official

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These forms had been out of stock for a long time. Instead applications were made on forms which did not specify the provision of the written consent of the proprietor. It is submitted that these forms could cause problems for the Registrar because it lays him open to an action from a proprietor who discovers that an official search was granted without his consent, or even from a person endeavouring to register an interst but which is postponed to that of the person obtaining the official search. In the latter situation, however, a court may be prepared to hold that the purchaser holds the land subject to the interest of the third party who had endeavoured to register it but could not because of the priority accorded to the purchaser.

92 S.I. 1361.

93 S.I. 1362.

Searches) Rules between a purchaser[94] and any other person; a purchaser "may apply for an official search *with priority* of the register,"[95] whereas any other person "may apply for an official search of a register *without priority*. (Italics mine.) This distinction is similar to that maintained by the Registered Land Act 1963 between purchasers and non-purchasers. Since purchasers would be prejudiced by the registration of interests immediately having made their search which showed a clear title, it is practical to grant them a priority period within which they can complete the transfer safe in the knowledge that no adverse interests have been registered since the search was made. Non-purchasers have no need for a priority period since their searches would probably be by way of curiosity.[96] One important difference however between the position under the 1963 Act in Kenya, and the 1990 Rules is that, under section 43(1) of the 1963 Act, a purchaser requiring an official search with priority, has to obtain the written consent of the registered proprietor. This is not necessary now in England.

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94 Defined in rule 2(1) as "any person (including a lessee or chargee) who in good faith and for valuable consideration acquires or intends to acquire a legal estate in land ..."

95 Land Registration (Official Searches) Rules 1990, s. 3(1).

96 However, such a person may be a mortgagee who intends to protect his interest by registering a notice of deposit of the land certificate, T.B.F. Ruoff, R. Roper, & E.J. Pryer, Registered Conveyancing 5th ed. (London 1986), p. 767.

Nevertheless, a personal search of the English register can be made by anyone using Form 111,[97] thereby bringing the position in England in line with that in Kenya.

3. Advantages of an Official Search

An official search has several advantages over a personal search:-

1) An official search confers priority, preventing the entry of any adverse interest onto the register before the purchaser has an opportunity to complete the transfer by registration. Therefore when an official search is applied for, the registration of any 'entry' or 'instrument' is 'postponed' or 'stayed' to a subsequent application to register the instrument affecting the dealing.[98] Under the Registered Land Act 1963 this period, referred to as the 'suspension period' lasts for 14 days[99] whereas under the Land Registration Act 1925 it is for 30 days.[100] So long as

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97 Land Registration (Open Register) Rules 1990, r.4. For a copy of the form See Appendix.

98 Land Registration (Official Searches) Rules 1990, r. 6; Registered Land Act 1963, ss. 43(1) & (2).

99 S. 43(1).

100 Land Registration (Official Searches) Rules 1990, r. 2(1). However, rule 2(1) provides that the purchase must be in good faith. It was held in Smith v. Morrison [1974] 1 All ER 957 that a purchaser is in good faith within the rule if he acted honestly with no ulterior motive. There is no requirement of 'good faith' under the Registered Land Act 1963 in respect of a person obtaining a 'stay of registration' under section 43. It follows that such a purchaser who obtains a stay or priority, may act with an ulterior motive. For example, to purposely defeat the interest of another intending purchaser who has concluded a

the purchaser applies within this period to register the transfer, he is protected from any adverse entries that may have been made before registration is completed.[101] No such protection is granted to a purchaser who merely makes a personal search of the register.

2) A significant advantage under the Land Registration Act 1925 is that where an official search has been obtained by a solicitor or other person in respect of land registered under the Land Registration Act 1925, he is not answerable for any loss that may arise from any error in it.[102] On the other hand no

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contract with the vendor but has yet to obtain an official search (See Smith v. Morrison *supra*). The purchaser in bad faith would therefore be entitled to be registered as proprietor in priority to the other intending purchaser.

[101] One can envisage a situation where a person with an interest in the registered land being transferred, but who has neglected to protect that interest by a caution, for example, subsequently decides to make an application to register the caution on learning that the land is to be sold. This took place in Smith v. Morrison, *op. cit.*, where the second defendant was aware that the plaintiff had entered into a contract to buy the land from the first defendant but thought that this was a 'try on' and in view of this took advantage of the priority period by registering a transfer of the land from the first defendant (the vendor) to himself. The plaintiff subsequently tried to register a caution against the land but it was cancelled. It was held that the second defendant had acted in good faith and since they had lodged their application to register the transfer within the priority period, the plaintiff did not have a cautionable interest, and therefore his caution was rightfully rejected. In Elias v. Mitchell [1972] Ch. 652 the defendant delayed in presenting the transfer for registration. In the meantime the plaintiff was able to register a caution (this taking place after the 30 day period). It was held that the interest of the plaintiff was binding on the defendant.

[102] Land Registration Rules 1925, r. 295. See Ruoff & Roper, *op. cit.*, p. 769.

such protection is conferred by the Registered Land Act 1963. It follows that if an official search certificate issued under the Registered Land Act 1963 and obtained by the purchaser's lawyer did not disclose a registered interest the purchaser may be entitled to sue his lawyer and also join the Registrar as defendant.[103]

3) Any person who suffers loss by reason of an error in an official search is entitled to be indemnified.[104] No such indemnity is available to a person who engages in a personal search of the register. The right to obtain an indemnity is an important one in view of the fact that officials operating the land registry are fallible and therefore errors are bound to be made from time to time.[105]

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[103] Unlike the English Land Registrar who is protected from liability for acts done in good faith (Land Registration Act 1925, s. 131), the Kenyan Land Registrar has no such protection and therefore would be liable for such an omission, notwithstanding that the error was made in good faith. This, it would appear, does not affect the right of the purchaser in obtaining an indemnity. This is important where the value of the land has risen from the time the mistake was made - see Registered Land Act 1963, s. 145.

[104] Registered Land Act 1963, s. 144(1)(c); Land Registration Act 1925, s. 83(3).

[105] As in Parkash v. Irani Finance [1970] 1 Ch. 101 where an official search failed to disclose a caution due to an error made by the Land Registry. It was held that the caution was binding on the purchaser. Plowman J., at p. 110, remarked that a personal search would have revealed the caution. This is ironic in view of the advantages outlined above that an official search has over a personal search. Nevertheless, the purchaser would have been entitled to an indemnity under section 83(2) of the Land Registration Act 1925.

c. Other Searches

Apart from searching the register of title the purchaser of registered land has to be aware of the charges and restrictions which the public authorities, both local and central, may have imposed on the land under statutory powers. These impose either a financial obligation on the property or a restriction on the use of the property. Examples are charges levied for the making up of roads, tree preservation orders, building preservation notices, controls on land development and so on. In England these liabilities are discoverable by inspecting the local land charges registers[106] which were introduced by the Land Charges Act 1925 and reorganised by the Local Land Charges Act 1975. These registers are kept by District Councils, and in London by the Borough Councils (or the City of London).[107] A search of the local land charges register is imperative for the purchaser in England[108] because while a local land charge is binding on a purchaser whether it is registered in the local land charges register or not[109] compensation can only be

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[106] Local land charges are defined in section 1(1) of the Local Land Charges Act 1975.

[107] Local Land Charges Act 1975, s. 3(1). The register need not be kept in documentary form and may be kept by computer - Local Government (Miscellaneous Provisions) Act 1982, s. 34.

[108] See Law Society General Conditions of Sale, 3(1), (2).

paid to a purchaser in respect of a local land charge that was not registered so long as he has made a search, whether personal or official.[110]

However, despite the existence of the local land charges register, a purchaser of registered land in England has also to make additional enquiries of the local authority, because the local land charges search only reveals the information which the local authority is bound to register and consequently the authority may have other information it is not obliged to register but which may affect the land the purchaser seeks to buy, for example whether there are proposals to build a motorway or trunk road within 200 metres of the property, restrictions on permitted development, whether the property is in a conservation area, whether the Council has served a Building Preservation Notice and so on.[111]

In Kenya, there is no system for registering local land charges imposed by the Central and Local authorities as there is in England. The advantage of a system of local land charges registration is that a purchaser can be compensated in respect of unregistered local land charges even though under the Local Land Charges Act 1975 they are still binding on the

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[109] Local Land Charges Act 1975, s. 10(1). Local land charges are overriding interests - Land Registration Act 1925, s. 70(1)(i).

[110] Local Land Charges Act 1975, s. 10(1).

[111] I.R. Storey, Conveyancing, 2nd ed. (London 1987) pp. 67, 68.

purchaser.[112] In Kenya, the purchaser has to make written enquiries to the Local authority in which the land is situated to discover whether there are any restrictions imposed by the authority on the land such as building restrictions,[113] and also whether charges have been levied on the land such as unpaid rates. The latter is particularly important because before a transfer of land can be registered by the Registrar under the Registered Land Act 1963 the local or 'rating' authority must produce a written statement to the Registrar that all rates and other charges payable to the authority in respect of the land for the last 12 years have been paid.[114] It would follow that if the written statement is to the effect that the rates have not been paid, the Registrar will refuse to register the transfer.[115] Herein lies an important difference

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112 *Supra.*

113 *Made under the Land Planning* Act Cap. 303.

114 S. 86.

115 Exceptions are where the land is subject to a lease the latter being the rateable property, or where the transfer relates to a lease and the freehold is the rateable property - proviso to section 86. However, section 86A of the Registered Land Act 1963 provides that the Registrar shall not register any interest in land unless a certificate is produced to him certifying that no rent is owing to the Government in respect of the land. This section would apply in particular to persons who had been granted leases of Government land, such land being subject to the Government Lands Act 1915. The Conversion of Leases Regulations 1960 and the Conversion of Leases Rules 1960 made under the Kenya (Land) Order-in-Council 1960 had made it possible for leaseholders who had been granted terms of 999 years to purchase that land. Moreover, section 149(3)(a) of the Government Lands Act 1915 also provided that the Government could alienate government land as freehold. Once such land was bought, it could

between Kenyan and English practice in the transfer of registered land. In England, the Registration of a charge by a local authority in the local land charges register that is adverse to the land that is the subject of a transfer between a vendor and purchaser, will not prevent the registration of the transfer of that land. The purchaser may agree to continue with the purchase, but subject to the vendor first undertaking to discharge the charge before completion.

However, in Kenya the statement that the land is subject to a local authority charge acts as a stay on the transfer of the land and unless the vendor discharges the charge, no registration will take place. One of the draftsmen of the Registered Land Act 1963 remarked that section 86 of the Registered Land Act was inserted in the Act because "the circumstances in Kenya are such that this type of prohibition probably represents the last line of defence by a local authority of its income from rates."[116] With respect, this opinion is not convincing. Section 30(e) of the Registered Land Act 1963 provides that charges for unpaid rates are overriding interests. These interests, though unregistered, are binding on a purchaser of land. Therefore if a vendor has not paid

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be registered under the Registered Land Act 1963 by virtue of section 12(1)(b). Section 86A of the 1963 Act would therefore ensure that people who bought Government land would not escape from their liabilities.

116 S. Rowton Simpson, Land Law and Registration, (Cambridge 1976), p. 543.

local authority rates which form a charge on the land, the local authority can still enforce these rates against the purchaser, since they are overriding interests. If the local authority in its written statement under section 86 had mistakenly declared that there were no charges payable, and the transfer was made and the purchaser registered as proprietor, and it was subsequently discovered that there were some outstanding charges, they would still be binding on the purchaser.

The English position is similar. Local land charges not registered under the Local Land Charges Act 1975 are still enforceable against a purchaser of registered land because they are overriding interests.[117] The difference, however, is that compensation may be payable to such a purchaser in respect of unregistered local land charges.[118] No such compensation is payable to a purchaser of land under the Registered Land Act 1963 with respect to charges that are not disclosed in the written statement issued under section 86 of the Act. The purchaser's remedy may be to sue the vendor for breach of the covenant of freedom from incumbrances. Where such a covenant formed part of the express terms of the contract then

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[117] Land Registration Act 1925, s. 70(1)(i). Unregistered local land charges would also be enforceable on a purchaser of unregistered land by virtue of section 10(1) of the Local Land Charges Act 1975.

[118] Local Land Charges Act 1975, s. 10(1).

there would be no great difficulty in obtaining damages for breach of the covenant for title. The problem arises where there are no express terms in the contract. As discussed earlier, covenants for title cannot be implied into a contract for the sale of land registered under the Registered Land Act 1963. A purchaser without the benefit of the covenants is therefore at a distinct disadvantage when he finds that he takes the land subject to undisclosed land charges. This problem illustrates the need to improve the position of the purchaser who contracts on his own behalf and usually will not have contracted on the basis of the standard conditions for the sale of land which have, as part of the terms, certains covenants for title. The position of such purchasers could be improved if provision is made to enable covenants for title to be implied in a transfer of registered land.

In Kenya, a purchaser of agricultural land would, in addition, have to make enquiries of the Ministry of Agriculture to determine whether the Minister has imposed a preservation order, a land development order or a management order under the Agriculture Act[119] against the land. The effect of these orders is to ensure that owners of agricultural land practice proper farming methods, for example taking measures to prevent soil erosion and preserve fertility, or effect other improvements on the land[120]. One of the consequences

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[119] Cap. 318.

[120] Agriculture Act, s. 51.

of failure to comply with these orders is that the Government can undertake the improvements and register the cost as a charge on the land,[121] and ultimately the Minister has power to sell the land.[122] The purchaser would therefore be concerned to ascertain whether any orders have been issued against the land he is purchasing and if so whether the vendor has undertaken the necessary improvements. Such enquiry is necessary because if no charge is registered against the land in respect of these improvements, the charge can still take effect as an overriding interest under section 30(e) of the Registered Land Act 1963, and therefore would be binding on the purchaser.

A type of search peculiar to England which a purchaser of land[123] (whether registered or unregistered) would be advised to make is a search in the register made under the Commons Registration Act 1965. Rights of common such as rights of pasture, estovers, turbary, and piscary, can be registered either in the register under the 1965 Act or under the Land Registration Act 1925,[124] although under the latter Act it would appear that the reference to registration refers to a note on the register rather

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121 *Ibid*, s. 56

122 *Ibid*, s. 187.

123 Especially where the land has never been built on or if it ever belonged to the local Lord of the Manor - I.R. Storey, *op. cit.* p. 710.

124 Commons Registration Act 1965, s. 1(2)(b).

than substantive registration.[125] The prudent course therefore would be to search both registers. In the context of registered land this is important because rights of common are overriding interests under the Land registration Act 1925.[126]

However, a purchaser of registered land in Kenya or in England cannot expect to be wholly protected from unregistered interest by relying on the official certificate of search and by searching the other registers outlined above.[127] Physical inspection of the land to be bought is necessary because of the binding effect of overriding interests,[128] and in particular the interests of those in actual occupation,[129] and issue considered in the next chapter.

D. Execution of the Transfer

For a transfer of land to be effective, the transfer form must be properly executed. The Registered Land Act 1963 provides an unusual procedure for the execution of instruments. Section 109(1)

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125 Ros Oswald, A Practitioner's Guide to Common Land and the Commons Registration Act 1965 (London 1989) p. 34.

126 S.70(1)(a).

127 For other types of searches which are uncommon or less usual in England see Frances Silverman, Searches and Enquiries, A Conveyancer's Guide, (London 1985), Parts IV and V.

128 Registered Land Act 1963, s.30; Land Registration Act 1925, s.70(1).

129 Registered Land Act 1963, s.30(g); Land Registration Act 1925, s.70(1)(g).

provides that the instrument evidencing a disposition "shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument. This means that the vendor and the purchaser must both sign the transfer form[130] and the signature of each must be attested by a witness. It used to be the practice in England for a deed of conveyance to be sealed and delivered and this extended to transfer forms of registered land. However, the Law of Property (Miscellaneous Provisions) Act 1989[131] abolished the practice of sealing;[132] what is now required for an instrument to be validly executed is signature, witnessing of the signature and delivery of the instrument as a deed.[133] A new form 19 (for the transfer of registered land) has been designed removing the requirement of sealing when execution is by an individual.[134]

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130 Illiteracy is a big problem in Kenya and consequently many individuals cannot write, or even sign their names. Therefore persons are permitted to place their thumbprints on the transfer forms. Each Land Registry has an ink pad to enable persons to place their thumbprints on the documents of transfer. The writer was able to assist several purchasers of land at the Kiambu District Land Registry to print their thumbprints on the transfer form.

131 Section 1(1).

132 This was an implementation of the Law Commission's recommendation that sealing should be abolished - see The Law Commission, Deeds & Escrows, Law. Com. No. 163.

133 Law of Property (Miscellaneous Provisions) Act 1989, s.1(3).

134 Land Registration (Execution of Deeds) Rules 1990. The rules prescribe different forms of attestation where execution is by a company.

Significantly, sections 110(1) and (2) of the Registered Land Act 1963 provide that a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed to enable the Registrar or the public officer or other person "to satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument, and shall complete a certificate to that effect." The purpose of these provisions was to prevent a forger from impersonating the registered proprietor of the land and selling the land to a third party[135] and to prevent a proprietor from selling under duress. The Registered Land Rules 1963[136] set out a list of public officers and other persons who may verify executions and they are: a judge or magistrate, the Registrar and Deputy Registrar of the High Court, the Registrar-General and his deputy and any Assistant Registrar-General, an administrative officer, a Superintendent of Prisons, an Advocate or a Bank official. The transfer form contains the certificate which is signed by the person certifying the identity of the parties.[137]

In Kenya, the identity of individuals is facilitated by the existence of national identity

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135 S. Rowton Simpson, *op. cit.* p. 394.

136 R.7, Fourth Schedule.

137 See Appendix.

cards. Every Kenya citizen over 18 years of age must have a national identity card which contains details of one's date and place of birth, place of residence, a photograph of the individual, his signature and his thumbprint. Both the vendor and purchaser will have an identity card, and this is used to ascertain their identity. The person verifying execution normally looks at the identity cards of the parties, and in particular the photograph and signature of the individual, checking this against the individual in front of him and ensuring that the signature on the card is identical to that on the form. However, parties who are unable to sign their names have their thumbprints placed on the transfer form.[138] Although section 110 of the Registered Land Act 1963 makes provision for the Registrar to verify execution, it is rare for him to do so. It was observed at the Kiambu District Land Registry that the execution of all the transfers and other dispositions of registered land were verified by advocates, and whenever parties came to the Registry to collect transfer forms they were always advised to have them verified by an advocate, the Registrar being too busy to do so.

Although this system does hinder forgery, there are instances where persons have been able to impersonate the registered proprietor by obtaining a false identify card and selling the land to a third

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[138] See n. 130, *supra*.

party. For example, in Republic v. Godfrey Kariuki Kinyanjui[139] the defendant was the son of the registered proprietor of the land in question. The defendant falsely represented himself as Muthunguri Ndungu, his father's name, and succeeded in obtaining an identity card bearing that name but with the defendant's photograph. Armed with this identity card he was able to obtain a certificate of title of the land registered in his father's name from the Land Registry and consequently proceeded to sell the land to an innocent purchaser. However, his fraud was subsequently discovered and the defendant was convicted. This case illustrates that a determined fraudster can still find ways of entering into fraudulent transfers, notwithstanding the system of verifying execution.

Nevertheless, the verification of execution would discourage all but determined persons from engaging in fraudulent transfers. In England there is no such safeguard for the transfers of registered land unless the execution is unusual, such as where an illiterate, a person of limited mental capacity or a blind person marks or signs a deed;[140] the only safeguard exists in the attestation of the transfer form. Section 75 of

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[139] Criminal Case No.35 of 1982 (Kiambu S.R.M.C) (unreported).

[140] In such cases the deed would be read to the individual and its full legal implications explained to him, with a solicitor having to attest the document - T.B.F. Ruoff, R. Roper & E.J. Pryer Registered Conveyancing, 5th ed., (London 1986), p. 319.

the Law of Property Act 1925 provides that a purchaser may at his own expense have the execution of the deed attested by his appointee, including his solicitor.[141] Since this procedure is not compulsory, unlike the verification of execution under the Registered Land Act 1963, it has been observed that although this power is rarely exercised, greater use should be made of it in view of the danger of fraud and forgery.[142]

It would certainly be impossible to have the English Land Registrar verify the execution of instruments in a manner similar to that under the Registered Land Act 1963. A phenomenal number of dealings are registered by the various District Land Registries in England compared with those in Kenya. For example, between 1988 and 1989, a total of 283,145 transfers were registered in the Nottingham District Land Registry, the busiest in England.[143] In contrast, roughly during the same period, a total of 4,742 transfers were registered in the Kiambu District Land

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141 No provision is made on form 19 for the purchaser to sign the form. The purchaser cannot attest the form because a party to a deed cannot also be a witness - Seal v. Claridge (1881) 7 Q.B.D. 516, at 519. However, if the transfer is accompanied by a plan then the plan must be signed by the vendor and by or on behalf of the purchaser - I.R. Storey, *op.cit.*, p. 195.

142 D.G. Barnsley, *op.cit.*, p. 399. However, Barnsley remarks that unless the clients are actually known to their solicitors, the risk of impersonation will always exist - *Ibid.*

143 Report on the Work of H.M. Land Registry 1988-89 (London 1989), Appendix I.

Registry, the busiest in Kenya.[144] The huge difference is all too obvious. Nevertheless, to prevent the increase of forgery or fraud in England in connection with registered land, it would be beneficial, at the very least, to make section 75 of the Law of Property Act 1925 mandatory thereby reducing, but not necessarily eliminating, the risk of impersonation.

E. Land Control Consent

Obtaining land control consent is an essential formality in Kenya before certain land, whether registered or unregistered is transferred. If the land is registered, the usual practice is that the Registrar will not register a transfer of land registered under the Registered Land Act 1963 until land control consent is granted to the transfer.[145] Obtaining land control consent is therefore the last formality before a transfer can be registered under the Registered Land Act 1963. The procedure for the grant of land control consent is governed by the Land Control Act 1967.

The Act was enacted as a result of the recommendations in the Report of the East Africa Royal Commission 1953-55.[146] The Commission was concerned that the change from the traditional system of land holding among the Africans to individual ownership of

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144 Kiambu District Land Registry, Monthly Returns, July 1988 - July 1989.

145 Land Control Act 1967, Cap. 302, s. 20(1).

146 Cmd. 9475.

land would result in the accumulation of large land holdings.[147] This would be caused by wealthy land owners buying land from poor land owners, resulting in the emergence of increased numbers of landless people.[148] To prevent this consequence, it was recommended that the transfers of land above a certain size should be prohibited, and that local land boards could be responsible for checking transactions to ensure that the above problem was prevented.[149] The Working Party on African Land Tenure drafted the Land Control Bill which subsequently became the Land Control Act 1967. The Act was therefore enacted as a social and economic measure; it would prevent the creation of a class of landless people which, if allowed, would create political problems; moreover it would prevent fragmentation of land resulting in sound agricultural practices.[150]

The Land Control Act 1967 creates land control boards whose purpose is to grant or refuse to grant consent to transactions of agricultural land. The transactions that are subject to consent are "the sale,

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147 Report of the East Africa Royal Commission on Land and Population 1953-55, Cmd. 9475, para. 35.

148 *Ibid.*

149 *Ibid.*

150 While it would be of interest to discuss the social and economic consequences of the Land Control Act 1967, it is beyond the scope of this thesis to do so. Nevertheless for a general discussion see R.J.A. Wilson, Land Control in Kenya's Smallholder Farming Areas, (1972) 5 E.A.J.R.D 123; S. Coldham, Land Control in Kenya, [1978] J.A.L. 63.

transfer, lease, mortgage, exchange, partition or other disposal of or dealing" as well as the "declaration of a trust".[151] Agriculture land is simply defined as land that is not within a municipality, township or a market, or land with a restrictive covenant that it shall not be used for agriculture.[152] This wide definition of 'agricultural land' which is almost exclusively a geographic definition,[153] means that virtually all transfers of land in Kenya are subject to the grant of consent under the Land Control Act 1967.

An application for land control consent is made by the vendor and purchaser and if the land is registered the Land Registrar refers the application to the local land control board.[154] The board[155] takes certain factors into account in deciding whether to grant consent to the transaction or not; these factors are

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151 Land Control Act 1967, ss. 6(1)(a), (2).

152 *Ibid*, s. 2.

153 Contrast the laboured definitions of 'agricultural' in the English Agricultural Holdings Act 1948, s. 1(2), and the Rent (Agriculture) Act 1976 s. 1.

154 While the Registrar should submit the form (see the instructions on the form), it was observed at the Kiambu District Land Registry by the writer that the parties are usually advised to present the application forms at the next land control board meeting which, in Kiambu District, takes place every two to four weeks (the dates of the meetings are displayed at the Land Registry).

155 The Board, like the Land Adjudication Board, is mainly composed of lay individuals, usually farmers, who are resident in the area. For the composition of the Land Control Board, see Land Control Act 1967, Schedule, para. 1.

set out in section 9 of the Land Control Act 1967. They take into account whether the transaction will be conducive to the economic development of the land;[156] if the purchaser of the land is unlikely to develop the land well or profitably, or has sufficient agricultural land, or that the terms and conditions of the transaction (such as the purchase price) are unfair then consent will be refused.[157] If consent to the transaction is refused, the decision of the Board is final and not subject to question "in any court"[158] Such a decision has the effect of making the transaction "void for all purposes".[159] Such an agreement therefore cannot be subject to an action for specific performance.[160] Nevertheless, the Act permits the recovery of any consideration from the party to whom it was paid.[161] Failure to make an application for consent within six months from the date of the

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156 Land Control Act 1967, s. 9(1).

157 *Ibid*, s. 9(2). For a discussion of these factors see the articles in note 150, supra.

158 Land Control Act 1967, s. 8(2). But see Elijah arap Koross v. Anthony Oyier, H.C.C.C. No.10 of 1980 (unreported, but noted in the Nairobi Law Monthly, Feb. 1989) where it was held that this provision cannot oust the unlimited jurisdiction of the High Court by virtue of section 60 of the Constitution of Kenya.

159 Land Control Act 1967, s. 6(1).

160 Gabriel Wamkota v. Sylvester Donati, Civil Appeal No. 6 of 1986 (unreported); Githire v. Munge (1979) Kenya L.R. 50.

161 Land Control Act 1967, s. 7.

agreement for sale will also make the agreement void, and therefore not capable of specific performance.[162]

What is the significance of the Land Control Act 1967 in the formalities for the transfer of agricultural land registered under the Registered Land Act 1963? First, under section 40 of the Registered Land Act 1963, if an instrument is presented for registration later than three months from the date of the instrument, an additional fee equal to the registration fee is payable for each three months which have elapsed since that date. Although section 8(1) of the Land Control Act 1967 provides that an application may be made for consent within six months from the date of the agreement, a purchaser would want to ensure that an application for consent is made and consent granted within three months from the date of making the agreement in order to register the transfer form, thereby avoiding having to pay extra registration fees. Moreover, if the failure to apply for consent is due to the wilful default of the purchaser, and therefore is the cause of the failure to present the transfer form for registration within three months, not only is he liable to pay any registration fee and any other fee payable for the delay, whether the form is presented for registration or not,[163] but if he fails to respond to the order of the Registrar to present the form for

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[162] However, the High Court has jurisdiction to extend the six month period - Land Control Act 1967, s. 8(1).

[163] Registered Land Act 1963, s. 41(1).

registration, he may be found guilty of a criminal offence.[164]

Secondly, if consent is not granted to the transfer of the registered land by the land control board, the transfer cannot be registered. Although section 38(1) of the Registered Land Act 1963 provides that an unregistered instrument may operate as a contract between the parties, it would not be capable of specific performance because it will have been deemed void by section 6(1) of the Land Control Act 1967.[165] If, in the event, the purchaser has advanced the purchase money to the vendor, and the latter subsequently transfers the same land to a third party who is successful in having the land registered in his name, the original purchaser would certainly be unable to sue the vendor for specific performance of the agreement nor indeed seek rectification of the register.[166] Nevertheless, he would be able to

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[164] *Ibid*, s. 41(2). If the parties fail to obtain consent or to apply for consent within the required period, and proceed to enter possession of the land or pay or receive money in furtherance of the void transaction, they may also to be guilty of a criminal offence under section 22 of the Land Control Act 1967. In Gabriel Wamukota v. Sylvester Donati, *op. cit.*, the defendant had been charged with an offence under section 22 of the Land Control Act 1967 and imprisoned. Unfortunately for the plaintiff, who was a party to the void transaction, but had nevertheless advanced purchase money to the defendant, the defendant on his release transferred the registered land to a *bonafide* third party. The plaintiff failed to have the register rectified in his favour.

[165] Gabriel Wamukota v. Slyvester Donati, *op. cit.*

[166] *Ibid.*

recover the consideration under section 7 of the Land Control Act 1967. However, if the first purchaser had protected his void estate contract by entering a caution[167] - assuming that the caution is entered before the contract is declared void - would the caution have been binding on the third party? It is submitted that it would not have, since there was no valid interest that the caution was protecting and the third party could successfully apply to have the caution removed.[168] The result would be the same if the first purchaser was in actual occupation and claimed an overriding interest under section 30(g) of the Registered Land Act 1963. Since the right under the estate contract is void, the interest is devoid of validity; therefore, even if it is coupled with actual occupation of the land it cannot be elevated into an overriding interest.[169]

But suppose the Registrar mistakenly registered the transfer which had been declared void by the land control board, or a transfer which had not been presented to the land control board for consent within

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167 Registered Land Act 1963, s. 131(1)(a)

168 *Ibid*, s. 133(2). However, such a caution would in reality discourage the third party from proceeding to purchase the land.

169 That there must be an interest coupled with actual occupation within section 30(g) was accepted in John Kiruga v. Mugecha Kiruga, Civil App. No. 52 of 1985 (unreported); for the identical position under section 70(1)(g) of the Land Registration Act 1925 see City of London Building Society v. Flegg [1987] 2 W.L.R. 1266.

six months[170] and is therefore void, what is the effect of the registration? This is an area where there appears to be a conflict of law. On the one hand, section 6(1) of the Land Control Act 1967 provides that a transaction for the sale of land that has not been granted land control consent is *"void for all purposes"* (italics mine). On the other hand section 27 of the Registered Land Act 1963 automatically vests the legal and equitable estate or 'absolute ownership' on the person who is registered as proprietor; moreover, section 28 of the same Act also provides that the rights of the proprietor shall not be liable to be defeated except as provided in the 1963 Act. Therefore, if a person is mistakenly registered as proprietor by the Registrar, although the transfer had been declared void, does section 6(1) of the Land Control Act 1967 extend to such a registration so that the registration itself is void, or do sections 27 and 28 of the Registered Land Act 1963 prevail so that the registration can only be defeated by the provisions in the 1963 Act? The answer to this question depends on the interpretation of section 4 of the Registered Land Act 1963. That section states:

> "Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:
>
> Provided that, except where a contrary intention appears, nothing contained in this

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[170] Assuming no application is made to the High Court to extend the period - Land Control Act 1967, s. 8(1).

> Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as *overriding any provision of any other written law requiring the consent or approval of any authority to any dealing."* (italics mine).

It is evident that the proviso to section 4 was written with the Land Control Act in mind.[171] The effect of the italicised words would appear to make the registration of a void transfer void by virtue of section 6(1) of the Land Control Act 1967 because section 6(1) provides that the transaction is "void for all purposes".

There appears to be a difference of opinion as to the effect of these provisions. Krishan Maini is of the opinion that notwithstanding section 4 of the Registered Land Act 1963, registration has the effect of validating a void transfer because of the basic principle of registration, that the register proves title.[172] However, Land Registry practice seems to indicate otherwise. The Deputy Chief Land Registrar narrated to the writer[173] an episode where a District Land Registrar was instructed by a District Officer to register a charge against a registered title without

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171 S. Rowton Simpson, Land Law and Registration (Cambridge 1976), p. 477. Strictly speaking, the 1963 Act at the time of its enactment was referring to the Land Control (Special Areas) Ordinance which was subsequently replaced by the present Land Control Act 1967.

172 *K. M. Maini*, Land Law in East Africa (Nairobi 1967), p. 167.

173 Interview with Mr. K. Gachiri, Nairobi Lands Office, 3 October, 1989.

first obtaining land control consent, because it was assumed that consent would be granted as a matter of course.[174] The charge was registered but consent was never granted to the charge. The proprietor of the land which was charged subsequently defaulted. The bank, however, as chargee, was unable to exercise its power of sale over the land because the charge was declared void by the Chief Land Registrar, notwithstanding its registration, because consent had never been granted to the charge. Registration of the charge was therefore viewed as not having conferred validity on the charge. However, the bank was able to recover an indemnity from the Government in view of the Land Registrar's mistake.[175]

The effect of such a mistake has yet to be considered by the courts. At present it would appear that the view of the Land Registry is the prevailing one, that is, a transaction is not validated by its registration and the registration of that transaction is void. This would appear to take the effect of section 6(1) of the Land Control Act 1967 to its logical conclusion; since a transaction without consent is "void for all purposes" everything stemming from that transaction is void, even its registration.

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[174] Charges are among the transactions that must be given consent under section 6(1) of the Land Control *Act 1967*.

[175] Rectification by removing the charge from the register was made and indemnity paid under section 144 of the Registered Land Act 1963.

Subsequent dealings would therefore be affected and they too would be void.

However, there is much to commend to Maini's view expressed above. Since proof of title in registered land is the register, registration should, *ipso facto*, validate a void transaction. For example, a forged transfer, if registered, can confer title on a purchaser of the land, registration acting as a kind of statutory magic automatically vesting the legal estate in the transferee.[176] Moreover, as registration "is to save persons dealing with registered land from the trouble and expense of going behind the register, in order to investigate the history of their author's title and to satisfy themselves of its validity"[177] why should the title of a purchaser for value by impugned by being declared void on the strength of a mistake committed by the Registrar, *a fortiori* since the purchaser himself could have discovered the defect in the vendor's title had he been allowed to investigate the same? Declaring a registration void would, in some cases, cause enormous complications where the rights of third parties are involved. For example, suppose A is the registered proprietor of Haraka Farm. B agrees to purchase the farm and the transfer form is completed. However, while land control consent is pending, the transfer is registered by mistake and B becomes the

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[176] Subject to rectification. See for example, Argyle Building Society v. Hammond, (1985) 49 P & C.R. 148.

[177] Gibbs v. Messer [1891] A.C. 248 at 254.

registered proprietor and receives a 'title deed'. Meanwhile land control consent is refused to the transfer from A to B. Before the mistake is discovered, B has transferred the land to C who obtains consent to transfer and is registered as proprietor and subsequently charges the land to D. If the first transfer from A to B is void, it would follow from the argument of the land registry that the registration of B is also void. If that is so, does it follow that the transfer from B to C is void, notwithstanding the subsequent consent by the land control board to that transfer, or does the subsequent consent of the B to C transfer validate that transfer, and have retrospective effect? It is submitted that the better result is that advocated by Maini, that is, registration should validate a transfer even if it is void. Section 4 of the Registered Land Act 1963 is a saving section[178] and its real effect is to provide that the procedure of transferring registered land under the Registered Land Act 1963 should be read subject to the Land Control Act 1967, so that a transfer of agricultural land should not be registered until land control consent is obtained. It would follow that although section 38(1) of the Registered Land Act 1963 provides that an unregistered transfer operates as a contract, such a contract cannot be capable of specific performance unless land control consent is obtained. But if such a

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[178] See S. Rowton Simpson, *op. cit.*, p. 477.

transfer is registered by mistake, then it is submitted that the registered proprietor should obtain a valid title that can only be defeated by the rectification provisions in section 143 of the Registered Land Act 1963.[179]

III CONCLUSION

The transfer of registered land under the Registered Land Act 1963 and the Land Registration Act 1925 is simplified by the use of simple transfer forms together with the straight forward procedure of obtaining an official search of the register. The search prevents a purchaser from having to undergo the tedious process of retrospectively deducing title from deeds, and clearly shows whether there are any adverse interests affecting the register. Moreover, the elaborate procedures in the transfer of land subject to customary law in Kenya no longer have to be undertaken by a prospective purchaser.[180] The relatively simple procedure of transferring registered land has enabled individuals in Kenya to undertake their own conveyancing, where transfers of freehold land are concerned, without the benefit of legal advice.

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[179] The proprietor would be protected if he is in possession - Registered Land Act 1963, s. 143(2). However, if the registered proprietor has been partly responsible for the failure to obtain consent, for example, not submitted the consent forms within the limitation period, then he may be held to have substantially contributed to the mistake by his neglect or default and therefore lose his protection - *ibid*, section 143(2).

[180] For a discussion of some of these procedures, see Chapter Two, *supra*.

Doubts have been raised in this Chapter as to whether the Law of Property (Miscellaneous Provisions) Act 1989 has really tightened up the formalities for contracts for the sale of land in England. It was argued that section 2(8) may not have completely abolished the doctrine of part performance. This aspect does not so much affect parties who are legally represented, as those who inter into a transaction on their own behalf to purchase land, whether registered or not. If their contract does not comply with section 2(1) of the 1989 Act, then it is clearly void and not merely unemforceable.

However, if the view is taken that section 2(8) of the 1989 Act has not completely abolished part performance, and the purchaser has paid a deposit to the vendor and entered possession, a court may take the view that to prevent the vendor from using the Act as an instrument of fraud, the purchaser having acted in part performance, should have the contract specifically enforced. While it is the writers view that it is highly unlikely that a court may undermine the intent of Parliament in this manner,[181] nevertheless, a doubt still remains as to the effect of the Act. It remains to be seen how a court would interpret these provisions.

As further highlighted in this chapter, there are certain pitfalls which may affect those who transfer

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[181] Applying the mischief rule may avoid this result.

land registered under the Registered Land Act 1963 without the assistance of a lawyer. The absence of implied covenants for title in the Registered Land Act 1963 may prejudice a purchaser contracting with a vendor for the sale of registered land. For example, if a third party was able to have the register rectified against the purchaser (now registered as proprietor), because the vendor had no right to convey the land registered in the proprietor's name, the lack of implied covenants for title would prevent the purchaser suing the vendor for breach of the covenant of the power to convey.[182]

However, in view of the lack of Kenyan authorities in this area, the discernible effect of implied covenants for title in registered land can only be viewed in the context of English authorities. But it has been shown that there is still a measure of uncertainty, in view of the conflicting Court of Appeal decisions in Meek v Clarke[183] and A.J. Dunning v Sykes[184] in this area. The writer takes the view that the latter decision is to be preferred. In Kenya, suing on the implied covenants for title, such as the good right to convey, would be the only remedy open to a plaintiff who fell victim to the provisions in the

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182 A.J. Dunning Ltd. v. Sykes Ltd. [1967] 1 All E.R. 700 highlights the usefulness of implied covenants for title in registered land.

183 LEXIS Transcript (1982).

184 *Op. cit.*

Registered Land Act 1963 preventing rectification and indemnity for first registrations.[185] Meek v Clarke[186] could probably be supported, if at all, on the basis that the plaintiff already had an unanswerable claim against the Land Registry, although this was limited to the value of the lost right.[187]

In additions, the covenant of freedom from incumbrances may be useful if the purchaser finds himself subject to overriding interests that were undisclosed by the vendor.[188] The lack of such an implied covenant would also prevent the purchaser from suing the vendor for breach of that covenant. The possibility of suing the vendor on the covenants is a valuable remedy if the proprietor had no right to an indemnity, or if the amount of indemnity awarded does not cover the value of his interest.[189] But a purchaser who has had the conveyancing undertaken by a lawyer in Kenya will have had the benefit of the Kenya Law Society's Conditions of Sale having been incorporated into the contract with the vendor and therefore will have the benefit of the express

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185 Ss. 143(1), 144(1)(b).

186 *Op. cit.*

187 However, this argument is tenuous since a claim for an indemnity and a claim against the vendor on the covenants are mutually exclusive.

188 In Meek v Clarke, *op. cit.* Oliver L.J., albeit *obiter*, expressed the view that such a covenant could have an operation against overriding interests.

189 Registered Land Act 1963, s. 145. However, this remedy is valueless if the vendor is a man of straw.

covenants upon which he could sue the vendor in damages if the latter was in breach of them. This highlights the danger that a purchaser may face if, as is usually the case in Kenya, he undertakes the transfer himself.

Although the official search of the register prevents a purchaser from having to deduce title by other means, this does not preclude him from having to undertake other equally important searches, such as finding out whether the local authority has registered a charge against the land. In England, this search is facilitated by the existence of a local land charges register. In Kenya, the absence of such a register means that a purchaser has to enter into correspondence with the local authority to ascertain whether all rates have been paid, for example. No transfer can be registered until a clear written statement is received. This procedure may cause unnecessary delay in a transaction if the authority is slow to reply, or if an unrepresented purchaser was unaware of this requirement and only discovered it at the last minute.[190] A solution to this problem would be to permit local land charges to be registered as charges on the register of title similar to the way a charge for improvements under the Agriculture Act can be registered as a charge on the register.[191] However, this would not absolve

[190] Such a purchaser would have to be careful tht he did not lose his suspension period under section 43(2) of the Registered Land Act 1963. If he did he would have to obtain another official search of the register.

[191] Agriculture Act Cap. 318, s. 56.

the need to make further inquiries of the local authority in respect of matters connected with the Land Planning Act[192] for example.

The verification of execution of a transfer of land under the Registered Land Act 1963 acts as a safeguard against impersonation and would potentially limit the incidence of fraud. This verification is facilitated by the system of national identity cards in Kenya. Nevertheless, there is nothing to prevent a determined forger from obtaining a fake identity card and entering into a fraudulent transfer.[193] While there is no similar system of verification of transfers in England, it would be expedient if the procedure in section 75 of the Law of Property Act 1925 were to be made compulsory.

The necessity of obtaining land control consent under the Land Control Act 1967 if the land is agricultural is underlined by section 6(1) of the 1967 Act which provides that a failure to obtain consent renders a transaction "void for all purposes". Failure to obtain such consent renders a contract for the sale of land incapable of specific performance. However, the problem arises where a void transfer is registered by mistake. As discussed earlier there exists a difference of opinion as to the effect of such a registration. Land Registry practice treats such a

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192 Cap. 303.

193 As in Republic v. Godfrey Kariuki Kinyanjui, Crim. Case No. 35 of 1982, Kiambu S.R.M.C. (unreported).

registration as void. But such a view can cause enormous complications for innocent third parties who have relied on the register and have registered their interests or who have obtained rights in the land such as overriding interests. Their interests would be declared void if the land registry view was to prevail. Such a view is contrary to the objective of land registration that the register is everything and is therefore proof of title. It was argued that section 4 of the Registered Land Act 1963 is concerned with pre-registration dealings so that a transfer of agricultural land should not be registered until consent has been obtained. If consent is not granted, a mistaken registration should, nevertheless, confer valid title on the registered proprietor, subject to rectification.

Despite the existence of this problem it is unlikely that it will occur frequently because the requirement of land control consent before registration of a transfer is strictly adhered to.[194] Nevertheless, it is a problem which can only be satisfactorily resolved by the courts, thereby ending the uncertainty.

It is evident that pitfalls exist even in the relatively 'simple' system of registered conveyancing. Arguably, amendments can be made to the Registered Land Act 1963 to protect unassisted purchasers. For example, provision may be made for covenants for title

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[194] Land Control Act 1967, s. 20(1).

to be implied where operative words such as 'beneficial owner' are used in a transfer.[195] Allowing the registration of local land charges on the register of title would make it easier to ascertain the existence of such charges and would prevent the delay in registration as is the current procedure.[196] Alternatively, local land charges could be added to the list of overriding interests under section 30 of the Registered Land Act 1963 and which would bind a purchaser; this is the position under the Land Registration Act 1925.[197] To prevent registering a

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[195] The amending Act would have to set out the covenants which are to be implied on a transfer. The operative words may then be included in the transfer form (Form R.L. 1). See the proposed amendment (clause 27) by the Law Commission in their Fourth Report on Land Registration (Law Com. No. 173).

[196] A similar suggestion has been made with respect to the register under the Land Registration Act 1925. Information about local land charges and other local authority matters affecting the house would also be placed on the land certificate - Michael Joseph, Lawyers Can Seriously Damage Your Health, (London 1984),pp. 292, 293. However, the Law Commission felt that it was not sensible to require the registration of local land charges on the register, (these are capable of being registered - see section 70(1)(i) of the Land Registration Act 1925 - a point that Mr. Joseph, *supra*, does not seem to be aware of) because they are already registrable under the Local Land Charges Register. Instead they recommended that local land charges should take effect as general burdens under the Land Registration Act 1925 with the Registrar having a discretion to enter a note of them on the register - Third Report on Land Registration, Law Com. No. 158, paras. 2.15, 2.94.

[197] Section 70(1). See the recommendation of the Law Commission *supra*, n. 196. However, it is interesting to note that although the Working Party on African Land Tenure noted that such charges should be overriding interests, this was not implemented - see Report of the Working Party on African Land Tenure 1957-58, (Nairobi 1958), para. 67(a). Making such charges overriding

transfer that has not received consent Registry officials should carefully scrutinise the documents presented for registration.

The English Law Society has however promoted a new conveyancing protocol known as TransAction designed to speed up the conveyancing process. One of the elements of the protocol was that the vendor's solicitor would have the responsibility of undertaking a local search at the vendor's cost, and the result of the search provided fee of charge to the purchaser's solicitor. Such a procedure would certainly save the purchaser time and money.

Despite the fact that registered conveyancing is 'simple' the vast majority of persons in England do not undertake their own conveyancing. The Royal Commission on Legal Services commented that it is only in a small proportion of transactions that a vendor and purchaser act on their own account'.[198] It has been suggested that this is probably due to solicitors making "a great song and dance about all the complicated things which [they have] to check before exchange of contracts" although in reality the work the solicitor does is 'worse than useless' since in the case of registered land all he has to do is to send printed forms since he no longer has to investigate

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interests however, would mean that a purchaser would want to find out what changes were binding on the land.

[198] Final Report of the Royal Commission on Legal Services, Vol. I, Cmnd. 7648, para. 21.28.

title.[199] Undoubtedly, the necessity of local land charge searches and inquiries of local authorities adds to the complexities of transferring registered land. But more significant is the existence of overriding interests and the difficulty of their discoverability. This is a serious pitfall for purchasers of registered land whether in Kenya or in England, and would certainly prejudice those who conducted their own transfers and were unaware of what to inspect. This aspect is discussed in the next chapter.

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[199] Michael Joseph, *op. cit.*, pp. 291,292.

Chapter Six

CUSTOMARY RIGHTS AND THE REGISTERED LAND ACT 1963

1. Introduction

The challenge that has faced the land adjudication teams is to ensure that all customary rights, whether those amounting to ownership of land or lesser rights in land, are identified and recorded on the adjudication register. However, as was shown in Chapter Three, the adjudication teams, particularly those in the Central Province, failed to record many lesser or subordinate customary rights, and including the rights of those claiming to own land. Several reasons were responsible; individuals claiming those rights were not present during land adjudication to ensure the registration of these claims on the adjudication register because of the civil war of the 1950's; the adjudication teams were not diligent enough when undertaking the adjudication process, with the inevitable consequence that some rights were missed out; many subordinate rights were unrecorded because there was a preoccupation with recording land ownership claims; moreover, the teams themselves were unable to categorise some of the customary rights into rights recognised by the Registered Land Act 1963.

In view of the fact that many of these customary rights were not recorded onto the adjudication register and hence not transferred onto the register under the

Registered Land Act 1963, the question that arises is this: are customary rights that are not protected on the adjudication register extinguished when land is brought onto the register, or do they survive registration even though they may be unprotected? This issue is an important one because many individuals are still asserting customary rights against registered proprietors many years after land adjudication is complete, claiming that these rights are still binding on these proprietors; consequently many have brought these cases before the courts. However, this issue has divided the courts.

One line of thought promoted in this chapter is that certain customary rights, despite being unregistered, are capable of binding the registered proprietor of land. To be binding however it has been held that such rights have to arise behind an implied trust. Two types of implied trusts have emerged: the resulting and the customary trust. Both these trusts have been developed by the courts in an attempt to protect those who failed to have their rights registered during land adjudication.

The contrasting line of thought was that initially expressed *obiter* in the High Court decision in Obiero v. Opiyo[1] and later followed in Esiroyo v. Esiroyo,[2] where it was held that customary rights are

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1 [1972] E.A. 227.

2 [1973] E.A. 388.

extinguished when land is brought onto the register. In the words of Bennett J. in Obiero v. Opiyo:

> "Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so."[3]

One researcher, Simon Coldham, supports this view and advanced an argument to lend credence to it, which can be summarised as follows:[4] section 40(f) of the Land Registration (Special Areas) Ordinance 1959 had expressly included a "right of occupation under native law and custom" as an overriding interest. Clearly under that statute, customary rights were not extinguished on registration. However, this provision was not repeated in the Registered Land Act 1963 which replaced the 1959 Ordinance. Instead section 11(3) of the 1963 Act provides that a right of occupation under African customary law recorded in the adjudication register is deemed to be a tenancy from year to year, such right falling under section 30(d) of the 1963 Act as an overriding interest. The inference that Coldham draws is that customary rights that are not recorded on the adjudication register - and therefore would not be

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3 [1972] E.A. 277, at p. 228.

4 Simon Coldham, The Effect of Registration of Title Upon Customary Land Rights in Kenya [1978] J.A.L. 91 at p. 106. See also Simon Coldham Registration of Title to Land in the Former Special Areas of Kenya, unpublished Ph.D thesis, London University, 1977, p. 196.

recorded onto the register under the 1963 Act - are extinguished.[5]

One right in particular has emerged to be of importance in this debate: the right to receive a share of land under customary law. The purpose of this chapter is to show that this customary right has been accepted as capable of binding registered proprietors of land despite the fact that it may be unregistered, and how the device of the resulting and the customary trust has been used to protect such a right.

It will be further shown that customary tenancies, despite being unregistered, are capable of subsisting under the Registered Land Act 1963, but under the new clothes of the rights created by the Act. Two important rights are recognised by the Act: the periodic tenancy and the licence. For a customary tenant to assert that his right is not extinguished he would have to show that his customary tenancy is either capable of subsisting as a periodic tenancy or licence because it has the elements of one of these rights. In this way his right is not extinguished but is transformed into a new right recognised by the Act. It will be shown that these rights may be protected either by the entry of a caution, or may even subsist as overriding interests under the Registered Land Act 1963.

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5 *Ibid.*

In England the protection of customary rights is not an issue that has generated the type of debate that has emerged in Kenya. Cases concerning customary rights have rarely come before the courts particularly in this century with regard to registered land. Nevertheless, the Land Registration Act 1925 makes provision for such rights to subsist as overriding interests.[6]

In discussing the use of the caution and other restraints on disposition such as the restriction and inhibition, provided for in the Registered Land Act 1963, their effect is compared with the effect of cautions and other restraints on dispositions entered under the Land Registration Act 1925. Of significance too is the question of overriding interests; the equivalent of section 30(g) of the Registered Land Act 1963 is section 70(1)(g) of the Land Registration Act 1925, both which protect the rights of those in actual occupation. It will be shown that a customary right may be capable of subsisting as an overriding interest under section 30(g) of the Registered Land Act 1963. In considering the deficiencies of the provisions of the Registered Land Act 1963 in this area, regard is made to the remedies that can be made to improve the system.

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6 S. 70(1)(a).

II. Methods of Protection

A. Cautions

The method of systematic adjudication and registration of land in Kenya means that nobody can prevent the registration of any land within an adjudication area.[7] For this reason there is no provision made for the entry of cautions against first registration. In contrast, provision is made for the entry of a caution against first registration under the Land Registration Act 1925 with respect to land that is unregistered.[8] This means that in the *ad hoc* system of land registration in England and Wales, anyone with an interest in land can prevent the registration of such land, albeit temporarily, with the entry of a caution. However the absence of provisions enabling the entry of a caution against first registration under the Registered Land Act 1963 means that those who discovered that their rights have not been recorded in the adjudication register in the interval between the completion of that register and the transfer of the recorded rights in that register to the register under the Registered Land Act 1963 cannot prevent the registration of that land.

Nevertheless, the Registered Land Act 1963 makes provision for a person to enter a caution against

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7 See Chapter Three, *supra*.

8 S. 55(1).

dealings. Section 131(2) of the Act provides that a caution may either:

> "a) forbid the registration of dispositions and the making of entries altogether; or
> b) forbid the registration of dispositions and the making of entries to the extent therein expressed.

Section 54(1) of the Land Registration Act 1925 merely states that a person may lodge a caution,

> " ... to the effect that no dealing with such land or charge on the part of the proprietor is to be registered until notice has been served on the cautioner."

Hence the entry of cautions under both Acts has the effect of preventing a registered proprietor from registering any dealings with his land. The difference is that under the Registered Land Act 1963, a caution of the section 131(2)(b) variety may be used to prevent the registration of dispositions to a limited extent. For example a caution may be expressed to prevent the registration of a transfer of the land if the purchase money is paid to less than a certain number of co-owners, whether two, three or four. In this way, the entry of such a caution would be similar to the effect of a restriction which can be entered to prevent purchase moneys being advanced to less than a certain number of people.[9]

However, the power of the cautioner in preventing dealings with the registered land is governed by the extent to which he can continue to make successful

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[9] Land Registration Act 1925, s. 58(3); *c.f.* Registered Land Act 1963, ss. 136(1),(2).

objections to the removal of the caution.[10] Under the Registered Land Act 1963 the cautioner has a 30 day period within which to object to the removal of the caution,[11] compared with the 14 day period under the Land Registration Act 1925.[12]

A caution entered under section 131(1) of the Registered Land Act 1963 is capable of protecting either one of the customary rights mentioned earlier. Two heads under this subsection are of importance here; section 131(1) provides that any person who:

> "a) 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: or
>
> b) is entitled to a licence
>
> c) ..."

1. Section 131(1)(a)

Under this subsection, a person with the benefit of a contract to grant an interest in land is entitled to lodge a caution. For example, a contract to grant an easement, profit or restrictive agreement, such interests being capable of created by forms registrable

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10 Registered Land Act 1963, s. 133(2); Land Registration Act 1925, s. 55(1).

11 Registered Land Act 1963, s. 133(2)(a); Practice Instruction: Removal of Cautions Under Section 133 of the Registered Land Act Cap.300 (K.D.L.R. Admin. File) from Chief Land Registrar to all Land Registrars.

12 Land Registration Act 1925, ss. 55(1); Land Registration Rules 1925, r. 218.

under the Act[13] would be capable of being protected by a caution.

However, the use of the term 'otherwise' in this subsection would indicate that a claim to obtain the right to an interest in land can arise by means other than by contract. The Chief Land Registrar indicated in a Practice Instruction that interests which arise behind a resulting trust qualify for protection by the entry of a caution under section 131(1)(a) of the 1963 Act[14]. Such an interest would include the customary right to receive a share of land. This issue is considered below.

a **Rights Arising Under a Resulting Trust**

The Chief Land Registrar recognised that during land adjudication family land was often given to one member of the family "on the understanding that he holds it on trust for himself and his other brothers"[15] The Registrar clearly envisaged the type of trust recognised in English law when land is voluntarily conveyed in the name of another.[16] This type of arrangement has sparked off a significant amount of

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13 For the registration of these interests, see Registered Land Act 1963, ss. 94, 95, 96.

14 Practice Instruction, Cautions : A Beneficiaries Interest, Ref. No. 79696/III/173.

15 Practice Instruction, Cautions : A Beneficiaries Interest, *op. cit.*

16 See Hodgson v. Marks [1971] Ch. 892. For a further discussion, see Chapter Seven, *infra*.

caselaw, because in many of these arrangements the person who received the land which was then registered in his name would subsequently deny his undertaking to hold the land on trust for the family members and, in some cases, would seek to evict his own family members from the land by virtue of the fact that their interests were not registered.[17]

One problem is definition; in the situation described above, the courts have described the type of trust they have implied as a 'family trust'[18] while other commentators have described it as a 'customary trust'.[19]

However, the situation the Registrar envisaged was partly brought about by the provisions of section 101(4) of the Registered Land Act which does not permit the registration of more than five persons as proprietors.[20] As African families or clans as land holding units tended to be large, it was often mutually

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17 See for example Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 253; Muthuita v. Muthuita, Civil Appeal No. 12 of 1982 (unreported); Ngugi Miru v. Kiringi Miru, Nation Law Reports, 30 December 1985; Kinyuru Matu v. Mwangi Matu, Civil Appeal No. 122 of 1985 (unreported).

18 John Kiruga v. Mugecha Kiruga, Civil Appeal No. 52 of 1985 (unreported), per Apaloo J.A.

19 Simon Coldham, Registration of Title to Land in the Former Special Areas of Kenya, Unpublished Ph.D Thesis, London 1977, p. 186. P.L. Onalo, Land Law and Conveyancing in Kenya, (Nairobi 1986), p. 196 *et. seq.* This type of trust is discussed below.

20 This section was contained in section 66 of the Land Registration (Special Areas) Ordinance 1959, the *predecessor of the 1963* Act.

agreed among them that one of their number should have the land registered in his name on behalf of the family or clan. This is illustrated in the case of Alan Kiama v. Ndia Mathunya.[21] There, the members of a large clan collectively owned a sizeable piece of land. Due to the upheaval caused by the Mau Mau war some clan members were put in detention. It was therefore felt that the land should be sub-divided among the clan members when things cooled down. In the meantime, they nominated one of their number, one Karuru Kiragu, to be registered as proprietor. However, Kiragu later sold the land to the plaintiff in exchange for another plot of land. The plaintiff brought an action against the clan members who were still occupying the land. It was held that a resulting trust arose in favour of the clan because of the "relationship of the parties" and the circumstances of the case, the clan having voluntarily conveyed the land to Kiragu. The court went on to hold that the clan members, having a equitable interest under the trust, had overriding interests under section 30(g) of the Registered Land Act 1963 binding on the plaintiff because they were in actual occupation of the land.

The clan members therefore, having the right to have the land subdivided among themselves, could have entered a caution under section 131(1)(a) of the

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21 Civil Appeal No. 42 of 1978 (unreported); noted in [1983] J.A.L. 62.

Registered Land Act 1963 by virtue of being beneficiaries under the resulting trust.[22]

b **Rights Arising Under a Customary Trust**

This type of trust is peculiar to Kenya, implied by the courts as a result of the influence of customary law[23] combined with the inability of the courts to rectify the register[24] to give effects to the unprotected rights of individuals.

In many African societies, it was the custom for the eldest son to distribute land belonging to the family to the family members, particularly the male issue.[25] This happened when the family head died intestate, the eldest son having been appointed under customary law. The eldest son was therefore viewed as the head of the extended family. With the outset of land registration, many of these had themselves registered as proprietors of the land, often by mutual agreement with their brothers, or by virtue of customary law, particularly if the brothers were not

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22 See Practice Instruction: Cautions : A Beneficiaries Interest, *op. cit.*

23 The Chief Land Registrar probably had this trust in mind which he classified as a resulting trust. See Practice Instruction, *op. cit.*

24 Registered Land Act 1963, s. 143(1). See further Chapter Eight, *infra*.

25 See generally, E. Cotran, Restatement of African Law, Kenya, Vol. II : The Law of Succession, (London 1969).

present.[26] Often, the rights of the other family members were not recorded, although they still continued to occupy the land.

Problems, however, began to occur when disputes arose several years later. This happened when the registered proprietor, probably due to a family quarrel decided to evict his brothers from the land they were occupying on the basis that their rights were unregistered and he, as first registered proprietor, took free from them by virtue of section 28 of the Registered Land Act 1963 and, in any event, as first registered proprietor, the register could not be rectified to take those rights into account because of section 143(1) of the Registered Land Act 1963.

In these circumstances, the courts, unable to have the register rectified,[27] began to imply a trust. For example in Muguthu v Muguth[u28] the plaintiff was the younger brother of the defendant. When land registration took place the defendant had the family land registered in his name. The plaintiff subsequently sought a court order declaring that the defendant was a trustee, holding the land for the benefit of the plaintiff and the defendant in equal

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[26] During the Mau Mau Civil War many family members were put in detention if they were found to have been in sympathy with the Mau Mau. See for example Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 253.

[27] Registered Land Act 1963, s. 143(1); see further Chapter Eight, *infra*.

[28] [1971] K.H.C.D. 16.

shares. The court granted such a declaration on the basis that the defendant "was registered as owner as the eldest son of the family *in accordance with Kikuyu custom which has the notion of trust inherent in it.*" It was not necessary for the plaintiff to have been registered "as trustee" within section 126(1) of the 1963 Act. The defendant's right to receive a share of the land was binding on the defendant.

Muguthu was followed in Gatimu Kinguru v. Muya Gathangi.[29] In that case the plaintiff and the defendant were brothers. The plaintiff, who was registered as proprietor of a plot of land claimed that the defendant was a persistent trespasser having erected a temporary house and cultivated on the land. Accordingly, the plaintiff sought a perpetual injunction restraining the defendant from trespassing on the land. The defendant claimed that he and the plaintiff were entitled to inherit the land in equal shares, but that while the defendant was in detention during the Mau Mau Civil war, the plaintiff was registered as proprietor. Hence he held the land on trust for the defendant and himself in equal shares.

The court held, *inter alia*, that although the plaintiff was not registered "as trustee" within section 126(1) of the 1963 Act, he still held the land on trust for himself and the defendant in equal shares

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29 (1976) Kenya L.R. 253.

and, accordingly, the defendant was entitled to live on the land.[30]

Gathangi was applied in the Court of Appeal decision in Muthuita v Muthuita.[31] The parties in this case were all members of one family. The respondent was the eldest son in the family who, after the death of his father, had the land registered in his name with the concurrence of the appellants who were his mother and two younger brothers. The respondent claimed that the land was his, having been registered as sole proprietor. The appellants, who had initiated the action, claimed that the respondent held the land on trust on their behalf since he had been registered as the eldest son in accordance with Kikuyu customary law. The Court of Appeal held that the respondent held the land on trust even though he was not registered "as trustee". Accordingly, the rights of the appellant to have the land subdivided amongst them were binding on the respondent.

The principle in Muguthu and Gathangi was applied in another Court of Appeal decision, Ngugi Miru v. Kiringu Miru.[32] In that case both the appellant and respondent were brothers. The appellant claimed that they were both entitled to inherit a plot of land that belonged to their deceased father. During land

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30 See further, Chapters Seven and Eight, *infra*.

31 Civil Appeal No. 12 of 1982 (unreported).

32 Nation Law Reports, 30 December, 1985.

adjudication, the land was registered in the name of the respondent. The appellant sought a declaration that the respondent held the land on trust for himself and the appellant in equal shares. The court accepted that the respondent held the land on trust and ordered that the land be sub-divided in equal shares.

A similar conclusion was reached by the Court of Appeal in Kinyuru Matu v Mwangi Matu.[33] Again, the parties were members of the same family. The land was registered in the name of the appellant, who was the elder brother of the respondents. The appellant claimed that he held the land as sole proprietor, to the exclusion of his brothers whose rights were unregistered. The court however held that the appellant held the land on trust for himself and his brothers, and that the rights of the latter were binding on him notwithstanding that they were unprotected on the register. Several factors are present in these cases.

1. In every case, with the exception of Alan Kiama v Ndiya Mathunya,[34] the proprietor was a first registered proprietor who, on the basis of section 28 of the Registered Land Act 1963 argued that the rights of the claimants were not binding on him because they were unprotected.

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33 Civil Appeal No. 122 of 1985 (unreported).

34 *Op. cit.*

2. Notwithstanding this argument, the courts implied a trust which explicitly recognised the customary practice of having land vested in one person with the responsibility of distributing that land to members of his family.

3. The rights asserted by the claimants, who all happened to be family members, in all cases were the *right to have a share of the registered land by virtue of the customary law on inheritance*.

4. These rights were binding on the registered proprietor by virtue of section 126(3) of the Registered Land Act 1963.

These cases establish an important principle; that the customary right to have an inheritance share in land is an interest in land that survives registration and is capable of binding the registered proprietor, despite the right remaining unregistered. It follows that a person can protect this right by the entry of a caution under section 131(1)(a) of the Registered Land Act 1963.[35]

It is notable that the elements running through the cases illustrating the customary trust are similar to the elements in the resulting trust envisaged by the Chief Land Registrar. In both instances, there either existed a mutual agreement that the land be registered in the name of the eldest son, or the eldest son

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[35] This would amount to a beneficiary's interest as defined by the Chief Land Registrar - Practice Instruction, Cautions : A Beneficiary's Interest, Ref. No. 79696/III/173.

registers himself in recognition of customary practice. In reality there may be no difference between the resulting and the customary trust and they are, more or less, examples of one genre, the implied trust. In practice, placing these trusts in two different categories may not serve any practical purpose.

Lord Diplock in Gissing v. Gissing[36] took an analogous view with respect to resulting implied or constructive trusts in English law in so far as they apply to disputes over the matrimonial home. As far as he was concerned, there was no need to distinguish between those three classes of trusts.[37]

The view that there is no need to categorise these trusts was echoed in Lloyds Bank v. Rosset[38] where Lord Bridge said that he did not see any need to create nice legal distinctions between the trusts.[39] It would appear that while textbook writers may favour conceptual tidiness whereby the circumstances giving rise to a particular trust are categorised, the judges see no practical benefit of pigeon holing situations to fit a label.[40]

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36 [1971] A.C. 886 at p. 905.

37 *Ibid.*

38 [1990] 2 W.L.R. 867.

39 *Ibid.*, at p. 876.

40 Traditional texts have conventionally sought to distinguish implied, resulting or constructive trusts - see for example Snell's Principles of Equity, 28th ed. by P.V. Baker and P. St. J. Langan, (London 1982), Part II Ch 4 & 5. The challenge facing authors of new editions may be whether to abandon the traditional classification of these trusts where the family home is

One may therefore conclude that customary trusts of family land in Kenya and trusts of the family home in England are both species of implied trusts.

The distinction is that in Kenya, the courts look at whether the person claiming a beneficial interest in the land formerly under customary law has a customary right to receive a share of that land; at times there may exist an agreement or understanding between the parties to this effect.[41] Usually, in finding out what the customary law position is, the court is able to take judicial notice of the custom without further proof "as for instance in cases where the particular customary law has been the subject of a previous judicial decision or where the customary law is set out in a book or document of reference ..."[42] However, the normal practice in court is for the party relying on

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concerned and simply call them trusts of the family home - see for example Hanbury & Maudsley, Modern Equity 13th ed. by Jill E. Martin, (London 1989), Chapter 11. See also the argument by Professor David Hayton, Equitable Rights of Cohabitees, [1990] Conv. 370, that in reality there is no distinction between 'common intention' constructive trusts and proprietary estoppel. See also Chapter Seven, *infra*.

41 See for example Muthuita v Muthuita, Civil Appeal No. 12 of 1982, unreported.

42 Kimani v. Gikanga [1965] E.A. 735 at p. 738, per Duffus J.A. See also Evidence Act 1963, ss 60(1)(a), (2). A leading treatise frequently resorted to by the courts to ascertain the customary law of any tribe in Kenya is E. Cotran, Restatement of African Law, Kenya, Vol.II : The Law of Succession, (London 1969).

customary law to call witnesses who testify as to what the relevant customary law is.[43]

In England, the question is whether there exists an agreement or understanding that the property is to be shared beneficially; in default of such agreement then is there a common intention - inferred from the conduct of the parties such as the payment of direct contributions to the purchase price - that the property be shared beneficially.[44] This approach, expressed by Lord Bridge in Lloyds Bank v. Rosset[45] is a return to the orthodoxy in Gissing v. Gissing[46] and moves away from the approach pioneered by Lord Denning in the Court of Appeal who developed the 'constructive trust of a new model'[47] which was imposed whenever 'justice and good conscience' required it.[48]

However, it has been suggested that the approach of the Kenyan courts towards the customary trust is identical to that taken by Lord Denning above; in effect that the customary trust is imposed where

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43 Kimani v Gikanga, *supra*, at p. 738. Such witnesses will usually be elders or respected wise men from the community.

44 Lloyds Bank v. Rosset [1990] 2 W.L.R. 867, at p. 877. Grant v. Edwards [1986] Ch. 638; Gissing v. Gissing [1971] A.C. 886.

45 *Op. cit.*

46 *Op. cit.*

47 Eves v. Eves [1975] 1 W.L.R. 1338, at p. 1341.

48 Hussey v Palmer [1972] 1 W.L.R. 1286, at p. 1289.

justice and good conscience requires it.[49] With respect, this view has been outmoded by the principles which have been fashioned by the courts through caselaw. A body of principles is now well established, for the customary trust to be inferred.[50] No trust is inferred if a case falls outside these principles.[51] Hence it cannot be said that the customary trust is imposed where justice and good conscience requires it.

Nevertheless, the customary trust approach is somewhat reminiscent of the approach taken by Dillon J in the English case of Lyus v. Prowsa Developments.[52] There, a bank sold registered land to the defendants with the express stipulation that the sale was subject to a contract for the benefit of the plaintiff. It was held that the plaintiff was entitled to an order for specific performance against the defendants despite the fact that the contract was not protected on the register. A constructive trust in favour of the plaintiff was imposed upon the defendants because they had reneged "on a positive stipulation in favour of the

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49 Simon Coldham, The Effect of Registration of Title Upon Customary Land Rights in Kenya, [1978] J.A.L. 91 at p. 107; Registration of Title to Land in the Former Special Areas of Kenya, Unpublished Ph.D thesis, University of London 1977, p. 182.

50 See above. This is considered further in Chapter Seven, *infra*.

51 See for example, John Kiruga v. Mugecha Kiruga, *op. cit.*

52 [1982] 2 All E.R. 953. For criticism of this case see n. 115, *infra*.

plaintiffs."[53] In a similar fashion, the proprietor of land, in the Kenyan cases, has had the customary trust imposed upon him because in some instance, he has reneged on a positive stipulation that he is to hold the land on behalf of his family members.

However, the Court of Appeal decision in Elizabeth Wanjohi v. Official Receiver (Continental Credit Finance Ltd)[54] casts doubt on all the customary trust cases. In each case, beginning with Muguthu v. Muguth[55] the courts justified the validity of the customary trust on the basis of section 126 of the Registered Land Act 1963. The unregistered rights of the claimants arising under the customary trust were held binding on the registered proprietor by virtue of section 126(3). However, section 126(3) provides that the registered proprietor is subject to any unregistered liabilities rights or interests to which the land is subject "*by virtue of the instrument creating the trust*" (italics mine). Section 126(3) therefore envisages a trust arising expressly, created by a written document. In Wanjohi the Court of Appeal was of this view. They said,[56]

> "The Registered Land Act itself did not omit to regulate the interest in land acquired by

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53 *Ibid*. at p. 962.

54 The Nairobi Law Monthly, No. 14, February 1989, p. 43.

55 [1971] K.H.C.D. 16.

56 The Nairobi Law Monthly, February 1989, 42 at p. 43.

> fiduciaries. *But the regulatory provisions [i.e. s.126] apply only when the fiduciary relationship arose from a written instrument*" (Italics mine).

Clearly, in the opinion of the court, section 126 of the Registered Land Act 1963 governs express trusts rather than implied trusts, In all the cases establishing the customary trust, based on section 126, none of the trusts were created expressly but, rather, were implied.[57] Wanjohi would therefore be inconsistent with all these cases, thereby casting doubt on the decisions. Strictly speaking, Wanjohi is correct to state that section 126(3) is confined to express trusts. However, the Court of Appeal in Wanjohi did not overrule or even attempt to discuss any or all of these cases, many of them Court of Appeal decisions, which have decided otherwise.

A situation of uncertainty therefore exists. Have the courts in the customary trust cases conveniently ignored the real effect of section 126(3) of the Registered Land Act 1963 or do they recognise its effect but have nevertheless gone on to fill what they perceive is a legislative gap? It would appear that the latter view may represent the true position and was even alluded to in Muguthu v. Muguthu[58] and repeated in

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[57] Section 126(3) of the Registered Land Act 1963 is in contrast with section 74 of the Land Registration Act 1925 which provides that no person dealing with registered land "shall be affected with notice of a trust express implied or constructive." Clearly, section 74 is not confined to express trusts unlike section 126(3) of the 1963 Act which is.

[58] [1971] K.H.C.D. 16.

Gatimu Kinguru v. Muya Gathangi.[59] It is clear that the position needs to be clarified. Parliament could amend section 126(3) to provide clearly that a proprietor holding the land under a trust, whether express or implied, is subject to the unregistered rights and interest under the trust.

c. Periodic Tenancies

These tenancies are capable of protection by the entry of a caution under s.131(1)(a)[60] of the 1963 Act. Section 46 of the same outlines the circumstances giving rise to a periodic tenancy. It is possible for a customary tenancy to be capable of protection by the entry of a caution if it falls within section 46(1)(b). That subsection provides:

> "where the proprietor of land permits the exclusive occupation of the land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy;"

Many of the customary tenancies such as the *Muthami*, for example, were created orally. However, where these tenancies are not protected on the register, because of having been overlooked during adjudication, it is submitted that they can continue to subsist, but in the new clothes of the periodic tenancy only, and only if the tenant can show:

i) he is in exclusive occupation, and

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59 (1976) Kenya L.R. 253 at 263.
60 Registered Land Act 1963, s. 46(2).

ii) he pays rent.

The question of what amounts to exclusive occupation was considered in Wainaina v. Murai.[61] The plaintiff was permitted by the registered proprietor of certain land to build and cultivate on the land. The plaintiff built a house and planted various crops on it, and was even allowed to borrow money on the security of the land. The proprietor later died and the plaintiff sought an order to be registered as proprietor in the place of the deceased. An issue the court had to consider was whether the plaintiff was either a donee, licensee or tenant at will.

It was held that the plaintiff was in exclusive occupation of the land and, accordingly, a tenancy at will was presumed. In the words of Simpson J.,

> " ... the plaintiff was allowed to build a house on the land, to improve it, to cultivate permanent crops and to bury his mother on the land. [The deceased] assisted him to borrow money on the land without restriction as to the amount."[62]

These factors were sufficient to indicate a tenancy at will rather than a licence.[63]

It is significant here that the plaintiff paid no rent. If rent had been paid, it is probable that the

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61 (1976) Kenya L.R. 227.

62 *Ibid.*, at p. 231.

63 The decision in E.A. Power & Lighting v. A.G. (1978) Kenya L.R. 217, is inconsistent with Wainaina v. Murai. In the former the court, without referring to Wainaina, held that a tenancy at will can only exist in Kenya when it results from an express agreement to create such a tenancy, and that there is no reason to imply one in Kenya.

court would have presumed a periodic tenancy, depending on the frequency of rent payments. Nevertheless, this case is important for the fact that the court accepted that the right of the plaintiff was equivalent to that of a *muhoi* in Kikuyu customary law, and that this right survived registration but re-emerged as a tenancy at will, the right holder successfully having established exclusive occupation.

Likewise, if a plaintiff is able to establish that he is in 'exclusive occupation' and continues to pay rent to the registered proprietor, then he can protect that interest by entering a caution under section 131(1)(a) of the Registered Land Act 1963.

At English law, 'exclusive possession' or 'exclusive occupation' is a hallmark distinguishing a lease from a licence.[64] This distinction is vital because the lease comes under the protection of the Rent Acts while a licence does not.[65] Moreover, in the context of registered land, a lease or tenancy is an

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[64] The phrases 'exclusive possession' and 'exclusive occupation' often tend to be used synonymously by the courts in the sphere of landlord and tenant law - see for example, Heslop v. Burns [1974] 3 All E.R. 406; A.G. Securities v. Vaughan [1988] 3 W.L.R. 1205. The court in Wainaina v. Murai (1976) Kenya L.R. 227, did not view the terms as mutually exclusive. However, it has been pointed out that the two terms are distinguishable because 'exclusive occuption' often characterises many licences; hence 'exclusive possession' is indicative of a true tenancy, the test being whether the landlord ertains 'overall control' or not - Kevin Gray, Elements of Land Law, (London 1987), p. 440.

[65] For a further discussion, see Jill E. Martin, Security of Tenure Under the Rent Act, (London 1986).

interest in land and therefore falls within the definition of a 'minor interest' under the Land Registration Act 1925[66] which is capable of protection on the register, or is capable of subsisting as an overriding interest within section 70(1)(g) of the same if the tenant is in actual occupation; a licence on the other hand would not be capable of such protection.[67]

In the context of the Registered Land Act 1963, the position is distinct: both periodic tenancies and licences are capable of protection by the entry of a caution under the Act. The position regarding licences is considered in the next section.

2. Section 131(1)(b)

Under this subsection, a licence is capable of protection by the entry of a caution on the register. A licence is defined in section 3 of the Registered Land Act 1963 to mean,

> " ... a permission given by the proprietor of land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass ..."

Hence, if a person claiming the right to a customary tenancy that was not protected on the adjudication register[68] during land adjudication fails to show that he had exclusive occupation of the land

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66 S. 3(xv).

67 But see the discussion in the next section, *infra*.

68 Land Adjudication Act 1963, s. 28; Registered Land Act 1963, s. 11(2A).

and paid rent, his next line of defence to show that he has a licence as defined in the Act which he can protect by the entry of a caution. In John Kiruga v. Mugecha Kiruga[69] the plaintiff claimed to have the customary right to receive an equal share of land registered in the name of his brother, the second defendant, and subsequently sold to the first defendant. However, it was held that in this instance, the second defendant had merely given him permission to stay on his land and cultivate a portion as a humanitarian gesture because the plaintiff had already sold his own piece of land. Accordingly, the plaintiff was a mere licensee and therefore did not have an overriding interest under section 30(g) of the 1963 Act, even though he was in actual occupation.

However, the court did not consider the effect of a licence which is not protected by a caution under section 131(1)(b) of the 1963 Act. Section 100(2) of the Registered Land Act 1963 provides:

> "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 under that section [i.e. section 131(1)(b)].

Therefore, according to section 100(2) a licence not protected by the entry of a caution is still capable of subsisting against a purchaser with *mala fides* or a volunteer. The court in Kiruga failed to consider whether the first defendant was a bona fide purchaser

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69 Civil Appeal No. 52 of 1985 (unreported).

for value; if he was not then the plaintiff's unprotected license would have been binding on him.

When section 3 defining the licence is juxtaposed with section 100(2) and 131(1)(b) of the Registered Land Act 1963, there appears to be conflict between them. While section 3 essentially defines the license as a personal interest, only enforceable between licensor and licensee, sections 100(2) and 131(1)(b) would appear to elevate it into an interest in land. Protection of a license by a caution under section 131(1)(b) would make it binding on all third parties unless the caution was removed. Moreover, an unprotected licence would still be capable of binding a purchaser tainted with *mala fies* or a volunteer.

Does this mean that a licence in Kenyan registered land law is an interest in land? The Court of Appeal in John Kiruga v. Mugecha Kiruga[70] viewed the licence as a mere personal interest and not an interest in land, although this point was not argued before the court. Undoubtedly, the protection of a licence by the entry of a caution under the 1963 Act raises the status of the licence over and above what has been the conventional definition of a licence in English law[71] and summarised in section 3 of the Registered Land Act 1963. Effectively, the licence is capable of binding

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70 *Op. cit.*

71 See Thomas v. Sorrell (1673) Vaug. 330; King v. David Allen & Sons (Billposting Ltd) [1916] 2 A.C. 54; Clore v. Theatrical Properties Ltd [1936] 3 All E.R. 483.

third parties and, notwithstanding its definition in section 3, it may be viewed as a right *in rem*. This forms an important distinction between the position under the Registered Land Act 1963 and English law. Since licences are not viewed as interests in land in England, they do not fall within the definition of minor interests under section 3(xv) of the Land Registration Act 1925 and, therefore, are not capable of protection by a caution, notice, restriction or inhibition under the 1925 Act. Neither would a licence constitute an overriding interest under section 70(1)(g) of the same.

Nevertheless, efforts have been made, notably by Lord Denning, to establish the contractual licence as an interest in land,[72] contrary to established cases.[73] However, the Court of Appeal in Ashburn Anstalt v Arnold[74] rejected this notion, albeit *obiter*, and instead held that a licence could give rise to a constructive trust only if the conscience of the third party was affected. The court gave examples such as Binions v. Evans[75] where the purchaser bought expressly subject to the licence and therefore at a reduced price, and Lyus v. Prowsa Developments[76] where the

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72 Errington v Errington & Woods [1952] 1 K.B. 290; Binions v Evans[1972] Ch. 359; D.H.N. Food Distributors Ltd v. Tower Hamlets L.B.C. [1976] 1 W.L.R. 852.

73 See n. 71, *supra*.

74 [1988] 2 W.L.R. 706.

75 [1972] Ch. 359.

76 [1982] 2 All E.R. 953.

plaintiff purchaser had given an express assurance that he would take care of the interest.[77] Such a licence could be protected by a caution under section 54 of the Land Registration Act 1925, or can subsist as an overriding interest under section 70(1)(g) of the same if the licensee is in actual occupation.

Estoppel licences are a second category which have been accepted as interests in land in England. These arise where one party knowingly encourages another to act, or acquiesces in the others actions to his detriment and infringement of the former's rights.[78] So in Inwards v. Baker[79] a son who built a bungalow on his father's land at his own expense having been encouraged to do so by the father was held to have a licence binding on the trustees for sale.[80] It has been argued that an estoppel licence may be capable of protection as a minor interest by the entry of a caution under the Land Registration Act 1925.[81] In reality it would be difficult to protect an estoppel licence by the entry of a caution because those with

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77 [1988] 2 W.L.R. 706 at pp. 727, 728, per Fox L.J.

78 Ramsden v. Dyson (1866) L.R. 1 H.L. 129; Willmot v Barber (1880) 15 Ch.D. 96; Crabb v. Arun D.C. [1976] Ch. 179.

79 [1965] 2 Q.B. 29.

80 See also Greaseley v. Cooke [1980] 1 W.L.R. 1306; Taylor Fashions Ltd v Liverpool Victoria Trustees Co. Ltd. [1981] 2 W.L.R. 576.

81 Maudsley and Burn, Land Law, Cases and Materials, 5th ed., by E.H. Burn, (London 1986), p. 511.

such an interest would not be aware of the need to protect it on the register. The estoppel interest is a defensive measure raised in response to an attempt by the proprietor of land to suit the holder of the interest from the land. An effectual protection is if it subsists as an overriding interest with section 70(1)(g) of the 1925 Act.[82]

In Kenya, the courts have accepted estoppel licences as interests capable of binding third parties.[83] Hence such interests would be capable of subsisting as overriding interests under section 30(g) of the Registered Land Act 1963. They would also be capable of protection by the entry of a caution under section 131(1)(b) of the Registered Land Act 1963; however, the practical problem mentioned above, of protecting the estoppel licence with a caution would mean that its protection effectively lies in section 30(g) of the Registered Land Act 1963, as an overriding interest.

Hence, section 131(1)(b) of the 1963 Act is of advantage to licence holders in Kenya since they can protect them on the register, unlike their counterparts in England whose licences are not capable of binding third parties, and as a result, are not capable of protection on the register, unless they can show that

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82 *Ibid*, p. 859.

83 Century Automobiles v. Hutchings Biemar Ltd. [1965] E.A. 304, where the court applied the principle in Ramsden v. Dyson (1866) L.R. 1 H.L. 129. See also Commissioner of Lands v. Hussein [1968] E.A. 585.

the licence gave rise to a constructive trust or arose by estoppel.

While it would appear unlikely that many people in Kenya would be aware of the need to protect their interests by lodging a caution, it is suprising how many people are indeed aware of the need to do so in reality. In the Kiambu District Land Registry, for example, 697 cautions were registered between 1988 and 1989.[84] When one considers that the population is rural and with little access to legal advice, this represents a significantly high number.[85] It was observed from perusal of the Kiambu registers that some of these cautions actually protected the rights of beneficiaries under what would have been inferred by the courts as a customary trust; an example was the entry of cautions by family members where the land was registered in the name of one of their number.

B. Restrictions and Inhibitions

When compared with the numbers of cautions entered on the register under the Registered Land Act 1963, the numbers of restrictions and inhibitions entered are negligible. Between 1988 and 1989 for example, only 10 restrictions were entered on the register in the Kiambu District Land Registry, while in the same period, only 2 inhibitions were made.

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84 K.D.L.R. Monthly Returns, July 1988 - July 1989.

85 See Chapter Four, *supra*.

The entry of restrictions under the Registered Land Act 1963 is governed by sections 136-138.[86] Their function, *inter alia*, is to prevent fraud or improper dealing.[87] To this end they may be expressed to endure "for a particular period", or until the occurrence of a particular event, "or until the making of a further order", and may *prohibit or restrict all* dealings or only such dealings as do not comply with specified conditions.[88] Unlike the Land Registration Act 1925 which only allows an application for a restriction to be made by the registered proprietor.[89] Any person interested in the land may enter a restriction under section 136(1) of the Registered Land Act 1963. It would be practical for family members who own land registered in the name of one of their number to be advised to enter a restriction providing that the land should not be sold until the consent of the family members is obtained. A similar provision exists in section 57(3) of the Land Registration Act 1925 with respect to joint proprietors, whereby the restriction may be to the effect that if the number of proprietors is reduced below a certain number no disposition shall be entered except under an order of the court, or of the registrar after inquiry into title.

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86 *C.f.* Land Registration Act 1925, s. 58.

87 Registered Land Act 1963, s. 136(1).

88 *Ibid.*, s. 136(2).

89 Land Registration Act 1925, s. 58(1).

Notably, section 136(1) of the 1963 Act provides that the Registrar may enter a restriction on his own motion. The power of the Land Registrar under the 1925 Act is limited to rejecting the application for a restriction on the basis that it is "unreasonable or calculated to cause inconvenience".[90] It is usually the case for the Kenyan registrar to enter a restriction on the title of a proprietor who has died.[91]

Inhibitions on the other hand are entered by the court[92] although under the Land Registration Act 1925 they may also be entered by the Registrar.[93] As indicated by the figures above they are rarely entered. Nevertheless in the few instances, they have been entered to prevent registered land being dealt with while the dispute concerning the land is before the court or even the Registrar. Thus an inhibition exercises the same function as an injunction. To obtain an inhibition, however, an applicant must make an application by originating summons.[94] This would probably explain why there are hardly any inhibition orders made. Obtaining an inhibition is more involving

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90 *Ibid.*, s. 58(2).

91 Practice Instruction, Cautions: A Beneficiary's Interest, Ref. No. 79696/III/173.

92 Registered Land Act 1963, s. 128(1).

93 s. 57(1).

94 Civil Procedure Rules, Order XXXVI, r.3F. See for example Sarah Nyambura Kungu v. David Thige H.C.C.C. No. 1882 of 1982 (O.S.).

and expensive than obtaining a caution. Hence the caution remains the most popular method of restraining dispositions of registered land.

Notably, under the Land Registration Act 1925 an additional method of protecting interests by means of a notice[95] is available, whereas under the Registered Land Act 1963, only the three methods, that is the caution, restriction and inhibition are available to protect subordinate interests.

The Committee responsible for the draft Registered Land Bill felt that three types of entry would be sufficient. The entry of an inhibition would be a "hostile act by the court"; the entry of a caution a 'hostile act by some individual'; whereas the restriction would be entered by the Registrar although in this case, such an entry 'may well be friendly.'[96] The entry of the inhibition and caution are viewed as hostile acts because they are entered without the permission of the registered proprietor and have the effect of fettering his power of disposition.[97] A restriction, on the other hand, can only be entered by

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95 Ss. 48-52.

96 Quoted in S. Rowton Simpson, Land Law and Registration (Cambridge 1976), p. 584.

97 Under the Land Registration Act 1925, the entry of a caution is viewed as a hostile act because it is not necessary to produce the land certificate to make an entry, unlike the entry of a notice or restriction which requires the production of the land certificate and therefore the assistance of the registered proprietor - see s.64(1)(c); David J. Hayton, Registered Land, 3rd ed. (London 1981), pp. 23,25.26.

the Registrar after he has made inquiries and served notices on interested persons which would include the proprietor.[98]

In view of the Committees satisfaction with the inhibition, caution and restriction, there was no need to include the notice as an additional means of protecting an interest. Under the Land Registration 1925 a notice, when entered, operates by way of notice only and does not otherwise validate the interest it protects,[99] nor does it prevent the registered proprietor from disposing his land or seek the consent of the unlike the effect of a caution or restriction.

However, if a person failed to protect his interest by one of the methods available either under the Registered Land Act 1963 or the Land Registration Act 1925, can such an interest bind a third party who had notice of it?

C. The Question of Notice

Under section 28 of the Registered Land Act 1963 the rights of a proprietor are "free from all other interests and claims ... but subject to [encumbrances on the register and overriding interests]". Hence any right or interest not falling within these categories would not bind the registered proprietor or a purchaser from him and although it does not specifically say so,

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98 Registered Land Act 1963, s. 135(1); Land Registration Act 1925, s. 52(2).

99 Land Registration Act 1925, s. 52(2).

the section implies that they are not binding on him even if he has notice of them. Although the proviso to section 28 and section 126(3) of the 1963 Act provides that the unregistered rights of beneficiaries behind a trust are binding on the registered proprietor where he is a trustee, for the purpose of registered dealings it is expressly provided in section 126(3) that a purchaser is deemed not to have notice of the trust. The combination of these provisions would appear to exclude the equitable doctrine of notice.

However, the issue of whether an unprotected right is binding on a purchaser of land with notice of it under the Registered Land Act 1963 is brought into question with regard to licences by virtue of section 100(2) of the Act. That section provides that a licence "is ineffective against a *bona fide* purchaser for valuable consideration" unless the licence is protected by a caution. Therefore, by the converse operation of section 100(2), a licence not protected by a caution is binding upon a purchaser who is not *bona fide*, or a purchaser for nominal consideration,[100] or a volunteer. It follows, therefore that a licence unprotected by a caution does not bind a purchaser in good faith for value.

Is a purchaser in good faith, therefore, one who has no notice? 'Good faith' is not defined in the 1963 Act, nor has it yet been defined by the courts. But it

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100 Registered Land Act 1963, s. 3.

is clear that fraudulent conduct on the part of the purchaser would render him liable to take subject to an unprotected interest. For example, in Wanyoya v. Gichungo[101] the plaintiff claimed to have a share as tenant in common in land that was solely registered in the name of the first defendant. The latter, who was aware of the unprotected interest of the plaintiff, transferred the land to his son, the second defendant, with the intention of defeating the interest of the plaintiff. The son was aware of this purpose. Muli J. held that the transfer was fraudulent, the son taking the land subject to the rights of the plaintiff. Clearly the son would have been in bad faith within section 100(2) of the Registered Land Act 1963. In view of the lack of Kenyan authorities on whether notice amounts to bad faith, this would be an area where English decisions on the question could be usefully applied.[102]

The leading English case is Midland Bank Trust v. Green.[103] There a father granted an option to purchase land to his son, but it was not registered under the Land Charges Act 1925 (now Land Charges Act 1972). Later the father wishing to deprive the son of the option, conveyed the land to the mother. The son, on discovering this, tried to register the option. The

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101 [1973] K.H.C.D. 59.

102 Registered Land Act 1963, s. 163.

103 [1981] A.C. 513.

House of Lords held that the option was void against the mother because, *inter alia*, 'good faith' was not part of the definition of a 'purchaser' within the Land Charges Act 1925 and even though the mother had notice of the unregistered option, she had not acted in bad faith. In this connection Lord Wilberforce, said,

> "If the position was simply that the purchaser had notice of the option, and decided nevertheless to buy the land, relying on the absence of notification, nobody could contend that she would be lacking in good faith. *She would merely be taking advantage of the situation, which the law has provided, and the addition of a profit motive could not create an absence of good faith.*"[104] (Italics mine.)

The difficulty for the court lies in finding out what the true motives of a purchaser are. In the words of Lord Wilberforce,

> "Any advantage to oneself seems necessarily to involve a disadvantage for another: to make the validity of the purchaser depend upon which aspect of the transaction was prevalent in the purchaser's mind seems to create a distinction equally difficult to analyse in law as to establish in fact: avarice and malice may be distinct sins, but in human conduct they are liable to be intertwined.[105]

Therefore in the eyes of the House of Lords, notice of an unprotected interest cannot amount to bad faith. This case is certainly preferable to the decision of Graham J. in Peffer v. Rigg[106] which was

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104 *Ibid*, p. 530.

105 *Ibid*.

106 [1977] 1 W.L.R. 285.

concerned with the provisions in the Land Registration Act 1925. Although the Act defines a 'purchaser' as being one in 'good faith for valuable consideration,'[107] notice is expressly excluded.[108] Despite that, Graham J held that a purchaser of registered land who had notice of an unprotected interest was not in good faith, and therefore took subject to the interest. The decision has been roundly condemned for equating 'good faith' with the absence of notice when the 1925 Act clearly excludes notice and, moreover, not taking into account those decisions which have variously held or stated that purchasers are not bound with interests not protected on the register of which they have notice.[109] For example, in De Lusignan v. Johnson[110] a purchaser with express notice of an estate contract was held not to be in bad faith. In Hodges v. Jones,[111] Luxmoore J. stated that notice of an unprotected interest "does not affect the property alleged to be subject to it."[112]

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107 S. 3(xxi).

108 S. 59(6).

109 See R.J. Smith, Registered Land: Purchasers with Actual Notice (1977) 93 L.Q.R. 341; F.R. Crane, Casenote (1977) 41 Conv. (N.S.) 207; S. Anderson, Notice of Unprotected Trusts (1977) 40 M.L.R. 602; D.J. Hayton, Purchasers of Registered Land [1977] C.L.J. 227; J. Martin, Constructive Trusts of Registered Land [1978] Conv. 52.

110 (1973) 230 E.G. 499.

111 [1935] Ch. 657 at 671.

112 See also Miles v. Bull (No.2) [1969] 3 All E.R. 1585, per Bridge J.

The subsequent decision in Williams & Glynn's Bank v. Boland[113] has reiterated the position that notice has no role to play in the Land Registration Act 1925. In the words of Lord Wilberforce, "the only kind of notice recognised is by entry on the register".[114] Although Peffer v. Rigg has not been overruled, it is unlikely to be followed in the future.[115]

The principle that notice of an unprotected interest does not amount to bad faith would therefore be applicable in Kenya. It is unfortunate that the Kenya Court of Appeal in John Kiruga v. Mugecha Kiruga[116] failed to consider whether the purchaser of the land was bound by the plaintiff's unprotected licence within section 100(2) of the Registered Land Act 1963. They should have determined whether the purchaser was *bona fide* or not; if he was not bona fide

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113 [1981] A.C. 481.

114 *Ibid*, at p. 504.

115 The decision in Lyus v. Prowsa Developments [1982] 2 All E.R. 953, was also criticised on the basis that it introduced the doctrine of notice in registered land - see Phillip H. Kenny, Constructive Trust of Registered Land, (1983) 46 M.L.R.96; Charles Harpum Constructive Trusts and Registered Land [1983] C.L.J.54; Paul Jackson, Estate Contracts, Trusts and Registered Land [1983] Conv. 64; C.T. Emery & B. Smythe, The Imposition of Trusts by 'Subject To' Clauses (1983) N.L.J. 798. However, Lyus was approved by the Court of Appeal in Ashburn Anstalt v. Arnold [1988] 2 W.L.R. 706 on the basis that the purchaser had bought the land expressly subject to an unprotected estate contract and had given assurances that he would give effect to the estate contract. According to Fox L.J. this was a valid application of the constructive trust - [1988] 2 W.L.R. 706, at pp. 727, 728.

116 Civil Appeal No. 52 of 1985 (unreported).

then the licence would have been binding on him. To this extent it is respectfully submitted that the decision is *per incuriam*.

D. Summary

This section has tried to show that unprotected customary rights are capable of being protected on the register by the entry of a caution or a restriction under the Registered Land Act 1963. The customary trust has been developed by the courts to protect those with unprotected rights based on custom, notably the right to receive a share of land, where the land is registered in the name of one person who reneges on the customary practice. It is also established Land Registry practice to allow those with such a right to enter a caution on the register. This practice runs counter to the argument that customary rights are extinguished when land is registered under the Registered Land Act 1963.

However, the next section will also show that such rights, arising behind a customary trust, are capable of subsisting as overriding interests within section 30(g) of the Registered Land Act 1963, and therefore binding on third parties.

III Overriding Interests

These are a class of interests not entered on the register and yet are binding on a purchaser; hence, they constitute an important feature of registration of

title. In view of their enforceability despite their non-entry on the register, they are a contradiction to the view that the 'register is everything'.[117] When justifying the necessity of having such interest in a system of registered title in Kenya, the Working Party on African Land Tenure said,

> " ... there are certain rights and liabilities which it is not practicable to register but which, though not recorded, must nevertheless retain their validity. For instance registration is not feasible every time, say, a monthly tenancy is changed and so it must be provided that short term leases are valid even though not registered. Again, public health and building regulations, for example may impose restrictions which affect all land in a certain area and which it would be waste of effort to have to repeat on the register in respect of every parcel affected. These exceptions are known as 'overriding interests' and all systems make provision for them."[118]

The list of overriding interests compiled by the Working Party in their draft bill became section 40 of the Native Lands Registration Ordinance 1959, which subsequently became, with amendments, section 30 of the Registered Land Act 1963. The equivalent of section 30 is section 70(1) of the Land Registration Act 1925. The problem with overriding interests is that they take effect even though they are not protected on the register. They bind a proprietor irrespective of notice, and hence they could be viewed as inconsistent

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117 Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd. [1926] A.C. 101 at 106.

118 Report of the Working Party on African Land Tenure, 1957-58, (Nairobi 1958), para. 67.

with the whole concept of a registered title.[119] One former English Land Registrar described them as "the stumbling block" on registration of title.[120] It means that a purchaser cannot simply rely on the register of title, but must necessarily make additional inspections of the land he is proposing to buy in order to discover any overriding interest that may be binding on him. But not all overriding interests will be readily apparent from inspection. What would be particularly galling for a purchaser is to find himself bound by an overriding interest despite having made a very careful inspection of the land. Unfortunately, indemnity is not available under the Registered Land Act 1963 or the Land Registration Act 1925. This is one area where reform is needed.[121]

The heads of overriding interests under section 30 of the Registered Land Act 1963 are as follows:

> a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
>
> b) natural rights of light, air, water and support;

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119 Law Reform Now, edited by Gerald Gardiner and Andrew Martin (1964), p.81, quoted in Third Report on Land Registration, Law Com. No. 158, para. 2.2.

120 Sir John Stewart Wallace, Principles of Land Registration (1937), p. 32, quoted in Third Report ... *supra*.

121 See the recommendations of the English Law Commission with regard to the 1925 Act in the Third Report, *supra*.

c) rights of compulsory acquisition, resumption entry, search and user conferred by any other written law;

d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies, within the meaning of section 46;

e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

f) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

g) 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;

h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any written power conferred by any written law:"

When compared with section 70(1) of the Land Registration Act 1925, section 30 above contains fewer heads of overriding interests. Nevertheless, there are

significant differences. For example, section 30(a) above excludes rights of way and rights of water and profits from subsisting as overriding interests *if created after first registration*. Easements and profits therefore created after first registration can therefore only take effect if registered as encumbrances.[122] However, section 70(1)(a) of the Land Registration Act 1925 - the corresponding section to 30(a) - contains a longer list of easements while section 70(1)(j) contains examples of profits such as rights of fishing and sporting, seignorial and manorial rights and franchises. The Law Commission has considered that several examples of easements and profits in section 70(1)(a) and 70(1)(j) are superfluous and in need of pruning.[123]

A curious and somewhat anomalous provision is section 30(b) of the Registered Land Act 1963 which includes in the list of overriding interests:

"natural rights of light, air, water and support". It is paradoxical that 'natural rights' should be declared overriding interests since the epithet 'natural' describes a right that is one of the ordinary and inseparable incidents of ownership, automatically accompanying such ownership.[124] Unlike easements

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122 Registered Land Act 1963, ss. 94,96.

123 Law Commission, Property Law, Third Report on Land Registration, Law Com. No. 158, (1987), paras. 2.19-2.21.

124 Cheshire and Burn, Modern Law of Real property, 14th ed. by E. H. Burn (London 1988), p. 501.

therefore, such rights are not acquired by grant, whether actual, implied or presumed.[125] Therefore, its unnecessary to provied for such rights to subsist as overriding interests since they automatically attach to the land.

Interestingly, English common law has never recognised a natural right to light[126] or a natural right to air.[127] In Harris v De Pinna[128] the court rejected a claim to a general flow of air. Bowen L.J. put it thus:

> "It would be just like amenity of prospect, a subject matter which is incapable of definition. So the passage of undefined air gives no rise to rights and can give rise to no righs for the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."[129]

Nevertheless, rights to light and air can be acquird as easements; for example, a right to the flow of light to a particular window,[130] or a right to a flow of air through a definite channel, such as a ventilator in a building.[131] It is therefore

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125 See Backhouse v Bonomi (1861) 9 H.L.C. 503 at p. 513, per Lord Wensleydale.

126 Sir Robert Megarry & H.W.R. Wade, The Law of Real Property 5th ed. (London 1984), p. 843.

127 Webb v Bird (1862) 13 C.B. N.S. 841 at 843; Bryant v Lefever (1879) 4 C.P.D 172.

128 (1886) 33 Ch.D. 238.

129 *Ibid*, at p. 262.

130 *Ibid*, at p. 259; Colls v Homes and Colonial Stores Ltd [1904] A.C. 179. See also Prescription Act 1832, s. 3; Rights of Light Act 1959.

131 Cable v Bryant [1908] 1 Ch. 259.

significant, that section 30(b) recognises and, in effect, creates new natural rights of light, and air in Kenyan land law.[132]

English law did, on the other hand, recognise certain rights to water and support as natural. For example a riparian owner was entitled

> "to have the water of the stream on the banks of which his property lies, flow down as it has been accustomed to flow down to his property ..."[133]

While landowners have a natural right to support,[134] there is no natural right to support for buildings. In the words of Lord Penzance in Dalton v Angus & Co,[135]

> "The owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground."

In view of these common law limitations with respect to natural rights of water and support, would an interpretation of section 30(b) take into account these limitations, on the basis of section 163 of the same Act? It is submitted that this should not be the case since section 30(b) itself created two new natural rights, light and air, which were unrecognised as such in English law. Consequently, the natural rights of

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[132] There is no Kenyan caselaw which recognised such rights as natural.

[133] John Young & Co. v Bankier Distillery Co. [1893] A.C. 691 at 698, per Lord Macnaghten.

[134] Hunt v Peake (1860) Johns 705 at p. 710; Backhouse v Bonomi (1861) 9 H.L.C. 503 at p. 513.

[135] (1881) 6 Appeal Cas. 740 at p. 804.

'water and support' in section 30(b) should be read *'ejusdem genesis'* to the former and not subject to the common law limits on these natural rights.

Section 30(b) therefore represents a radical departure from English common law, establishing new rights but only over registered land subject to the Act. Land subject to the Indian Transfer of Property Act 1882 would therefore be subject to the English Common law view on natural rights as expressed above, since the 1882 Act is silent on these matters.[136]

Section 30(c) of the 1963 Act provides that rights of compulsory acquisition are overriding interests. It is submitted that this section is superfluous in view of section 75 of the Constitution of Kenya which retains the inherent power of the state to expropriate property. Section 75 provides that no property "shall be compulsorily taken possession of" unless:

a) "the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the pbulic benefit; and

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136 See Judicature Act 1967, s. 3.

b) the necessity thereof is such to afford reasonable justification for the causing any hardships that may result to any person having any interest in or right over the property.

Section 75 further provides for the payment of "full compensation" when property is compulsorily acquired.[137] It is therefore irrelevant that rights of compulsory acquisition are made overriding interests in land registered under the Registered Land Act 1963, since section 75 affects all land in Kenya, whether registered or not.

Section 70(1) of the Land Registration Act 1925 contains no provision equivalent to that in section 30(c) of the 1963 Act. Compulsory purchase in England is governed by several statutory provisions which empower a public body or class of public bodies such as county councils to select and compulsorily buy land.[138] This is done by making a compulsory purchase order and following the procedure laid down in the Acquisition of Land Act 1981. The Land Compensation Act 1961 contains the rules for assessing compensation for those whose

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137 See the Land Acquisition Act 1968 which supplements section 75 of the Constitution, setting out the procedure available to those opposing the legality of a compulsory acquisition order.

138 See for example, Town and Country Planning Act 1971, Part VI.

land subject to a compulsory purchase order.[139] A compulsory purchase order applies to any land, whether registered or unregistered. When a compulsory purchase order is obtained the authority must notify the owners and occupiers concerned, and if a 'general vesting declaration' is made, then notice of this declaration must be registered as a total land charge under the Local Land Charges Act 1975.[140]

In Kenya, a purchaser would therefore have to make enquiry to a local authority as to whether the land he is purchasing is subject to compulsory acquisition under section 75 of the Constitution of Kenya, since there is no local land charges register as in England where he could find out this information.

Section 30(d) allows a much shorter time limit for leases to take effect as overriding interests - two years when compared with 21 years under section 70(1)(k) of the 1925 Act. This means that the register has to be kept up to date with accurate information regarding short leases with more than 2 years, a process which creates extra work for little purpose. This is a factor that convinced the English Law Commisstion that the 21 year period was adequate, because it reduced the workload of the Land Registry, and helped save tenants the cost of having to register

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139 On compulsory purchase in England generally, see Law of Compulsory Purchase and Compensation, K. Davies, 4th ed. (London 1984).

140 "Land" is usually defined in the appropriate authorizing Act.

short leases.[141] Another difference lies in the fact that section 30(d) permits agreements for a lease to be an overriding interest, whereas section 70(1)(k) of the 1925 Act does not; the latter only provides for leases which are granted for a term and therefore excludes a mere agreement for a lease.[142]

The overriding interests under section 30(e) of the 1963 Act correspond to those in section 70(1)(i) of the 1925 Act, the important difference being that section 30(e) is only limited to charges of a monetary nature, whereas local land charges under section 70(1) of the 1925 Act are varied, for example prohibitions of or restrictions on the use of land imposed by a local authority.[143]

Section 30(f) relates to rights acquired by adverse possession under the Limitations of Actions Act 1967; this subsection corresponds with section 70(1)(f) of the 1925 Act. Section 30(g) which deals with the rights of those in actual occupation ocresponds with section 70(1)(g) of the 1925 Act.

Sections 30(d) and 30(g) of the 1963 Act are of significance for the purpose of this chapter, and the

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141 Law Commission, Property Law, First Report on Land Registration, Law Com. No. 125 (London 1983), para. 4.26; Property Law, Third Report on Land Registration, *op. cit.* para. 2.41.

142 City Permanent Building Society v. Miller [1952] 1 Ch. 840 - the word 'granted' excluded by force of the context the case of a mere agreement for a lease having no more than contractual effect - *ibid* at pp. 852, 853, per Jenkins L.J.

143 Local Land Charges Act 1975, s. 1.

question is whether they allow customary rights to subsist as overriding interests. The conventional view stated earlier has been that customary rights are not capable of subsisting as overriding interests under the registered Land Avt 1963. The view was first expressed, albeit *obiter*, by the High Court in Obiero v. Opiyo.[144] In that case the plaintiff, who was the widow of Opiyo, was registered as proprietor of 9 acres of land. Opiyo had been polygamous and had married several wives before his death. The defendants were the sons of the other wives. The plaintiff brought an action against the defendants for damages for trespass and an injunction to restrain them from repeating the acts of trespass. The defendants claimed that they were the owners of the land under customary law; they had occupied and cultivated the land for many years. However, Bennett J. was not satisfied, on the evidence, that the defendants ever had any rights to the land under customary law, but even if they did "those rights would have been extinguished when the plaintiff became the registered proprietor.[145] He added:

> "Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so."[146]

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144 [1972] E.A. 227.

145 [1972] E.A. 227 at 228.

146 *Ibid.*

These *obiter* remarks were applied by Kneller J. in Esiroyo v. Esiroyo.[147] There, the plaintiff, who was the father of the defendants, sought an order to evict his sons from his land. The defendants claimed that because they were the natural sons of the plaintiff they were entitled to certain portions of the plaintiff's land, their titles to this land being well founded in customary law. However, Kneller J. held that "the matter is taken out of the purview of customary law by the provisions of the Registered Land Act"[148] Although the defendants had rights under customary law they were extinguished when the plaintiff became the registered proprietor. Moreover, they did not amount to overriding interests because "rights arising under customary law are not among the interests listed in s.30 of the [Registered Land] Act as overriding interests."[149] Esiroyo has been followed in several decisions, notably the Court of Appeal decisions in Alan Kiama v. Ndiya Mathunya[150] and Elizabeth Wanjohi v. Official Receiver (Continental Credit Finance Ltd).[151]

However, it is respectfully submitted that this view can be rebutted if the provisions of the Act are

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147 [1973] E.A. 388.

148 *Ibid*, at p. 390.

149 *Ibid*.

150 Civil Appeal No. 42 of 1978 (unreported).

151 The Nairobi Law Monthly, No.14, February 1989.

examined closely. Earlier in this chapter,[152] it was shown that a right arising under a resulting trust, a customary trust, a periodic tenancy or a licence are capable of protection by the entry of a caution on the register. It is submitted that these rights, although they may have their origin in custom, may still subsist as overriding interests under section 30 of the Registered Land Act 1963. This issue is now addressed with particular reference to two heads of overriding interests under sub-sections 30(d) and 30(g).

A. **Section 30(d)**

> "Leases or agreements for leases for a term not exceeding two years, periodic tenances and indeterminate tenancies within the meaning of section 46."

Section 46(1) of the 1963 Act states two ways a periodic tenancy can arise:

i. where in a lease the term is not specified and no provision is made for the giving of notice to determine the tenancy, or

ii. where the proprietor of land permits the exclusive occupation of the land at a rent but without any agreement in writing.

Customary tenancies, as seen earlier[153] were created orally. The types of tenancy created would depend on the terms and conditions. So for example a *muthami* had more extensive rights than a *muhoi*, and it was more

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152 Section II(A), *infra*.

153 See Chapter Two, *supra*.

difficult to determine the tenure of the *muthami* than that of the *muhoi*. During land adjudication, the function of the Recording Officer is to categorise the customary right being claimed as a class of right or interest recognised by the Registered Land Act 1963. Most rights wer either entered on the adjudication register as rights of occupation or ignored. With regard to rights recorded on the adjudication register, section 11(3) of the Registered Land Act 1963 automatically deems them periodic tenancies without more irrespective of whether such rights could be properly classed as periodic tenancies. Therefore, with these rights there is no need to consider whether there is exclusive occupation or not or whether rent is payable or not. The difference occurs with those rights that are not noted on the adjudication register. In what way?

With regard to customary tenancies not noted, in determining whether they still remain effective the question to ask is not whether they are subsisting as customary interests, but whether they fall within sections 45 and 46 of the Registered Land Act 1963. For example, suppose the registered proprietor granted to a third party a tenancy before the land was registered. If this tenancy is recorded as a right of occupation, then it is automatically deemed a periodic tenancy. If it is not recorded, it is for the third party to show:-

1. that a lease was granted for the life of the lessor or lessee or for a definite term. If the term of the lease is not specified - as is the case with customary tenancies, the term being left to run indefinitely until the occurence of an event which makes the landlord terminate the tenancy - and 'no provision is made for the giving of notice to determine the tenancy' then a periodic tenancy is deemed to have been created.[154]
2. Alternatively, if he cannot show that a lease was granted, he must show that the proprietor permitted him to have exclusive occupation of the land or part of it, at a rent. In all the customary tenancies even if some form of regular payment was not made, what can be termed as a nominal rent ws usually paid to the landlord as a gesture of goodwill.[155] The case of Wainaina v. Murai[156] illustrates what acts amount to exclusive occupation.

If the third party can produce enough evidence to show the above, bringing himself within section 46(1) of the 1963 Act, then it is submitted that his customary tenancy is transformed into a periodic tenancy, and therefore capable of subsisting as an

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154 Registered Land Act 1963, s.46(1)(a).

155 Chapter Two, *supra*.

156 (1976) Kenya L.R. 227, discussed *supra*.

overriding interest under section 30(d) of the Registered Land Act 1963.

B. Section 30(g)

> "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"

The corresponding provision in the Land Registration Act 1925 to the above sub-section is section 70(1)(g) which reads,

> "the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed."

A significant difference between the two subsections is the addition in section 30(g) of the words "to which he is entitled in right only of such possession or occupation". These words make section 30(g) very difficult to understand, a point that was even admitted by one of the draftsmen of the Act.[157]

The effect of section 30(g) was considered by Madan J.A. in Alan Kiama v. Ndiya Mathunya[158] where he said,

> "overriding interests which arise in right only of possession or actual occupation

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[157] S. Rowton Simpson, Land Law and Registration (Cambridge 1976), p. 500. Section 30(g) was actually copied from section 47(f) of the draft Registered Land Bill for Lagos, Nigeria which had attempted to improve on the formula of section 70(1)(g) of the Land Registration Act 1925.

[158] Civil Appeal No. 42 of 1978 (unreported). Although Madan J.A.'s judgment was a partially dissenting one (on the question of the resulting trust) he came to the same conclusion as the majority.

> without legal title *are equitable rights which are binding on the land*, therefore on the registered owner of it. Under section 30(g) they possess legal sanctity without being noted on the register; they have achieved legal recognition in consequence of being written into statute" (Italics mine).

1. **The 'rights'**

According to Madan J.A., the rights of the person under section 30(g) are equitable interests which are binding on the land.[159] This reflects what the House of Lords in National Provincial Bank v. Ainsworth[160] said with regard to the rights arising under section 70(1)(g) of the Land Registration Act 1925, that the rights,

> "must ... create a burden on the land, that is, an *equitable estate or interest in the land*" (italics mine).[161]

Hence, both section 30(g) of the 1963 Act and section 70(1)(g) of the 1925 Act would not protect mere personal rights.[162] In England, examples of rights that have been held to come under section 70(1)(g) include an option to purchase[163] the equitable interest

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159 This was also accepted in John Kiruga v. Mugecha Kiruga Civil Appeal No. 52 of 1985 (unreported).

160 [1965] A.C. 1175.

161 *Ibid*, at p. 1237 per Lord Upjohn - the House of Lords adopted the statement of principle of Russell L.J. in the Court of Appeal - [1964] Ch. 665 at 696. See also City of London Building Society v. Flegg [1987] 2 W.L.R. 1266 at p. 1287 per Lord Oliver.

162 Elizabeth Wanjohi v. Official Receiver (Continental Credit Finance Ltd). The Nairobi Law Monthly, No.14, Feb. 1989, 42; National Provincial Bank v. Ainsworth [1965] A.C. 1175.

163 Webb v. Pollmount [1966] Ch. 584.

of a beneficiary under a resulting trust[164] or a trust for sale[165] the right to an unpaid vendor's lien[166] and the right to have a conveyance rectified in equity on the ground of mistake.[167]

Section 30(g) on the other hand has not often been considered by the courts in Kenya. What is of immediate concern is whether section 30(g) can protect the customary rights of those who failed to have them protected on the register during adjudication. It is significant that section 70(1)(a) of the Land Registration Act 1925 expressly provides that customary rights are overriding interests. Such rights would include for example the right of the fisherman inhabitants of a parish to spread *and dry their nets on* the land of a private owner[168] and the right to dance upon a particular close belonging to an individual.[169] The predecessor to the Registered Land Act 1963, the Land Registration (Special Areas) Ordinance 1959, expressly provided in section 40(f) that a customary right of occupation was an overriding interest. But

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164 Hodgson v. Marks [1971] Ch. 892.

165 Williams & Glyns Bank v Boland [1981] A.C. 487.

166 London & Cheshire Insurance Co. Ltd. v. Laplagrene Property Co. ltd. [1971] Ch. 499.

167 Blacklocks v. J.B. Developments (Godalming) Ltd. [1982] Ch. 183.

168 Mercer v. Denne [1905] 2 Ch. 538.

169 Abbot v. Weekly (1665) 1 Lev. 176. For further examples see Halsbury's Laws of England, 4th ed., Vol.12 (London 1975), para. 401.

this section was not repeated in the 1963 Act which led to the argument that customary rights are extinguished.[170]

However, in view of the position that the rights protected by section 30(g) of the Registered Land Act 1963 are equitable in nature, the question to ask is whether customary rights arising in Kenya are capable of subsisting as equitable interests under section 30(g). It is argued that they can if they arise under a trust.

a. Rights Under a Resulting Trust

This trust arises where land is voluntarily conveyed into the name of another person. The rights of the beneficiaries under such a trust are capable of subsisting as an overriding interest under section 30(g) if they are in actual occuption. In Alan Kiama v. Ndiya Mathunya[171] the members of a clan who had the land registerd in the name of one of their members who then subsequently sold the land to the plaintiff were held to have overriding interests under section 30(g) that were binding on the plaintiff. These rights, that is, the right to have the land divided among the clan members were equitable rights arising by virtue of the resulting trust.

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170 S. Coldham, The Effect of Registration of Title Upon Customary Land Rights in Kenya [1978] J.A.L. 91, at p. 106.

171 Civil Appeal No. 42 of 1978 (unreported).

It is significant that this right had its origin in custom, *and was not extinguished when the land was registered but was able to subsist as an overriding interest under section 30(g)* of the Registered Land Act 1963. It has been shown that such a right is capable of protection by a caution which can be entered after first registration.[172]

Another right arising under a resulting trust is where two or more persons advance purchase money for the acquisition of land but the transfer is made to one person only and registered in his or her name. The Kenya Chief Land Registrar pointed out that such a trust is capable of protection by a caution.[173] Such a trust usually arises where a matrimonial home is concerned, with the wife claiming to have a beneficial interest in the home which is registered in the sole name of the husband.[174] In Karanja v. Karanja[175] a trust was declared where the wife had made direct and indirect contributions to the purchase of the home. Although section 30(g) of the Registered Land Act 1963 was not in issue in Karanja the wife could have had an overriding interest under that subsection.[176]

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[172] See section II(A)(1)(a).

[173] Practice Instruction, Cautions: A Beneficiary's Interest, Ref. No. 79696/III/173.

[174] The converse applies.

[175] (1976) Kenya L.R. 307. For a further discussion of this case, see Chapter Seven, *infra*.

[176] See also Wanjohi v. Official Receiver (Continental Credit Finance Ltd). The Nairobi Law Monthly, No.14, Feb. 1989, 42 at p. 43.

b. Rights Under a Customary Trust

It was argued earlier that rights arising under such a trust are capable of being protected by the entry of a caution. Essentially, the right that usually arises under the customary or family trust is the right to have a share in the division of inherited land, which has been held to be binding on the first registered proprietor.[177] The question whether such a right can subsist as an overriding interest under section 30(g) of the Registered Land Act 1963 ws considered in John Kiruga v. Mugecha Kiruga.[178] The plaintiff and the first defendant were brothers. A certain plot of land was registered in the name of the first defendant. He sold the land to the second defendant. The plaintiff resided and cultivated on the land and the second defendant subsequently sought to evict him. The plaintiff claimed that he was entitled to receive a share of the land, stating that the first defendant took advantage of prevailing circumstances and had himself registered as proprietor of the family land which should have been divided between the brothers. Accordingly, he claimed to have an overriding interest under section 30(g) of the Registered Land Act 1963 that was binding on the second defendant. Alternatively, he claimed to have acquired

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[177] See for example Muthuita v. Muthuita, Civil Appeal No. 12 of 1982 (unreported).

[178] Civil Appeal No. 52 of 1985.

title by adverse possession. At first instance, it was held that the plaintiff did not have an interest binding on the second defendant, and therefore the second defendant was entitled to evict him from the land.

On appeal, the Court of Appeal considered whether a customary trust did arise. It was found in evidence that the plaintiff had already received a share of land from his father but had sold it. However, his brother, the first defendant had allowed him to reside on the land in dispute. No trust arose because the act of the first defendant was "an act of charity" and "on grounds of pure humanity."[179] The plaintiff had only a licence which was revoked when the first defendant sold the land the second defendant. The Court distinguished Williams & Glyn's Bank v. Boland[180] from the present case on the basis that in Boland the wife had made contributions to the purchase of the property which was registered in the sole name of her husband whereas in Kiruga the plaintiff was merely given permission to reside on the land. Nevertheless, it is implicit from the judgments in Kiruga that customary rights would be capable of subsisting as overriding interests.

But the argument that customary rights are overriding interests was rejected by a differently constituted Court of Appeal in Wanjohi v. Official

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179 Per Masime and Apaloo JJ.A.

180 [1981] A.C. 487.

Receiver (Continental Credit Finance Ltd).[181] The plaintiffs were the wives of the registered proprietors who had charged their land to the defendant finance company. The proprietors defaulted in their repayments and later died. The defendants subsequently sought to exercise their power of sale under section 74 of the Registered Land Act 1963. The plaintiffs applied for an injunction to restrain the defendants from selling the land, arguing that they had a right to own the land by virtue of their customary law marriage to the chargors and since they were in actual occupation, they had an overriding interst under section 30(g) of the Registered Land Act 1963 that was binding on the chargees. In effect they were asserting that their right to own the land was a customary right which was an overriding interest under section 30(g).[182]

Counsel for the plaintiffs argued that the rights of the plaintiffs could subsist as a section 30(g) overriding interest because they arose behind a customary trust: the land that was registered in the names of their husbands was family land which was held by the husbands on trust for their families and since the wives were part of the family they had an interest in the land, that interest being the right to own the land on the death of their husbands. As they were in actual occupation of the land, that interest was

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181 The Nairobi Law Monthly, No. 14, February 1989, 42.

182 *Ibid*, pp. 42,43.

binding on the chargees when the land was charged. However, the court admitted that it did not understand this argument and therefore it was rejected.[183] They held that,

> " ... the relationship of trustee-beneficiary between the applicants and their late husbands could only arise, if the applicants were in truth the owners of these ... lands but allowed their titles to be registered in the names of their husbands."[184]

The court went on to hold that in reality the applicants "asserted no other right to the land beyond those of wives in coverture in occupation of their spouses' lands" and that this in no way impressed the land with any trust. In any event, such a right was a mere right *in personam* rather than a right *in rem* and since it was a right based on custom it was extinguished on registration of the land.[185]

However, in rejecting the argument that a right arising behind a customary trust could not subsist as an overriding interest under section 30(g) of the Registered Land Act 1963, the Court failed to consider its own decision in John Kiruga v. Mugecha Kiruga[186] which had clearly pointed out that a right arising behind a customary trust could subsist as an overriding interest. The court in Wanjohi also neglected to consider all the cases which had inferred a customary

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183 *Ibid.*

184 *Ibid*, p. 43.

185 *Ibid.*

186 Civil Appeal No. 52 of 1985, (unreported).

trust, preferring instead to reject the idea that a customary trust could be inferred. In one respect the conclusion of the Court that the rights of wives to reside on land *qua* wives are not proprietary interests in land and therefore are not overriding interests is reminiscent of the House of Lords approach in National Provincial Bank v. Ainsworth[187] where the contention that the right of a deserted wife to occupy a matrimonial home was an overriding interest within section 70(1)(g) of the Land Registration Act 1925 was rejected. Lord Hodgson in analysing the nature of the wife's rights said,

> "The matrimonial law did not, however, at any time give the wife any property in the house in which she lived with her husband unless she could rely upon a settlement. His duty is to live with his wife and to supprt her *but she has no proprietary rights in the house by virtue of her status as a wife.* She is lawfully there not by reason of any contract or licence but simply because she is the wife. If her husband leaves her *the right which she has to be left undisturbed is a personal right and does not attach itself to any specific piece of property* which may at a given time be the house in which the spouses have lived together." (Italics mine).[188]

The decision in Wanjohi that the rights of wives to reside on land *qua* wives are not proprietary interests, and therefore cannot subsist as overriding interests under section 30(g) of the Registered Land Act 1963

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187 [1965] A.C. 1175.

188 *Ibid*, at p. 1220.

would correspond with the decision in Ainsworth with respect to the deserted wife's equity.[189]

However, the failure of the Court of Appeal in Wanjohi to accept the principle that customary rights may subsist as overriding interests if they arise behind a customary trust is inconsistent with its decision in Kiruga. The further rejection of the customary trusts without discussion negates all the decisions of the Court of Appeal and the High Court wich have established the customary trust. It is therefore respectfully submitted that to this extent the decision in Kiruga is preferred to that in Wanjohi.

2. 'Possession or Actual Occupation'

What constitutes an overriding interest in section 30(g) of the Registered Land Act 1963 is, "the rights of a person in possession or actual occupation ..."; the formula used in section 70(1)(g) of the Land Registration Act 1925 is "the rights of every person in actual occupation or in receipt of rents and profits thereof ..." It has been accepted with regard to both sub-sections that actual occupation is not in itself an

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[189] The Matrimonial Homes Act 1967 (now Matrimonial Homes Act 1983) was passed to mitigate the rigours of Ainsworth. The Act gives a 'right of occupation' to a spouse who was not entitled to occupation by virtue of any estate or interest; the right is registrable as a land charge (Land Charges Act 1972 s. 2(7)) or protected by the entry of a notice under the Land Registration Act 1925 (Matrimonial Homes Act 1983, s. 2(8)(a)) and therefore binding on third parties.

overriding interest; the rights of a person plus his actual occupation constitute the overriding interest.[190]

It is evident that the formula in section 30(g) of the 1963 Act is distinct from section 70(1)(g) of the 1925 Act through the use of the term 'possession' in the former and the phrase 'in receipt of rents and profits' in the latter. *Prima facie*, section 30(g) would appear to confine the rights only to those who are in physical occupation, thereby excluding those who are in receipt of rents and profits such as landlords. Indeed this had been the intention of those who drafted the Registered Land Act 1963; one of the draftsmen said,

> "we suggest that the omission of the words 'or in receipt of rents and profits thereof' would confine it unmistakably to the rights of the occupation tenant, and that this is all it should be concerned with."[191]

This intention would have been successfully carried out had the term 'possession' not been included in section 30(g) of the 1963 Act. Although 'possession' is not defined in the 1963 Act, English common law recognised several types of possession: legal, actual and constructive possession. A person could be said to be in constructive possession of land if for example he

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[190] John Kiruga v. Mugecha Kiruga, Civil App. No.52 of 1985, (unreported); City of London Building Society v. Flegg [1987] 2 W.L.R. 1266.

[191] S. Rowton Simpson, Land Law and Registration, (Cambridge 1976, p. 500).

leased it to someone.[192] Not surprisingly section 205(xix) of the Law of Property Act 1925 provides that "'possession' includes receipt of rents and profits and the right to receive the same ...".[193] In view of the common law definition of 'possession' a landlord in receipt of rent from a licensee could be in 'possession' within section 30(g) of the Registered Land Act 1963 and therefore have an overriding interest.[194]

However, recognising the rights of landlords in receipt of rents and profits as overriding interests complicates matters for purchasers of land. It means that they have to enquire from the person in occupation as to whether he pays rent to anyone, and also whether the person in occupation has any rights.[195] The English Law Commission accepted this problem as the

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192 Jowitt's Dictionary of English law, Vol.2, 2nd ed. by John Burke (London 1977), p. 1389; see also Martin Estates Co. v. Watt & Hunter [1925] N.I. 79 at p. 85 per Moore L.J.; Ocean Estates Ltd v Pinder [1969] 2 A.C. 19 at pp. 25, 26, per Lord Diplock.

193 See also Land Registration Act 1925, s. 3(xviii). It has been pointed out that for a person to be in 'receipt of rents and profits' under section 70(1)(g) of the 1925, he must be in actual receipt and not merely have the right to receive such rent and profits - Law Commission, Property Law: Third Report of Land Registrtion, Law Com. No. 158, para. 2.58; see Strand Securities v. Caswell [1965] Ch. 958. This means that the phrase 'in receipt of rents and profits' does not equate with the concept of possession in section 3(xviii) of the 1925 Act - para. 2.58.

194 Registered Land Act 1963, s. 163.

195 This information may not be apparent from the certification of search if the person in occupation is a tenant under an equitable lease.

reason for excluding the rights of persons in "receipt of rents and profits" from section 70(1)(g) of the Land Registrtion Act 1925.[196] Moreover, in their view, it was sensible to expect such persons to have their rights protected on the register avoiding the injustice of having the purchaser make two sets of enquiries; in any event, the interest of the landlord "is inherently more likely to be compensatable by payment of indemnity than the interest of the purchaser."[197] These arguments could also be used to limit the term 'possession' in section 30(g) of the 1963 Act to mean those who have physical control of the land, that is, those with actual possession as opposed to constructive possession. Hence the meaning of 'possession' in section 30(g) of the 1963 Act would correspond with the meaning given to the same term in section 143(2) of the same.[198]

'Actual occupation' on the other hand is concerned with physical presence on the land as opposed to some entitlement in law.[199] It was accepted by the English Court of Appeal in Lloyds Bank v. Rosset[200] that a

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196 Law Commission, Property Law; Third Report on Land Registration, Law Com. No. 158, para. 2.70.

197 *Ibid.*

198 See Natwarlal Chauhan v. Zakaria Omagwa, Civil Appeal No. 12 of 1980, (unreported), discussed further in Chapter Eight, *infra*.

199 Williams & Glyns Bank v. Boland [1981] A.C. 487, at p. 505 per Lord Wilberforce.

200 [1988] 3 All E.R. 915.

person could be in 'actual occupation' through the physical presence of an employee or agent on the property although this would depend on the function the employee or agent was discharging in the presmises; therefore, the defendant's wife could be in 'actual occupation' of a semi-derelict house which was being renovated by builders.[201] In the Kenyan case of John Kiruga v. Mugecha Kirgua[202] the Court of Appeal accepted the fact that a person could be in 'actual occupation' through the presence of his wife, while he was absent. However, 'actual occupation' denotes some degree of permanance and continuity; therefore, in the House of Lords decision in Abbey National Building Society v. Cann[203] it was held that the acts of laying carpets and bringing furniture into a house prior to moving in did not establish actual occupation, these being no more than preparatory steps leading to the assumption of actual residential occupation.

3. Protection From Section 30(g).

How can a purchaser of land registered under the Registered Land Act 1963 ensure that he takes free from

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201 *Ibid*, pp. 925-927, per Nicholls L.J. This point was not considered by the House of Lords on appeal because the Court concluded that the wife had no beneficial interest in the property. There was no common intention that the husband and wife were to share the property beneficially [1990] 2 W.L.R. 867 at pp. 877, 878, per Lord Bridge.

202 Civil Appeal No. 52 of 1985 (unreported).

203 [1990] 2 W.L.R. 832.

the rights arising under section 30(g) of the Act? Section 30(g), like section 70(1)(g) of the 1925 Act, provides that the rights are not binding where inquiry is made of the person in possession or actual occupation and the rights are not disclosed. Hence the purchaser has to make careful inspection of the land he is proposing to buy and make inquiry of all the persons in actual occupation.[204] In the words of Russell L.J. in Hodgson v. Marks[205] with regard to section 70(1)(g) of the 1925 Act, the purchaser cannot rely on the "untrue *ipse dixit* of the vendor". This principle was applied in John Kiruga v. Mugecha Kiruga[206] where it was pointed out that the purchaser of the land should not have confined himself to making enquiries of the registered proprietor but should have made enquiry of the plaintiff but since he was not present on the land, *enquiry should have also been made of* his wife too.

The position reflects the view taken by the House of Lords in Williams & Glyn's Bank v. Boland[207] that what is involved is a departure from the easy going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so, and to "substitute for this a practice of more careful inquiry as to the fact of occupation ..."

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204 John Kiruga v. Mugecha Kiruga, *op. cit.*

205 [1971] Ch. 892 at p. 932.

206 *Op. cit.*

207 [1981] A.C. 487 at p. 508, per Lord Wilberforce.

Nevertheless, even the most careful inquiry and inspection will not necessarily protect a purchaser since there may be rights not at all apparent to the purchaser.[208] A further problem arises where a person with rights enters into actual occupation after inspection has been made but before registration. This is an acute problem for a mortgagee who creates a charge over the land having made all the necessary inquiries, but a person enters occupation before the charge is registered. This issue (the so called 'registration gap') has not been considered by the Kenyan courts vis a vis section 30(g) of the Registered Land Act 1963; however, it has been considered by the House of Lords with respect to section 70(1)(g) in Abbey National Building Society v. Cann.[209] It was held that the person claiming an overriding interest under section 70(1)(g) had to have been in actual occupation at the time of creation or transfer of the legal estate and not at the moment of registration. This decision removes the danger facing a purchaser or mortgageee who registers a transfer or charge, unaware of a person with rights who has entered occupation

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208 See for example, Kling v. Keston Properties (1983) 49 P & C.R. 212, where an option to purchase a garage was binding on a lessee of the garage. The persson with the benefit of the option was held to be in 'actual occupation' of the garage by virtue of the presence of her car in the garage. Vinelott J. expressed disquiet that this overriding interest would not have been apparent despite careful inspection and inquiry by the purchaser - *ibid*, at p. 222.

209 [1990] 2 W.L.R. 832.

after the creation of the charge or the signing of the transfer forms. If this issue were to arise before the Kenyan Courts, it is submittd that this problem would be eliminated if Abbey National were to be followed.

With regard to rights arising behind a trust for sale, particularly where a matrimonial home is jointly owned, the safeguard for a purchaser under the Land Registration Act 1925 is to pay the purchase money to at least two trustees for sale or a trust corporation.[210] Such payment has the effect of overreaching the interests of beneficiaries under a trust for sale, these interests being transferred to the proceeds of sale.[211]

In Kenya, the only time a trust for sale arises is when a proprietor makes a strict settlement of land under the Trusts of Land Act 1941.[212] That Act, unlike the English Settled Land Act 1925, imposes a trust for sale where land is settled or where there is an

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210 Law of Property Act 1925, ss. 2, 27.

211 City of London Building Society v. Flegg [1987] 2 W.L.R. 1266. However, the Law Commission has argued that overreching puts the equitable owner at a disadvantage because it obliges him "to surrender his occupation right in favour of his financial one, without the chance to make a choice" since the interest is transferred to the proceeds of sale. The Commission therefore recommended that the conveyance of a legal estate should not overreach the interest of the equitable owner (of full age and capacity) in actual occupation "*unless that person consents*." (italics mine) - Law Commission, Transfer of Land, Overreaching: Beneficiaries in Occupation, Law Comm. No. 188, paras. 4.1, 4.3.

212 See further Chapter Seven, *infra*.

attempted settlement of land.[213] If a settlement was created, the beneficaries under the settlement would have overriding interests within section 30(g) of the Registered Land Act 1963 if they are in actual occupation of the land subject to the settlement. However, such interests may be overreached if a purchaser pays the purchase money to no less than two trustees for sale or to a trust corporation.[214] The equitable interests behind the trust take effect in the proceeds of sale and the purchaser takes a good title free from all beneficial claims.

The mechanism of the trust for sale therefore confers a measure of protection to a purchaser. It has limited application where the Registered Land Act 1963 is concerned applying only where land is settled. At present, a purchaser of registered land under the Act can only make inquiries to ensure there are no interests which may bind him. However, where overriding interets that are not apparent are concerned, inquiry may not offer adequate protection. This is therefore an area which could undergo reform; the mechanism of the trust for sale could be adopted so that land that is jointly owned under the Registered Land Act 1963 may be made subject to a trust for sale. At present the Act merely allows no more than five

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213 Trusts of Land Act 1941, ss. 11, 12.

214 *Ibid*, s. 7.

persons to be registered as proprietors.[215] However, as shown earlier, the rights of family members are capable of subsisting as overriding interests. Since these rights are claims to joint ownership of land, a purchaser may find himself saddled with them particularly where the vendor was silent about their existence. Paying purchase money to more than one person would ensure that the purchaser takes free from such interests.[216] An additional safeguard for the beneficiaries under the trust for sale is to provide that their rights should not be overreached unless they have consented.[217] This would prevent a proprietor from appointing a sham trustee to simply comply with the rules for payment of the purchase moneys.

IV CONCLUSION

This chapter has shown that despite the view that unprotected customary rights are extinguished when land is brought onto the register, in reality certain customary rights have been accepted as capable of being protected by a caution, and probably by a restriction under the Registered Land Act 1963. One right that stands out is the right of family members to receive a

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[215] Registered Land Act 1963, s. 101(4). See the discussion in Chapter Seven, *infra*.

[216] It is suggested in Chapter Seven that payment to a large number of trustees for sale would be adequate, particularly in view of the fact that families or clans tend to be large in Kenya.

[217] See Law Commission, Third Report ... *op. cit*, *supra*.

share of land. This right has been held to be binding on a registered proprietor if it arises behind a customary trust, notwithstanding the fact that it is unregistered.[218] Moreover, the right of clan members to subdivide clan land may take effect behind a resulting trust.[219] Not only would such rights be capable of protection by a caution, but would also be capable of subsisting as overriding interests.[220]

Moreover, those with customary tenancies that were not entered on the adjudication register and thereafter transferred to the Register under the Registered Land Act 1963 can do either of two things:

1. Show that the customary tenancy amounts to a periodic tenancy under section 46(1)(b) of the Registered Land Act 1963. The tenant would have to show that he has exclusive occupation of the land and he pays rent. If so, then he can register a caution under section 131(1)(a) of the 1963 Act;
2. Alternatively, the periodic tenancy would be capable of subsisting as an overriding interest under section 30(d) of the

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218 Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 253; Muthuita v. Muthita, Civil Appeal No. 12 of 1982 (unreported); John Kiruga v. Mugecha Kiruga, Civil Appeal No. 52 of 1985.

219 Alan Kiama v. Ndiya Mathunya, Civil Appeal No. 42 of 1978 (unreported).

220 Practice Instruction, Cautions: A Beneficiary's Interest (K.D.L.R. Admin File); Alan Kiama v Ndiya Mathunya, *op. cit.*; John Kiruga v. Mugecha Kiruga, *op. cit.*

Registered Land Act 1963. If the elements of exclusive occupation or rent are not present in the customary tenancy, the next option is to show that it is a licence relating to the use or enjoyment of land.[221] All a person has to show is that he has been given permission to reside on the land.[222] Such a licence is capable of protection by a caution;[223] if not protected, it would still be capable of binding a purchaser with bad faith or a volunteer. This represents an important difference with the position in English law where licences are viewed as personal interests rather than interests in land, and therefore are not capable of binding third parties. Hence they would not be capable of protection by a notice, caution or restriction under the Land Registration Act 1925. Nevertheless, a licence giving rise to a constructive trust,[224] or an estoppel licence,[225] could be capable of being protected on the register by a notice or caution for example, or capable of

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221 Registered Land Act 1963, s. 100(2).

222 *Ibid*, s. 3.

223 *Ibid*. ss. 100(2); 131(1)(b).

224 See Ashburn Anstalt v. Arnold [1988] 2 W.L.R. 706.

225 Inwards v. Baker [1965] 2 Q.B. 29.

> subsisting as an overriding interest within section 30(g) of the Land Registration Act 1925.

However, the question of whether customary rights are capable of binding registered proprietors has continued to be a problematic one for the courts in Kenya. No court has yet analysed in depth and reviewed the cases recognising the customary trust and those cases which reject the idea that customary rights survive first registration. In essence, the fundamental fault lies with the adjudication teams which should have noted scrupulously all the customary rights that were being claimed. It is of interest that many of the cases where customary rights are being claimed and which have come before the courts mainly concern land situated in the Central province. This was the area that bore the brunt of the Mau Mau Civil War in the 1950's. The war caused the adjudication teams to conduct their work with haste with the colonial government endeavouring to speed up the work in an attempt to stifle African support for the Mau Mau, and as a result, many failed to have their rights protected on the Adjudication register.[226]

Many years later, the courts are now having to deal with these unprotected rights. The difference in approach may suggest that some judges are unprepared to accept customary rights as capable of surviving

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226 See Chapters Two and Three, *supra*.

registration while other judges are. However, the general consensus accepts that the customary right to inherit land can still bind a registered proprietor. Nevertheless, this is one area that will require judical clarification. Clearly it is necessary for the Court of Appeal to review all the caselaw and come up with an authoritative ruling. Alternatively, legislative reform may be necessary to clear this anomaly.

How can a purchaser protect himself from adverse interests, particularly, as we have seen, the rights of those claiming to have a share of land under customary law? Undoubtedly, obtaining a search of the register would be the first prerequisite. The entry of a caution should be enough to put him on alert. However, obtaining a certificate of search is not adequate protection in view of the existence of overriding interests, and particularly those interests not apparent on inspection of the land. Herein lies the weak link in the system of land registration. The register cannot fully protect the purchaser from adverse interests and making enquiries and inspecting the land may, in some circumstances, not be enough. The 'two trustee' rule in English law whereby the interests of those behind a trust for sale are overreached offers a measure of protection for the purchaser or mortgagee.[227] This mechanism could

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227 City of London Building Society v Flegg [1987] 2 W.L.R. 1266.

usefully be adopted in Kenya, applying to co-owned land registered under the Registered Land Act 1963. At present a statutory trust for sale is applied only where land is subject to a strict settlement.[228] These provisions could be extended so that a trust for sale is imposed whenever land is co-owned. A purchaser need not worry about being bound by the interests of beneficiaries behind a trust for sale so long as he pays the purchase moneys to a limited number of trustees. Provision may be made, as has been suggested by the English Law Commission with respect to the provisions under the Law of Property Act 1925, that overreaching may only take place where the beneficiaries of full age have given their consent. This would ensure that the land is not sold behind the backs of the beneficiaries.

However, this may not necessarily protect the purchaser from all overriding interests. The problem with both the Registered Land Act 1963 and the Land Registration Act 1925 is that the provisions on rectification and indemnity do not apply to overriding interests.[229] The English Law Commission has recommended with respect to the Land Registration Act 1925 that,

> " ... a registered proprietor against whom an overriding interest is asserted should be able to apply for indemnity but the Registrar may, as a discretionary condition precedent

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228 Trusts of Land Act 1941, ss. 11, 12.

229 See Re Chowood's Registered Land [1933] Ch. 574.

> to paying indemnity, rectify the register by entering the overriding interest in it."[230]

Such a remedy would not be available to the registered proprietor if he contributed to the loss suffered by a lack of proper care.[231] This could happen where for example, he fails to make the necessary inspections and enquiries. If such a reform was adopted to amend the Registered Land Act 1963, it would remove the disadvantage suffered by purchasers of land with respect to overriding interests.

The two reforms, that is the mechanism of the trust for sale and allowing overriding interests to be subject to rectification and indemnity would ensure some kind of balance under the Registered Land Act 1963, protecting those with subordinate interests as well as purchasers of registered land. Such measures can only come about through legislative reform.

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230 Law Commission, Property Law: Third Report on Land Registration, Law Com. No. 158, para. 3.29.

231 *Ibid.*

Chapter Seven

CO-OWNERSHIP IN REGISTERED LAND

I) Introduction

Co-ownership arises where two or more people are simultaneously entitled in possession to an interest or interests in the same property. In Kenya the law on co-ownership was complicated by the dichotomy of various land laws. Land that was registered under the Land Titles Act 1908, the Government Lands Act 1915, and the Registration of Titles Act 1919 was subject to the substantive land law contained in the Indian Transfer of Property Act 1882. The 1882 Act contains provisions on co-ownership that are vague and ambiguous[1]. Moreover, Trust Land that was not registered under the above Acts was subject to customary law which varied from tribe to tribe. Naturally, the nature of co-ownership varied in these societies. The aim of enacting the Registered Land Act 1963 was not only to unify the system of land registration but also the substantive law. Part of the substantive law that the Act introduced was a system of co-ownership. This system would eventually replace the system of co-ownership under the Indian Transfer of Property Act 1882 once all land registered under the three registration Acts mentioned above was brought

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1 Discussed *infra*.

under the Registered Land Act 1963[2]. Further, the system under the 1963 Act was to replace the methods of land holding under the multifarious customary laws of the various tribes inhabiting the Trust Lands. Once the Trust Lands were brought under the Registered Land Act 1963 the customary methods of land holding would cease to exist, having been replaced by the system under the 1963 Act.

The *Registered Land Act 1963* introduced a system of co-ownership that, in some respects, was similar to the system under the English Law of Property Act 1925. The major difference is that land held by co-owners under the Registered Land Act 1963 does not take effect behind a trust for sale, whether the co-owners hold as joint tenants (or 'joint proprietors' which is the term used in the 1963 Act) or tenants in common ('proprietors in common'). In contrast co-owned land in England is held on trust for sale under the Law of Property Act 1925. Moreover, the system of co-ownership under the 1963 Act has several limitations; for example, it is virtually impossible to unilaterally sever a joint proprietorship, whereas under English law where several methods are prescribed. This creates problems for the joint proprietor who wishes to sever his share *inter vivos* or by will. Further problems occur in a situation where one joint owner kills the

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[2] The Indian Transfer of Property Act 1882 would eventually cease to apply completely once all land was registered under the Registered Land Act 1963 - see s. 3 Registered Land Act 1963.

other in order to obtain his share by *jus accrescendi*. Kenyan law is not very clear on the legal position in such a situation. The solution to this problem can be found by turning to English sources.

A more serious problem is the lacuna created by section 101(4) of the Registered Land Act 1963 which provides that in the special areas[3] land should be registered in the names of no more than five proprietors. It means that this limitation does not apply to registered land situated in the urban areas for example, and it is submitted that an unlimited number of persons can be registered as proprietors. However, the Act does not say what happens when the land is owned by more than five people. In contrast, the Law of Property Act 1925 imposes a trust for sale where land is co-owned. This chapter therefore looks at the types of trusts that can be imposed in a situation under the 1963 Act where land is held by more than five people.

The Kenya Parliament did attempt to correct the deficiency by enacting the Land (Group Representatives) Act 1968. However, it will be shown that this Act is unsatisfactory in several respects and it does not really solve the problem caused by section 101(4) of the Registered Land Act 1963.

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3 Land which formed the African Reserves, see Chapter Two, *supra*.

Nevertheless, before the provisions on co-ownership in the Registered land Act 1963 can be considered, it would be useful to consider the nature of multiple ownership in areas that were subject to customary tenure, that is the special areas, and also the system of co-ownership set up by the Indian Transfer of Property Act 1882, before looking at the position under English common law.

A. Co-ownership In Land Subject To Customary Tenure

It is difficult to categorise African conceptions of land holding along the lines of English common law. To say that Africans had a method of land holding, where more than one person had an interest in the ownership of the same piece of land, and that this was analogous to co-ownership under common law, would be myopic. Two reasons account for this; firstly, the difficulties in evaluating the clusters of rights, privileges and liabilities which are related to the ways in which Africans hold land; and secondly, the 'imbrication of economic, social and political factors'[4]. These aspects make the system of land holding among Africans unique.

It used to be said by various historians and anthropologists that land amongst the Africans was owned by the whole community or by the tribe and therefore the concept of private ownership of land by individuals within these groups was non-existent[5].

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[4] D. Biebuyck, ed., African Agrarian System (1960), p. 52.

This view, however, was erroneous because it was assumed that these societies had centralised political authority whereby the Chief or King held the residuary and reversionary ownership of all the land occupied by the community, the community members merely having a possessory interest in the land[6]. In Kenya this was not the position. Kenyan societies had segmented political structures with no overall Chief or King[7]; most societies were divided into clans which were in turn made up of families. The majority of clans had elders whose function was to administer over the affairs of the clan and this included the arbitration of disputes among clan members and the granting of consent for transfers of land among clan members or to strangers (i.e. people who were not members of the clan). However, these elders had no residuary or reversionary interest in the land. It was the family which was the unit of land holding rather than the clan or the society as a whole.

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5 See for example, F.D. Lugard, The Dual Mandate in Tropical Africa (London, 1922), p. 280.

6 See T.O. Elias, The Nature of African Customary Law (Manchester 1956) pp. 82-6, 164.

7 The colonial authorities did try to promote prominent individuals within certain societies to become leaders in order to act as go-betweens between the colonial government and that particular society. For example, the colonial government recognised Lenana as the 'paramount chief of all the Masai' at the beginning of this century. However, the Masai had never recognised such a position - M.P.K. Sorrenson, Origins of European Settlement in Kenya (Nairobi 1968), p. 191.

It is more accurate to say that ownership of land among African communities in Kenya was part communal part individual. This kind of land ownership practised by these communities can be traced to the period when those communities migrated from the northern parts of the continent into what is now Kenya seeking areas to settle, eventually settling in land that was unclaimed. Families within these communities would clear the land of bush and seek to cultivate it, and each family would demarcate the land that they had cleared. Although the land belonged to the head of the family each member of the family had the right to live, work and cultivate on the land. Normally, the head of the family, who usually had more than one wife, would allocate land to his wives to cultivate upon during their lives. When his sons reached marriageable age he would also allocate some land to them to cultivate and build upon. This would be the basis for the development of their own families. If the family head died before he could allocate land to his sons, then the customary rules of intestacy for that group would apply[8]. This process would be repeated when each son started his own family

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[8] It is true to say that the customary rules of intestacy among many societies were more or less identical. It was often the case that the sons of the deceased family head received equal shares of the property, the notional title to which had been vested in the deceased, such property being viewed as family land.

and later would allocate among his male issue shares of the land that he initially received from his father[9].

The communal nature of land ownership was demonstrated by the fact that not only was land set aside for communal purposes, such as grazing land, but also within the family the family head could not transfer the land to another member of the community without seeking first the consent of his family members and the consent of the clan elders[10]. The nature of the interests of the family members in the land reflects the African view that land was shared by the members of the family as a whole, because land was regarded as a "social and economic cement that held the society together"[11]. Land was not viewed as a mere commodity to sell or to speculate with, but as a means of providing the family social and economic security[12].

Nevertheless, the fact that there was a power to sell the land, subject to the necessary consents, plus

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9 The daughters never received a share of land absolutely. See E. Cotran, Restatement of African Law, (Kenya), The Law of Succession, Vol. 2. (London 1969), for an illuminating discussion on the laws of succession of different tribes in Kenya. See also Chapter Two, *supra*.

10 See Jomo Kenyatta, Facing Mount Kenya, (Nairobi, 1979) pp. 31-2.

11 Mwangi Wa-Githumo, Land and Nationalism (New York, 1981), p. 48.

12 In Warari v Public Trustee H.C.C.C. No. 227 of 1975 (unreported), E. Cotran, Casebook on Kenya Customary Law (Nairobi 1987), Case No. 86 p. 310 at p. 321, Muli J., remarking on Kikuyu custom, said that the custom discouraged "free alienation of land ... although alienation among members of the family and the clan was to a limited extend permissible."

the fact that an individual family member who had been allocated land by the head could exclude other community members from it meant that land ownership was not wholly communal but was tinged with a form of private ownership.

This interwoven nature of communal and private ownership as expressed through the family members was commented upon by A.P. Barlow who, on observing the Kikuyu people, said:

> "The sense of family ownership is so strong and the instinct to preserve the integrity of the family's land (*githaka*) is so deep seated that the inquirer into the system of tenure may at times find difficulty in disentangling family rights and individual rights. Under normal circumstances, family control over the land remains inconspicuous, and individual rights play the important part in the everyday life of the land (*githaka*). Every sub-division of the clan (*mbari*), and every individual, down to the youngest son of the youngest wife of the most junior member of the family, have their indisputable rights in their respective portions of the land. And yet every transaction concerning any modicum of the land is preceded by consultation between the members of the *mbari* whose common interests are affected."[13]

Although this method of land holding was unique to the Africans and satisfactory for their purposes, the colonial government saw it as an impediment to agricultural development. The Working Party on African Land Tenure said that this method of ownership was "a serious danger" to the idea of using and utilising land economically and to make it freely negotiable, because

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[13] The Kenya Land Commission Report, Evidence and Memoranda, Cmd. 4556 (1934), p. 3023.

the customary laws of inheritance "produces more and more owners and smaller and smaller shares"[14]. The Working Party felt that it would be difficult to develop land as a single unit, or even to sell it to a purchaser, because of "the impracticability of obtaining the agreement of numerous persons"[15]. This method of land holding would make it very difficult for a progressive co-owner to obtain a mortgage to develop a portion of his share of the land, if the other co-owners were unwilling to grant their consent. Furthermore banks would be unwilling to lend their money to owners of land held under customary law. Since customary law was by nature unwritten, it meant that those claiming rights of ownership in land subject to customary law could not prove their ownership with documents which could act as sufficient security for the banks.

The system of land registration *proposed by the* Working Party on African Land Tenure was designed to remove this uncertainty, since the interests of those claiming ownership of land would be recorded on the register, with registration being proof of ownership[16]. The Working Party also proposed to limit the number of co-owners who could be registered as owners of

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14 Report of the Working Party on African Land Tenure, 1957-8, (Nairobi 1958), para. 82.

15 *Ibid.*

16 See Chapter Three, *supra*, for the discussion of land adjudication the aim of which was to have these rights recorded.

registered land to five[17]. This would prevent unauthorized subdivisions on the ground and would fully secure the rights of those registered.

B. Co-ownership Under the Indian Transfer of Property Act 1882

The African system of land tenure was confined to the Trust Lands. Land outside the Trust Lands was set apart for European settlement[18]. The substantive law governing land outside the Trust Lands was provided by the Indian Transfer of Property Act 1882[19].

This Act was deficient in many respects, and one of its deficiencies was its failure to define forms of co-ownership and provide an adequate structure for co-owning land. The provisions of the Act *merely implied* that a joint tenancy and a tenancy in common could be created and they did not define what they were or the conditions under which they could be held. The oblique references in the Act to such forms of co-ownership were sections 44 - which allowed a tenant in common to sell his share - and section 45 which provided that a purchase of property by two or more persons would result in their sharing the property in shares corresponding to their contributions; section 46

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17 Report of the Working Party on African Land Tenure, *op. cit.*, para. 87.

18 This land came to be known as the Scheduled Areas which were defined in the seventh schedule to the Highlands Order-in-Council 1939.

19 It was a simplified version of the Conveyancing Act 1881, an Act in force in England before the Law of Property Act 1925 was enacted.

provided that where there was a sale the proceeds would be divided in accordance with the shares they held in the property.

The failure of the Indian Transfer of Property Act 1882 to adequately and comprehensively fill in the substantive law on joint tenancies and tenancies in common and, in particular, the lack of a proper definition and the conditions upon which they were held meant that the gaps in the Act had to be filled by the application of English common law[20].

C. Co-ownership Under English Common Law[21]

The essential nature of a joint tenancy under common law is that the joint tenants as a group own the entire interest in the property but without indication as to the share of each. The common law provided that for a joint tenancy to be created what are known as the four unities must co-exist; these are unity of possession, interest, time and title. If they do not exist a tenancy in common will arise.

On the other hand, a tenant in common has a definite interest in the property but it is not physically demarcated and the shares of the tenant in

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20 By virtue of art. 11(a) of the East Africa Order-in-Council 1897 which was subsequently repealed and eventually replaced by the Judicature Act, 1967 s. 3(1)(c), the applied common law would have been that existing on 12 August 1897.

21 See generally Sir Robert Megarry & H.W.R. Wade, The Law of Real Property, 5th ed., (London 1984), pp. 457-462.

common remain undivided. The only unity required for a tenancy in common was unity of possession. Before 1925 a tenancy in common in England was capable of existing at law. This would mean that under the Indian Transfer of Property Act 1882 both joint tenancies and tenancies in common could subsist as legal titles and can still do notwithstanding the fact tenancies in common were abolished as legal estates in England by the Law of Property Act 1925 and thereafter they could only exist in equity[22].

As mentioned earlier, this chapter looks at the structure set up by the Registered Land Act 1963 regarding co-ownership in comparison with the English common law position and the structure under the Law of Property Act 1925. Further analysis is made of the judicial approach to the position of co-owners and beneficiaries where land is registered in the name of one person. In the third section of this chapter of the Land (Group Representatives) Act 1968 is discussed. This Act was passed by the Kenya Parliament to facilitate the registration of land occupied by large groups of people who had no concept of individual land ownership, but rather held land communally. Since the co-ownership structure in the Registered Land Act 1963

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[22] Ss. 1(6), 34(1), 36(2); Settled Land Act 1925, s. 36(4). Co-parcenary and tenancy by entireties were two further types of co-ownership that existed prior to 1925. The latter was abolished by the Law of Property Act 1925, Sched. 1, Pt VI, whereas the former rarely occurs and is now virtually obsolete - see generally Sir Robert Megarry and H.W.R. Wade, *op.cit.*, pp. 456-462.

would have been unsuitable for these groups the 1968 Act sets up a form of co-ownership that is unique to these groups.

II. Co-ownership Under The Registered Land Act 1963

The Registered Land Act 1963 introduced two types of co-ownership: joint proprietorship and proprietorship in common[23]. The terminology used to express these two forms of co-ownership is modern and does not reflect the anachronistic 'joint tenancy' and 'tenancy in common' still used in English law. Although the tenor of the Kenyan 'joint proprietorship' and the 'proprietorship in common' is similar to the English joint tenancy and tenancy in common, there are differences in their characteristics. An important difference lies in the function of law and eguity in relation to land that is co-owned. The Law of Property Act 1925 established that all forms of co-ownership should exist behind a trust for sale with the legal estate being held by a small number of trustees. The Registered Land Act 1963, however, did not set up a similar arrangement and as a result, a conceptual problem has arisen.

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23 Ss. 102, 103.

A. The 'Joint Proprietorship' and the 'Joint Tenancy' Contrasted

The characteristics of the joint proprietorship are set out in section 102 of the Registered Land Act 1963. That section provides as follows:

> "(1) Where the land, lease or charge is owed jointly, no proprietor is entitled to any separate share in the land, and consequently -
> (a) dispositions may be made only by all the joint proprietors; and
> (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.
>
> (2) For avoidance of doubt, it is hereby declared that -
> (a) the sole proprietor of any land, lease or charge may transfer the same to himself and other person jointly; and
> (b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.
>
> (3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument."

The essential nature of joint ownership is therefore preserved in this section; in the eyes of the common law joint owners are viewed as one person even though as between themselves they have separate rights. This is reflected in section 102(1) of the Registered Land Act 1963 which provides that no joint proprietor is entitled to any separate share in the land, and in section 102(1)(a) of the same Act which provides that

dispositions may be made only by all the joint proprietors.

A unique feature of joint ownership at common law was *jus accrescendi* - the right of survivorship. This right is enshrined in section 102(1)(b) of the Registered Land Act 1963 to the effect that on the death of one joint owner his interest in the land vests in the other joint owner(s), the process continuing until there is only one survivor who then holds as the sole owner.

At common law for a joint tenancy to be created the four unities had to co-exist; with unity of possession each joint tenant must be entitled to the possession of the whole of the land; unity of interest required that each joint tenant must have the same estate or interest in the land; unity of title required that each joint tenant must have the same title, having acquired it in the same instrument; whereas unity of time meant that each joint tenant must have an estate for the same time[24]. Since the Registered Land Act 1963 is silent on how a joint proprietorship can be created, this would appear to be an area where the provisions of the common law of England regarding the creation of a joint tenancy would apply by virtue of section 163 of the Registered Land Act 1963.

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24 Sir Robert Megarry & H.W.R. Wade, *op cit.*, pp. 419-422.

1. Severance of a Joint Tenancy

In England the methods of severance at common law were summarised in Williams v. Hensman[25] by Sir William Page-Wood V.C. where he stated three methods of severing a joint tenancy: first, by an act of any one of the persons interested operating on his own share; secondly, severance by mutual agreement; and thirdly, severance by a course of dealing. Before 1926 a joint tenancy could be severed both at law and in equity by any one of the three ways above. However, section 36(2) of the Law of Property Act 1925 abolished the right to sever a joint tenancy at law although it did not affect the right to sever a joint tenancy in equity, and neither did it affect the common law methods of severance. Nevertheless, section 36(2) did add an additional method of severance, namely, the service by a tenant upon the other joint tenants of a notice indicating a desire to sever. By virtue of section 196(4) of the Law of Property Act 1925 this notice can be sent by post in a registered letter addressed to the other joint tenants at their address.

Once a joint tenancy is severed in equity the joint tenants become tenants in common in equal shares irrespective of the size of their contributions to the purchase price [26] while the legal estate is still held as a joint tenancy on trust for sale.

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25 (1861) 1 J. & H. 546 at p. 557-558.

26 Goodman v. Gallant [1986] Fam. 106. See also M.P. Thompson, Co-Ownership (London 1988), pp. 24-25.

2. Severance of a Joint Proprietorship

The Registered Land Act 1963 on the other hand provides that a joint proprietor can sever the joint proprietorship by executing an instrument in the prescribed form[27]. Since no other methods of severance are prescribed in the Act, can it be argued that the Williams v Hensman[28] methods of severance are applicable to jointly owned land under the 1963 Act?

According to section 163 of the Registered Land Act 1963, the English common law is applicable to land registered under the 1963 Act but subject to the provisions of the Act. Since section 102(3) of the 1963 Act does provide a method of severance it would follow that the additional common law methods of severance cannot be applied, since the common law is applicable where there is a gap in the provisions of the Act. This interpretation was applied by the Court of Appeal in Virginia Edith Wambui Otieno v Joash Ochieng Ougo & Another[29] when considering a similar provision to section 163 in the Judicature Act 1967 (s.3(1)). They said that "the common law and doctrines of equity ... *are to be applied to fill up what is not provided for in the written laws* ..." (italics mine). This means, therefore, that where severance of a joint

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27 S. 102(3). For the form see Registered Land Rules 1963, 3rd Sched., Form R.L. 15.

28 *Op.cit.*

29 Civil App. No.31 of 1987 (unreported); Eugene Cotran, Casebook on Kenya Customary Law, (Nairobi 1987), Case No. 88, p.331.

proprietorship is concerned, there is only one method of severance compared to the four methods in English Law.

Severance, under the 1963 Act, can only be undertaken by joint proprietors who are not trustees[30]. This would appear to be similar to the position under the Law of Property Act 1925 whereby severance of a joint tenancy can only be made in equity[31]. This is made possible due to the fact that the Law of Property Act 1925 automatically sets up a trust for sale whenever land is co-owned[32] so that, for example, the legal estate can be held by joint tenants on trust for sale for themselves beneficially. However, the position under the 1963 Act is made ambiguous by the fact that the Act does not reveal how and when a joint proprietor can be made a trustee, thereby making it difficult to determine which joint proprietor can or cannot sever the joint proprietorship[33]. A further important difference is the fact that under English law, where severance of a joint tenancy in equity is made and the land is already registered under the Land Registration Act 1925, the joint tenants who are now tenants in common cannot be registered as proprietors unless they happen to be registered as legal joint

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30 Registered Land Act 1963, s.102(3).

31 Law of Property Act 1925, s.36(2).

32 Ss. 34(2), 36(2).

33 See the suggested solution, *supra*.

tenants, such legal joint tenancy not being severable[34]. In contrast, under section 102(3) of the Registered Land Act 1963, the equitable joint proprietors who sever their shares are registered as proprietors in common. However, in harmony with section 101(4) of the 1963 Act, the number of persons who are registered cannot exceed five. What is the position where there are more than five? The Act is silent. This problem is addressed below.

Unilateral severance by one joint tenant acting on his own share would not appear to be possible under the Registered Land Act 1963. This is implied by the wording in section 102(3) which states that "*Joint proprietors*
... may execute an instrument signifying that *they agree* to sever ... and the severance shall be completed by registration of the *joint proprietors as proprietors in common* ..." (italics mine). Section 102(2)(b) of the Act further states that a joint proprietor may transfer his interest to all the other proprietors. No mention is made as to whether that interest can be alienated *inter vivos* or by will to someone who is not a joint proprietor. The Act therefore makes it virtually impossible for a joint proprietor, who does not want his share to pass to the other joint proprietors on his death, to sever his share unilaterally so that he can transmit that share in his

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34 Law of Property Act 1925, s. 36(2).

will to his heirs or to transfer it to a third party *inter vivos*. The difficulty was caused by the fact that he would have to get all the other joint proprietors to agree to sever their shares as well.[35] This may be virtually impossible especially where there are numerous co-owners some of whom may not want to sever their shares. The effect of this means that unlike the position in English law whereby one joint tenant can sever his share and transfer it *inter vivos* to a stranger who then holds that share as tenant in common while the other joint tenants still continue to hold their shares as joint tenants,[36] joint proprietors under the 1963 Act would all have to sever their shares and all become proprietors in common. It would not be possible for some joint owners to remain as joint proprietors while others hold as proprietors in common.

But suppose a joint proprietor decided to forge the signatures of the other joint proprietors on the prescribed form; would this be sufficient to sever the joint proprietorship? Although this issue has not been considered in Kenya, the English Court of Appeal in First National Securities v. Hegerty [37] took the view that the act of a husband who forged his wife's signature on a legal charge was "a sufficient act of alienation of

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[35] The position is similar for proprietors in common - s. 103(2) Registered Land Act 1963.

[36] Bedson v Bedson [1965] 2 QB 666 at 689, per Russell L.J.

[37] [1985] Q.B. 850. See also Ahmed v Kendrick [1988] Fam. Law 201.

the husband's interest to sever the beneficial joint tenancy" and the effect was that they held as tenants in common.[38] Since there is nothing in section 102 of the Registered Land Act 1963 to conflict with the application of this principle, nor is there judicial opinion to the contrary it is arguable that this case could apply in Kenya by virtue of section 163 of the Registered Land Act 1963, with the result that the other joint proprietors become proprietors in common.

Nevertheless, safeguards in the Registered Land Act 1963 make it difficult for a co-owner to forge the signatures of the other co-owners. Section 110 of the Act provides that the execution of an instrument must be verified before *the Registrar or other public* officer.[39] Since the prescribed form of severance must be registered[40] the Registrar would have to ascertain that the signatures of the co-owners are proper and not mere forgeries.[41] However, if a co-owner was

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[38] [1985] Q.B. 850 at p. 862, per Sir Denys Buckley. The case was decided on other grounds.

[39] Registered Land Rules 1963, r. 7, Fourth Schedule.

[40] Registered Land Act 1963, s. 102(3).

[41] This would be done by verifying the signatures as well as the identities of the co-owners against their national identity cards.

successful in forging the signatures of the other co-owners and had the form of severance registered, a chargee, in pursuing his power of sale under section 77(1) of the Registered Land Act 1963, should only be able to recover the loan money from the cash value of the forger's share of the proceeds of sale, the rest of the money entitled to be distributed to the other co-owners.

What is the legal position in Kenya where one joint tenant kills the only other joint tenant in order to obtain that ones share by *jus accrescendi*?[42] The Law of Succession Act 1972 provides in section 96(1) that

> "a person who, while sane, murders another person shall not be entitled directly or indirectly to *any share in* the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though the murderer died immediately before the murdered person".

However, it would appear to follow that if the joint tenant is found guilty of manslaughter, he would be entitled to the estate of the dead joint tenant[43].

Section 96(1) of the Law of Succession Act 1972 reflects the long established principle at English law known as the forfeiture rule, that a criminal should not profit from his crime[44]. However, section 96(1)

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42 Registered land Act 1963, s. 102(1)(b).

43 See Law of Succession Act 1972, s. 96(2). The same would apply if the joint tenant became insane before committing the murder - *ibid*, s. 96(1).

44 In the Estate of Crippen [1911] p.108 at p.112, per Evans P.

only applies to murder and would not apply, for example, where the criminal is guilty of manslaughter. Looked at closely, section 96(1) arguably does not offer any solution to the problem where one joint tenant murders the other. The section merely refers to the fact that the defendant shall not be entitled to any share "in the estate of the murdered person". By implication this would mean that the defendant would be entitled to his own share where the property was jointly owned or where the proprietor and the deceased are proprietors in common[45].

Therefore, if the defendant and the deceased held the property as joint proprietors under section 102 of the Registered Land Act 1963, how would the share of the deceased be held? There are two solutions to the problem: the whole property can be vested in the survivor in accord with the *jus accrescendi* principle, but holding one half on constructive trust for the benefit of the next of kin of the deceased, with the survivor not entitled to take as a beneficiary; or secondly, the killing would sever the joint proprietorship so that the survivor and the deceased (or his estate) became proprietors in common. The

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45 While in English law a tenant in common would be entitled to receive his share, it was held in Davitt v Titcumb [1989] 3 All E.R. 417 that the estate of the murdered tenant in common is entitled to receive a contribution in equity from the surviving tenant in common.

former solution has been promoted in the Commonwealth[46] while the latter represents the position at English law[47]. Under English law the survivor holds the property on trust for himself and the estate of the deceased as tenants in common in equal shares[48].

In view of the fact that Kenyan law is silent on the question of how the shares of two joint tenants should be held where one has murdered the other, if the property was registered under the Registered Land Act 1963 it is submitted that the English common law position is applicable by virtue of section 163 of the 1963 Act. Therefore the survivor holds the property on trust for himself and the deceased's estate as proprietors in common. Arguably the English common law position should also apply where the surviving joint tenant is guilty of manslaughter. Since section 96(1) of the Law of Succession Act 1972 is only concerned with murder, the implication is that the surviving joint tenant would be entitled to the interest of the deceased, even though found guilty of manslaughter. However, where the land is registered under the Registered Land Act 1963 it is submitted that the

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46 Schobelt v. Barber (1966) 60 D.L.R. (2d) 519; Re Pechar (dec'd) (1969) N.Z.L.R. 574.

47 Re K (dec'd) [1985] Ch. 85, affmd [1986] 1 Ch. 180.

48 *Ibid.* See Kevin Gray Elements of Land Law, (London, 1987) pp. 333 *et. seq.* Sections 2(1) & (2) of the Forfeiture Act 1982 allow the courts to modify the forfeiture rule by taking into account the conduct of the offender and the deceased and other material circumstances.

equitable principle that no criminal should profit from his own crime is applicable by virtue of section 163 of the Act[49] thereby displacing the implication above.

Unilateral severance is permissible under the Law of Property Act 1925[50] by a joint tenant acting upon his own share by giving notice to the other joint tenants of his intention to sever[51]. In England it had once been thought that one joint tenant could sever his interest by adopting a course of conduct from which his intention to sever could be inferred, for example taking out a summons under section 17 of the Married Women's Property Act 1882 asking for an order that the property be sold[52]. However, it is accepted that a unilateral act or course of conduct by one joint tenant can be sufficient to sever the joint tenancy as long as it indicates an intention to terminate the joint tenancy and is made clear to the other joint tenant[53]. Unilateral severance by one joint tenant giving notice to the other joint tenants only affects the share of the joint tenant who is severing so that while his

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49 In the case of land that is not registered under the Registered Land Act and therefore subject to the Indian Transfer of Property Act 1882, it is submitted that the English common law position would also be applicable by virtue of section 3 of the Judicature Act 1967 (Cap 8).

50 S. 36(2).

51 *Ibid.*

52 Re Draper's Conveyance [1969] 1 Ch. 486.

53 Sir Robert Megarry & H.W.R. Wade, The Law of Real Property, 5th ed., (London, 1984) p. 432.

interest converts into that of a tenant in common, the shares of the other joint tenants still remain joint tenancies.

The Registered Land Act 1963 therefore creates a serious limitation on the power of a joint proprietor to sever his share unilaterally. This can create potential difficulties where the joint tenants are husband and wife and the marriage has broken down and the wife, for example, seeks to sever her interest but the husband refuses to sever his share. It is submitted that the wording of section 102 (2) & (3) of the 1963 Act does not allow the application of common law principles on unilateral severance by a joint tenant. However, the solution to this problem lies in the procedure on partitioning land that is set out in sections 104-106 of the Registered Land Act 1963 and is discussed below.

B. Characteristics of the Proprietorship in Common

Before 1926, a tenancy in common could exist in English law as a legal estate and in equity. However, section 1(6) of the Law of Property Act 1925 abolished it as a legal estate and now it can only exist in equity under a trust for sale. In Kenya the Working Party on African Land Tenure considered whether the tenancy in common should be contained in the legislation on land registration that they were about

to introduce[54]. They felt that although it had been abolished as a legal estate in England, there was no harm in retaining it in Kenya because there were occasions where it might be desired; for example, it might encourage a father and his sons to work a holding together in partnership, or it could encourage a businessman and a farmer to team up together in developing a farm, the former providing capital for the enterprise[55]. However, the Working Party had consulted other officials who were of the opinion that land should be inherited by a sole heir as a safeguard against fragmentation of land; some Africans in some of the Districts expressed a desire that land should be inherited by a sole heir[56]. The Working Party therefore decided to have the 'best of both worlds' by not forbidding a tenancy in common altogether, but by having not more than five persons registered as the owners of any parcel of land[57]. The tenancy in common was renamed 'proprietorship in common' which would reflect the modern sense of the phrase.

The characteristics of the 'proprietorship in common' are now set out in section 103 of the Registered Land Act 1963 and they are as follows:

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54 Report of the Working Party on African Land Tenure 1957-8, (Nairobi 1958), para. 84.

55 *Ibid.*, para. 86.

56 *Ibid.*, paras. 84, 85.

57 See now Registered Land Act 1963, s. 101(4).

> "(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.
>
> (2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld."

Section 103(1) reflects the common law position regarding tenancies in common. Under common law, tenants in common hold in undivided shares, with each having a distinctive share in the property but which is not yet divided among the tenants. While the tenancy lasted no one could say which particular share belonged to him[58], but nevertheless it is only between tenants in common that the allocation of shares or proportions was possible, unlike joint tenants, so that, for example, A could claim a one-quarter interest and B a three-quarters interest. This would also be similar with the 'proprietorship in common' under the Registered Land Act 1963. However, unity of possession, which is the sole and an essential constitutive element of a tenancy in common[59], and, a *fortiori*, a proprietorship in common, would mean that no proprietor in common could physically demarcate any

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58 Sir Robert Megarry & H.W.R. Wade, *op. cit.*, p. 422.

59 Kevin Gray, Elements of Land Law (London 1987), p. 303.

part of that land as his to the exclusion of the other proprietors in common.

Section 103(1) also indicates the absence of a right of survivorship in a proprietorship in common which was also absent in a tenancy in common at common law. In the absence of a right of survivorship, the share of each proprietor in common passes on his death either in accordance with the terms of his will (if he dies testate) or according to the rules of intestate succession[60].

However, the proprietor in common, by virtue of section 103(2), cannot deal with his undivided share as he would like. He would have to seek the consent of the others in writing if, for example, he wanted to alienate his share *inter vivos* to a third party. The Working Party on African Land Tenure inserted this provision to "emphasize the partnership nature of this co-ownership" and to enable the other co-owners "to prevent the intrusion into the 'partnership' of anybody they do not like"[61]. But the Working Party was aware of the danger whereby an unscrupulous co-owner could refuse to give his consent to a sale and thereby depreciate the value of the undivided share[62]. Their solution was to provide a procedure whereby the co-

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60 *Ibid*. The Law of Succession Act 1972 governs the rules of intestate succession in Kenya.

61 Report of the Working Party on African Land Tenure, 1957-58, (Nairobi 1958), para. 89.

62 *Ibid*.

owner who was unable to obtain the necessary consents to the sale of his undivided share could apply to the Registrar for the land to be partitioned or sold and either a separate part of the land could be allocated to him or the land or his share could be valued and offered for sale[63].

However, section 103(2) contains a proviso which states that "such consent shall not be unreasonably withheld". This acts as a safeguard to prevent the withdrawal of consent by a co-owner for unwarranted reasons. Nevertheless, if a co-owner can provide good reasons for refusing to grant consent, the court cannot force that one to give his consent. In Mohamedali v Keki Dastoori[64] it was held that the consent of the other co-owner is not a mere formality and if he raised valid objections, and the applicant cannot discharge his burden of proving that they are unreasonable, then the court will uphold those objections.

This subsection seems to reflect the customary law position existing in many societies whereby one who sought to grant some interest or land to a stranger who was not a member of the family, clan or tribe could not do so until the consent of the elders had been obtained[65]. The purpose of the Registered Land Act 1963 was to remove the constraints of customary law

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63 *Ibid.*

64 (1976) Kenya L.R. 233.

65 See S. Coldham, Land Control in Kenya, [1978] J.A.L. 63 at pp. 72-73.

enabling security of title as well as allowing freely marketable titles thereby freeing landowners from the constraints of customary law. The safeguard is that a co-owner of registered land, who is hampered by the unreasonable objections of the other co-owners, may not only make an application to the High Court to have the objections removed, but may also employ the partition procedure set out in sections 104-106 of the Registered Land Act 1963 which is now discussed.

C. Partition

Partition is the method whereby "each of the co-owners becomes the owner of a single defined subdivision of the land in proportion to the size of his undivided share"[66]. The Working Party on African Land Tenure felt that the partition of co-owned land would be a safeguard against the shortcomings of multiple ownership. Their recommendations were adopted and sections 104-106 of the Registered Land Act 1963 now contain detailed provisions on partitioning land owned in common. Partition was in effect the method that was adopted under the 1963 Act to help a proprietor in common who wanted to deal with his undivided share but was prevented by the other proprietors in common who refused to grant their consent to such a move under section 103(2), or where a joint proprietor wanted to sever his share unilaterally

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66 S. Rowton Simpson, Land Law and Registration (Cambridge 1976), p. 244.

but was prevented from doing so by the provisions of section 102(3) of the Registered Land Act 1963[67].

An application can be made to the Registrar for the partition of land owned in common by any one or more of the proprietors[68]. The Registrar can effect partition of the land in accordance with the agreement of the proprietors in common, and if there is no agreement, then the Registrar can partition the land in "such a manner as he may determine"[69]. It would appear therefore that partition can be forced on the other co-owners even if they wanted otherwise. Each co-owner would get a separate piece of the original land proportional to his share. Partition is then completed by "closing the register of the parcel partitioned and opening registers in respect of the new parcels created by the partition and filing the agreement or determination"[70].

The Registrar may order sale of the co-owned land either because the land is incapable of partition - for example because it is too small and partition would result in parcels of land which are below the economic level conducive for effective farming[71] - or because

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67 *Supra.*

68 Registered Land Act 1963, s. 104(1)(a). This is made on form R.L. 16 - Registered Land Rules 1963, 3rd Schedule.

69 *Ibid.*, s. 104(1).

70 Registered Land Act 1963, s. 104(1).

71 The economic levels vary from district to district. For example, the Ministry of Agriculture recommended that the economic level in Kisii District

the partition would adversely affect the proper use of the land, and a demand is made by one of the proprietors in common that the land or share be sold[72]. The Registrar is entitled to value the land, in default of any agreement between the co-owners, and sell it by public auction[73] and any proprietor in common is entitled to buy the whole of the land or share, thus enabling him, to buy out the others[74].

However, where land is sought to be partitioned but the shares would be too small to satisfy the co-proprietors, the Registrar is authorised to "add such share to the share of any other proprietor or distribute such share amongst two or more other proprietors in such manner and in such proportions as, in default of agreement, he thinks fit"[75]. The proprietor who has had his share distributed to the others is entitled to receive the value of his share from the other co-proprietors who have received a proportion of it[76].

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should not be less that 3.0 ha, while in Nyeri the minimum levels varied between 2.4-4.0 ha - R.J.A. Wilson, Land Tenure and Economic Development: A Study of the Economic Consequences of Land Registration in Kenya's Smallholder Areas, (1972) 22 J.S.S.I.I. 124 at pp. 143, 147.

72 Registered Land Act 1963, s. 105(1).

73 *Ibid.*

74 *Ibid.*, s. 105(2).

75 *Ibid.*, s. 106(1).

76 *Ibid.*, s. 106(2).

This procedure is in direct contrast to the position of co-owners in English law. A joint tenancy or a tenancy in common can only exist behind a trust for sale, and consequently the trustees for sale are given power to effect a partition if the co-owners want to physically sub-divide the land. Under section 28(3) of the Law of Property Act 1925 trustees for sale can effect partition with the consent of the beneficiaries and to convey to each his separate portion of the land. However, if one of the beneficiaries refused to consent to a partition, then any person interested can apply to the court under section 30 of the Law of Property Act 1925 which may then make "such order as it thinks fit". It has been noted that partition of co-owned land in England is very rare[77]. In contrast applications for partition of land by co-owners are numerous in Kenya. For example, between July 1988 and July 1989, the Kiambu Land Registrar received 762 applications for the partition of co-owned land[78]. Many of these applications concerned co-owners, many of whom were related to each other, holding an interest in agricultural land and seeking to partition that land for a variety of reasons; one example was where a husband registered some land in the names of his two wives as joint proprietors, but the wives had a

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77 Kevin Gray, Elements of Land Law (London 1987), p. 342, n. 13.

78 Kiambu District Land Registry, Monthly Returns, July 1988 - July 1989.

disagreement and sought to have the land partitioned[79]. In another example, two brothers with an interest in land, which previously had been in the name of their deceased father, sought to have that land partitioned because they each wanted to farm a separate portion of it[80].

To understand the reason as to why partition of land is rare in England while common in Kenya, one has only to look at the type of property that is registered and the physical relationships of the co-owners. In England co-owners mainly consist of either husband and wife or co-habitees, and the type of property that is co-owned consists of a house which forms the matrimonial home. If the relationship breaks down (which is frequently the *case in co-ownership* disputes), and the parties seek to realise their shares, it is impossible to physically sub-divide the house. Consequently the house is sold to enable the proceeds of sale to be shared. On the other hand, in Kenya a lot of land that is subject to co-ownership is mainly farmland, and many farms are co-owned by family members. Where disputes arise between the co-owners, usually over inheritance, partition is sought so that the co-owners can farm their own identifiable portion

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79 Re Komathai/Kibichoi/801, K. D. L. R. Case File (unreported).

80 Re Ndumberi/Ndumberi/1089 K. D. L. R. Case File (unreported).

of the land, as opposed to selling the land to realise their shares, land being viewed as very precious[81].

It was mentioned earlier land that is subject to co-ownership in England is held on trust for sale. The trust for sale is a conveyancing device to facilitate the transfer of land that is subject to co-ownership. The purchaser deals with a limited number of trustees without having to investigate the title of all the beneficiaries, and the interest of the beneficiaries transferred to the proceeds of sale (known as the doctrine of conversion)[82]. However, the Registered Land Act 1963 never adopted the trust for sale or any other trust where land is subject to co-ownership. This causes a conceptual and practical problem where land is owned by more than five people. This issue is discussed in the next section.

III. Co-ownership And The Imposition Of Trusts

Co-ownership of land has been viewed as a 'disease' because it is a barrier to effective dealings with land and thereby impedes development[83]. It has been pointed out that it can be cured in several ways:

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81 However, if the partition of land proceeds at this rate, the problem of land fragmentation which had largely been eradicated by the programme of land consolidation, will bound to recur in the future.

82 Kevin Gray, *op. cit.*, pp. 358, *et seq.* However, the Law Commission has recommended the abolition of the trust for sale, and to be replaced with a new trust of land - The Law Commission, Transfer of Land, Trusts of Land, Law Com. No. 181. Discussed *infra*.

83 S. Rowton Simpson, *op cit.*, p.243.

(a) by partitioning the land, (b) appointing trustees to deal with the land, (c) incorporating the co-owners, or (d) compulsorily selling sub-economic shares[84]. The approach in English law since 1925 to facilitate dealings with land subject to co-ownership, is to impose a statutory trust for sale upon land conveyed to or held by on behalf of two or more persons beneficially, whether as joint tenants or as tenants in common[85]. The legal estate is held by not more than four trustees as joint tenants[86] "upon trust to sell the [land] and to stand possessed of the net proceeds of sale ... and subject to such powers and provisions, as may be requisite for giving effect to the *rights* of the persons ... interested in the land ..."[87]. A purchaser therefore is only be concerned with the legal estate vested in the trustees for sale. The beneficial interests would be of no concern to him so long as he paid his purchase money to two or more trustees for sale or a trust corporation[88]. This greatly improved the investigation of title, and no longer would the purchaser have the inconvenience of investigating the

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84 *Ibid*.

85 Law of Property Act 1925, ss. 34 & 36.

86 *Ibid*, s. 34(2).

87 Law of Property Act 1925, s. 35.

88 *Ibid*, ss. 2(1)(ii), 27. See City of London Building Society v. Flegg [1987] 2 W.L.R. 1266.

titles of all the co-owners, especially where land was held under a tenancy in common[89].

In Kenya the approach was different. The Trusts of Land Act 1941 imposes the mechanism of a trust for sale where land is settled[90]. However, the Trusts of Land Act 1941 does not impose a trust for sale where co-ownership arises. The Working Party on African Land Tenure, when considering the topic of co-ownership, did not even refer to the question of a trust arising where land was co-owned. They merely stated that not more than five persons should be registered as owners of any parcel of land[91]. Where there were more than five persons, usually in cases of inheritance, the Working Party proposed that the African court should decide which five of them would take the land and how the

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89 Sir Robert Megarry & H.W.R. Wade, The Law of Real Property, 5th ed. (London 1984), p.434.

90 Ss. 10, 11, 12. The trustees therefore have a duty to sell the land (see definition in section 2, *ibid*) although a power to postpone sale is implied (*ibid*, s. 3(1)). A purchaser of settled land overreaches the interests behind the trust if payment of the purchase money is paid to no less than two trustees for sale or a trust corporation (*ibid*, s.7.)

In comparison, the English settled Land Act 1925 imposes a cumbersome mechanism where land is settled. The 1925 Act empowers the tenant for life with the disposition of the settled land (s. 38) but in order to overreach the interests of the settled land beneficiaries, he must pay the proceeds of sale to no less than two trustees of the settlement (s. 18(1)). For who is a tenant for life and the trustees of the settlement see Settled Land Act 1925, ss. 19 and 30 respectively. As to the creation of a settlement under the 1925 Act, see s. 4(1).

91 Report of the Working Party on African Land Tenure, 1957-8 (Nairobi 1958), para. 87.

others would be compensated, whether by distributing the movable assets of the deceased, or by ordering the payment of compensation by the registered five to the excluded persons[92]. It is felt that the Working Party promoted this solution because it was obsessed with preventing the problem of fragmentation of land recurring, thereby unravelling the whole programme of land consolidation[93]. Land fragmentation had been caused by the ownership, mainly through inheritance under customary law, of numerous plots of land by individuals which led to uneconomic farming[94]. Therefore, having only five persons registered as proprietors of one registered parcel of land would result in fewer landowners and therefore less subdivision of land. The recommendation regarding the registration of a maximum of five co-proprietors was adopted in section 101(4) of the Registered land Act 1963. Section 101(3)(a) provides that this number may be increased or reduced by the Minister of Lands who "may prescribe the maximum number ... of persons who are allowed to be registered in the same register as proprietors ..."[95]. Section 120 of

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92 *Ibid.*

93 See also the Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966), para. 266.

94 See Chapter Two, *supra*.

95 The maximum number of proprietors has been increased to 20 but only in respect of land registered in Embu district - Registered Land (Registration of Maximum Number of Proprietors) Rules 1968.

the Act also contained a procedure whereby an African court could determine which heirs were entitled to inherit the land of a proprietor who had died intestate. Where there were more than five heirs section 120(7) provided:

> "a court ... may add the share of any entitled person to the share of any other entitled person or distribute such share amongst two or more entitled persons in accordance with any agreement which may be made between such persons or, in the absence of agreement, in such manner and in such proportions as that court thinks fit, with compensation, if any, as it may determine to be proper to be paid by the person who benefits by the addition to any person adversely affected thereby, and the court may order that such compensation be secured by way of charge on the share of the person who benefits by the addition."

The solution contained in the above provision would have been unsatisfactory and unacceptable because no African likes to be excluded from inheriting a piece of land no matter how small it is or how numerous the heirs are[96]. As mentioned earlier in this chapter Africans viewed land not as a mere commodity to buy and sell, but as the cement that held society together. To be excluded from inheriting a piece of land would in effect be viewed as being excluded from one's own society. Even if one was able to inherit movables, inheriting no land was viewed as inheriting nothing[97].

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96 See Warari v Public Trustee H.C.C.C. No. 227 of 1975 (unreported), reproduced in Eugene Cotran, Casebook on Kenya Customary Law (Nairobi 1987) Case No. 86 p. 310 at pp. 320, 321.

97 See S. Rowton Simpson, Land Law and Registration, (Cambridge 1976), p. 551.

Land was certainly an emotive issue and this explains why the sense of grievance that many Africans in Kenya felt about their loss of land to the Europeans exploded in the form of the Mau Mau civil war of the 1950s[98]. Money could never be adequate compensation for loss of land since money can, in any event, be squandered or frittered away.

It is therefore not surprising that the procedure in section 120(7) was found to be "very difficult to operate" and therefore virtually unworkable[99]. Section 120 was eventually repealed by the Law of Succession Act 1972[100]. The Act introduced new rules of intestate succession[101] which determined how land and other movable property would be inherited in intestacy. The High court was granted power to consider who would be granted letters of administration to distribute the property according to the rules of intestacy in the Law of Succession Act 1972[102]. It is provided in sections 35 and 38 of the Act that in the case of intestate succession, the intestate's children receive an equal share of the property[103]. Therefore the solution here was that the land would be divided equally among the

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98 See Chapter Two, *supra*.

99 S. Rowton Simpson, *op.cit.*, p. 576.

100 Ninth Schedule.

101 Part V.

102 S. 66.

103 The spouse having received a life interest in the property.

intestate's children, no matter how many there were. Assuming that the children were interested in receiving a physical share of the land, it would mean that the land would have to be sub-divided and distributed among them.[104]

The solution provided by the Law of Succession Act 1972 meant that the wheel turned full circle. Sub-division of the land that belonged to a proprietor who had died intestate would result in the problem of land fragmentation recurring, especially where the land was agricultural, a problem which the Working Party on African Land Tenure had striven to avoid.

However, the solution in the Law of Succession Act 1972 only applies where a proprietor has died intestate and has heirs, who may number more than five, and who are entitled to the land, which is registered in this case. Those heirs would be entitled to have the land sub-divided among them, an act which would prevent co-ownership of the land from arising amongst them.

But the problem created by section 101(4) of the Registered Land Act still remains. The Law of Succession Act 1972 only came into force in July 1981 and there are still cases coming up before the courts which involve registered proprietors who died intestate before 1981 and who left several heirs claiming a share

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[104] Those who were not interested in the land could simply sell their shares. However, if the deceased did not own land, but owned a house, the ultimate result would be that the house would have to be sold for each of his issue to realise a share.

in the registered land belonging to the deceased. Since only five can be registered as proprietors of the land, what happens to those in excess of five? Moreover, what is the position where, for example, a group of people, lets call them A, B, C, D, E, F, and G, are interested in buying a plot of registered land? The application of section 101(4) of the Registered Land Act 1963 would mean that only A, B, C, D and E would be entitled to be registered as proprietors. The Act does not say what happens to F and G. The pragmatic solution is that the five registered proprietors should hold on trust for the others. But what is the nature of this trust? The Registered Land Act 1963 does not say. This is therefore, a serious omission that was made by the drafters of the Registered Land Act 1963 and this omission is to be regretted. Nonetheless, it is submitted that there are types of trusts that may be applicable depending on the circumstances, and these are now considered in turn. Also considered later is the solution that Parliament proposed in the form of the Land (Group Representatives) Act 1968.

A. Resulting Trusts

In English law, resulting trusts are classified into two categories[105]: 'automatic' and 'presumed'

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105 See the discussion by Megarry J. in Re Vandervell's Trusts (No.2) [1974] Ch. 269 at p.294. For a general discussion see Hanbury and Maudsley, Modern Equity, 14th ed. by Jill E. Martin (London 1989), Chapters 10 & 11.

resulting trusts. The first category arises where property in conveyed to trustees but the beneficial interest is not completely disposed of, causing a resulting trust to arise in favour of the settlor. The second category arises where a conveyance in property is not made expressly upon trust, but due to certain presumptions established by law, the legal owner is required to hold the property upon trust for the settlor. This section is concerned with the second category of resulting trusts and the extent to which they may apply to fill the gap created by section 101(4) of the Registered Land Act 1963. Two types of presumed resulting trusts are considered.

1. **Property Purchased in the Name of Another**

Eyre C.B. in Dyer v Dyer[106] explained the principle thus:

> "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, ... whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser, whether in one name or several; whether jointly or successive, results to the man who advances the purchase money."[107]

The application of this type of resulting trust arises frequently in England in the context of the matrimonial home. The issue has been considered in Kenya in the leading case of Karanja v Karanja.[108] The plaintiff

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106 (1788) 2 Cox Eq. Cas. 92 at p.93.

107 See also Wray v Steele (1814) 2 V. & B. 388.

108 (1976) Kenya L.R. 307, Customary Law Casebook, Case No. 30, p.116.

had been married to the defendant for 20 years before their marriage was dissolved. The plaintiff claimed that during their marriage she made direct and indirect contributions to the purchase of several properties including the matrimonial home, all of which were registered in the sole name of her husband. She therefore sought a declaration that she was a joint owner. Simpson J. held that the defendant held the property on trust for himself and the plaintiff. Significantly, Simpson J. stated that payments by the wife need not be direct but may be indirect such as the meeting of household or other expenses, since these would relieve the husband from expenditure which he would otherwise have had to bear, thereby helping him indirectly with the mortgage expenses.

Although Simpson J. referred to the English case of Gissing v Gissing[109], he did not highlight the stress laid by Lord Diplock[110], where indirect contributions are made, that such contributions must be consistent with the existence of an original common intention between the parties that they are to share the beneficial interest in the home. In Karanja v Karanja[111], the wife had, in any event made substantial

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109 [1971] A.C. 886.

110 *Ibid.*, at pp. 908, 909 & 910. See the further discussion below.

111 *Supra*.

direct contributions to the purchase of the properties to justify the imposition of a trust.[112]

The purchase money resulting trust therefore provides the answser in a situation where a group of individuals, whether more or less than five, purchase land which is registered in the names of one or more of their number. Those registered as proprietors would hold the land on resulting trust for those whose names are not on the register of title, in shares depending on their respective contributions. Where the contributions have been in unequal shares then those whose names are on the register hold for themselves and the others as proprietors in common.[113]

2. Voluntary Transfers of Property

This type of resulting trust arises where the existing owner of property makes a voluntary transfer of the property to a third party or to one's wife, for example. The grantee is said to have the legal estate

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112 Simpson J. did not label the trust he imposed. It was, nevertheless, a good example of a purchase money resulting trust.

113 Wambui Njenga v F.X. Njenga, H.C.M.C. No. 342 of 1981 (unreported). The court in this case used the phrase 'tenants in common' because the land was registered under the Government Lands Act 1915, and therefore subject to the Indian Transfer of Property Act 1882. If the land was registered under the Registered Land Act 1963 the appropriate phrase would have been 'proprietors in common'. In England unequal contributions may result in the purchasers holding as tenants in common - Lake v Gibson (1729) 1 Eq. Ca. Abr. 290 at p.291.

while the grantor retains the equitable interest[114]. It has been said that in English law, where there is a voluntary conveyance of land in the name of the grantee, no resulting trust in favour of the grantor arises[115]. Although Russell L.J. in Hodgson v Marks[116] said that this point was debatable[117] the decision itself seems to point firmly in favour of the view that a voluntary conveyance in the name of another does create a resulting trust in favour of the grantor[118]. In that case, Mrs Hodgson was an old lady who was the registered owner of a house. She developed an affection for a lodger, Evans, who lived in the house. She trusted him to look after all her affairs. She transferred the house to Evans in order to prevent him from being kicked out of the house by Mrs Hodgson's nephew. However, it was orally agreed that she would continue to be the beneficial owner. Evans sold the house to a *bona fide* purchaser and the question was whether Mrs Hodgson was protected against the purchaser. It was held that she remained the beneficial owner because she remained in actual occupation, she had an overriding interest[119].

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114 Hanbury & Maudsley, Modern Equity, 13th Ed. by Jill E. Martin (London 1989) pp. 240, 241.

115 Snell's Principles of Equity, 28th Ed. by P.V. Baker & P. St. J. Langan, (London 1982) p. 188.

116 [1971] Ch. 892.

117 *Ibid*, at p. 933.

118 See Hanbury & Maudsley, *op.cit.* p. 241.

119 Land Registration Act 1925, s. 70(1)(g).

Although the oral agreement was unenforceable under section 53(1)(b) of the Law of Property Act 1925 the evidence of her intention was sufficient to give rise to "*a resulting trust of the beneficial interest* to the plaintiff, which would not, of course, be affected by section 53(1)(b)" (italics mine)[120].

In Kenya it has been recognised that a resulting trust can occur where there is a voluntary transfer of land from a person or group of persons to the name of another. The leading case in this respect is Alan Kiama v. Ndia Mathunya[121]. In the High Court Muli J. held that the plaintiff held the land on trust for the defendants and ordered him to transfer it to them to be registered as owners in common[122], and on appeal the Court of Appeal upheld the decision of the High Court. Law and Potter JJ.A held that a resulting trust arose "out of the relationship of the parties" and "the circumstances of the case". Only Madan J.A. dissented on this point, holding that "there was no trust resulting or otherwise by implication of law or under Kikuyu customary law". The court concluded that since the clan members were in actual occupation, they had overriding interests within section 30(g) of the

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120 [1971] Ch. 892, at p. 933.

121 Civil Appeal No. 42 of 1978 (unreported); Casenote in [1983] J.A.L. 62. See Chapter Six *supra*.

122 Muli J. seemed to have been unaware of the fact that not more than five members of the clan could have been registered as proprietors of the land by virtue of section 101 of the Registered Land Act 1963.

Registered Land Act 1963 which were binding on the plaintiff. As the clan's interest here was the right to have the land transferred in their name, the court ordered the plaintiff to transfer the land to the clan.[123]

The case of Alan Kiama v. Ndiya Mathunya[124] highlights the solution to the problem that section 101(4) of the Registered Land Act 1963 creates[125]; in that case the clan mutually agreed that the land should be registered in the name of one of the members of the clan, since it would have been impossible for all the members of the clan to be registered as proprietors of the land. The court recognised this arrangement as a resulting trust, notwithstanding the fact that the land was voluntarily transferred by the clan to Kiraqu. There was a common intention among the members of the clan that the members would retain a beneficial interest in the property while the legal title was

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123 However, the Court of Appeal did not promote a solution as to which five members should be registered as proprietors. It would appear that the matter was left to the clan members to decide which five should be registered.

In Wainaina v Wainaina Civil App. No. 8 of 1979 (S.R.M.C.) (unreported); Customary Law Casebook, Case No. 74, p. 270, Rauf S.R.M. in a succession case went further and ordered the land in question to be registered in the names of seven persons as tenants in common in equal shares. Since this land was not registered in Embu District and in view of section 101(4) of the Registered Land Act 1963, it is respectfully submitted that the decision in Wainaina is *per incuriam*.

124 *Op.cit.*

125 *Supra.*

registered in the name of Kiragu, this being done as a matter of convenience, and Kiragu was aware of this intention. Therefore where more than five people have inherited registered land and are co-proprietors, whether jointly or in common, the solution is to mutually agree that one or not more than five of them should be registered as proprietors of the land, thus creating a resulting trust.

However, the courts in Kenya have also recognised another trust that is peculiar to Kenya; this is the customary trust, and this second type of trust is considered below.

B. Customary Trusts

It was shown in Chapter Six that rights arising under a customary trust are capable of protection by the entry of a caution or even subsist as overriding interests under section 30(g) of the Registered Land Act 1963. The trust is implied in a situation where a person, who has been registered as a proprietor of land that belonged to his family on the understanding that he will distribute portions of the land among members of the family, once the land is registered, reneges on that understanding on the basis that his registration is indefeasible by virtue of section 28 of the Registered Land Act 1963, the rights of the family members not being protected on the register. The understanding that the proprietor would distribute the land to the family members had in these cases been

based on customary law, the rule under custom being that the eldest son had the obligation to distribute the family land among the family members, in default of the father having done so.

In all cases the customary trust has been implied where several individuals claim to have a share in the ownership of land registered in the name of one person[126]. The question arises whether the customary trust can be implied to fill the lacuna created by section 101(4) of the Registered Land Act 1963. It is submitted that the customary trust has limited application. Following the principles established in the caselaw[127] the customary trust can be implied if the following conditions are met:

> 1) the land is viewed as family land because, although owned by a family head, the members of his family live on the land and *acquire* rights to it, particularly the right to

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126 Muguthu v. Muguthu [1971] K.H.C.D. 16; Wamathai v. Mugweru H.C.C.C. No. 56 of 1972 (unreported); Mishek v. Wambui & Wanjiku, H.C.C.C. No. 1400 of 1973 (unreported); Mukono v. Nganga H.C.C.C. No. 1762 of 1973 (unreported), Customary Law Casebook, Case No. 73, p. 268; Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 253; Limuli v. Sabayi, (1979) Kenya L.R. 251; Imbusi v. Imbusi, H.C.C.C. No. 72 of 1978 (unreported); Muthuita v. Muthuita, Civil App. No. 12 of 1982 (unreported); Ngugi Miru v. Kiringu Miru, Nation Law Reports, 30 Dec. 1985. Warari v. Public Trustee, H.C.C.C. No. 227 of 1975 (unreported), Customary Law Casebook, Case No. 86, p. 310 at p. 321. Doubt was however expressed on the validity of the customary trust in Elizabeth Wanjohi v. Official Receiver (Continental Credit Finance Ltd). The Nairobi Law Monthly, No. 14 Feb. 1989, p. 42, on the basis that section 126 of the Registered Land Act 1963 deals with trusts which have been created by a written instrument. However, see the arguments in Chapter Six where this case is discussed.

127 See The Cases in n.122 supra.

> inherit a share under the customary laws on the death of the family head, and;
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> 2) the family head before his death appoints his eldest son or any other son to distribute the land amongst his brothers, and other relatives, or if he died before making such an appointment the eldest son is appointed as administrator in accordance with customary law in order to distribute the family head's property, including the land, according to the customary rules of succession, and;
>
> 3) the land, if it was unregistered prior to the deceased's death, is registered in the name of the administrator and he becomes the first registered proprietor, and;
>
> 4) the administrator subsequently refuses to distribute the land to the intended beneficiaries, denying his obligations under customary law or any undertakings that were made[128].

In these circumstances the courts have implied the trust. The family aspect of this trust is reflected by the fact that it is implied only where there exists a close family relationship between the registered proprietor of the land and the beneficiaries. For example the trust has been imposed between brothers and their sister-in-law[129], step-brothers[130], brothers[131],

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128 It is not necessary that the unconscionable conduct of the administrator is a necessary pre condition for the implication of a customary trust. In Kamau Mukono v Julius Kamau Nganga H.C.C.C. No. 1762 of 1963 (unreported); Customary Law Casebook, Case No. 73, p. 268, the defendant did not deny the existence of the customary trust. What was in issue was the extent of the share belonging to the plaintiff, who was the half-brother of the defendent.

129 Mishek v Wambui & Wanjiku H.C.C.C. No. 1400 of 1973 (unreported).

130 Ngugi Miru v. Kiringu Miru, Nation Law Reports, 30th December 1985.

131 Kinyuru Matu v. Mwangi Matu, Civil Appeal No. 122 of 1985 (unreported).

father and son[132] and between a mother and step-daughter[133]. In these cases the trustee has been compelled by the courts to carry out his obligations under customary law, thereby reinforcing the customary flavour of this type of trust.

However, the application of this trust has been limited by the enactment of the Law of Succession Act 1972 which came into force in 1981. A common element that runs through the cases that deal with the customary trust is succession, hence the recognition of the administrator as trustee. Since the parties in these cases had been subject to customary law, inheritance was based on the customary rules of succession. However, the 1972 Act changes that to a large degree, providing that where a testator dies after 1981 without having made a will then the rules of intestate succession that apply are those found in Part V of the Act. A person granted letters of administration by the court would have to distribute the property in accordance with the provisions in sections 35-40 of the Law of Succession Act 1972. However, the Act also makes provision for a testator to dispose any of his property by will "by reference to any secular or religious law that he chooses".[134] It

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132 Mani Gichuru v. Kamau Mani, H.C.C.C. No. 34 of 1977 (unreported).

133 Muthiora v Muthiora, Civil Appeal No. 19 of 1982 (unreported).

134 Law of Succession Act 1972, s. 5(1).

would therefore be possible for the testator to state in his will that his property shall devolve in accordance with the customary law belonging to his tribe. A court would therefore have to ascertain what the applied customary law would be[135].

Therefore, the customary trust would still have application where the testator died intestate before 1981, and there are many decisions where this is the case. However, it will be only a matter of time before the customary rules of succession, will have been superseded as a whole by the provisions of the Law of Succession Act 1972 and hence limiting the application of the customary trust.

Despite the recognition by the courts of the customary trust, they will not necessarily imply such a trust whenever the circumstances outlined in 1) to 4) above appear. In John Kiruga v. Mugecha Kiruga[136] the appellant contended that his father had transferred land to his brother, the respondent, to hold it on trust for both of them. The land was registered in the name of the respondent and both of them occupied it. The land was subsequently sold by the respondent to a purchaser, who was joined in the action. The appellant contended that as he was in actual occupation, he was entitled to an overriding interest binding on the

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135 As to how it would do this, see rule 64 of the Probate and Administration Rules.

136 Civil Appeal No. 52 of 1985 (unreported). See Chapter Six, *supra*.

purchaser, by virtue of the customary trust. However, the Court of Appeal (per Apaloo and Masime JJ.A) held that there was no customary trust. The land had been given to the respondent as a gift by his father, and therefore he was entitled to sell the land. Consequently the appellant had no overriding interest binding on the purchaser. But in his dissenting judgement, Platt J.A. felt that a customary trust had been established at the time the respondent was registered as proprietor of the land and that the appellant was entitled to receive a share of the land, and since he was in actual occupation, he had an overriding interest binding on the purchaser. The majority judges however, did recognise that the appellant had simply not adduced enough evidence to warrant the court's recognition of a customary trust[137]. Therefore, if he had adduced more evidence, the court would have recognised the existence of a customary trust. Despite the above limitations on the application of the customary trust, it has certainly become part of the jurisprudence of the law of Kenya. In the context of sections 101(3) & (4) of the Registered Land Act 1963, where more than five people are entitled to a share of registered land by virtue of inheritance through customary law, the person or persons (not more than five) who are registered as

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[137] What influenced the court was the fact that the appellant had, in the past, received a share of family land but subsequently sold it.

proprietors of the land with a duty to distribute the land, may be viewed as holding the land on a customary trust for the intended beneficiaries.

C. Constructive Trusts

Could a constructive trust be imposed in a situation where several people claim a beneficial interest to land as co-owners, and the land is registered in the names of one of their number?

The Kenyan courts have imposed constructive trusts in cases where a person intermeddles with trust property thereby becoming a *trustee de son tort*.[138] It has been further argued that the cases which have established what was considered in the previous section as the customary trust, are in fact applications of the constructive trust as an equitable remedy.[139] Nevertheless, it has been submitted that the customary trust is an institution in its own right, applicable in the factual situations discussed in the *previous* section.[140] Moreover, Kenyan courts have never termed the customary trust a 'constructive trust' .

What role can the constructive trust play where section 101(4) of the Registered Land Act 1963 is concerned? If, as stated earlier, several individuals

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138 Mungolora Wamatha v Mugweru (1972) H.C.C.C. No.56 of 1972 (unreported); Mzee Karanja v Mukuria Karanja H.C.C.C. No. 1455 of 1977, Customary Law Casebook, Case No. 71, p.259.

139 Simon Coldham, Registration of Title to Land in the Former Special Areas of Kenya, Unpublished Ph.D. Thesis, University of London, 1977, p.188.

140 See Chapter Six, *supra*.

claim a beneficial interest in land that is registered in the name of one or two of their number, then a constructive trust could only be imposed where the registered proprietors conduct themselves inequitably denying the beneficiaries an interest in the land.[141]

In England, this type of constructive trust has seen frequent application in the context of the matrimmonial home. In the words of Lord Diplock in Gissing v Gissing[142] the trustee will have conducted himself inequitably,

> "if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

It is the case that the parties in these situations do not make an express written agreement as to the way in which the beneficial interest will be held. There will instead be either an oral agreement or an understanding - or what the court in Gissing v Gissing[143] described as a common intention - that the beneficial interest in the land shall be rested in them jointly. Direct contributions to the mortgage instalments would be conduct corroborative of such a common intention. A constructive trust would therefore be imposed on the

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141 See Gissing v Gissing [1971] A.C. 886 at p.905, per Lord Diplock.

142 *Supra*.

143 [1971] A.C. 886.

party in whose name the property was registered, or whose name was on the title deeds.

The English Court of Appeal led by Lord Denning ignored the orthodox view established in Gissing and instead took the view that the constructive trust was a remedy to be imposed "wherever justice and good conscience [required] it ..., an equitable remedy by which the court can enable an aggrieved party to obtain restitution"[144]. This "constructive trust of a new model"[145] went into decline with the retirement of Lord Denning, and the Court of Appeal began a return to the orthodoxy in Gissing v Gissing[146]. In Grant v Edwards[147] the Court of Appeal held that where a couple chose to set up home together and a house was purchased in the name of one of the parties, equity would infer a trust if there was a common intention that both should have a beneficial interest in the property and the non-proprietary owner had acted to his or her detriment upon that intention.

These principles were recently stressed by the House of Lords in Lloyds Bank v Rosset.[148] Lord Bridge giving the leading judgement held that a constructive

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144 Hussey v Palmer [1972] 1 W.L.R. 1286 at p.1289 per Lord Denning MR.

145 Eves v Eves [1975] 1 W.L.R. 1338.

146 Op.cit. See Burns v Burns [1984] 1 All E.R. 244; Midland Bank v Dobson [1986] 1 F.L.R. 171.

147 [1986] 1 Ch. 638.

148 [1990] 2 W.L.R. 867.

trust could be created where there has been an agreement or understanding that property is to be shared beneficially between the parties and one of the parties relies to his or her detriment in reliance on the agreement.[149] Alternatively, if there was no agreement or arrangement to share, then the court can rely on the conduct of the parties from which to infer a common intention to share the property bheneficially, giving rise to a constructive trust.

It would appear that the wheel has turned full circle back to the principles enunciated in Gissing v Gissing[150]. Since none of the new model constructive trust cases have been overruled,[151] a Kenyan court would therefore have the choice in deciding whether to apply the 'common intention constructive trust'[152] or the 'new model constructive trust' in a situation where one or more individuals claim a beneficial interest in property registered in the names of one or more different parties.[153]

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149 Ibid., at p.887.

150 *Op.cit.*

151 Eves v Eves [1975] 1 W.L.R. 1338 was in fact supported by Lord Bridge in Lloyds Bank v Rossett, *op.cit* at p.877, on the basis that the excuse made by the male partner to the female partner that her name could not be put onto the title because she was underage gave rise to a common intention that she was to have a beneficial interest in the property and she acted to her detriment in reliance on the understanding.

152 Terminology used by Professor David Hayton, Equitable Rights of Cohabitees, [1990] Conv. 370.

153 On the basis of section 163 of the Registered Land Act 1963.

The advantage of the 'common intention constructive trust' is that it gives rise to greater certainty in the law because it is inferred on the basis of settled principles. The principle of certainty, particularly where property rights are involved, was emphasised by Bagnall J. in Cowcher v Cowcher[154] where he said:

> "I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice that flows from the application of sure and settled principles to proved or admitted facts. So in the field of property law the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child-bearing; simply that its progeny must be legitimate - by precedent out of principle. It is as well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit".[155]

The new model constructive trust on the other hand is more akin to the American view of the constructive trust, that it may be imposed whenever the constructive trustee has been "unjustly enriched at the expense of the constructive beneficiary".[156] The criticism with the new model constructive trust is that it is imposed "regardless of established legal rules, in order to

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154 [1972] 1 W.L.R. 425 at p.430.

155 See also Pettitt v Pettitt [1970] A.C. 777 at pp.793, 801, 803, 805, 809, 825.

156 A.J. Oakley, Constructive Trusts, 2nd ed. (London 1987), p.10. See paragraph 160 of the American Restatement of Restitution.

reach the result required by equity, justice and good conscience."[157] It therefore leads to uncertainty as to when it would apply. It also led one commentator to remark that it introduced "a rule that in cases which the plaintiff ought to win, but has no legal doctrine or authority to support him, a constructive trust in his favour will do the trick."[158]

The common intention constructive trust has therefore much to commend it, and it is submitted that a Kenyan court could be persuaded to apply the principles expressed by the House of Lords. It is of interest to note that in the Kenyan case of Karanja v Karanja[159], counsel argued that since the parties were both Kikuyu, there could be no intention between the husband and wife that the wife should have a share in the property, because under Kikuyu customary law a married woman could not own property. This argument was rejected by Simpson J. because on evidence, married women under Kikuyu customary law could own property.[160] Moreover, since the husband and wife were both urbanised and in salaried employment, that, by implication, displaced customary law and the English authorities were applicable. The fact that the

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157 Hanbury and Maudsley, Modern Equity, 14th ed. by Jill E. Martin, p.310.

158 *Ibid*. See also R.H. Maudsley Constructive Trusts, (1977) 28 N.I.L.Q. 123.

159 (1976) Kenya L.R. 307, Customary Law Casebook, Case No. 30, p.116, considered *supra*.

160 Customary Law Casebook, pp.118, 119.

property was registered in the sole name of the husband did not exclude the imputation of a trust in favour of the wife.[161]

D. Summary

Three types of trust have been considered which may be applicable to fill the lacuna created by sections 101(3) & (4) of the Registered Land Act; the resulting trust of the presumed resulting type which may occur either where a group of individuals purchase land and have it registered in the name of their number[162], or where the group of individuals already own the land which is unregistered, but when it is registered, have the land registered in the name of one of their number[163]. The customary trust was the second type of trust that was considered, and its application is limited to those situations where the registered proprietor denies obligations imposed upon him by custom to distribute the land among his relations, or denies oral agreement whereby he undertakes to distribute the land to the same.

The constructive trust is the third type of trust that may be applicable. It was argued that the Kenyan courts may have a choice between applying a

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161 *Ibid*, at p.119.

162 This will usually occur in the matrimonial situation, as in Karanja v Karanja (1976) Kenya L.R. 307.

163 Alan Kiama v Ndiya Mathunya, Civil Appeal No. 42 of 1978.

constructive trust inferred where justice and good conscience requires it, or a constructive trust arising where the parties have expressed a common intention that the property is to be shared beneficially and they act to their detriment on the basis of such an intention. It is notable that there has been a tendency among English judges on the other hand to blur the distinctions between resulting and constructive trusts[164] and even recently, between constructive trusts and proprietary estoppel.[165] For example Lord Bridge in Lloyds Bank v Rosset[166] held that in a situation where there is no evidence to support a finding of an agreement or arrangement to share the property beneficially, the court relies on the conduct of the parties from which to infer the common intention; but he felt that *nothing less than direct contributions to the purchase price* by the partner who is not the legal owner would justify the inference necessary to the creation of a constructive trust.[167] This limitation on direct contributions means that the common intention constructive trust is in reality not

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164 See for example Gissing v Gissing [1971] A.C. 886 at p.905 per Lord Diplock; Hussey v Palmer [1972] 1 W.L.R. 1286 at p.1289 per Lord Denning MR.

165 Lloyds Bank v Rosset [1990] 2 W.L.R. 867 at p.877 per Lord Bridge.

166 *Ibid.*

167 All the other Law Lords agreed with Lord Bridge's speech.

very different from the purchase money resulting trust discussed above.[168]

Moreover, Lord Bridge further held that a partner acting to his or her detriment in reliance on an agreement to share the property beneficially gives rise "to a constructive trust or a proprietary estoppel".[169] It has been argued by Professor Hayton that this is an example of how the principles of the constructive trust and proprietory estoppel run together and that the distinction between the two can be rendered illusory;[170] consequently, he argues it "is time that the courts moved beyond pigeon-holing circumstances into constructive trusts and proprietary estoppels and looked at this basic principle of unconscionability underlying both concepts."[171]

Indeed, this argument can be taken further when looking at the resulting, customary and constructive trusts discussed above. The principle that runs through these is that of unconscionability. It is significant that the Kenyan courts have never attempted to pigeon-hole these categories of trusts, but neither has there been any meaningful discussion of the type of trusts that should be inferred in the context of

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168 See a similar doubt expressed by Professor David Hayton, Equitable Rights of Cohabitees, [1990] Conv. 370 at p.377, n.33.

169 [1990] 2 W.L.R. 867 at p.877.

170 Professor David Hayton, *op.cit.*, at pp.377 *et. seq.*

171 *Ibid.*, at p.378.

section 101(4) of the Registered Land Act 1963. It is therefore submitted that either the resulting, customary and constructive trusts described above may be applied by a Kenyan court when looking at the problem. Unconscionability is merely a factor that will be taken into account in deciding whether a party not registered as a co-owner is entitled to a beneficial interest.

However, the Kenyan Parliament enacted an Act that provides a structure where land is co-owned by a group of people, and this Act is considered in the next section.

IV. The Land (Group Representatives) ACt 1968

A. The Structure

As mentioned earlier, the Registered Land Act 1963 did not make provision for the registration of land in the names of more than five persons, and was silent on the legal position where the land was owned by more than five people. The Land (Group Representatives) Act 1968 was enacted to enable the registration of land occupied by large groups of people. A group is defined as "a tribe, clan, section family or other group of persons, whose land under recognized customary law belongs communally to the persons, who are for the time being the members of the group ..."[172]. The fact that these groups owned the land communally would reflect

[172] Land (Group Representatives) Act 1968, s. 2; Land Adjudication Act 1968, s. 2.

the fact that individual ownership would have been an unknown concept among these groups. Many of these groups were nomadic, leading a peripatetic life, moving seasonally from place to place with their livestock in search of water and pasture. It would therefore have been a hopeless task to induce the concept of individualisation among these peoples. This could only come with time, and especially when these groups saw the benefits accruing to individuals in other societies who had their own land and registered in their own names.

The Lawrance Mission felt it would be appropriate to establish group ranches covering thousands of acres for these nomadic societies, such as the Masai, in view of their traditional way of life. These ranches would contribute to the development of these groups, and if they were registered they would be able to attract credit to facilitate agricultural development[173]. The Land (Group Representatives) Act 1968 was passed to adopt this recommendation[174]. The Act sets up a structure whereby a number of representatives from the group are incorporated as 'group representatives'[175]. The function of these representatives is to act on

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[173] Report of the Mission on Land Consolidation and Registration in Kenya, 1965-1966, (London 1966) para. 106.

[174] S.F.R. Coldham, Land Tenure Reform in Kenya: the Limits of the Law (1979) 17 J.M.A.S 615 at p.621.

[175] Land (Group Representatives) Act 1968, s. 7. A maximum of ten and a minimum of three representatives are elected by the members, *ibid*, ss. 5(1), 7(1).

behalf of the members of the group, and have the power to "sue ... acquire, hold, charge and dispose of property of any kind and to borrow money ..."[176]. The enactment of the Land (Group Representatives) Act 1968 facilitated the registration of group land under the Registered Land Act 1963. Section 11 (2A) of the 1963 Act provides that the group representatives are registered as proprietors of the group land. Section 106A of the Registered land Act 1963 deems the group representatives to be "absolute proprietors" once registered.

What, then, is the position of the members of the group once the group land is registered in the names of the group representatives? The Second Schedule to the Land (Group Representatives) (Prescribed Provisions) Order 1969 provides that the constitution of every group shall be deemed to contain a provision that every member of the group shall "be deemed to" share in the ownership of the group land in undivided shares. This provision is curious in view of the fact that neither the Land (Group Representatives) Act 1968 nor the 1968 Order provides that the group representatives are trustees of group land. It has been argued that this means the members cannot be viewed as beneficiaries in equity, since there is no recognition by the Land (Group Representatives) Act 1968 of the existence of a

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176 *Ibid*, s. 8(1).

trust[177]. On the other hand, it is arguable that since group land is registered under the Registered Land Act 1963, the application of the doctrines of equity by virtue of section 163 of the latter Act would bring about the implication of a resulting trust, so that although the representatives are registered as proprietors, the members retain a beneficial interest. However, this argument may not have much force in view of the fact that under the Land (Group Representatives) Act 1968, the rights of the members are recorded in the group constitutions, so that the members are rather like shareholders of a company, while the group representatives are like directors having the power to manage and control group land. This arrangement in the Act would appear to preclude the implication of a trust.

Even though the Land (Group Representatives) (Prescribed Provisions) Order 1969 deems the members to share ownership of the group land in undivided shares, in no way can they sever their shares, whether unilaterally or by mutual agreement with the other members. It follows that a member can never dispose his share *inter vivos* or by will[178]. It therefore appears that the Second Schedule to the 1969 Order

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177 S. Coldham, Registration of Title to Land in the Former Special Areas of Kenya, Unpublished Ph.D thesis 1977, University of London, p. 145.

178 It is theoretically possible for the constitution of a group to make provision for the severance of the shares of the members.

rings hollow. Deeming ownership to the group members does not mean that as individuals they can deal with their share in any way they think fit, nor can they order the Registrar to order sale of the land or apply for partition of the land under section 105 and 104 of the Registered Land Act 1963, unless all the group members decided to do so[179].

Real ownership lies with the group representatives. Studies have shown that in many group ranches, group representatives rarely promote the interests of the group members because of the lack of 'collective responsibility'[180]. For example, they hardly call the members of the group together, neither do the group representatives meet frequently. It is usually the case that decisions are made affecting the group by one of the group representatives acting on his own initiative and without consultation[181].

B. Purchase of Group Land

A person wanting to purchase group land would have to deal with the group representatives since only they have the power to sell group land[182]. However, the representatives can only exercise their power of sale

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179 This process is now being encouraged, discussed *infra*.

180 S.F.R. Coldham, Land Tenure Reform in Kenya: the Limits of Law, (1979) 17 J.M.A.S. 615 at p. 623.

181 *Ibid*. This has caused widespread dissatisfaction among the members, see *infra*.

182 Land (Group Representatives) Act 1968, s. 8(1).

if it is for the "collective benefit of all the members of the group"[183]. In determining whether the sale would be for the collective benefit of the group, the group representatives are bound to consult the other members of the group and seek their agreement to the sale[184]. The 1968 Act does not specify how many members are required to give their assent to such an exercise of the power of the group representatives, but it is likely that the group's constitution may have a provision stating the numbers required for a majority.

Once the consent to sell is obtained, the land may be sold. The purchaser need not be concerned with the interests of the members, so long as he advances the purchase money to the group representatives. The money received is then kept in the group's account managed by the treasurer[185], the money being used for the benefit of the members, such as improving ranch facilities. Although the members may be deemed to be joint owners nowhere is it provided that they are entitled to receive a share of the proceeds of sale of any part of the group land, although it is theoretically possible that the group's constitution may make such a provision.

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183 *Ibid.*, s. 8(2).

184 *Ibid.*

185 Land (Group Representatives) Act 1968, ss. 18, 19.

C. Assessment of the Act

As a social measure the Act was designed to protect and even change the behaviour of nomadic groups by protecting their occupation within well defined boundaries and having the land registered as group land. The registration of such land would create opportunities for the agricultural development of the group land. This policy has succeeded to a limited extent. Some group ranches have been able to introduce irrigation, which has in turn improved agricultural productivity to some extent on these ranches.

However, from a legal standpoint the Act has significant deficiencies[186]. The declaration in the Second Schedule to the Land (Group Representatives) (Prescribed Provisions) Order 1969 that the group members are deemed to be joint owners of the group land belies the reality. Their rights cannot be equated with those of joint proprietors under section 102 of the Registered Land Act 1963. Joint proprietors under the latter Act have the right to sever their shares, albeit by mutual agreement, and can also have the registered land partitioned. On the other hand, group members have no right to do so. Their rights are those of occupation in the group land, and to utilise the ranch facilities as well as the right to vote at

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[186] S.F.R. Coldham, Land Tenure Reform in Kenya, *op.cit.*, considers the social problems which the Act has failed to remedy and which are beyond the scope of this thesis to consider.

general meetings.[187] They are not entitled to share in the proceeds of sale of any part of group land, as joint proprietors under the Registered Land Act 1963 are entitled to.

The fact that the group members are not beneficial owners poses problems where the group representatives sell part of the group land without consulting the group members. The members cannot claim to have overriding interests over the land if they are in actual occupation under section 30(g) of the Registered Land Act 1963 since they have no equitable rights to protect. However, it is arguable that such a secret sale by the representatives would be *ultra vires* the constitution of the group, and accordingly the sale would be void. It would therefore be open to the members to make an application to the High Court to have the sale set aside.

More than twenty years have passed since the enactment of the Land (Group Representatives) Act 1968. It is noticeable that there has been a trend among many groups to have group land partitioned, so that individuals within the groups can have their own plots of land. However, the desire to partition the group land is due to the considerable dissatisfaction group

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187 Although the members can, by exercising the right to vote at general meetings, have the land partitioned, the majority of the members would have to agree to such a proposition. This would make it difficult, to say the least, for a sole individual wanting to have the land partitioned, so that he can sell his share.

members have felt with the way group representatives have undertaken their responsibilities. This has, in turn led to many quarrels between the members and their group representatives. This led to the President of Kenya directing that these Ranches should be sub-divided between the members of the groups, so that each would get a parcel of land and have it registered in his name[188]. This means that before group land can be partitioned, a resolution in favour of partition has to be passed by the majority of the members. The Survey of Kenya is now involved in surveying and partitioning the land belonging to groups who have resolved to have the land partitioned. An example of a group ranch which decided to have the land sub-divided is the Olchoro Onyore Group Ranch in Kajiado district which has a total of 3,572 ha. At the time of research the Survey of Kenya was measuring the land and marking the boundaries, these measurements being used as the basis for drawing plans for the plots that each member would receive. The plots varied in size from one to ten acres.

This process is a remarkable reflection of the way land tenure amongst these nomadic groups, and in particular the Masai, has evolved from communal to individual land holding. While this evolution, especially among occupants of group land, is mainly due to dissatisfaction with the structure under the Land

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[188] Interview with Dr Aruka, Land Adjudication Department, Nairobi 12 September 1989.

(Group Representatives) Act 1968, it can be said in favour of the Act that it has facilitated this change and therefore it has been of benefit. The serious problem, however, is that a large proportion of group land is arid or semi-arid. Sub-division of this land into small plots would bring economic problems for the proprietors because it would be difficult to grow crops on such land, unless it was irrigated. Some proprietors have resorted to selling their land to individuals intent on acquiring large blocks of land that would support livestock for commercial purposes, or to use the land for the establishment of shops and other commercial property[189]. Nevertheless the fact that most of these small plots are uneconomic agriculturally is a problem that demands economic rather than legal solutions.

V. Conclusion

This chapter has highlighted some similarities between the structure of co-ownership under the Registered Land Act 1963 and that under English Law. Although the fundamental characteristics of the joint proprietorship and the proprietorship in common under the Registered Land Act 1963[190] are similar to the joint tenancy and the tenancy in common in English law differences arise where the method of severance of a

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189 Interview with Mr J. Yago, Survey of Kenya, Nairobi 13 September 1989.

190 Ss. 102, 103.

joint tenancy/joint proprietorship are concerned. Additional methods of severance of a joint tenancy are possible under common law in addition to severance by written notice under the Law of Property Act 1925[191] in comparison with severance of a joint proprietorship under the Registered Land Act 1963 which only allows severance by a written notice *which must be registered*[192]. Nevertheless it has been argued that where a joint proprietor has forged the signature of the other joint proprietor in order to sell the property to a bona fide purchaser or kills the other joint proprietor, these acts will be sufficient to sever the joint proprietorship. This is the position under English law, and it is submitted *that this* position is applicable under the Registered land Act 1963 by virtue of section 163.

However, the biggest difference is in connection with the method of land holding where land is co-owned. The Law of Property Act 1925 imposes a trust for sale where land is subject to co-ownership. This facility enabled co-owned land to be sold easily, purchasers not being concerned with the interests of the beneficiaries and only having to deal with the trustees for sale, while at the same time providing security for the beneficiaries through the device of 'overreaching'[193].

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191 S. 36(2).

192 S. 102(3).

193 Kevin Gray, Elements of Land Law, (London 1987) p. 354.

The Registered Land Act 1963 did not introduce a similar concept because the land was viewed not merely as an investment asset to buy and sell but to be used as an agricultural asset for the benefit of the owners. The Working Party on African Land Tenure was against land being held by more than five people because it would encourage the fragmentation of land, caused by the numerous owners seeking to sub-divide the land among themselves in turn re-creating the problems of land fragmentation which land consolidation had removed. This is the philosophy that lay behind the co-ownership provisions in the Registered Land Act 1963 and in particular section 101(3) & (4) of that Act. However, the Working Party was out of touch with reality, and their solution which was adopted in section 120 of the Registered Land Act 1963 was a failure. But the abolition of that section has not solved the problem of what happens where land is owned by more than five people.

It has been argued in this chapter that three types of trusts may arise: a resulting trust, a customary trust and a constructive trust. The resulting trust would arise where either a group of persons purchase land but have the land registered in the names of one of their number and in any case not more than five. The persons who are registered would hold on resulting trust for the other members of the group. The resulting trust would also arise where, for example, a clan voluntarily decide to have their land,

which was unregistered, registered in the name of one of their number[194]. The customary trust would mainly arise in succession cases where a dispute arises between those persons entitled to an interest in land that is registered in the name of one of their number by virtue of customary law. The refusal of the registered proprietor to recognise the existence of the rights of the other persons residing on the land brings about the imposition of the trust. However, the enactment of the Law of Succession Act 1972 which introduced new rules of intestate succession means that the significance of the customary trust is bound to diminish with the passing of time. This means that the constructive trust will begin to play a greter role in this situation.

The Land (Group Representative) Act 1968 was passed to provide a structure where land is co-owned by large groups of people. The land is registered in a limited number of group representatives who retain absolute and beneficial ownership of the land. The members of the group in reality do not have a beneficial interest in the group though deemed to be joint owners. If the group representatives are unscrupulous and secretly sell part of the group land to a *bona fide* purchaser, so long as the purchaser advances the purchase money to the group representatives he takes free from any interests of the

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194 As in Alan Kiama v Ndiya Mathunya Civil Appeal No. 42 of 1978 (unreported); noted in [1983] J.A.L. 62.

members. It would be up to the members to prove that the sale was *ultra vires* the constitution of the group. Dissatisfaction by group members with the way the group representatives have misused their powers has caused the Land (Group Representatives) Act 1968 to be discredited. Many groups are resolving to sell group land and at the rate that this is taking place it will not be long before group land under the 1968 Act ceases to exist.

Clearly legislative reform is necessary to provide a satisfactory solution to the position where land is owned by more than one person under the Registered Land Act 1963, which would provide protection for the co-owners and certainty for purchasers of land subject to co-ownership, because the trusts outlined above will not necessarily be implied if some of the ingredients necessary for their existence are not present.

It is of interest to note that in England, dissatisfaction has been expressed with the trust for sale on the ground that it is an artificial concept since the imposition of a duty to sell on the trustees is inconsistent with the interests and intentions of the majority co-owners who acquire land, not for the purpose of using the land for investment purposes and the realisation of the capital value of the land, but rather for the purpose of occupation[195]; further artificiality is illustrated by the doctrine of

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[195] Law Commission, Transfer of Land: Trusts of Land, Law Com. No. 181, para. 3.2.

conversion whereby an interest held under a trust for sale is an interest in the proceeds of sale of the land and therefore the beneficiaries are deemed not to have an interest in the land[196].

The Law Commission therefore proposed the abolition of the trust for sale, replacing it with a trust of land which would give the trustees of land a power to sell and a power to retain the land rather than a power merely to postpone sale[197]. The abolition of the trust for sale would, *ipso facto*, do away with the doctrine of conversion[198]. However, as at present, a purchaser would continue to take title from the trustees and if payment was made to two trustees the equitable interests of the beneficiaries would be overreached[199]. In a subsequent report[200] the Law Commission further recommended that the interest of a person of full age and capacity who is entitled to the beneficial interest in the property and who has the right to occupy it and is in actual occupation should not be overreached, unless that person consents. The new trust of land that is proposed by the Law

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196 *Ibid.*, para. 3.4. See Williams & Glyn's Bank Ltd v Boland [1981] A.C. 487.

197 Law Commission, Transfer of Land; Trusts of Land, Law Com. No. 181, paras. 3.5, 3.6.

198 *Ibid.*

199 *Ibid.*, para. 3.6.

200 The Law Commission, Transfer of Land, Overreaching: Beneficiaries in Occupation, Law Com. No. 188 (1989) para. 4.3.

Commission will not radically change the law on co-ownership, and will not be much different from the trust for sale. In fact the trust of land has been viewed as "cosmetically more attractive" than the trust for sale which was "inaccurately labelled but perfectly workable"[201].

Nevertheless such a trust is clearly advantageous where land is co-owned. It is arguable that the adoption of a similar trust in Kenya to apply where land was co-owned would solve the problem created by section 101 of the Registered Land Act. Such a trust would, on the one hand, facilitate conveyancing by allowing a purchaser of land subject to co-ownership to deal with a specific number of trustees[202] and not be concerned with the interests of the beneficiaries; on the other hand such a trust would safeguard the interests of the beneficiaries since their interests would only be defeated if the purchaser failed to advance the purchase moneys to all the trustees. In view of the fact that in Kenya co-owners tend to be numerous, such as where a clan has an interest in land, it would be advantageous if the minimum number of trustees a purchaser was to deal with was say, not less than four. A high minimum number would prevent a transfer that was not in accord with the wishes of the beneficiaries and would also prevent fraudulent

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201 Kevin Gray, *op.cit.*, p. 368.

202 There should be at least not less than two.

transfers thereby preventing the scenario in Alan Kiama v Ndiya Mathunya[203].

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[203] Civil Appeal No. 42 of 1978 (unreported).

Chapter Eight

RECTIFICATION AND INDEMNITY

I. Introduction

One of the greatest advantages of a registered title is its curative nature. Past defects, present when the title was unregistered, are cured once it is registered and successive purchasers need no longer investigate the past history of the title or even be concerned with the previous faults.[1] It is this that has given rise to registered titles being described as 'indefeasible',[2] 'absolute'[3] or 'state guaranteed.'[4] These phrases give the impression that a registered title cannot be impugned under any circumstances, and therefore, it remains intact for all time. However the phrases are a misnomer because:

i) Registered titles are subject to overriding interests. Therefore the registered proprietor should have made exhaustive enquiries prior to purchase in order to discover whether there are any which may bind him; failure to do so may result in the registered

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1 See Gibbs v. Messer [1891] A.C. 248 at p. 254.

2 *Ibid.*

3 Land Registration Act 1925, ss. 4, 5.

4 S. Rowton Simpson, Land Law and Registration (Cambridge 1976), p. 175).

5. Williams & Glyns Bank v. Boland [1981] A.C. 487; Alam Kiama v. Ndia Mathunya, Civil Appeal No. 42 of 1978 (unreported).

proprietor unexpectedly finding himself subsequently bound by the
rights of persons whether he has notice of them or not, thereby impeaching his, heretofore, 'absolute' title.[5]

ii) The system of registered title is administered by humans and since they are fallible, they are bound to make mistakes or omissions when registering title, which may cause the registered proprietor to suffer loss.[6]

iii) A registered proprietor may fall victim to fraud committed by unscrupulous individuals. Through forgery these may either charge the land without the knowledge of the registered proprietor, or transfer it to themselves or even to an innocent purchaser who subsequently becomes the registered proprietor.[7]

It would certainly not cut much ice, if a registered proprietor, after having suffered loss through either one of the three above mentioned ways, was told that he has an 'indefeasible' title.[8] It is

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6 See for example, Re 139 High Street, Deptford [1951] Ch. 574; The District Commissioner, Kiambu v. R. ex p. Ethan Njau [1960] E.A. 109.

7 Re Leighton's Conveyance [1936] 1 All E.R. 667; Argyle Building Society v. Hammond (1985) 49 P & C.R. 148; Natwarlal Chauhan v. Zakaria Omagwa Civil Appeal No. 12 of 1980 (unreported).

8 Ruoff & Roper argue that the term 'absolute' title is accurate because such titles indicate that they are "so far as is humanly possible, complete and perfect" - Registered Conveyancing, 5th Ed., (London 1986) p. 880. This is the term used in the land Registration Act 1925 and in the Registered Land Act 1963.

evident, therefore, that this protection is qualified.[9] For this reason, most land registration legislation makes provision for rectification of the register where the proprietor has suffered loss due to a mistake, omission, or to fraud, and if such rectification is not possible, then compensation or an indemnity is awarded for the loss incurred.[10]

Both the Land Registration Act 1925 and the Registered Land Act 1963 have provisions for rectification of the register and indemnity where loss is suffered due to rectification.[11] However, it is of interest to note that the original precursor to the Land Registration Act 1925, the Land Registry Act 1862, only contained provisions for rectification of the register on the ground of fraud[12] because the requirements for the grant of an absolute title were so stringent that it was not thought that there could be any cause for error. However, this Act was a failure because the conditions were too strict and only a few proprietors had their titles registered. The Land Transfer Act 1875 removed the stringent conditions for

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9 *C.f.* Re 139 High Street, Deptford [1951] 1 Ch. 884 at p.889.

10 It is of interest to note that there are some countries with systems of registered land, such as Fiji, Malaysia and Sudan, which do not have provision for indemnity - see S.Rowton Simpson, Land Law and Registration, (Cambridge 1976), pp. 179-183.

11 Land Registration Act 1925, ss. 82, 83; Registered Land Act 1963, ss. 142, 143, 144-147.

12 Land Registry Act 1862, s. 138.

registration of titles and for the first time the court was given a power to rectify the register. This Act was repealed by the Land Transfer Act 1897 which added provisions for indemnity. The Land Registration Act 1925 increased the power of rectification although it provided a measure of protection for registered proprietors 'in possession.'[13]

In Kenya, prior to the enactment of the Registered Land Act 1963, the Land Titles Act 1908, which introduced a form of registration of titles in the Coast Province, made no provision for rectification or indemnity because at the time it was felt that "the cost of forming an insurance fund and employing officers of sufficient legal knowledge to make it safe for government to guarantee title would be beyond the income which could be expected from transactions."[14] The Registration of Titles Act 1919, which introduced an improved system of registration, made provision for rectification and indemnity.[15] However, the provisions in section 24 for claiming an indemnity are stringent and make it difficult for a proprietor to obtain compensation for lose or damage suffered by him due to a mistake or error in the register. Not surprisingly, this Act was found to be unsatisfactory in many

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13 Law Commission, Property Law, Third Report on Land Registration, Law Comm. No. 158, p. 41 para. 3.1.

14 S.Rowton Simpson, *op.cit.*

15 Ss. 23, 24.

respects, with some provisions being found "to be in conflict with others".[16]

The Registered Land Act 1963 brought numerous improvements to the whole system of registered land, including provisions for rectification and indemnity. This chapter will show that the provisions for rectification and indemnity under the Registered land Act 1963 are unduly restrictive,in comparison with the relevant provisions in the Land Registration Act 1925. Consequently, the 1963 Act provisions are more likely to cause injustice to those who suffer loss; furthermore, the protection from rectification that is afforded to registered proprietors under the Registered Land Act 1963 is rather limited. This chapter will further show how the courts in Kenya have endeavoured to go round the statutory barrier preventing the rectification of first registrations.

II. Rectification

A. Meaning of 'Rectification'

'Rectification' is not defined either in the Land Registrations Act 1925 or in the Registered Land Act 1963. The English courts have yet to define the word in the context of the Land Registration Act 1925. There are, however, definitions of the word in relation

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16 Adonia v. Mutekanga [1970] E.A. 429 at p. 433, per Spry J.A. Nevertheless, this Act, together with the Land Titles Act 1908 is still in force. See Chapter Two, *supra*.

to other Acts of Parliament. For example in Pulbrook v. Richmond Consolidated Mining[17] Jessel MR defined the word in relation to the Companies Act 1862 where he said:

> "The result is that, rightly or wrongly, but I am bound for this purpose to assume rightly, the name of Mr. Cuthbert has been struck out of the register and the register rectified. The effect of that is exactly the same as if it had never been put in. That is the meaning of 'rectified'. You strike it out by way of rectification, and the court has therefore declared that it ought never to have been entered at all. They have struck it out from the beginning."

However, this is a narrow view of the meaning of 'rectification', because the above definition is confined to the correction of errors. 'Rectification', in the context of the Land Registration Act 1925, not only means the correction of errors, but also includes the insertion of matters which have been omitted.[18]

The courts in Kenya seem to have taken a narrow view of the meaning of 'rectification' in relation to the Registered Land Act 1963. In The District Commissioner, Kiambu v. R. ex parte Ethan Njau[19] Gould J.A. in defining rectification, referred to Hogg, Registration of Title Throughout the Empire, (1920 Edn.) p. 367, where it said:

> "Rectification of the register, though sometimes denoting any alteration, properly means an alteration made in the register for the purpose of *putting right an erroneous*

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17 (1878) 9 Ch.D 610 at p. 615.

18 Land Registration Act 1925, s. 82(1)(b).

19 [1960] E.A. 109 at p. 125.

> *entry* ... [R]ectification is only required when some mistake in the register cannot otherwise be put right." (Italics mine).

The above definition is narrow for it does not include rectification of omissions. Kneller, J.A. in Muthiora v. Muthiora[20] relied on the definition of Jessel MR in Pubrook v. Richmond Consolidated Mining[21] quoted above. However, Kneller J.A. went on to say:

> "To rectify, however, is to correct or define something which is erroneous or doubtful. Rectification is often used for making an alteration *correcting an entry in a register* and that, in my judgment, is its meaning in section 143 of the Act itself." (italics mine).

Although Kneller JA did not refer to Ex parte Ethan Njau he emphatically appears to take the same narrow view as Gould J.A. on the definition of rectification, that it is confined to the correction of errors in the register. It is submitted both these definitions fail to point out that 'rectification' in the Registered Land Act 1963, like the Land Registration Act 1925, is an amendment to the register to correct an erroneous entry as well as inserting matters which have been omitted.[22]

B. Rectification as a Discretionary Power

In both the Land Registration Act 1925 and the Registered Land Act 1963, the Registrar and the Courts are given the power to rectify the register. However,

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20 Civil Appeal No. 19 of 1982 (unreported).

21 *Op.cit.*

22 Registered Land Act 1963, ss. 142(1)(a), 143(1).

in both Acts there are limitations on this power. For example there can be no rectification if the registered proprietor is in possession.[23] Moreover, under the case of the Registered Land Act 1963, first registrations cannot be rectified.[24] Nevertheless, where these limitations do not apply, or have been met, rectification is a discretionary remedy.[25] In Epps v. Esso Petroleum[26] Templeman J., when considering the exceptions in section 82(3) of the Land Registration Act 1925 which allow rectification where the proprietor is in possession, said that the discretion is such that even where section 82(3) does not apply, "there may still be circumstances which defeat the claim for rectification."[27] For example, section 82(1)(h) provides that the court may rectify the register in any other case where it may be deemed just. The Law Commission, commenting on this section, said that one of the factors that a court would have to take into account under this subsection is the conduct of the

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23 Land Registration Act 1925, s. 82(3); Registered Land Act 1963, s. 143(2) - under the latter Act he must have acquired the registered land for valuable consideration.

24 S. 143(1).

25 As indicated by the use of the word 'may' in both Acts e.g. 'The register *may* be rectified' - s. 82(1) Land Registration Act 1925; 'The Registrar *may* rectify' and 'the court *may* order rectification' - ss. 142(1), 143(1) Registered Land Act 1963.

26 [1973] 1 W.L.R. 1071 at p. 1078, 1079.

27 *Ibid.*, at pp. 1078, 1079. See also Argyle Building Society v. Hammond (1985) 49 P & C.R. 148 at p. 158 per Slade L.J.

parties;[28] if the conduct of the parties was unconscionable, the court may refuse to order rectification.

Although the discretion under section 82 has been described as "wide" and "unqualified",[29] it must be exercised judicially on general equitable principles.[30] Despite rectification being a discretionary remedy, the Registered Land Act 1963 gives the Kenyan courts and the Registrar very limited powers of rectification compared with the power granted to the court and the Registrar under the Land Registration Act 1925. The differences in the power to rectify are discussed below.

C. Rectification by the Registrar

Section 142(1) of the Registered Land Act 1963 provides that the Registrar may rectify the register in the following cases:

> "a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
>
> b) in any case and at any time with the consent of all persons interested;
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> c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons

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28 Property Law, Third Report on Land Registration, Law Com. No. 158, para. 3.7.

29 Price Bros v. J. Kelly Homes [1975] 3 All E.R. 369 at p. 373 per Buckley L.J.

30 Argyle Building Society v. Hammond, *op.cit.*, at p. 162.

appearing by the register to be interested or affected of his intention so to rectify."

1. Section 142(1)(a)

'Formal matters' includes such things as the misspelling of the name of a proprietor or the misdescription of land or part of it. The correction of names in the register by the Registrar is done frequently. This is either due to misspelling by the registry, or the proprietor changing his name. Between July 1986 and July 1989 the Kiambu Land Registrar made 464 correction of names in the register. Application is normally made by the proprietor who wishes to have his name changed. He fills in the application form as well as the statutory declaration which must be signed and stamped by a Commissioner for Oaths, and witnessed by one other person. The proprietor must then submit the application form together with his National Identity Card. Once the Registrar is satisfied with the application he can proceed to rectify the register.

The limited power of the Registrar to rectify the register is reflected in the fact that he can rectify the register under this subsection "in the case of errors or omissions *which do not materially affect the interests of any proprietor*" (italics mine). A 'proprietor' is defined in section 3 of the Registered Land Act 1963 to mean:

"a) in relation to land or a lease, the person named in the register as the proprietor thereof; and

b) in relation to a charge of land or a lease, the person named in the register of the land

> or lease as the person in whose favour the charge is made."

The scope of this definition considerably narrows the power of the Registrar to rectify. To illustrate; suppose A is the registered proprietor of a farm. B succeeds in forging a transfer of the farm to himself and is registered as the proprietor; he subsequently charges the land to C and the charge is registered. B defaults on his payments and C seeks to repossess the farm. A then discovers the forgery and applies to the Registrar for rectification of the proprietorship and the charges register. It follows that the Register would have no power to rectify the proprietorship register because B is "the person named in the register" and his interests as a proprietor would be 'materially' affected by the rectification.[31] The Registrar would also be unable to rectify the charges register because C is "the person named in the register of the land ... as the person in whose favour the charge is made" and therefore as a 'proprietor' his interests would also be materially afffected if rectification were made.[32]

In contrast the English Land Registrar would have the power to order the rectification of both registers

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31 While this may appear perverse, the conclusion is inevitable due to the wording of the sub-section.

32 Nevertheless, the High Court would have power to order rectification of both registers under secction 143(1) of the Registered Land Act 1963, as the registration in B's name would be a second registration. If the charges register were to be rectified against C, he would be entitled to an indemnity.

in the above situation by virtue of sections 82(1)(g) and (2)[33] of the Land Registration Act 1925 thereby indicating a much wider power than that exercisable by the Kenyan Land Registrar.

The power of the Kenya Land Registrar under section 142(1)(a) of the Registered Land Act 1963 could have been exercised in the case of Rahab Njeri Kinuthia v. Nganga Kirogo.[34] There the Land Registry made a mistake by issuing the plaintiff and the defendant the wrong title numbers. Both parties were occupying the correct parcels of land but the plaintiff was issued with the title number that belonged to the defendant and *vice versa*. The solution was simply to rectify the property section of each register to reflect the correct title numbers. What complicated the matter was that the parties did not want that to be done but rather wanted to move into each other's land. The Chief Land Registrar advised the parties to, *inter alia*, make an application to the High Court and have the case determined there. Unfortunately the High Court referred the case to a panel of elders which then proceeded to subdivide the land between the parties and ordered rectification of the register. This order was

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[33] In relation to the rectification of the charges register, the Court of Appeal in Argyle Building Society v. Hammond (1985) 49 P & CR., held that the court had power to rectify the charges register against a bona fide chargee by virtue of section 82(3) of the Land Registration Act 1925. This power could also be exercised by the Registrar - see s. 82(1).

[34] H.C.C.C. No. 404 of 1982 (unreported).

contrary to section 143(1) of the Registered land Act 1963 which prevents rectification of a first registration.[35] It would have been within the power of the Registrar to have made a simple rectification to correct the error since the material interests of both proprietors would not have been affected; in this way the decision by the panel of elders, which was contrary to law and therefore *per incuriam*, would have been avoided.[36]

2. Section 142(1)(b)

Under section 142(1)(b) of the Registered Land Act 1963 the Land Registrar can rectify the register 'in any case and at any time with the consent of all persons interested.'[37] Here, there is no limit on the rectification of first registrations[38] and rectification can be made whether or not the material interests of any proprietor are affected. Considering that the consent of all interested persons would have to be obtained, it is unlikely this power is often used except probably in non-contentious matters.

3. Section 142(1)(c)

Section 142(1)(c) relates to the rectification of the register where there has been an improper survey,

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35 The land in question was subject to a first registration.

36 For a discussion of the panel of elders and the problems they have created see Chapter Nine, *infra*.

37 Section 82(1)(c) of the Land Registration Act 1925 has a similar provision.

38 See s. 143(1) R.L.A. 1963.

most likely during land adjudication. Large areas in the Central Province were surveyed in a hurry during the 1950s during the height of the Emergency and it is not surprising that many improper surveys were made.[39] The Chief Land Registrar pointed out that the Registry Index Maps are often unreliable in determining boundaries and therefore Land Registrars should not place undue reliance on them.[40]

The English Land Registrar has unlimited powers of rectifying the register where it is proved to his satisfaction that the whole of land comprised in a title or too large a part to be properly dealt with as a mere clerical mistake, has been registered in error.[41]

In summary, the English Land Registrar has wider powers of rectification than those of the Kenyan Land Registrar. For example he can rectify the register where any entry in the register has been made by fraud;[42] where two or more persons are, by mistake, registered as proprietors of the same registered estate or charge;[43] where a mortgagee has been registered as

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39 Witness the enactment of the Land Registration (Fort Hall District) Special Provisions Ordinance 1961 - see the discussion in Chapter Three, *supra*.

40 Practice Instruction: Use of Registry Index Maps in the Determination of Boundary Disputes and the Role of Surveyors in the same, 8 March, 1985.

41 Land Registration Rules 1925, rr. 13, 14.

42 Land Registration Act 1925, s. 82(1)(d).

43 *Ibid*, s. 82(1)(e).

proprietor of the land instead as proprietor of a charge and a right of redemption is subsisting;[44] and finally "*in any other case* where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, *it may be deemed just to rectify the register,* or otherwise."[45] (italics mine).

Why is the power of rectification of the Kenyan Land Registrar under the Registered Land Act 1963 so narrow, in particular under section 142(1)(a)? One of the draftsmen of the Act hinted as to why this power was limited; he pointed out that because rectification appeared to upset the basic principle of registration of title - that the entry in the register is absolute proof of title - it should only be allowed without injuring anyone.[46] It is interesting that the English Law Commission in their Third Report pointed out that "defeasibility through the ready availability of rectification is productive of future uncertainty and contrary to the raison d'etre of registration of title."[47] However, while this is a purist's view of the effect of registered title, rectification is inevitable

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44 *Ibid*, s. 82(1)(f).

45 *Ibid*, s. 82(1)(h).

46 S. Rowton Simpson, *op.cit.*, p. 283 - This would reflect why under section 142(1)(a) the Registrar can only rectify an error or omission where the material interests of any proprietor are not affected.

47 Property Law : Third Report on Land Registration, A. Overriding interests, B. Rectification and Indemnity, C. Minor Interests, Law. Com. No. 158, para. 3.5.

in a system of land registration because, as indicated earlier, the register is always susceptible to human error. Nevertheless, although the Law Commission regretted the existence of the rectification provisions in section 82 of the Land Registration Act 1925, they added that the principle of indefeasibility is compensated for in practice by the possibility of indemnity under section 83 of the 1925 Act.[48] While the indemnity provisions in the Land Registration Act 1925 are satisfactory, those in the Registered Land Act 1963 are clearly not as they are very limited in their application.[49] While monetary compensation may be a poor substitute for one who has lost title due to rectification of the register, at least it eases some of the pain. Under the Registered Land Act 1963, the inability of obtaining rectification as well as indemnity simply aggravates the pain of losing title. This becomes evident when one considers the limited power of the courts to rectify the register under the Registered Land Act 1963.

D. Rectification by the Court

Section 143(1) of the Registered Land Act 1963 provides that the court may rectify the register

> "by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first

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48 *Ibid*, para. 3.4.

49 These limitations are discussed below.

registration) has been obtained, made or omitted by fraud or mistake."

From this subsection it is evident that the court can rectify any[50] registration, so long as it is not a first registration, which is caused by fraud or mistake. It has to be 'satisfied' that such registrations have been "obtained, made or omitted by fraud or mistake." It therefore appears that if the court is not satisfied that a registration has been caused by fraud or mistake, it can not order rectification. Thus the words 'where it is satisfied' would appear to limit the discretion to rectify granted by the section.[51]

The limits on the power of the courts to rectify the register imposed by sections 143(1) & (2) of the Registered Land Act 1963 are therefore as follows:

1. First registrations cannot be rectified - s. 143(1)
2. Any other registration can only be rectified if the court is satisfied that it has been 'obtained, made or omitted by fraud or mistake'. - s. 143(1).
3. Rectification cannot be made against a proprietor in possession who must have been a purchaser of

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50 Here the word 'any' refers to the types of registrations available, for example, registrations of absolute proprietors, registered leases, easements, *et al*. *Prima Facie* the use of this word would make it possible for a court to rectify retrospectively. This is not possible under the Land Registration Act 1925 - Freer v. Unwins [1976] Ch.288.

51 As indicated by the use of the phrase, 'may order rectification' - s. 143(1).

the registered land for valuable consideration - s. 143(2).

Each of these limitations are now considered in turn.

1. Non-Rectification of First Registrations

This limitation is the most drastic imposed on the courts by the Registered Land Act 1963 and its severity is reflected by the fact that the court cannot even rectify a first registration which has been obtained by fraud or mistake. Why was such a provision inserted in the Act? In a Practice Note issued by the Chief Land Registrar[52] he stated that the provision was "a deliberate administrative policy decision in order to:

a) stave off any vexatious litigants and

b) to ensure the finality of a registered title ..."

The first ground has its origins in land litigation that was particularly rampant in Central Province prior to consolidation and adjudication of land in the 1950s.[53] The litigation had been caused by land shortage together with the uncertainty of Government policy. Government policy in connection with land was to encourage the creation of individual titles and to promote the scientific use and management of land.[54] However, the shortage of land meant that a number of

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52 Section 143(1) 8 E.A.L.J. 68.

53 For a general account see M.P.K. Sorrenson, Land Reform in the Kikuyu Country, (Nairobi 1967), pp. 78-80. See also Chapter Three, *supra*.

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

Kikuyu began to evict *ahoi*,[55] who had inhabited their land for many years, as a result of the increasing need of the land owners to cultivate all of their land. This resulted in bitter disputes between the real owners and the *ahoi* and it "was common for a plaintiff to allege that the defendant was his *muhoi* and *vice versa*".[56] Moreover, due to the undocumented nature of customary law, many disputes arose over the position of boundaries.

This conflict over land was said to have turned "family against family, brother against brother in an individualistic race for more acres of eroded soil."[57] The resulting land litigation resulted in huge fees being spent in bringing these cases before the African Courts.[58] In Kiambu District, for example, the fees being paid in African Court cases - the majority of them being land cases - rose from £13,000 in 1949 to £24,000 in 1951.[59] With the introduction of consolidation and adjudication of land in the Central Province, the colonial administration felt that these disputes would jeopardise the whole exercise of land

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55 For the rights of *ahoi* see Chapter Two, *infra*.

56 M.P.K. Sorrenson, *op. cit.*, p. 79.

57 Fort Hall District Annual Report, 1949 - quoted in Sorrenson, *op.cit.*, p. 79.

58 The African Courts had exclusive jurisdiction over cases between Africans. See Chapter Seven for a discussion of the jurisdiction of the African Courts.

59 Kiambu District Annual Report, 1951 - quoted in Sorrenson, *op.cit.*, p. 79.

registration. Accordingly the African (Suspension of Suits) Ordinance 1956 was passed. It put a temporary stay on all litigation for a period of three years,[60] enabling consolidation, adjudication and finally registration of title to proceed unhindered. Before approving the Ordinance the Governor, Sir Evelyn Baring, promised that appeals to the Courts would be allowed in the substantive legislation which was going to be prepared by the Working Party on African Land Tenure.[61] However, colonial officials felt that the achievements being made in the consolidation and adjudication programme would be undermined if appeals were allowed against the completed register.[62] It appears that the administrative officials did succeed in convincing the Working Party on African Land Tenure on the need to prevent the rectification of first registrations. In their report the Working Party said:[63]

> "We discussed at length with Provincial and District Commissioners the desirability of including provision where errors in the first registration of titles could be rectified. All concerned were of opinion that to allow the first registration to be open to challenge would endanger the whole process ... One of the major advantages that Africans will gain from registration will be relief from the crippling burden of payment for lawsuits brought before the African courts.

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60 S. 1(2).

61 M.P.K. Soresnon, *op.cit.*, pp. 134, 188.

62 *Ibid.*, at pp. 187, 188.

63 Report of the Working Party on African Land Tenure, 1957-58 (Nairboi 1958), para. 67(i).

> We came to the conclusion that the advantage to the Africans of making first registration final and absolute far outweigh any advantage that might result from allowing the original adjudication to be challenged."

This led to the second ground,[64] that is, the opinion that the register should be final, thereby cementing the whole process of land registration. The above recommendation of the Working Party was adopted in section 89(1) in the Native Lands Registration Ordinance 1959. That section provided in part:

> "a court may order rectification of the register -
> a) by directing that any registration entry or note in the register (*other than the first registration of the title to any land in accordance with the provisions* of this Ordinance) be cancelled or amended if the court is satisfied - ..." (italics mine).

The Court of Appeal in The District Commissioner, Kiambu v. R. *ex parte* Ethan Njau[65] held that the above sub-section effectively precluded any rectification of first registrations.

The effect of the African Courts (Suspension of Suits) Ordinance 1956 and, subsequently, section 89(1)(a) of the Native Land Registration Ordinance 1959 meant that any disputes over land should have been determined and solved during the objections stage in the adjudication process thereby obviating the need to rectify a first registration.[66] Once a proprietor was

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64 Practice Note, 8 E.A. L.J. 68.

65 [1960] E.A. 109.

66 Land Adjudication Act 1968, ss. 26, 27. However, this was on the assumption thta the land adjudication committees were successful in determining disputes over titles, and in identifying defects in titles. However, as was shown in Chapter Three, many of these committees

granted his certificate of title, his registration could no longer be challenged, and it was, so to speak, set in stone.

However, the Chief Land Registrar in his Practice Note did not set out the third reason why first registrations were precluded from rectification. The reason is a political one. Following the outbreak of the Mau Mau civil war and the declaration of the Emergency in October 1953, the colonial government decided to implement the recommendations of the Swynnerton Plan.[67] Swynnerton had recommended that an improvement in African agriculture could be made if the system of land tenure was reformed by the consolidation of fragmented land holdings and the registration of these titles, and if Africans were given the opportunity of growing cash crops.

The government felt that if it could implement these measures, support for the Mau Mau would diminish as Africans would seize the opportunities of growing cash crops, resulting in increased incomes as well as the benefit of having a secure registered title. Because many African land owners as well as politicians had been detained for supporting the Mau Mau during the Emergency, the administration felt that it was

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failed to properly identify everyone who had proprietary interests in the titles concerned or classify adequately various interests in land.

[67] R.J.M. Swynnerton, A Plan to Intensify the Development of African Agriculture in Kenya (Nairobi 1954). See Chapter Two, *infra*, for a discussion of the Plan.

important to push through with land consolidation and adjudication as fast as possible before those detainees were released as it was feared that they would cause trouble and interfere with the programme. Several of these detainees had their land confiscated and awarded to those considered loyal to the government.[68] Moreover, there were allegations that the Land Adjudication Committees had ignored the rights and interests in land belonging to those who were put in detention when adjudicating over land belonging to them and in many instances deprived them of the land and awarded it to others.[69] By preventing the rectification of these registrations, the released detainees would be unable to get their land back.[70] It was suggested that allowing these detainees the opportunity to make applications to have the register

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[68] Under the Forfeiture of Lands Ordinance 1954. For a detailed account see M.P.K. Sorrenson, op. cit., pp. 104-107, 113-118; 240-241.

[69] See the Report of the Mission on Land Consolidation and Registration in Kenya 1965-66, (London 1966), para. 273.

[70] Interestingly, the absence of the detainees was often exploited by those who were left behind to look after their lands (such land having avoided confiscation), usually members of the family. These ones were often registered as proprietors of these lands and subsequently took advantage of the provisions of the Registered Land Act 1963 (ss. 28 & 143(1)) to deny the real owners ownership of the land - see Practice Note, section 143(1) 8 E.A.L.J. 68; Kimani v. Gikanga [1965] E.A. 735 (allegations by the defendant); Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 256 (plaintiff denied that the defendant, who was his brother and had been in detention, was entitled to a share of land which was now registered in his (the plaintiff's) name. The court held that the defendant was entitled to an equal share of the land.

rectified would have reopened old wounds, reviving the bitterness that existed within the Kikuyu tribe.[71]

Nevertheless, the prevention of rectification of first registrations has had a wide effect on all those who had their land registered under the Registered Land Act 1963, including those who had nothing to do with the convulsions in Central Province. The harsh effect of section 143(1) can be illustrated in the landmark decision in The District Commissioner, Kiambu v. R. *ex parte* Ethan Njau.[72] The facts of the case are as follows: during land consolidation in the Kiambu area of Kiambu District, the adjudication committee appointed under the Native Land Tenure Rules 1956 (the original precursor to the Registered Land Act 1963) allocated a certain plot of land to Ethan Njau after having ascertained and made up the record of existing rights. The committee allocated another plot of land half a mile away to John Munge. After Njau was given a certificate of title, Munge complained that the plot of land that was allocated to Njau should have been allocated to himself, and therefore the allocation was unfair. The committee considered this complaint and, by a majority, reversed its decision. The register was then drawn up reflecting the new position. Before the register was confirmed Njau complained, arguing that by virtue of the certificate issued to him he was the

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71 See Report of the Mission on Land Consolidation ..., *op. cit.*, para. 274.

72 [1960] E.A. 109.

owner of the plot originally allocated to him. This complaint was rejected by the committee, and it proceeded to confirm the register as it stood.

Njau then made an application to the High Court for an order of *mandamus* directed to the District Commissioner as the officer responsible under the 1956 Rules to register Njau as the title holder. The High Court held that the action of the committee in subsequently allocating the plot to Munge was unlawful and, therefore, *mandamus* would be granted. The District Commissioner appealed.

The Court of Appeal held that the allocation of land by the committee to Munge was *ultra vires* because they had no power under the 1956 Rules to consider allegations of unfairness. The Court considered the effect of section 89(1)(a) of the Native Lands Registration Ordinance 1959 (this Act had come into force while the case was pending appeal), which provided that the court could order rectification of the register other than a first registration. Gould J.A. considered that granting an order for *mandamus* would be the same as ordering rectification. Since the subsection precluded rectifications of first registrations, the court would not issue an order of *mandamus*. As a result Njau was unable to have the register rectified even though the decision of the committee was *ultra vires*.

Nevertheless the court said that it was open to Njau to obtain an indemnity under section 90(1)(b) of the Native Lands Registration Ordinance.[73]

The inability of the courts to rectify first registrations is manifestly unfair to those who are affected through no fault of their own, as in Njau's case. Moreover, the fact that no indemnity is now available for mistakes and omissions in first registrations aggravates the injustice.[74] The astonishing effect of section 143(1) of the Registered Land Act 1963 is that the court cannot even rectify a first registration *even if it has been obtained by fraud*. Indirectly, therefore, the Act is an instrument of encouraging fraud and the courts remain powerless to act, even though this was not the intention of Parliament.[75]

Nevertheless the Practice Note issued by the Chief Land Registrar[76] pointed out a way of avoiding the harshness of this section and the courts have made increasing use of this method.

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73 [1960] E.A. 109, at pp. 128,129. It is significant that section 90(1)(b) was not reproduced in the Registered Land Act 1963. Section 144 of the 1963 Act provides that mistakes or omissions in first registrations cannot be indemnified except where they have been obtained by fraud. If Njau had brought his action after 1963 he would not have obtained either rectification or an indemnity.

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

75 Practice Note, Section 143(1) 8 E.A.L.J. 68.

76 *Ibid.*

a. **Solutions to the problem**

i. *The Order in Personam*

The Chief Land Registrar was of the opinion that the hands of a court were tied by section 143(1) of the Registered Land Act 1963. He therefore proposed that where a court found itself in this situation, it 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 the parcel to B", and if A refused to do so, then someone else (e.g. a Registrar of the High Court, a District Commissioner or a Land Registrar) could "effect the execution for and on behalf of A".[77] Having consulted with the Attorney General, the Chief Land Registrar concluded that the process should be taken in two stages:

> "a) The declaration that A holds the property as a trustee for B including the order *in personam* to A to transfer the property to B.
>
> b) In deficit of A obeying the court order a second application be made to the court so that a person other than A be authorised to execute the transfer for and on behalf of A."[78]

This view had been raised previously in The District Commissioner, Kiambu v. R. ex parte Ethan Njau[79] where Gould J.A. (although he did not expand on this issue)

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77 *Ibid.*

78 *Ibid.*, at p. 69.

79 *Op. cit.*, at p. 125.

quoted Hogg, Registration of Title Throughout the Empire (1920 edn.) p. 367, where it said:

> "Occasionally the court, in deciding in favour of a person who claims rectification, will declare the registered owner a trustee for the claimant, in lieu of ordering the register to be actually altered. So the court will sometimes order the registered owner to transfer to the person rightfully entitled, instead of ordering the existing entries on the register to be cancelled."

Thus by directing an order *in personam* against the registered proprietor (who has been declared trustee) to execute a transfer of the registered title to the real owner, the court is able to neatly sidestep section 143(1) and yet achieve the same effect as if rectification had been ordered. This procedure has been applied by the courts in several cases concerning first registrations.[80] The position was summarised by Cotran J. in Limuli v. Sabayi[81] where he said:

> "It is now generally accepted by the courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration, and there is nothing to prevent the giving effect to such a trust by requiring the trustee to do his duty by executing the transfer documents."

It is evident, therefore, that for the courts to make an order *in personam* directed against the registered proprietor, they would have to declare him a trustee,

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80 Muthiora v. Muthiora, Civil Appeal No. 19 of 1982 (unreported); Nthiga v. Nthiga, H.C.C.C. No. 1949 of 1976 (unreported); Warmattai v. Mugweru, Nyeri H.C.C.C. No. 56 of 1972 (unreported); Muguthu v. Muguthu, [1971] K.H.C.D. 16.

81 [1979] J.A.L. 187 at p. 188.

holding the property on trust for the real owners. In Gatimu Kinguru v. Muya Gathangi[82] Madan J held that section 143(1) "does not exclude the recognition of a trust *provided it can be established*" (italics mine). How have courts been able to establish the existence of trusts in these circumstances? This issue has led to the development of the customary trust.

ii. *Declarations of Trust : the Customary trust*

The nature of the customary trust was discussed in Chapter Six. It arose primarily due to the unconscionable behaviour on the part of administrators appointed under customary law to distribute family land among the male issue in the family. The land was registered in the name of the administrator, who was normally the eldest son in the family, to hold it on trust for his brothers, especially where his brothers were too young,[83] or where they were staying elsewhere.[84] Many of these administrators subsequently denied the existence of these trusts, and claimed that they were the absolute proprietors and held the land free from unregistered interests.[85] Since many of these were first registrations, they could not be rectified because of Section 143(1) of the Registered

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82 (1976) Kenya L.R. 253 at p. 263.

83 See for example Limuli v. Sabayi [1979] J.A.L. 187.

84 Gatimu Kinguru v. Muya Gathangi, *op. cit.*, (younger brother in detention).

85 Registered Land Act 1963, s. 28.

Land Act 1963. However, the courts took the view that these trustees were bound to carry out their obligations notwithstanding the fact that these were obligations under customary law. This is because the proviso to section 28 of the Registered Land Act 1963 provides that a proprietor cannot escape from his duties and obligations as a trustee. Since the registration of the eldest son as proprietor of the land had 'the notion of trust inherent in it' the administrators held the land subject to these trusts.[86] Although the interests of the beneficiaries (i.e. the right to receive a share of the registered land) under these trusts were unregistered, the trustees were still bound by them because section 126(1) of the Registered Land Act 1963 provides that trustees are subject to unregistered liabilities.[87]

Having been able to establish the existence of a trust, the courts were then able to issue an order *in personam* against the registered proprietor directing him to execute transfer documents in favour of those entitled to a share of the land. In this way the courts avoid breaching section 143(1) and rectification of the register is indirectly made.

b. **Rectification and Adverse Possession**

The non-rectification of first registrations by section 143(1) of the Registered Land Act 1963 has

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86 Muguthu v. Muguthu [1971] K.H.C.D. 16.

87 See Gatimu Kinguru v. Muya Gathangi, *op. cit.*, at p. 263.

raised the question as to what happens where a person obtains title by adverse possession against the registered proprietor. Section 38(1) of the Limitation of Actions Act 1967 provides:

> "Where a person claims to have been entitled by adverse possession to land registered under any of the Acts cited in section 37 [i.e. the Government Lands Act 1915, the Registration of Titles Act 1919, the Land Titles Act 1908, and the Registered Land Act 1963], or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

Does this section conflict with section 143(1) of the Registered Land Act 1963, or does it merely create an exception to the rule? The effect of sections 37 and 38 of the Limitations of Actions Act 1967 were considered in Hosea v. Njiru.[88] The case concerned an action for adverse possession of registered land. Simpson J. held that by virtue of section 37 of the Limitation of Actions Act 1967 the registered proprietor held the land as trustee on behalf of the adverse possessor.[89] He said that an order made under section 38(1) of the Limitations of Actions At 1967 was "distinguishable from rectification under section 143 [of the R.L.A. 1963]" and therefore such an order could

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88 [1974] E.A. 526.

89 Section 37(a) provides: "where, if the land were not so registered, the title of the person registered as proprietor for the time being in trust for the person who, by virtue of this Act has acquired title against any person registered as proprietor ...".

affect a first registration.[90] However, Simpson J. did not order rectification of the register in favour of the plaintiff, but rather, he ordered the defendant, who was now holding the land as trustee, to execute a transfer of the land to the plaintiff.

However, a close inspection of section 38(1) of the Limitations of Actions Act 1967 reveals that the court can, in effect, order rectification of the register because that sub-section provides that the adverse possess can apply to the High Court "for an order that *he be registered as the proprietor of the land ... in place of the person then registered as proprietor* ... (italics mine)." This is a direct order to the Registrar to effect rectification rather than an order *in personam* against the registered proprietor to transfer the land to the adverse possessor as ordered y Simpson J. in Hosea v Njiru.[91] Madan J. in Gatimu Kinguru v. Muya Gathangi[92] gave a further explanation as to why the registration of an adverse possessor as proprietor displacing the first registered proprietor is not in conflict with section 143(1) of the Registered Land Act 1963. He said:

> " ... section 143(1) does not erect a statutory barrier which wipes out the benefit of a title acquired by adverse possession even in the case of a first registration. A title acquired by adverse possession creates a change in

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90 [1974] E.A. 526 at p. 529.

91 *Op. cit.*

92 (1976) Kenya L.R. 253.

> ownership of the title, not requiring rectification of the register. There is no mistake or error which is rectified, corrected or set right or to be rectified, corrected or set right ... It is transmission of title by operation of law and what happens is that a new owner supplants the existing or old owner."[93]

Therefore, according to Madan J., a successful action for adverse possession causes a change of ownership to the title of the existing proprietor and the replacing of the latter's name on the register with that of the adverse possessor is not a 'rectification' since title has been transmitted by operation of law, and therefore it does not conflict with section 143(1) of the Registered land Act 1963. Interestingly, in a subsequent case[94] where the applicant claimed adverse possession of registered land, Cotran J. said that he was "precluded by section 143 of the Registered Land Act from ordering the rectification of the register." Therefore he preferred to make an order direction the first registered proprietor to "execute a transfer" of the registered land to the applicant. However, Cotran J. was not referred to the arguments expressed in Hosea v. Njiru[95] and Gatimu Kinguru v. Muya Gathangi[96] discussed above, though the order *in personam* was correctly issued. It is submitted that he would have

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93 *Op. cit.*, p. 261.

94 Abdi v. Shem [1979] J.A.L. 189.

95 *Op.cit.*

96 *Op.cit.*

been perfectly entitled to order rectification of the register in favour of the applicant.

Not to be forgotten is the fact that rights acquired by adverse possession are overriding interests by virtue of section 30(f) of the Registered Land Act 1963. Since the Registrar is empowered to register any of the overriding interests as he thinks fit, if a person can successfully establish adverse possession, the Registrar can register the name of the adverse possessor as proprietor in place of the existing registered proprietor.

The Land Registration Act 1925 on the other hand provides in section 75(1) that where title has been obtained by adverse possession, the title shall be held on trust by the registered proprietor for the adverse possessor. Since, invariably, there will be a dispute between the adverse possessor and the registered proprietor, both may apply to the court for the determination of the dispute under section 75(3).

The difference, therefore, between the provisions in Kenya on adverse possession of registered land and those in England is that in England, section 75(2) of the Land Registration Act 1925 permits the adverse possessor to apply to the Chief Land Registrar to be registered as proprietor. The application is based on the best available evidence, supported by statutory declaration.[97] In Kenya, an application has to be made

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[97] Ruoff & Roper, Registered Conveyancing, 5th Ed., by T.B.F. Ruoff, C. Roper & E.J. Pryer (London 1986), pp. 737, 738.

to the High Court under section 38(1) of the Limitations of Actions Act 1967 for an order that the name of the possessor should replace that of the existing registered proprietor. The Land Registrar would then effect such an order.

The similarities in the provisions on the registration of adverse possessors in both countries is that the registered proprietor who has been ousted from possession holds the land on trust for the adverse possessor.[98] The title of the original registered proprietor is not extinguished as it would have been if the land was unregistered.[99] Furthermore both section 30 of the Registered land Act 1963 and section 70(1) of the Land Registration Act 1925 provide that rights acquired by virtue of limitation are overriding interests. However, while the Registrar under the Land Registration Act 1925 is empowered to enter a notice of the overriding interest on the register,[100] the Kenyan Registrar can register the overriding interests as he thinks fit.[101]

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98 Land Registration Act 1925, s. 75(1); Limitation of Actions Act 1967, s. 37(a).

99 *Ibid.* See also Spectrum Investment Co. v Holmes [1981] 1 W.L.R. 221.

100 S. 70(3).

101 Registered Land Act 1963, s. 30.

2. Rectification of Other Registrations

Although the courts in Kenya cannot rectify first registrations, nevertheless, they are empowered by section 143(1) of the Registered Land Act 1963 to rectify other registrations if they are "satisfied that any registration ... has been obtained, made or omitted by fraud or mistake." This is a narrow power of rectification in comparison with the power of English courts to rectify the register where "by reason of any error or omission in the register, or by reason of any entry made under a mistake, *it may be deemed just* to rectify ..." (italics mine).[102] The courts in Kenya are confined to rectifying registrations which have been brought about by fraud or mistake.

What types of conduct would amount to fraud under section 143(1) of the Registered Land Act 1963? At one end of the specturm, it is evident that a deliberate act of deception will amount to fraud. This is illustrated in Raphael Njuguna Mwaura v Gikonyo Kariuki Kaniaru v Others.[103] In 1974, the plaintiff bought a plot of land in Kiambu from the first dependent and the Land control Board granted consent to the transfer. The second defendant subsequently entered into an agreement with the first defendant to purchase two acres out of that same plot that had been sold to the plaintiff. However, the Land Control Board refused to

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[102] Land Registration Act 1925, s. 82(1)(h). See also ss. 82(1)(d) & (e).

[103] Daily Nation, September 28, 1990, p. 3.

grant consent to this agreement. The sale agreement between the first and second defendants was then rescinded by mutual consent. In the meantime, the second defendant had succeeded in lodging a caution against the plaintiff's title by "suppressing the material fact from the [Kiambu District] Land Registrar that the Land Control Board had refused to grant consent to the transfer of the land in his favour."

The second defendant then approached the Chief Land Registrar and convinced him that he was the true owner of the land registered in the plaintiff's name. The latter, not knowing the truth, wrote a letter to the Kiambu District Land Registrar directing him to register the land in the second defendants name. The District Land Registrar complied with the direction by deleting the plaintiff's name, replacing it with that of the second defendant, and issuing a new land certificate.

Pall J. held that the registration of the second defendant was fraudulently obtained and the register should be rectified in favour of the plaintiff. This was certainly an elaborate web of deception contrived and executed by the second defendant. Indeed Pall J. remarked that the second defendant was "lucky indeed that he has not been charged with knowingly deceiving and misleading the Land Registrar by failing to give

true and honest information in respect of his professed interest in the land."[104]

Another example of conduct that is certainly fraudulent under section 143(1) of the Registered Land Act 1963 is a double conveyance. In Natwarlal Chauhan v Zakaria Omagwa,[105] a registered proprietor of land entered into a contract for the sale of land with the plaintiff. The plaintiff, for reasons that are unclear, did not have himself registered as proprietor but nevertheless went ahead and started building on the land. Aware that the plaintiff had not registered himself as proprietor, the vendor sold the same land to the defendant who proceeded to register himself as proprietor. The plaintiff prevented the defendant from entering the land when he realised what happened, and applied to have the register rectified. The Court of Appeal granted an order for rectification of the register because the registration of the defendant was obtained as a result of the fraudulent double

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104 The offence is under section 155(2) of the Registered Land Act 1963. It is not known why the second defendant was not charged with the offence. A disturbing element of this case is the fact that even though the Chief Land Registrar was deceived by the second defendant, he had no jurisdiction to order rectification of the register in the name of the second defendant. The preferred course of action would have been for the Registrar to state a case to the High Court for its opinion under section 149 of the Registered Land Act 1963. This course of action would, it is submitted, have uncovered the deceoption before it was successfully carried out.

105 Civil Appeal No. 12 of 1980 (unreported).

conveyance perpetrated by the original registered proprietor.[106]

At the other end of the spectrum is the question of whether mere notice of an unregistered interest amounts to fraud. This is addressed to below. In between both ends of the spectrum is the issue of whether a deliberate ploy to defet an unregistered interest amounts to fraud. This question was addressed by the Kenya High Court in Rungoyo Wanyoya v. Samuel Gichungo.[107] The first defendant transferred land to his son, the second defendant, knowing full well that the plaintiffs had not protected their right to receive a share of the land in the register, and that their rights would have been defeated by the transfer. Muli J. held that the transfer was fraudulent because it was

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[106] While obtaining registration as a result of presenting forged documents would be fraudulent, there is no reported Kenyan case on this issue, vis a vis registered land. Interestingly, this point has not been directly addressed to in England by the Courts. In one case, Re Leighton's Conveyance [1936] 1 All E.R. 667, a plea that the transfer was forged was not proceeded with. In the second case, Argyle Building Society v Hammond (1985) 49 P & C.R. 148, although it was alleged by the appellant that the transfer and registration of the property was effected as a result of a forged deed, no finding of forgery was made at first instance or in the Court of Appeal. Furthermore when the case was sent back to the High Court for a rehearing, Argyle Building Society v Steed, (1989) LEXIS Transcript, forgery was not pleaded but rather the plea of *non est factum*. Forgery is, in any event, a criminal offence in England under the Forgery and Counterfeiting Act 1981. In the context of land retgistration it would be considered as a criminal offence under section 117 of the Land Registration Act 1925. In Kenya, forgery would be considered as an offence under section 155(2) of the Registered Land Act 1963.

[107] [1973] K.H.C.D. 59.

deliberately intended to defeat the rights of the plaintiffs. Therefore the court ordered that the register should be rectified so that the plaintiffs should be entered in the register as proprietors in common. This case therefore illustrates that a deliberate ploy to defeat an unregistered interest will amount to fraud, and a transfer resulting out of such conduct would be subject to rectification.[108]

The above case would have undoubtedly fallen within the definition of 'fraud' in section 2 of the Registration of Titles Act 1919. That section provides,

> " 'fraud' shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."

This section 2 definition would preclude mere notice of an unregistered interest as amounting to fraud.[109] But does, the definition of fraud under the Registered Land Act 1963 also preclude mere notice? It was shown in Chapter Six that mere notice under the 1963 Act would not amount to bad faith and, therefore, it follows that it would not also amount to fraud. The paucity of Kenyan authorities to illustrate what type of conduct amounts to fraud under section 143(1) of the

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108 *C.f.* Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd. [1926] A.C. 101 at p. 106, per Lord Buckmaster - "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent."

109 Jandu v. Kirpal [1975] E.A. 225.

Registered Land Act 1963, makes it pertinent to view English cases which illustrate fraudulent conduct in relation to the Land Registration Act 1925, and which would therefore be of persuasive authority before a Kenyan court.

In Jones v. Lipman[110] a vendor conveyed property to a company that he controlled, in an attempt to defeat an unregistered contract. It was argued that the company was a purchaser for value. However, Russell J. held that the company was, in reality, a creature of the vendor, "a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity."[111] Accordingly, specific performance was ordered. The sham transaction was therefore viewed as an example of fraudulent conduct.[112] This deliberate ploy is indeed reminiscent of the defendants transfer in Rungoyo Wanyoya v Samuel Gichungo[113] to defeat the plaintiff's unregistered interest, the difference being that in the latter case,

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110 [1962] 1 W.L.R. 832.

111 *Ibid.*, at p. 836.

112 Diplock L.J. in Snook v. London and West Riding Investment Co Ltd. [1967] 2 Q.B. 786 at p. 802, defined a sham transaction as involving "acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create."

113 *Op. cit.*

the transfer was to an individual rather than to a sham company as in Jones v Lipman.[114]

In Lyus v. Prowsa Developments[115] land had been transferred to the defendants subject to and with the benefit of the plaintiff's contract. The defendants pleaded that the contract was not protected on the register and therefore was not binding on them. However, Dillon J. held that because the defendants had expressly contracted to take subject to the contract, their reliance on the Land Registration Act 1925 was to use it as an instrument of fraud. The fraudulent conduct was the "first defendant reneging on a positive stipulation in favour of the plaintiffs in the bargain under which the first defendant acquired the land." Despite considerable academic criticism[116] this case was approved in Ashburn Anstalt v. Arnold,[117] on the basis that the defendants had given an express assurance that they would honour the plaintiff's contract.[118]

To this extent, Lyus is distinct from Peffer v. Rigg.[119] In Peffer, there was no express assurance that the transferee would give effect to the

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114 *Op. cit.*

115 [1982] 2 All E.R. 953.

116 See Chapter Six.

117 [1988] 2 W.L.R. 706.

118 [1988] 2 W.L.R. 706, at p. 728, per Fox L.J.

119 [1977] 1 W.L.R. 285.

unregistered interest. There, the first defendant transferred to the second defendant a house for £1, and the latter was registered as proprietor. The second defendant claimed that an express trust in favour of the plaintiff was not binding on her because the plaintiff had not protected his interest on the register. The court imposed a constructive trust on the second defendant because she knew "that the property was trust property when the transfer was made to her.[120] Therefore, mere notice, according to Graham J., amounted to bad faith.

One academic has supported the imposition of the constructive trust in Peffer v Rigg[121] "on the basis that the transferee's conduct was sufficiently fraudulent to cause the equitable *in personam* jurisdiction to be invoked."[122] However, it has been argued[123] that this reasoning is weak because although there are cases which have established that a constructive trust can be imposed on a purchaser - who claims to take free from an unregistered interest - because of his fraudulent or unconscionable conduct, there is an element of fraudulent misrepresentation,[124]

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120 *Ibid.*, at p.294.

121 *Ibid.*, at p. 294.

122 David J. Hayton, Registered Land, 3rd ed., (London 1981), p.134.

123 M.P. Thompson, Registered Land, 3rd ed., (London 1981), C.L.J. 280 at pp. 290-292.

124 Loke Yew v. Port Swettenham Rubber Co. Ltd. [1913] A.C. 491

bribery or corruption on the part of the purchaser;[125] mere notice, the author concluded was not enough in these cases.[126] Peffer v. Rigg[127] has also been heavily criticised on the basis that it imports the doctrine of notice into the Land Registration Act 1925 which is contrary to the policy of the Act.[128] Although Peffer has never been overruled, it has been seriously discredited and it is unlikely to be followed in the future.

3. Other Limits to Rectification

Section 143(2) of the Registered Land Act 1963 provides that the register "shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land ... for valuable consideration ..."

Therefore if a proprietor is to protect his title from rectification he must establish:

a) that he is 'in possession'; and

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125 Assets Co. Ltd. v. Mere Roihi [1905] A.C. 176 at p. 210, per Lord Lindley.

126 M.P. Thompson, *Op. cit.*

127 *Op.cit.*

128 One commentator described it as driving "a coach and horses through the Land Registration Act 1925". - David Hayton, Purchasers of Registered Land, [1977] C.L.J. 227. For further criticism see also Stuart Anderson, Notice of Unprotected Trusts, (1977) 40 M.L.R. 602; Roger J. Smith, Registered Land: Purchasers with Actual Notice (1977) 93 L.Q.R. 341; Jill Martin, Constructive Trusts of Registered Land [1978] Conv. 52. M.P. Thompson, Registration, Fraud and Notice, [1985] C.L.J. 280.

b) that he acquired the land 'for valuable consideration'.

What is the significance of these two elements?

a. *'In Possession'*

Possession is a legal concept of variable meaning depending on the context.[129] A person who exercises physical control over land may be said to be in actual or *de facto* possession, for example a lessee of a house is in actual possession while he occupies it.[130] What is the meaning, therefore, of 'possession' in the context of section 143(2) of the Registered Land Act 1963? The Kenya Court of Appeal had the opportunity to consider this issue in Natwarlal Chauhan v. Zakaria Omagwa.[131] the facts of which have been outlined earlier. In determining whether they could rectify the register against the defendant, who had been registered as proprietor as a result of the fraud committed by the first registered proprietor, the Court of App[eal had to consider whether the defendant was 'in possession'. If he was, and there was no doubt that he was innocent,

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[129] See Chapter Six, *supra*. The question as to whether there exists exclusive possession in distinguishing a lease from a licence in English law is an issue that has continued to absorb the time and attention of the courts. For examples of recent cases Street v. Mountford [1985] A.C. 809; A.G. Securities v. Vaughan [1988] 3 W.L.R. 1205; Antoniades v. Villiers [1988] 3 All ER 1053; Aslan v. Murphy (No.1) [1989] 3 All ER 130; Mikeover Ltd. v. Brady [1989] 3 All ER 618.

[130] Jowitt's Dictionary of English Law, 2nd ed., by J. Burke

[131] Civil Appeal No. 12 of 1980 (unreported).

then rectification could not be made against him.[132] Madan J.A., who gave the leading judgment, held that 'possession' within the context of section 143(2) of the Registered Land Act 1963 "means *actual possessing* of the land (italics mine)".[133] Therefore, if a proprietor was to have his title protected from rectification he would have to be in physical control of 'actual possession' of the land. Since, in this case, the defendant had been prevented by the plaintiff from entering the land he was held not to be 'in possession'.[134] Accordingly the court ordered that the register be rectified in favour of the plaintiff as the proprietor.[135]

The Land Registration Act 1925 also provides that rectification cannot be ordered against a registered proprietor in possession.[136] However, possession is defined "unless the context otherwise requires" in

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[132] The defendant was clearly a proprietor since he was 'the person named in the register as the proprietor' - Registered Land Act 1963.

[133] However, Madan J.A. did not seem to be sure because he prefaced the sentence by saying, "I think ..."

[134] C.f. the English case of Epps v. Esso Petroleum Co., [1973] 1 W.L.R. 1071 where the plaintiff erected a fence to act as a boundary between the disputed land - which the defendant was claiming - and the defendant's land. Templeman J. said that the defendants did not have to forcibly tear down the fence and re-enter the land in order to come within section 82(3) which protects proprietors in possession.

[135] The defendant would have been entitled to an indemnity under section 144(1) of the Registered Land Act 1963.

[136] S. 82(3).

section 3 (xviii) to include "receipt of rents and profits or the right to receive the same, if any". This would mean that rectification would not be ordered against a non-occupying proprietor 'since he could claim the right to receive the profits of the land, if any, merely by virtue of being registered.'[137] This is in direct contrast to the position under section 143(2) of the Registered Land Act 1963; since, according to Madan J.A. 'possession' in that sub-section means 'actual possession' or physical control, it follows that the courts in Kenya would be able to order rectification against a non-occupying registered proprietor who received rents or profits from the land, such as a landlord.

It has been argued that the meaning of 'possession' in relation to section 82(3) of the Land Registration Act 1925 should be restricted to protect the proprietor who is in the physical occupation of the registered property. Ruoff and Roper state:

> "There is little doubt, however, that the principle behind the Land Registration Acts is that an innocent registered proprietor who is in physical occupation of the registered property should not be ousted from his enjoyment of it. Monetary compensation is of little comfort to a man who is thrown out of his home or ejected from his land, whilst it should normally be ample to recompense an owner who has never occupied his property. This is plain common sense."[138]

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137 Law Commission, Property Law, Third Report on Land Registration, Law. Com. No. 158, para. 3.12.

138 Registered Conveyancing, 5th ed. (London 1986), p. 887.

The Law Commission was of the same opinion and recommended that only proprietors in actual occupation of the land should be protected.[139] If this recommendation is adopted in an Act of Parliament, it would cause the meaning of 'possession' where rectification is concerened under the Land Registration Act 1925, to be similar to the meaning of 'possession' under the Registered Land Act 1963.

b) *'Valuable Consideration'*

For a registered proprietor in Kenya to be protected from rectification, not only must he be 'in possession', he also must have acquired the land for 'valuable consideration'.[140] 'Valuable consideration' is defined in section 3 of the Registered Land Act 1963 as including 'marriage, but does not include a nominal consideration'. The requirement of valuable consideration means that no protection from rectification is afforded to registered proprietors who are donees, or who have been registered as trustees by virtue of customary law,[141] or those who have received the land by virtue of inheritance, unless these

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139 Third Report, *op.cit.*, In their Fourth Report (Law Com. No. 173), the Law Commission included this recommendation in s.44(3)(b) in their draft Land Registration Bill.

140 Registered Land Act 1963, s. 143(2).

141 Muguthu v. Muguthu [1971] K.H.C.D. 16; Gatimu Kinguru v. Muya Gathangi (1976) Kenya L.R. 253. See generally Chapter Six, *supra*.

registered proprietors are under a first registration.[142]

The position under the Registered Land Act is in contrast to that under the Land Registration Act 1925. The latter Act does not provide the requirement that the registered proprietor should have acquired the land for value. Although section 3(xxi) of the Land Registration Act 1925 defines 'purchaser' to mean "a purchaser in good faith for *valuable consideration* (italics mine)" the word 'purchaser' is not referred to in section 82(3) of the Act and therefore the definition in that sub-section would not apply to the proprietor. However, the Law Commission in their Third Report on Land Registration recommended that section 82(3) of the Land Registration Act 1925 should be redrafted so as to benefit registered proprietors who were *prudent purchasers for value in good faith*" (italics mine).[143] They said that this would make the sub-section consistent with "general and statutory principles of property law and conveyancing,"[144] as well as harmonise with the position of minor interests since they are asserted against persons who have *not*

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

143 Third Report, *op.cit.*, para. 3.15. Although the Law Commission did not explain what they meant by a 'prudent purchaser', this can be taken to mean a purchaser who has made all the necessary searches, inquiries and inspections of the land prior to purchase.

144 Third Report, *op.cit.*, para. 3.15.

given value or who are not in good faith.[145] If this recommendation is adopted in a future Land Registration Act[146] then the protection currently afforded to the registered proprietor will have been narrowed significantly.

4. **Rectification Against the Proprietor in Possession**

Section 143(2) of the Registered Land Act 1963 provides that rectification can be ordered against the proprietor in possession if he "had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default." There are therefore three elements, either of which must be present if rectification is to be ordered against the proprietor in possession. The proprietor *must either have had*:

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145 Under the Land Registration Act 1925, (ss. 20(4), 23(5), unprotected minor interests are binding against the original grantor or creator and against anyone taking from such person otherwise than by purchase for value.

146 The Law Commission inserted this recommendation in their Land Registration Bill contained in the Fourth Report on Land Registration Law Comm. No. 173) Section 44(3) of the draft Bill provides that the proprietor should have been a purchaser if he is to be protected from rectification. However, the reference to a purchaser would bring in the requirement of good faith which forms part of the definition of 'purchaser' in section 3(xxi) of the Land Registration Act 1925. If this recommendation is adopted, it would form a significant difference between the protection from rectification afforded to the registered proprietor under the Registered Land Act 1963 and that afforded to the proprietor under the Land Registration Act 1925 (if amended), since under the former Act the registered proprietor need not have acquired the registered title in good faith.

1. "knowledge of the omission, fraud or mistake," or;

2. "caused such omission, fraud or mistake," or;

3. "substantially contributed to it by his act, neglect

or default."

An example of how a registered proprietor in possession who acquired the land for valuable consideration lost his protection from rectification is illustrated in Rungoyo Wanyoya v. Samuel Gichungo.[147] It is arguable that the second defendant could have been found to have 'caused' or 'substantially contributed' to the fraud 'by his act' of presenting the transfer documents for registration. In other words the fraud would not have been successful had the second defendant not signed and presented the transfer documents for registration; therefore by the mere act of presenting the documents for registration the *second defendant would* have caused or substantially contributed to the fraud. While this causes no problem where the defendants have connived to execute the fraud, it does create a problem for the registered proprietor who, when purchasing the land from the vendor, is unaware of the fraud committed by the latter. 'By his act' of simply presenting the transfer documents for registration the proprietor, even though he acted in good faith, may be found to have 'caused' the fraud or 'substantially contributed' to it. Such a construction is perverse in so far as it

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147 *Op.cit.*

affects the registered proprietor who was unaware of the fraud.[148] It would appear that the same result would occur where a mistake made by the Land Registry results in an application for rectification. This can happen for example where the Registry registers A, without his knowledge, as proprietor of a title that belongs to B, while B is registered as proprietor of title belonging to A.[149]

Subsequently, A, without knowledge of the mistake, transfers the land to C, a *bona fide* purchaser, who has the land registered in his name and enters possession. B later realises the mistake and seeks to have the register rectified as against C. It is submitted that C may be found to have 'caused' or 'substantially contributed' to the mistake 'by the {mere} act' of presenting the transfer documents for registration and having the land registered in his name, thereby allowing the register to be rectified against him. Rectification against C would certainly be unfair considering that he was unaware of the mistake and neither could he have known of it. Nevertheless, C would be entitled to an indemnity under section 144(1)(a) of the Registered Land Act 1963 because although rectification is made against him as a result

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148 The English courts came to the same conclusion - see below.

149 A similar mistake committed by the land registry occurred in Rahab Nganga Kinuthia v. Nganga Kirogo, H.C.C.C. No. 404 of 1982 (unreported), but this point was not argued. For a discussion of this case see above.

of his substantial contribution to the mistake 'by his act', and therefore loses the protection given to proprietors in possession under section 143(2), section 144(2) provides that indemnity is not payable to those who have contributed to the damage by their 'fraud or negligence'. Consequently, C, having substantially contributed to the mistake 'by his act' would be outside section 144(2) of the Registered Land Act 1963.

The courts in Kenya have yet to discuss this issue, that is, what acts by the proprietor in possession will enable him to be found to have 'caused' or 'substantially contributed' to either fraud or a mistake, resulting in the loss of his protection from rectification. However, this issue has been considered by the courts in England in relation to the Land Registration Act 1925. Prior to its amendment by the Administration of Justice Act 1977,[150] section 82(3)(a) provided that the registered proprietor lost his protection if he was "a party or privy or has caused or substantially contributed, *by his act, neglect or default*, to the fraud, mistake or omission in consequence of which such rectification is sought; ..." (italics mine).[151]

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[150] Ss. 24, 32, Sch. 5 Part IV. See also section 83(5)(a) of the 1925 Act with regard to indemnity, which was amended by section 3(1) of the Land Registration and Land Charges Act 1971.

[151] The phrase in italics is identical to that used in section 143(2) of the Registered Land Act 1963.

The first of three English cases where this point was considered was Chowood v. Lyall.[152] In that case the plaintiffs were registered as first proprietors with absolute title to a plot of freehold land, which included certain strips of woodland. The plaintiffs brought the action against the defendant for trespass. In defence, the defendant successfully asserted a title acquired before first registration based on adverse possession. The defendant was also successful in a counterclaim for rectification of the register. Luxmoore J. held that one of the reasons why the claim for rectification succeeded was because the plaintiff company had "*by its own act, that is, by the registration of a conveyance which by itself is inoperative to pass the pieces of land in dispute, caused the mistake,* that is the inclusion of the pieces of the land in dispute in the registered title ..." (italics mine).[153] Although the Court of Appeal upheld the decision on different grounds no dissent was made from the above principle expressed by Luxmoore J.

The second case was Re 139 High Street, Deptford.[154] In this case, a certain Mr. Dobkins, having purchased an unregistered shop with an annexe, became registered as first proprietor with an absolute title. In the conveyance to Dobkins the land was

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152 [1930] 1 Ch. 426.

153 *Op.cit.*, at p. 438."<

154 [1951] Ch. 884.

conveyed by description without any plan, and both the vendor and Dobkins mistakenly believed that the property conveyed included in its description the annexe, although in fact this annexe was owned by the British Transport Commission. The plan in the land certificate which was issued to Dobkins showed plainly that his title included both the shop and the annexe. On an application by the Commission for rectification of the register it was held (per Wynn-Parry J.) that the Commission was entitled to rectification because Dobkins had substantially contributed to the mistake in registration *by putting forward, quite innocently, a misleading description of the property for the purposes of registration.*

The third case was Re Sea View Gardens.[155] There Pennycuick J. held:

> "The registered proprietor is a party to the mistake and has caused or substantially contributed to it, *when he puts forward a transfer which contains incorrect particulars* of the land it contained ... [Wynn-Parry J. in Deptford) bases his reasoning, quite clearly, on the view that where a registered proprietor lodges with the Land Registry a document which contains a misdescription of the property, then he has caused or substantially contributed to the mistake." (italics mine).

In summary these three cases held that registered proprietors had substantially contributed to the mistake even though there was no fault on their part. In the view of Cretney and Dworkin, the courts in these

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155 [1966] 3 All E.R. 935.

three cases merely looked at the matter as one of causation and hardly any attention was given to the question of whether or not the mistake was "unintentional and non-negligent".[156]

Section 83(2)(a) of the Land Registration Act 1925 was subsequently amended and it now provides that the proprietor in possession loses his protection where he "has caused or substantially contributed to the error or omission by fraud or lack of proper care ..."[157] The phrase 'lack of proper care' indicates that there would have to be fault on the part of the proprietor before he loses his protection from rectification. Although the Law Commission pointed out that the wording 'lack of proper care' lacks definition, statutory or judicial[158] it has been suggested that a "failure to carry out the usual conveyancing inquiries and inspections should amount to lack of proper care, which probably should be judged objectively and not subjectively."[159] In view of the fact that this issue has not been deliberated upon by the courts in Kenya, how would it be considered if it came before them? The

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156 S. Cretney & G. Dworkin, Rectification and Indemnity: Illusion and Reality, (1968) 84 L.Q.R. 528, at p. 535. This article exposed the deficiency of s. 82(3) of the LRA 1925, and led to the amendment of the sub-section.

157 See Theodore Ruoff & Peter Meehan, Land Registration: The Recent Act 35 Conveyancer (N.S.) 390.

158 Third Report, *op. cit.*, para. 3.14.

159 David J. Hayton, Registered Land, 3rd ed., (London 1981) p. 175.

courts would certainly have to examine The three English cases discussed above would be persuasive authority in determining whether a registered proprietor would have substantially contributed to a mistake by simply presenting a defective transfer document for registration. However, like section 82(3)(a) of the Land Registration Act before it was amended, section 143(2) of the Registered Land Act 1963 does not introduce the question of motive, that is, whether the mistake should be viewed as intentional or unintentional, and it is probably for this reason that the courts in the three English cases above did not introduce this element in deciding whether the registered proprietors in those cases had caused or substantially contributed to the mistake.[160] This is why legislative intervention was necessary to rectify this deficiency. It is submitted that section 143(2) of the Registered Land Act 1963 would similarly have to be rectified to give ample protection to the proprietor in possession and thus prevent the existing protection from being illusory.

III. Indemnity

A. Introduction

An important benefit of a registered title is the fact that a registered proprietor of land or a charge may receive an indemnity or compensation from the State

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160 In contrast, section 144(2) of the 1963 Act introduces the motive element with regard to indemnity through the use of the wording 'fraud or negligence'. C.F. Land Registration Act 1925, s. 83(5(a).

where he suffers loss due to his property because of fraud. This contributes to make a registered title superior to an unregistered one, the latter titles having no similar provisions. The provisions for indemnity reflect the common phrase that a registered title is 'State guaranteed' or that the State insures proprietors of registered titles against the loss that they may suffer. In effect "the applicant for first registration enters into a contract with the State for insurance against defects overlooked by or unknown to him or to his solicitors as well as against defects known to him and candidly disclosed, and a small part of the fees may be regarded as a premium."[161]

However, some writers do not necessarily see the need for indemnity provisions in statutes dealing with registration of title. Simpson,[162] for example, points out that there are many countries with systems of land registration which do not have provisions for indemnity in their statutes. Such countries are Fiji, Malaysia, Belize, Germany and most of the Continental systems. Simpson argues that although these countries have no provisions for indemnity their system of registered title is operated effectively. Moreover, in view of the fact that those countries which do provide for indemnity do not pay out substantial sums in compensation, it may be argued that indemnity is

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161 Ruoff & Roper, *op.cit.*, p. 879.

162 S. Rowton Simpson, Land Law and Registration, (Cambridge 1976), pp. 179-183.

unnecessary. However, it must be remembered that in registered conveyancing the transfer and vesting or ownership is not effected by the execution of the instrument of transfer or other act of the owner but by the State through its officer, the Registrar. As the Registrar is human, and therefore imperfect and fallible, he is bound to make mistakes which may result in a proprietor suffering from the loss of his title.[163] Since the register, which is operated by the State, has been relied upon at all times by the proprietor it would only be fair for the State to recompense him for the loss of his title due to a mistake made by one of its officers. However, in the case of fraud, a fraudster, for example, may deprive a registered proprietor of his land and transfer it to a *bona fide* purchaser who, having relied on the State operated register, registers himself as proprietor. If the first registered proprietor obtains rectification of the register, then the *bona fide* purchaser should be indemnified for the loss he has suffered since *he relied on a register which contained no adverse interests*. Conversely, if the first proprietor is unable to obtain rectification, then he should obtain indemnity. In both cases since the register has warranted that it is conclusive, those who have relied on it and subsequently suffer loss should be compensated by the State which operates the register.

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[163] In making a claim for indemnity it is not necessary to show that the Registrar was at fault.

In effect the State, in the case of fraud, transfers the burden of paying compensation from the fraudster to itself.[164] Such features make the provisions on indemnity an attractive feature of land registration.

B. The Right to Indemnity

The indemnity provisions in the Registered Land Act 1963 and in the Land Registration Act 1925 are complimentary to the rectification provisions. Section 144 of the Registered Land Act 1963 contains the main provisions for the award of indemnity. Section 144(1) provides:

> "Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of:-
>
> a) any rectification of the register under this Act; or
>
> b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
>
> c) any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act,
>
> shall be entitled to be indemnified by the Government out of moneys provided by the Legislature."

Therefore, there are three main heads, when considering the right to indemnity under section 144(1) of the Registered Land Act 1963, and it is to these we now turn to.

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164 Nevertheless the right to sue the fraudster remains.

1. **Rectification**

Section 144(1)(a) provides that a person suffering damage by reason of "any rectification of the register under this Act" may obtain an indemnity.[165] While this provision may appear wide, it is qualified by the preceding words, that is, the entitlement to indemnity is subject to the provisions of the Act and adverse possession. For example, section 30 of the Registered Land Act 1963 provides that the Registrar may register an overriding interest thus, in effect rectifying the register. Since a registered proprietor takes land subject to overriding interests[166] he suffers no damage if the Registrar subsequently registers an overriding interest under section 30, thereby rectifying the register. Further if the proprietor purchased land, part of it in the possession of a squatter who has

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[165] See section 83(1) of the Land Registration Act 1925. The difference is that under section 144(1)(a) of the Registered Land Act 1963, a person has to show that he suffered 'damage', whereas under section 83(1) of the 1925 Act a person must have suffered 'loss' . The predecessor to the 1963 Act, the Land Registration (Special Areas) Ordinance 1959 had used the word 'loss' in section 90(1). However, the Committee responsible for drafting the 1963 Act substituted the word 'damage' for 'loss' since, in the words of one of the draftsmen, "a person might be registered, in error, as the proprietor of land he was not entitled to own, and he might then be able to claim on rectification, that he had suffered 'loss' whereas he could not maintain that he had suffered 'damage'." - S. Rowton Simpson, *op. cit.*, p. 596. But even such a person might still be able to claim that he had suffered 'damage'. For example, if the transferor made the error, so that he included land he though he owned in the transfer documents, and the purchase price reflected this, the purchaser will certainly have suffered 'damage' if the register is rectified.

[166] Registered Land Act 1963, s. 28.

acquired title, if the squatter succeeds in being registered as the proprietor under the Limitation of Actions Act 1967, the former proprietor would not be entitled to an indemnity for his 'damage' because he was bound by such an interest anyway; moreover rights acquired by virtue of limitation are overriding interests under section 30(f) of the Registered Land Act 1963.

The English courts have taken a similar view in respect of the indemnity provisions under the Land Registration Act 1925. In Chowood v. Lyall[167] the plaintiff was held not to have title to some strips of woodland, even though they had been included in the parcels of the conveyance to them, because the defendant had acquired a good title by adverse possession and was then able to obtain rectification of the register. The plaintiff then claimed an indemnity for the loss of the woodlands[168] but it was held that the rectification in favour of Mrs. Lyall had put the company in no worse position than before rectification, and accordingly since they had suffered no loss, the plaintiffs would not be entitled to indemnity.[169]

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167 [1930] 1 Ch. 426 affirmed [1930] 2 Ch. 156, discussed *supra*.

168 Re Chowood's Registered Land [1933] Ch. 574.

169 The English Law Commission has recommended that the indemnity scheme should be extended to cover overriding interests. Although a registered proprietor would still automatically take subject to overriding interests, he will be able to apply for indemnity - Third Report, *op. cit.*, para. 3.29.

Section 144(1)(a) of the Registered Land Act enables a person who has been the victim of fraud to be able to recover indemnity. For example in the case of Natwarlal Chauhan v. Zakaria Omagwa,[170] the defendant who had the register rectified against him because he was not in possession would have been entitled to indemnity under this sub-section. The subsection also enables those who have been victims of fraud but are not able to obtain rectification due to exclusion of first registrations in section 143(1) of the Registered Land Act 1963, to be entitled to receive an indemnity.

2. Non-Rectification

Where a mistake or omission has occurred in the register, but it is not rectified, the position in Kenya and in England respectively is that any person suffering 'damage'[171] or 'loss'[172] is entitled to indemnity. The significant difference between the Registered Land Act 1963 and the Land Registration Act 1925 is that the former provides in section 144(1)(b) that mistakes or omissions in first registrations cannot be indemnified. Just as in the case of rectification[173] this is a significant exception. When discussing the reasons for the exclusion of the

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[170] Civil Appeal No. 12 of 1980 (unreported), discussed *supra*.

[171] Registered Land Act 1963, s. 144(1)(b).

[172] Land Registration Act 1925, s. 83(2).

[173] Registered Land Act 1963, s. 143(1).

rectification of first registrations under section 143(1) of the Registered Land Act 1963, it was seen that one of the reasons for the exclusion was political.[174] However, although the Native Lands Registration Ordinance 1959 had provided that there could be no rectification of first registrations,[175] section 90(1)(b) provided that any person suffering loss by reason of an error or omission which could not be rectified was entitled to indemnity. In the District Commissioner, Kiambu v. R. *Ex parte* Ethan Njau,[176] Njau, although unable to obtain rectification of the register despite the *ultra vires* action of the adjudication committee, was advised by the Court of Appeal that he may have been able to obtain indemnity under section 90(1)(b).[177] Four years later the Registered Land Act 1963 was enacted and it prevented persons suffering mistakes and omissions in first registrations from being able to receive indemnity. Although it has not been said why this change was made[178] it may be due to the fact that the Njau case

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174 *Supra*.

175 S. 89(1)(a).

176 [1960] E.A. 109.

177 [1960] E.A. 109, at p. 129. It is not known whether he succeeded in obtaining an indemnity.

178 The amendment was not discussed in Parliament when the Registered Land Bill was being debated. Furthermore the 30 year rule prevented the writer from being able to look at official documents in the Kenya National Archives which would have thrown light on the matter.

had made the Government realise that many people would be entitled to claim indemnity if they failed to obtain rectification,[179] since, as indicated earlier, many mistakes had been made during land adjudication which affected many proprietors. If indemnity was available, this would have resulted in a flood of cases as people brought compensation claims, and it may have been feared that the cost of indemnifying these claims would have been prohibitive. As a result it may have been decided to prevent the indemnity of mistakes and errors in first registrations thereby bringing this provision in line with section 143(1) of the Registered Land Act 1963.

However, despite the exclusion of first registrations in section 144(1)(b) of the Registered Land Act 1963, other registrations are not affected.

3. **Errors**

Under section 144(1)(c) of the Registered Land Act 1963 any person who suffers damage due to an error in an official search or a copy or extract from any document or plan certified under the Act is entitled to be indemnified.[180] An example of an error is where the official search certificate states that the title has no adverse interests and on the strength of this a

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179 The Njau case had raised a lot of publicity - for an account see M.P.K. Sorrenson, *Land Reform in the Kikuyu Country*, (Nairobi 1967), pp. 203-206.

180 *C.f.* Land Registration Act 1925, s. 83(3).

person purchases the registered land only to discover that there was indeed a charge registered against the title. The registered proprietor would be entitled to be indemnified for the damage suffered by having to redeem the charge. In Kenya, there appears to have been a serious problem whereby official searches containing errors made by Land Registry officials were causing purchasers relying on them to suffer damage by subsequently discovering that there were adverse interests registered against the title. It meant that the proprietors relying on the certificates had to be indemnified because of the mistakes and omissions on the search certificates. This prompted a letter from the Chief Land Registrar warning Land Registrars of the need to exercise care when issuing search certificates. The letter is worth quoting in full. He said:

> "I must emphasize that by issuing a Search Certificate, a Land Registrar assumes responsibility on behalf of the Government for the correctness of the information given. Should any person incur any loss or damage by reason of a mistake in a Search Certificate, he would under section 144 of the Registered Land Act be entitled to indemnity from the Government. The Land Registrars should not however expect to put the Government into unnecessary expense by their carelessness or negligence. It should therefore be made clear to the Land Registrars that any money paid by way of indemnity occasioned by carelessness or negligence will be recovered from the Land Registrar responsible."[181]

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[181] Letter from the Chief Land Registrar to the Land Registrars of Nyeri, Nakuru, Kakamega, Kisumu, Mombasa and Embu, 1 July 1982.

This meant that Land Registrars would be personally liable for such carelessness[182]. In an interview with the Deputy Chief Land Registrar[183] he pointed out to the writer that some Land Registrars had been unscrupulous and had sometimes issued Search Certificates which did not reflect the true position of the register, and these actions had subsequently caused the Government loss when they had to indemnify those who had relied on the Certificates and had subsequently suffered damage. The above letter would serve as a potent warning to those who would be tempted to engage in such conduct that they would be liable to reimburse the government for the sums paid out as a result of their carelessness. The Deputy Chief Land Registrar pointed out that some Registrars had been dismissed for their carelessness and negligence. He narrated the example of a Land Registrar who negligently registered a charge against a registered title before ensuring that Land Control Board consent was obtained.[184] The Board refused to grant consent and the charge was therefore void.[185] By this time the bank had already

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182 See also Registered Land Act 1963, s 147 where it is evident that the Minister is entitled to recover the amount paid by way of indemnity "from *any person* who has caused or substantially contributed to the loss by his fraud or negligence" (italics mine). hence there would be power to recover the money from a Land Registrar who negligently caused an error in a search certificate for example.

183 Nairobi Lands Office, 2 October 1989.

184 Land Control Act 1967, s. 6(1)).

185 *Ibid*.

advanced the moneys to the registered proprietor who disappeared. Since the charge was void, the bank was unable to realise its security. Accordingly, it sought indemnity from the Government and it succeeded. The negligent Land Registrar was later removed from his position.

This revelation would probably explain why the Registered Land Act 1963 contains no provision providing that Land Registrars or other officials in the Land Registries would not be liable for any act or matter done or omitted to be done in good faith.[186] This therefore puts a very heavy responsibility upon Land Registrars in Kenya to be meticulous in compiling the register and in issuing Search Certificates and other documents connected with the register. The absence of this provision makes a Land Registrar potentially liable in damages for mistakes and omissions made in good faith.[187]

C. Limits to Indemnity

1. Fraud and Negligence

Under section 144(2) of the Registered Land Act 1963 no indemnity is payable to "any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made

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[186] The Land Registration Act 1925 contains such a provision in section 131. The Registrar, however, would be liable for *mala fide* acts.

[187] See below.

bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage." This disqualification is less severe than section 143(2) which provides that no rectification is available to the proprietor who substantially contributed to the fraud or mistake by his 'act, neglect, or default'.[188] The form of words in section 144(2) of the Registered Land Act 1963 is similar to section 83(5)(a) of the Land Registration Act 1925 except that the latter sub-section uses 'lack of proper care' rather than 'negligence'. Prior to its amendment by the Land Registration and Land Charges Act 1971 section 83(5) had contained the words 'act neglect or default'. However, it was argued that this form of words seriously limited the availability of indemnity to proprietors who, through no fault of theirs, were found to have substantially contributed to a mistake for example.[189]

2. Errors in Survey

Section 148(1) of the Registered Land Act 1963 provides:

> "As between the Government and a proprietor, no claim to indemnity shall arise and no suit shall be maintained on account of any surplus or deficiency in the area or measurement of any land disclosed by a survey showing an area or measurement differing from the area or measurement disclosed on any subsequent

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188 See *supra*.

189 S. Cretney & G. Dworkin, Rectification and Indemnity: Illusion and Reality, (1968) 84 L.Q.R. 528.

> survey or from the area or measurement shown in the register or on the registry map."

This subsection refers to situation where the area or measurements on the ground are different from those on the Registry Index Map, such discrepancy having been discovered by a subsequent survey. The Chief Land Registrar highlighted that this problem arises with surveys that were carried out during land adjudication.[190] As indicated previously, these surveys were carried out in a hurry, resulting in many errors being made.[191] This provision therefore protects the Government from having to pay out indemnity to proprietors who discover the discrepancy in the area of their land and also prevents proprietors from bringing actions against the Government in respect of such discrepancies.[192]

However, where a purchaser of registered land, for example, bought land which was stated on the register to measure an area of 3 acres, and subsequently has the

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[190] Practice Instruction: Use of Registry Index Maps in the Determination of Boundary Disputes and the Role of Surveyors in the Same, 8 March 1985.

[191] As in Fort Hall where the scale of the errors resulted the enactment of the Land Registration (Fort Hall District) Special Provisions Ordinance 1961 to deal with the problem.

[192] The English Land Registrar has the power to rectify where too much land has been registered in error, under the Land Registration Rules 1925, r. 14. Indemnity under section 83(1) of the 1925 Act would be available to a person suffering loss as a result of a rule 14 rectification since the 1925 rules enjoy "the same force as if enacted in [the 1925] Act." - Land Registration Act 1925, s. 144(1). See also Law Commission, Property Law: Third Report on Land Registration, Law Com. No. 158, para. 3.3.

land surveyed and discovers that it only measures 2 acres then according section 148(2) the proprietor would be entitled to be indemnified since the purchase price he will have paid will have been calculated on the basis of the area shown on the register. However, section 148(2) imposes a limit of six months "from the date of registration of the instrument under which the proprietor acquired the land." It would mean, therefore, that the proprietor would have to survey his land immediately after registration, in order to come within the six month period.

It is submitted that this limitation period is too short.[193] Since the purchaser of registered land has relied on a register that is meant to be conclusive and which he should not have any reason to doubt it is unfair to stipulate such a short period since it is likely that the discrepancy would come to his knowledge after a long time. It is submitted that the period should be six years to fall in line with the limitation period for the other provisions.

However, in view of the present short limitation period it would be prudent for purchasers of registered

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[193] Under the section 83(11) of the Land Registration Act 1925 liability to pay indemnity is deemed to be a simple contract debt, so that it is barred after six years; but time does not begin to run until the claimant knows of the existence of his claim, or but for his own default might have known. Although the Registered Land Act 1963 does not specify what the limitation period for recovering indemnity under section 144 is, it would appear that sections 4(1)(d) and 37 of the Limitation of Actions Act 1967 would make the limitation period to be six years from the date on which the course of action accrued.

land to have the land measured before registering the transaction and therefore avoid the problem of having to seek indemnity, which can take a long time to recover.

Although the Land Registration Act 1925 does not contain a provision similar to section 148 of the Registered Land Act 1963, nevertheless an equivalent claim for indemnity would lie in respect of fixed boundaries. Such boundaries are precisely measure and if there was a rectification of those boundaries then an indemnity claim could be sustained.[194]

3. Mistakes and Omissions in First Registrations

Section 144(1)(b) of the Registered Land Act 1963 provides that a person suffering damage by reason of

> "any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration ..."

shall be entitled to be indemnified. This sub-section when read together with section 144(1)(a) would appear to allow indemnity for a first registration obtained by fraud. This is evident from the fact that section 144(1)(b) provides that indemnity is not payable for "a mistake or omission in a first registration." Therefore, although no first registration can be rectified, whether obtained by fraud or otherwise, indemnity is available for a first registration

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[194] See Ruoff & Roper, Registered Conveyancing, 5th Ed., (London 1986, p. 66).

obtained by fraud but not one made by mistake. Hence, section 144(1)(b) appears to mitigate the rigours of section 143(1), albeit limited to first registrations obtained by fraud.

What remedy is therefore available to a person who has, due to a mistake committed by the Land Registry for example, had his land registered in the name of another, and cannot have the register rectified because it is a first registration nor can he obtain indemnity? It is submitted that the only remedy available is to sue the Land Registrar for negligence. It is notable that the Registered Land Act 1963 does not contain a provision providing for the immunity of the Chief Land Registrar and other officers of the Registry from suit for actions done in good faith, unlike its predecessor, the Native Lands Registration Act 1959, which contained such a provision in section 97.[195] This makes it possible for an individual to bring an action against the Land Registrar for damages, whether the mistake was made in good faith or not, or preferably against the Government, since the latter would be vicariously liable for the acts of its officials.[196] This is illustrated in Kimani v. Attorney-General.[197] The plaintiff and one Bari both claimed to own a certain

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[195] *C.f.* Land Registration Act 1925, s. 131 which contains a similar provision.

[196] Government Proceedings Act Cap.40, s. 4(3). In suing the Government he would bring his action against the Attorney General.

[197] [1969] E.A. 29.

plot of land when the land was being consolidated. The land consolidation committee for the area determined the dispute and adjudged that the land belonged to the plaintiff, whose name was subsequently entered into the Record of Existing Rights under the Native Land Tenure Rules 1956, and later transferred to the Adjudication Register under the Native Land Registration Ordinance 1959 which replaced the Rules. However, Bari covertly succeeded in convincing Government officials to have the case reopened and, as a result, another land consolidation committee held that the land should be subdivided and Bari's name be entered on the reigster. The actions of Bari were clearly improper and the order of the committee to have the land subdivided was evidently wrongly obtained.[198] The plaintiff, in effect, brought an action for rectification of the register but failed.[199] He then sued the Attorney General for negligence, claiming damages for being wrongfully deprived of his land, his name having been removed from the register without any justification.

The High Court held that the Government was liable in damages for the acts of its officials who had removed the name of the plaintiff from the register. Trevelyan J held that there was a duty of care between the plaintiff and the Government Officers concerned

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198 *Ibid*, at p. 30.

199 Apparently, because it was a first registration, *ibid*, at p. 30. See P.J. Bayne, Government Liability for Torts by Public Officials, 6 E.A.L.J. 243 at p. 244.

(among whom included the Land Registrar) not to remove his name from the register and that the duty had been breached when the plaintiff's name was removed from the register. Accordingly, the plaintiff was awarded damages for the loss of his land.[200] Although the Attorney General appealed to the Court of Appeal on the level of damages awarded by the High Court, which were reduced accordingly, the decision of Trevelyan J. on the substantive issue was affirmed.[201]

However, pursuing this remedy causes problems for a chargee, whose charge is not registered by the Registrar against the relevant title, and the chargee consequently suffers economic loss. In Kimani v. Attorney-General,[202] Trevelyan J. in the High Court had awarded the plaintiff damages for loss of profits, but on appeal, it was held that such loss was economic and therefore could not be recovered. The appeal against this head of damage was therefore allowed. Such a chargee would be unable to recover for such loss.[203]

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200 Surprisingly the Attorney General did not raise the defence available in sections 4(4) of the Government Proceedings Act Cap 40, and section 97 of the Native Lands Registration Ordinance 1959 which negatived the Government's liability.

201 [1969] E.A. 502.

202 [1969[E.A. 29.

203 In contrast, in the English case of Ministry of Housing and Local Government v. Sharp [1970] 2 Q.B. 223, the plaintiff was able to recover economic loss against a local authority which, through its servant, the local land charges registrar, negligently issued a search certificate which failed to disclose the plaintiff's interest. English law, however, draws the line where economic loss is suffered as a result of a negligent misstatement, and where it arises out of

The Land Registration Act 1925 contains four other instances not included in the Registered Land Act 1963 where indemnity is not payable to a claimant and they are: for mines and mineral rights unless they are expressly included in the title;[204] where a purchaser has acquired an interest under a registered disposition from a company free from any mortgage, charge, debenture, debenture stock or trust deed (whether or not it has been registered under the Companies Acts) unless it is protected on the register of title;[205] where a registered lease is disclaimed by the trustee in bankruptcy and an order is made by the court vesting the lease in any person;[206] and costs incurred in taking and defending any legal proceedings without the consent of the Registrar.[207]

D. **Levels of Indemnity**

Both the Land Registration Act 1925 and the Registered Land Act 1963 provide that a person is

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damage or injury to property; in the former it is recoverable whereas in the latter, it is not - see generally Winfield and Jolowicz on Tort, 13th ed. by W.V.H. Rogers, (London 1989) p. 84 *et. seq.* However, Salmon L.J. in Ministry of Housing, *infra*, at p. 278, did admit that the case did "not precisely fit into any category of negligence yet considered by the courts".

204 Land Registration Act 1925, s. 83(5)(b).

205 *Ibid.*, s. 60(2).

206 *Ibid.*, s. 42(2).

207 *Ibid.*, s. 83(5)(c). Under the section 146 of the Registered Land Act 1963 the Registrar has the discretion to award such costs. However, no consent needs to be obtained from him.

compensated for the actual loss that he has suffered. Where indemnity is claimed for non-rectification of the register both statutes provide that it shall not exceed the value of the interest at the time when the mistake, error or omission which caused the damage or loss was made.[208] However, this may result in the indemnity awarded being inadequate especially where the mistake is discovered a long time after it was made, and in the meantime the value of the land has risen. Both statutes provide that indemnity for rectification is limited to the value of the lost interest immediately before rectification.[209]

Since indemnity is paid for by the State it is accordingly provided in section 144(1) of the Registered Land Act 1963 that claims are paid out of moneys provided for by Parliament. In an interview with the Kenyan Deputy Chief Land Registrar,[210] he pointed out that very little is paid out by way of indemnity, although he himself was unaware of the precise amounts involved.[211] Nevertheless, he said that it is probably due to the fact that there are not

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[208] Registered Land Act 1963, s. 145(a); Land Registration Act 1925, s. 83(6)(a).

[209] Registered Land Act 1963, s. 145(b); Land Registration Act 1925, s. 83(6)(b).

[210] Mr. Kago Gachiri.

[211] It is unfortunate that in Kenya there are no official records providing how much the Government has had to pay out every year by way of indemnity. Apparently such records confidential. It is therefore impossible to compare numerically the levels of indemnity in Kenya with those in England.

many applications for indemnity. This may reflect the fact that the tight limits in the provisions on indemnity in the Registered Land Act 1963, such as no indemnity for mistakes or omissions in first registrations, may weed out many applications for indemnity.

Section 146 of the Registered Land Act 1963 provides that on the application of an interested party the Registrar may determine whether a right of indemnity has arisen, and if so, can award indemnity and has the discretion to award any costs and expenses properly incurred in the matter. However, in practice, where an application for indemnity includes a threat to sue the Government the Chief Land Registrar, as a matter of caution, passes on these claims to the Attorney General who then determines the matter, that is whether indemnity should be awarded or not.[212] The English Land Registrar has no power to determine whether a person is entitled to indemnity and the amount thereof. This power was taken away by the Land Registration and Land Charges Act 1971,[213] and now only the High Court has the power to determine such claims. Nevertheless the 1971 Act still allows the Land Registrar to settle indemnity claims by agreement.[214]

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212 Interview with the Deputy Chief Land Registrar, Mr. Kago Gachiri, 2 October, 1989.

213 S. 2(1).

214 *Ibid.*, s. 2(5).

E. Conclusion

Undoubtedly the two biggest differences in the rectification and indemnity provisions in the Registered Land Act 1963 and the Land Registration Act 1925 are that the 1963 Act does not allow a court to rectify a first registration irrespective of the circumstances it was obtained;[215] neither does the 1963 Act provide for indemnity of mistakes and omissions in first registrations.[216] It was shown that there were three reasons why section 143(1) in particular was inserted in the Act;[217] to prevent vexatious litigants, to ensure the finality of the register, and thirdly, to prevent the system of land registration in Central Province from being undermined since it had been pushed through with tremendous haste in the 1950's, resulting in numerous errors and mistakes being made; furthermore many of those deprived of their land were political detainees who were not present during adjudication to protect their claims.

However, more then 25 years have elapsed since the Registered Land Act 1963 was enacted and the question arises whether the exception to rectification in section 143(1) and consequently the exception in section 144(1)(b) of the Act serve any useful purpose today. Undoubtedly these sections cause untold

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

216 *Ibid.*, s. 144(1)(b).

217 *Supra.*

hardship on individuals who were not registered as first proprietors of their land parcels due to mistakes made by adjudication and land registry officials, such mistakes only being discovered years later. Such individuals would not be able to obtain either rectification or indemnity. The only option for these is to engage in a costly action to sue the Government for the negligence of the Land Registrar, which may be difficult to establish. Where an individual has been the victim of fraud, and the fraudster registers himself as the first registered proprietor, the individual would be unable to obtain rectification of the register although he would be entitled to an indemnity. Nevertheless, the development of the customary trust by the courts has minimised to some extent the problem created by section 143(1); the person who had obtained registration as proprietor by fraud would be unable to assert his right if the fraud could be proved, but would instead hold on customary trust.[218] Unfortunately, section 143(1) may have the effect of encouraging unscrupulous individuals to use the Registered Land Act 1963 as an instrument of fraud. In any event, even if a person who has been the victim of the fraud could be indemnified for the loss of his title, money is poor compensation where the loss of land is involved, especially in Kenya where land is

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[218] See pp. 539-542, supra. Moreover, the fraudster can also be prosecuted for a criminal offence under section 155(2)(a) of the Registered Land Act 1963. For example in Republic v. Godfrey Kariuki Kinyanjui Criminal Case No. 35 of 1982 Kiambu S.M.R.C. (unreported), the defendant was convicted for obtaining a certificate of title by fraudulent means and disposing the registered land.

the sole means of livelihood for many people and in view of the African concept of land is priceless.[219]

The issue whether sections 143(1) and 144(1)(b) of the Registered Land Act 1963 should be repealed was considered as far back as 1966 by the Lawrance Mission. In their Report the Mission said that while they did not wish to start a flood of cases or re-open old wounds which might revive the bitterness that existed within the Kikuyu tribe at the time of the Emergency, there were some cases which would benefit from ventilation and should be reviewed by the High Court.[220] Accordingly the Mission suggested that section 143(1) of the Registered Land Act 1963 should be amended by deleting the words "(other than a first registration)" and section 143(2) to be amended to ensure that the title of a proprietor on a first registration is protected. They also advocated that section 144(1)(b) of the 1963 Act should also be amended by deleting the words "other than a mistake or omission in a first registration" enabling individuals who were affected by the errors committed during the Emergency to be compensated if they could not obtain rectification of the register. However, the Government did not accept these recommendations.[221] The matter

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219 See Chapter Two, *supra*.

220 Report of the Mission on Land Consolidation and Registration in Kenya, 1965-66, (London 1966), paras. 273, 274.

221 See The National Assembly, Official Report, Vol. XIV (6th Sess.), Col. 1943. It did, however, accept the other recommendations of the Mission, such as the

was also debated upon by Parliament years later and MPs felt that section 143(1) should be repealed, but these views were rejected by the Government because it felt that repealing the sub section would cause the political animosities of the 1950s to break out again, as well as the increase of the litigation that the sub-section was designed to prevent.[222]

It therefore appears unlikely that the sections 143(1) and 144(1) are likely to be amended for a long time. Nevertheless the use of the customary trust by the courts to prevent registered proprietors from, in many cases, defrauding their relatives has lessened the impact of section 143(1) of the Registered Land Act 1963. The establishment of the trust enables an order *in personam* to be issued against the proprietor ordering him to transfer the registered land to the real owners(s). While this procedure enables the court to have the register rectified without breaching section 143(1), it is limited in its application since the customary trust will not be established in every situation where fraud has been committed.

The powers of the Kenyan Land Registrar to rectify the register are limited when compared to those of the English Land Registrar. The Kenyan Registrar can only rectify the register in minor matters and where the

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adoption of the Land Adjudication Bill which the Mission drafted, and which became the Land Adjudication Act 1968.

222 See The National Assembly, Official Report, Vol. LVI, (24 Nov. 1981), Col. 1913.

material interests of any proprietor are not affected. The Registrar cannot rectify where there has been fraud, unless of course he can obtain the consent of all persons interested. In contrast the English Land Registrar can rectify any registration if he deems it just to do so.[223]

The limited power of rectification by the Kenyan Land Registrar and the limitation of the rectification of first registrations reflects the finality of the register of land under the Registered Land Act 1963, thereby absolutely preventing any recourse to the past to find the history of a title.

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223 Land Registration Act 1925, s. 83(4).

Chapter Nine

THE PROBLEMS CREATED BY THE MAGISTRATES' JURISDICTION (AMENDMENT) ACT 1981

I. Introduction

Up to 1981 jurisdiction over land registered under the Registered Land Act 1963 was exercised by the High Court where the value was more than 10,000 kshs, and where it was less, the High Court exercised concurrent jurisdiction with the Resident Magistrates Court.[1] Section 159 of the Registered Land Act 1963 governs the jurisdiction of the courts over land registered under the Act.[2] However, the Magistrates Jurisdiction (Amendment) Act 1981 (hereinafter 'M.J.(A.) A. 1981') made far reaching changes to the jurisdiction of the courts over land registered under the 1963 Act through the amendment of section 159 of that Act.

The M.J.(A.) A. 1981 amended the Magistrates' Courts Act 1967 by introducing tribunals known as the

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1 The Magistrates Courts in Kenya are divided into two tiers: the Resident Magistrates' and the District Magistrates' Courts. Both are subordinate courts, with the District Magistrates' Court lying at the bottom of the tier. Their jurisdiction is governed by the Magistrates' Courts Act 1967. Unlike the magistrates' courts in England which are primarily criminal courts with limited civil jurisdiction (see Magistrates' Courts Act 1980; Terence Ingman, The English Legal Process, 3rd ed., (London 1990), pp.36-58), the Magistrates' Courts in Kenya exercise criminal and wide civil jurisdiction.

2 Appeal from the High Court lies to the Court of Appeal while from the Resident Magistrates' Court it lies to the High Court and finally to the Court of Appeal - Civil Procedure Act 1924, ss. 65(1), 66.

panels of elders.[3] These panels were composed of elders who were defined as,

> " ... persons in the community or communities ... who are recognised by custom in the community or communities as being, by virtue of age, experience or otherwise, competent to resolve issues between parties ..."[4]

Unlike the courts of normal jurisdiction, these panels were composed of lay individuals with no legal training. They were to exercise jurisdiction over certain land matters, namely, the beneficial ownership of land, division and determination of boundaries, claims to occupy or work land, and trespass to land.[5] The magistrates' courts were no longer to exercise jurisdiction over such matters.[6] Importantly, the M.J. (A.) A. 1981 amended section 159 of the Registered Land Act 1963 to enable these panels to exercise jurisdiction in such matters over land registered under the 1963 Act.

Herein lies the root of the problem. To begin with, the amended section 159 was poorly drafted. The High Court, the Resident Magistrates' Court and the panels of elders were to exercise jurisdiction over registered land but the limits of this jurisdiction are ambiguous. Further problems were generated by the provisions creating the panels of elders. The panels

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3 Magistrates' Courts Act 1967, ss. 9A(2), 9B.

4 Magistrates' Courts Act 1967, s. 9F.

5 *Ibid.*, s. 9A(1).

6 *Ibid.*, preamble and s. 9A(1).

of elders are composed of people who have a knowledge of customary law but had no legal training. Since there was nobody with legal training who sat on the panels, either as chairman or as an advisor to the panels, many decisions have been reached which conflict with the provisions of the Registered Land Act 1963. As a result the 1963 Act is in danger of being undermined, a problem made serious by the fact that the higher courts cannot correct these decisions due to the provisions of the 1981 Act which make it difficult to make an appeal from the decision of a panel of elders.

This chapter considers how section 159 as amended can be interpreted to achieve a measure of certainty with respect to the jurisdiction of the courts. The problems created by the panels of elders are considered, particularly how decisions of these panels have conflicted with the provisions of the Registered Land Act 1963 and other provisions of the law. One problematic area is procedural. The Land Registrar has specific jurisdiction to determine boundary disputes of registered land, but so have the panels. This has created a procedural conflict which the Chief Land Registrar has tried to solve with limited success.

In view of the difficulties caused by the creation of the panels of elders, proposals for reforming the system are analysed in the concluding part of this chapter.

II. Section 159 and the Jurisdiction of the High Court and the Panels of Elders

Section 159 of the Registered Land Act 1963, as amended by the M.J.(A.) A. 1981, governs the Jurisdiction of the High Court and the Resident Magistrates Court over land registered under the Act.[7] That section provides,

> "Civil suits and proceedings relating to the title to, or the possession of, land, or to the title *to a lease or charge, registered* under this Act, or to any interest in such land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of Part III A of the Magistrates' Cours Act, in accordance with that part."

It is evident that section 159 as amended is ambiguous in the extreme. The ambiguity is created in part by the portion which states "Civil suits [etc. etc.] ... shall be tried by the High Court *and* where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrates Court ..." (italics mine). The inclusion of the conjunction 'and' raises the question as to whether the jurisdiction of the High Court is limited to matters concerning registered land where the value of the land exceeds £25,000 (500,000 k sh) or whether

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7 The District Magistrates Courts never had jurisdiction over land registered under the Registered Land Act 1963 - s. 159.

the jurisdiction is concurrent with that of the Resident Magistrates Court.

In addition, section 159 raises further questions in the part which states,

> " ... or, where the dispute comes within the provisions of Part IIIA of the Magistrates Cours Act, in accordance with that part.

Does this mean that the jurisdiction of the panel of elders, is merely concurrent with that of the Resident Magistrates Courts within section 159 or is it *also* concurrent with that of the High Court, that is having jurisdiction over land valued at more than £25,000?

In its pre-1981 form, section 159 was clear. It stated,

> " ...[C]ivil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being an interest which is registered or registrable under this Act, or being an interest which is expressed by this Act not to requires registration, shall ... be tried by the High Court, or, where the value of the subject matter in dispute does not exceed ten thousand shillings, *by the High Court*, or a subordinate court held by a senior Resident Magistrate or a Resident Magistrate" (italics mine).

It was clear, in this version, that the jurisdiction of the High Court extended to land over 10,000/- and concurrent with the jurisdiction of the Resident Magistrates Courts where the value was less than 10,000/-. How then, is section 159 in its present form, to be construed?

It was the intention of Parliament to limit the jurisdiction of the High Court to matters over £25,000 where land was registered. This was made clear by the Attorney General when moving the Magistrates Jurisdiction (Amendment) Bill during its second reading. He said,

> " ... there has to be some division in the case of registered land between the kinds of cases which would go to the High Court and those which would be heard by the elders or to [the] Resident Magistrates Court [*sic*], and that the dividing line is where the value of the subject matter is in dispute. Now we have put a figure of £25,000 which is a very high figure ... [T]his figure was formerly under the jurisdiction of the High Court. But now the elders will look into that *and only the cases above that figure will go to the High Court*.8" (Italics mine).

However, the words of section 159 do not make this intention clear. The clearest method in achieving the intention would have been to insert an earlier clause emphasising that the mandatory reference to the High Court ('shall be tried by the High Court') only covered claims exceeding £25,000. For example

> "Civil suits [etc. etc.] ... *where the value of the subject matters in dispute exceeds £25,000*, shall be tried by the High Court, *but* where the said value does not exceed £25,000, shall be tried by the Resident Magistrates Court."

To come to the construction of section 159 advanced by Parliament, it is necessary to imply the italicised words into the statute. The use of the conjunction 'but' (above) is preferable to 'and' (in the persent

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8 The National Assembly, Official Report, Vol. LVI, Col. 1799 (24 November 1981).

form) in making the intention clear. The pre-1981 version acquired its clarity by express reference to 'the High Court' after the value-limitation clause clearly indicating that the jurisdiction of the High Court was concurrent with that of the Resident Magistrates Court.

However, since the courts cannot revert to the debates of the Kenya Parliament as reported in Hansard[9] and therefore discover what the intention of Parliament was, how should they construe section 159?

If the amended version is construed with reference to the pre-1981 version, the intention of Parliament becomes tolerably clear - viz, to confine claims where the value does not exceed £25,000 to the Resident Magistrates' Court. Hence, the jurisdiction of the High Court would not be concurrent with that of the Resident Magistrates Court, but would be confined to claims over £25,000. Although this point has never been argued before the courts, Nyarangi J.A. in Wamalwa Wekesa v. Patrick Muchwenge[10] appeared to imply, without discussion, that the jurisdiction of the High Court was not concurrent with that of the Resident Magistrates Court.

However, it is submitted that this construction is in conflict with the Constitution of Kenya. Section

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9 Tudor Jackson, The Law of Kenya, 3rd ed. (Nairobi 1988), p. 10. Katikiro of Buganda v Attorney-General of Uganda [1959] E.A. 382 at p. 397, per O'Connor P.

10 Civil Appeal No. 107 of 1985 (unreported).

60(1) of the Constitution provides in part that the High Court

> " ... shall have *unlimited original jurisdiction* in civil and criminal matters *and such other jurisdiction and powers* as may be conferred on it by this constitution or any other law" (italics mine).

It follows that the jurisdiction of the High Court cannot be ousted *even by an express provision of a statute*.[11] Its jurisdiction can only be ousted or limited by an amendment to the Consitution.[12] According to section 3 of the Constitution,

> " ... if any other law is inconsistent with this constitution this constitution shall prevail and the other law shall, *to the extent of the inconsistency, be void*" (italics mine).

Hence, if section 159 was construed to limit the jurisdiction of the High Court to land over £25,000, it would be in conflict with the Constitution. In avoiding such a conflict, the ambiguity created by section 159 should be resolved with reference to the Constitution, in favour of the High Court retaining concurrent jurisdiction with the Resident Magistrates' Court. Undoubtedly, this would be at odds with the intention of Parliament. However, it is respectfully submitted that when enacting the M.J. (A.) A. 1981, section 60(1) of the Constitution should also have been

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11 Elijah arap Koross v. Anthony Oyier, H.C.C.C. No. 10 of 1980 (unreported), noted in Nairobi Law Monthly, No. 14, February 1989.

12 Christine Miller v. Cecil Miller, Civil Application No. Nai. 12 of 1988 (unreported), noted in Nairobi Law Monthly, No.14, February 1989.

amended to reflect the limit of the High Courts' jurisdiction with respect to registered land.[13] The failure to have done so means that section 159 of the Registered Land Act 1963 as amended is void, in so far as it conflicts with the Constitution. Therefore the High Court should retain jurisdiction over registered land where the value is less than £25,000.

The other question is whether panels of elders have a concurrent jurisdiction with the High Court where the value exceeds £25,000. The argument in favour of a concurrent jurisdiction is that the use of 'or' in section 159 indicates that the restriction on the Resident Magistrates Courts jurisdiction to £25,000 is not to affect the panels of elders: since the dispute comes within Part IIIA of the Magistrates Courts Act 1967, it must be '[tried] ... in accordance with that Part.' Since Part IIIA does not itself set any financial limit on the panels powers, it would follow that their jurisdiction is concurrent with that of the High Court.

However, the argument against concurrent jurisdiction is evident from section 9A of the Magistrates Courts Act 1967. Since, according to that section, the panels are taking over jurisdiction from the Magistrates Courts in certain matters, their jurisdiction should be similarly limited to £25,000 in

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13 A special Act of Parliament has to be enacted to amend the Constitution, which should have the support of two-thirds majority of the members of Parliament - Constitution of Kenya, ss. 47(1)(2).

the absence of any specific provision. In the absence of authority on this point, this argument is attractive and is preferable to the former.

III. Jurisdiction of the English Courts

Section 138 of the Land Registration Act 1925 governs the courts having jurisdiction with respect to land registered under the Act. Section 138(1) provides that

> "[A]ny jurisdiction conferred on the High Court by [the Land Registration Act 1925] or by the Land Registration and Land Charges Act 1971 may also be exercised, to such extent as may be prescribed, by county courts."

However, no such rules extending jurisdiction to the county courts have yet been made[14]. Therefore, a reference to "the Court" in the 1925 Act confines it to the High Court.[15] However, section 82(1)(a) of the 1925 Act provides that rectification of the register may be ordered by "a court of competent jurisdiction" if that court has decided that a person is entitled to any estate, right or interest in or to any registered land. In Watts v. Waller[16] it was held that a county

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[14] But the Courts and Legal Services Act 1990 considerably widens the jurisdiction of the County Courts. Section 1 enables the Lord Chancellor to make orders allocating proceedings between the High Court and the County Court. Personal actions where less than £50,000 is at stake have to be commenced in the County Court. Section 2 provides for the High Court to transfer proceedings to a County Court and vice-versa.

[15] Matters within the jurisdiction of the High Court and assigned to the Chancery Division - Land Registration Act 1925, s. 138(2).

[16] [1972] 3 All E.R. 257.

court was "a court of competent jurisdiction", and therefore had jurisdiction to order the vacation of a notice.

Therefore, unlike Kenya where panels of elders, composed of lay people have jurisdiction to determine certain matters concerning land registered under the Registered Land Act 1963, lay people do not hear and determine disputes under the Land Registration Act 1925. Indeed lay people play a very small role in the English judicial system where the determination of land matters is concerned.[17] They are appointed to the panels of Rent Tribuanals and Rent Assessment Committees where they may sit as chairpersons; moreover, lay persons can be appointed to sit in the Local Valuation courts which value property for rating purposes.

Questions concerning title to land and allied matters require people with the knowledge and skill to grasp the issues, and it would be difficult for a lay person to be expected to do so, and more so to adjudicate over such matters. Hence, such questions are dealt with the judges of the High Court, who when appointed are barristers of at least 10 years standing; the county court is composed of circuit judges, who must also be barristers of at least 10 years standing, and registrars who are solicitors of at least 7 years

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[17] This is in contrast to the magistrates courts, where the majority of magistrates are lay persons - see section V, *infra*.

standing.[18] The next section highlights the problems caused by the use of lay people in the determination of disputes over registered land in Kenya.

IV Problems Created by the Panels of Elders

While moving the Magistrates Jurisdiction (Amendment) Bill during its second reading the Attorney General explained that the panels were being created in response to the dissatisfaction that had been expressed by farmers at the way the District Magistrates Courts in particular, were conducting cases. Many people were of the opinion that these courts were not often understanding the issues of the disputes before them, nor were they recording those issues or taking proper evidence. Consequently, when appeals were made to the High Court, the court was faced with a record that was incomplete or insufficiently imprecise to form the basis of an appeal and very often the High Court had no alternative but to either persuade the parties to have the case heard before elders, or to have the case re-tried by the magistrate. Parties therefore frequently experienced delay, expense and frustration.[19]

Therefore, the Attorney General felt that since most communities in the country had a customary machinery for the settling of disputes by means of

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18 Walker & Walker, The English Legal System, 6th ed. by R. J. Walker, (London 1985), pp. 193, 201, 210

19 The National Assembly, Official Report, Vol. LVI, Col. 1797, (24 November 1981).

elders, it was to those elders that litigants should look for speedy resolutions of their disputes.[20] The elders were viewed as people with "intimate knowledge of the communities in which they live and their views are in many cases more respected than those of magistrates whose remoteness from the issues is felt to be disadvantage."[21]

However, it is suspected that the real reason why the panels were created was to prevent lawyers, from representing litigants in land disputes; instead the bulk of such disputes would be transferred to the panels, and since these panels were composed of lay members, litigants would appear before them unrepresented. That this may be the real reason why the panels were created is evident from the verbal attacks, some quite vitriolic, made on the lawyers by many members of Parliament while the Magistrates Jurisdiction (Amendment) Bill was undergoing its second reading.[22] Lawyers were seen as parasites, only intent on collecting large fees from the conduct of land cases and contributing to the delays common in these cases. Therefore by referring these cases to the panels, litigants could represent themselves, lawyers having

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20 *Ibid.*

21 The National Assembly, Official Report, Vol. LVI, col. 1797 (24 November 1981).

22 *Ibid.*, cols. 1799-1802, 1805.

been excluded from this process, thereby reducing delay and cost.[23]

Although the elders are defined in section 9F of the Magistrates Courts Act 1967 as persons who are recognised as 'competent to resolve issues between parties', it is evident that in pratice, the creation of the panels of elders has generated more problems than it has solved. The biggest drawback, especially where the Registered Land Act 1963 is concerned, is that the elders have no legal skills, and many of them are even illiterate. As a result, they are unfamiliar with the provisions of the Registered Land Act 1963. Since there are no lawyers present in their deliberations, there is no one to direct them to the relevant provisions of the law or decided cases when the disputes are being determined by the panels.[24] Consequently, although the panels are proficient in their knowledge of customary law, their decisions are often in conflict with the Registered Land Act 1963, or with the decisions of the courts. For example, in many decisions, the panels have ordered rectifications of first registrations despite the prohibition by section 143(1) of the Registered land Act 1963.[25]

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23 *Ibid.*

24 Although the Chairman of the panels is a District Officer who is an administrative Official (Magistrates Courts Act 1967, s. 9B(a)), he has little or no legal training either.

25 See Re Ndumberi/Tinganga/76, Francis Kinyanjui v. Hannah Kirie, K.D.L.R. Case File (unreported); Re Kiambaa/Thimbugua/527, Njambi Wamithu v. Waweru Kimani, K.D.L.R. Case File (unreported); Re Ndumberi

Several other examples illustrate how the elders come to conclusions and make decisions that fail to take into account equitable and common law principles, as well as provisions of the Registered Land Act 1963. In Re Ndumberi/Ndumberi/1140, Peter Mwenja v. Kiringu Miru,[26] the plaintiff entered into a contract to purchase a one acre plot of registered land from the defendeant. The plaintiff paid the purchase price but the dependant refused to transfer the land to the plaintiff. The plaintiff therefore sought specific performance. The dispute was adjudicated by a panel of elders who decided, for reasons not evident in their judgment, that the plot should be sub-divided so that the plaintiff receive 0.75 acres and the defendant 0.25 acres. What makes this decision amazing is that neither party sought partition of the land when arguing this case before the panel. Instead the panel decided on customary law principles, that the land should be sub-divided. This was in conflict with equitable principles which would have been applicable by virtue of section 163 of the Registered Land Act 1963, the remedy of specific performance being the appropriate remedy. Moreover, this being a first rectification, the subdivision of the land and the issuing of spearate

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Tinganga/1554, Stephen Mugo v. Hannah Kangethe, K.D.L.R. Case File (unreported); Rahab Nganga Kinuthia v. Nganga Kirogo, H.C.C.C. No. 404 of 1982 (unreported).

26 K.D.L.R. Case File (unreported).

title deeds was a rectification of a first registration, an order contrary to section 143(1) of the Registered Land Act 1963. Another example is Fredrick Kinyanjui v. Charity Kanyi;[27] in which the plaintiff, who was registered proprietor of certain property, transferred the property to his wife and sons to prevent his creditors from repossessing property. After he eventually repaid the creditors, he sought to have his wife and sons transfer the property back to him. They refused to do so. The wife claimed that he had given the properties to her as a gift and he had expressed no intention of wanting them back. Clearly the issue here was whether there was a resulting trust in favour of the husband, or whether the wife and sons could successfully plead the presumption of advancement. However, the elders did not analyse these issues which were well established in the High Court decision in Gideon Mutiso v. Sarah Mutiso.[28] Rather, it was held applying Kikuyu customary law, that the plaintiff was entitled to have the property registered in his name because the plaintiff "was polygamous and the idea of the properties being in the hands of one wife and his sons *is repugnant to say the least according to Kikuyu customary law*." (italics mine)

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[27] R.M.C.C. No. 3165 of 1982/E.L.C. No.31 of 1984 (unreported).

[28] H.C.C.C. No. 631 of 1985 (unreported). It was held that the wife could keep the property in her name if the husband could not rebut the presumption of advancement.

This is an instance where the principle in Gideon Mutiso v Sarah Mutiso[29] should have prevailed over customary law.[30] Therefore, the panel of elders decision is *per incuriam* and should not be followed.

The elders decision in Fredrick Kinyanjui v. Charity Kanyi[31] as well as the other cases referred to above, illustrate the problem of having the panel of elders arbitrate over registered land without any legal assistance or training. There is no right of appeal from the decision of a panel of elders. Their decision can only be set aside by the Resident Magistrates Court on the grounds of misconduct or corruption by a panel or where a party fraudulently concealed a matter he should have disclosed or wilfully misled the panel.[32] As a result, there is little opportunity for the higher courts to overturn decisions of the panels although, notably, there is a growing tendency for the higher courts to consider appeals on the ground that the panels had no jurisdiction to determine questions on title.[33]

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29 *Ibid.*

30 Judicature Act 1967, s.3(2).

31 *Op. cit.*

32 Magistrates Courts Act 1967, s. 9D(3) - the record of a panel of elders can only be set aside on the grounds of misconduct or corruption by a panel member, or where a party fraudulently concealed a matter he should have disclosed or wilfully misled the panel.

33 See Leonida Wekesa v. Musa Wanjala, Civil App. No. 23 of 1985, (unreported); Wamalwa Wekesa v. Patrick Muchwenge, Civil Appeal No. 107 of 1985, (unreported) discussed *infra*.

The determination by the panels of elders over boundary disputes[34] has brought about a conflict in procedure. Under section 21(2) of the Registered Land Act 1963 the Registry has the power to determine the position of an uncertain or disputed boundary. However, section 21(4) of the 1963 Act provides that

> "No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."

Hence, before any court under section 159 of the 1963 Act can determine a boundary dispute, it must first be determined by the Registrar.[35] However, it is evident that in practice many parties have their boundary disputes determined by the panels of elders without first making an application to the Registrar under section 21(2) of the Registered Land Act 1963. The Registrar only knew about the determination by the panels when a copy of their decision was sent to him ordering rectification of the register in accordance with their decision.[36]

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34 Magistrates Courts Act 1967, s. 9A(b).

35 Thirikwa v. Mbogori, Civil Appeal No. 35 of 1974 (unreported): Kiarie Wamutu v. Mungai Kiarie, Civil Appeal No. 64 of 1981 (unreported). But see Mwangi Muraguri v. Kamara Rukenya Civil Appeal No.18 of 1983 (unreported) where it was held that the courts should not determine the position even after the Registrar has done so. It is respectfully submitted that the latter decision was decided *per incuriam* because no reference was made by the court to the two previously decided cases.

36 Interview with the Kiambu District Land Registrar, Miss R.N. Mule, Kiambu 2 October 1989.

It is for this reason that the Chief Land Registrar issued Practice Instructions providing that the Land Registrar when determining a boundary dispute should sit with four elders, each party appointing two elders, although the parties could by agreement in writing, dispense with the elders.[37] The Chief Land Registrar was therefore incorporating the procedure in section 9B of the Magistrates Courts Act 1967 which provides that the panel of elders is to consist of a chairman, who may be "any ... person appointed by the District Commissioner, being a person who has had no previous connection with the issues in dispute",[38] and "either two or four elders agreed upon by the parties."[39] The Land Registrar would, as suggested by the Chief Land Registrar, be appointed as Chairman by the District Commissioner, and preside over a panel adjudicating over a boundary dispute. Although under section 9b(b) of Magistrates' Courts Act 1967, it is evident that parties are to nominate their own elders, and this is indeed the practice,[40] the Chief Land

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37 Practice Instruction: Magistrates Jurisdiction (Amendment) Act 1981. Boundary Disputes and Partitions, 15 September 1982 (K.D.L.R. Admin. File; Practice Instruction: Use of Registry Maps in the Determination of Boundary Disputes and the Role of Surveyors in the same, 8 March 1985 (K.D.L.R. Admin. File).

38 Magistrates' Courts Act 1967, s. 9B(a). A District Commissioner is the administrative official in charge of a District. Kenya is divided up into 41 such Districts.

39 *Ibid.*, s. 9b(b). Each party would have either one or two elders, the numbers being equal for both sides.

Registrar suggested that the Land Registrar could nominate a group of elders with the parties having opportunity to reject any one of them thereby allowing impartiality.[41]

This has now become the estalished practice. Indeed, the views of the elders are not binding on the Registrar and he is free to disregard them.[42] The solution of the Chief Land Registrar is pragmatic since the presence of the Land Registrar in the panel prevents the elders from reaching a decision that conflicts with the Registered Land Act 1963. However, this solution can only be effective if proper publicity is given to this procedure by the administration. This was hinted by one author who felt that people were unclear about the provisions of the law as a result of the M.J. (A.) A. 1981.[43] Hence, not suprisingly, people are still bypassing the Registrar and making applictions to the District Officer to convene a panel chaired by the latter whenever there is a boundary dispute.[44] A practical solution is for District

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40 See *infra* for the discussion on the problems that this procedure has created.

41 Letter from the Chief Land Registrar to the Land Registrars of Nyeri, Nakuru, Embu, Kakemega, Kisumu and Mombasa, 13 September 1982 (K.D.L.R. Admin. File).

42 *Ibid.* One former District Land Regisrar commented that his views prevailed over those of the elders when he chaired the panels. Interview with Mr. Kago Gachiri, Nairobi, 3 October 1989.

43 Smokin Wanjala, Land Law and Disputes in Kenya, (Nairobi 1990), p. 46.

44 Interview with the Kiambu District Land Registrar, Miss R.M. Mule, Kiambu, 2 October 1989.

Commissioners to be instructed to appoint the Land Registrar as chairman of a panel whenever applications are made to him (the District Commissioner) by parties seeking to have boundary disputes determined.[45]

In other matters over which the panels have jurisdiction[46] the Registrar does not chair the panels unless the District Commissioner appoints him to do so under section 9B(a) of the Magistrtes Courts Act 1967. Consequently, as stated before, the panels arrive at decisions that conflict with the provisions of the Registered Land Act 1963, and frequently over matters over which it has no jurisdiction, such as ordering rectification of the register.[47]

To prevent the panels from exceeding their jurisdiction, the Court of Appeal in Leonida Nekesa v. Musa Wanjala[48] declared that the panels of elders have no jurisdiction to rectify first registrations and, furthermore, have no jurisdiction over matters connected with title to land. This was followed in Wamalwa Wekesa v. Patrick Muchwenge.[49] In Wamalwa the Court of Appeal held that although the panels have

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45 It was apparent from the Kiambu District Land Registry files, and discussions with the District Land Registrar, that District Commissioners did not often appoint the Land Registrar as Chairman whenever there was a boundary dispute.

46 Magistrates Courts Act 1967, s. 9A(1).

47 See n. 24, *supra*.

48 Civil Appeal No. 23 of 1985 (unreported).

49 Civil Appeal No. 107 of 1985 (unreported).

jurisdiction to consider the beneficial ownership of land,[50] that does not entail a transfer of legal title. Beneficial ownership entailed the equitable rather than legal title to land.[51] The plaintiff had claimed that his brother, the defendant, was registered as proprietor of the family land, and therefore held one portion on customary trust for the plaintiff. The matter was considered by the panel of elders and they ordered the defendant to transfer a portion of the land to the plaintiff. The Court of Appeal held that the panel had no jurisdiction to make such an order. Their jurisdiction under section 9A(1)(a) of the Magistrates' Courts Act 1967 was limited to making a declaration of trust in favour of the plaintiff, but not ordering a transfer of land.

This clarification of the jurisdiction of the panels of elders is welcome because it prevents them from making orders for rectification of the register and transferring land from one person to another.[52] Clearly the Court of Appeal was interpreting section 159 of the Registered Land Act 1963 to mean that matters concerning title to land such as transfers or rectification could only be considered by the High Court or by the Resident Magistrates court but not by

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50 Magistrates Courts Act 1967, s. 9A(1)(a).

51 Civil Appeal No. 107 of 1985 (unreported), per Nygarangi J.A.

52 This principle was also made clear by Gachuchi Ag. J.A. in Leonida Nekesa v Musa Wanjala, *op. cit.*

panels. One author has taken this to mean that "the elders have no power to listen to any dispute concerning land which is already registered under the RLA."[53] It is respectfully submitted that this statement is too wide and not based on a proper understanding of the authorities. It would make a nonsense of section 159 of the Registered Land Act 1963. Although it is desirable that the elders should not have any jurisdiction over registered land in view of the confusion they have brought into the law of registered land, the provisions of section 159 of the 1963 Act and section 9A(1) of the Magistrates Courts Act 1967 means that they still retain jurisdiction over some matters. It is clear, however, that they have no jurisdiction to order transfers of land or rectify first registrations.

V. Panels of Elders Contrasted with Lay Magistrates in England

Although English lay magistrates mainly exercise criminal jurisdiction albeit with some limited civil jurisdiction, whereas the jurisdiction of the panel of elders is only limited to specific land matters, both their characteristics are worth comparing. The elders and lay magistrates are ordinary members of the public appointed to these positions without legal training. But herein lies an important difference: lay

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53 Smokin Wanjala, *op.cit.*, p. 46.

magistrates are expected to attend courses of instruction.[54] Their training, which extends over a year, consists of observing proceedings in the magistrates courts, listening to lectures on specialised legal matters and visiting penal institutions.[55] The purpose of this training is to enable them to understand their legal duties.

The panels of elders on the other hand receive no training or attend no courses on how to exercise their duties under the Magistrates Courts Act 1967; neither are they made familiar with the principles of registered land law. Consequently, their decisions reflect their ignorance of statutory and case law. Herein lies the root of their problem. However, it is virtually impossible to train the panels of elders because they are not appointed from a pool of individuals by the parties; instead the parties to the dispute appoint anyone from the community who, in their opinion, is considered to be 'wise'[56]. Hence the panel can be composed of anybody who is considered old and wise in the community. The composition of panels is therefore in constant flux, since their composition is on an *ad hoc* basis. The solution to this problem would

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54 Justices of the Peace Act 1979, s. 63.

55 Baldwin, The Compulsory Training of Magistrates, [1975] Crim. L.R. 634; Terence Ingman, *op. cit.*, p. 37.

56 'Community' in section 9F of the Magistrates' Courts Act 1967 can be widely defined, but in practice is generally taken to mean the members of the tribe in which a party belongs.

be to have a pool of elders appointed for each District. It would then be easier to train these elders in the exercise of their duties and help them acquire a knowledge of the basic princip-les of registered land law. This was advocated as a possible solution by the Kenya Law Reform Commission.[57] They suggested that parties to a dispute may be allowed to object to the appointment of any elder from the pool to hear the dispute.[58]

However, a significant difference between the lay magistrates and the panels is that the former are assisted by a justices' clerk who is a barrister or solicitor of at least five years standing.[59] His function is to advise the lay magistrates on questions of law, practice and procedure.[60] The panels of elders on the other hand do not have a lawyer to assist them in a similar manner. Although the Chairman is an administrative official, he is not legally trained, and therefore not of much assistance to the panels when registered land law principles are in issue. The only exception is when the Land Registrar acts as chairman whenever there is a boundary dispute. The appointment of a legally trained person to assist the panels may be

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57 Kenya Law Reform Commission, Fourth Annual Report, 1 September 1985 - 31 August 1986 (Nairobi 1986), p. 17. para. 1(b).

58 *Ibid.*

59 Justices of the Peace Act 1979, s. 26.

60 *Ibid.*, s. 28(3): See also Practice Directions [1981] 2 All E.R. 831; [1954] 1 All E.R. 230.

beneficial in helping them rech decisions that are in accord with the provisions of the law.

Like the lay magistrates, the panels of elders are unpaid. The difference is that lay magistrates are paid allowances for travel, subsistence and loss of earnings.[61] The panels do not receive any allowances from the Government. This is a serious drawback and has been responsible for spawning corruption,[62] the same problem that has afflicted the land adjudication committees.[63] This problem has been aggravated by the fact that the elders are appointed by the parties themselves; since each party appoints his own elders,[64] he is responsible for paying their expenses and as a result, there has been a tendency for elders to demand payments from the parties who have appointed them in order to reach decisions in their favour.[65] As a result, decisions are never impartial, elders being polarised in favour of the parties appointing them. Since the number of elders for each side are even, the Chairman invariably makes the final decision.[66] To

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61 Justice of the Peace Act, 1979, s. 12.

62 Kenya Law Reform Commission, *op.cit.*, p. 16; Smokin Wanjala, *op. cit.*, pp. 46, 47.

63 See Chapter Three, *supra*.

64 See Magistrates Courts Act 1967, s. 9B(b): Practice Instruction: Magistrates Jurisdiction (Amendment) Act 1981. Boundary Disputes and Partitions, 15 September 1982 (K.D.L.R. Admin. File).

66 Interview with Deputy Chief Land Registrar, Mr. Kago Gachiri, Nairobi, 3 October, 1989. See also Kenya Law Reform Commission, *op. cit.*, p. 16; Smokin Wanjala, *op. cit.*, pp. 46,47.

prevent this state of affiars, some kind of allowance should be given to the elders when they deliberate.[67] However, such allowances can only be effective if they are granted to a pool of elders appointed specifically to deal with mattters under section 9(A)(1) of the Magistrates' Courts Act 1967.[68]

VI Proposals for Reform

The Magistrates Jurisdiction (Amendment) Act 1981 was described by one official as a 'dirty piece of legislation'. The Kenya Law Reform Commission admittted that the Act was a failure.[69] The Commission received many complaints from the public and from administration officials about the workings of the Act and the difficulty of implementing it.[70] There were frequent complaints that the panels were still continuing to determine cases outside their jurisdiction because the guidelines issued to them were not clear.[71] The writer came across several recent panel decisions which ordered transfers of registered

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67 When the Magistrates Jurisdiction (Amendment) Bill ws undergoing its second reading in Parliament, one member warned that the system would be undermined if no allowances were given to the elders. Sadly his prophecy has become true - The National Assembly, Official Report, Vol. LVI, Col. 1929 (24 November 1981).

68 Kenya Law Reform Commission, *op. cit.*, p. 16.

69 *Ibid.*, p. 21.

70 *Ibid*, p. 19.

71 *Ibid*, p. 16.

land despite the Court of Appeal decisions holding that the panels had no jurisdiction to order transfers of registered land.[72]

It was certainly a retrograde step to allow the panels of elders, composed of lay individuals, many of them illiterate, to have jurisdiction over registered land. Their application of customary law in these cases, without being aware of the limitations imposed by the written law on the application of customary law, is in danger of unravelling the system put in place by the Registered Land Act 1963 and creating a measure of uncertainty. As the Kenya Law Reform Commission pointed out, customary law varies from tribe to tribe, ethnic group to ethnic group, and even from district to disctrict. The danger therefore is that there will be many different customary laws governing land, thereby undermining the Registered Land Act 1963.[73] Moreover, it is beyond the capabilities of the elders for reconcile all the different customary laws with the provisions of the Registered Land Act 1963. Concepts such as adverse possession, absolute proprietorship, propreitorship in common, licences, mortgages, easements and so on "with all their concomitant intricacies~" were said to be "wholly alien" and

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72 See Re Ndumberi/Tinganga/76, Francis Kinyanjui v. Hannah Kirie K.D.L.R. Case File (unreported); Re Kiambaa/Thimbugua/527, Njambi Wamithi v. Waweru Kimani K.D.L.R. Case File (unreported).

73 Kenya Law Reform Commission, Fourth Annual Report, 1st September 1985 - 31 August 1986 (Nairobi 1986), p.18.

"incomprehensible" to the majority of elders and even the District Officers who act as chairmen to the panels.[74] In retrospect, it is difficult to see how the elders could have been given jurisdiction over such matters when many of them are illiterate to the extent that some cannot even sign their names on the record![75]

However, the Kenya Law Reform Commission made several recommendations to improve the system. First to prevent elders from exceeding their jurisdiction, the District Officer should submit all applications made to him to convene a panel to the Resident Magistrates Court for it to determine the issues and see whether they come under the jurisdiction of the panels.[76] Secondly, there should be provision for a general right of appeal from the decision of the panels, since the existing provisions virtually prevent anyone from lodging an appeal.[77] Third, there should

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74 *Ibid.*, p. 20.

75 See for example, Re Ndumberi/Tinganga/1554, Stephen Mugo v. hannah Kangethe (K.D.L.R. Case File); Virginia Kinuthia v. Seraphino Kinuthia, Civil Appeal No. 177 of 1987 (unreported). While the Magistrates Jurisdiction (Amendment) Bill was undergoing its second reading a member of Parliament pointed out that since many elders were illiterate they would not understand the issues. It was further suggested that an amendment should be made to the Bill to ensure that all the elders who would hear disputes were literate. Unfortunately, this suggestion was never taken up by the Attorney General. The National Assembly, Official Report, Vol. LVI, cols. 1811, 1906, (24 November 1981).

76 Kenya Law Reform Commission, Fourth Annual Report, 1 September 1985 - 31 August 1986 (Nairobi 1986), p.17, para. 1(a).

77 *Ibid.*

be two categories of elders: those chosen by the administration to form a pool from which the District Officer could choose, and those chosen by the parties who would act as witnesses on their behalf. Those choosen by the District Officer would be impartial in comparison with the latter, since the role of the latter would be that of witnesses.[78]

Alternatively, the 1981 Act could be repealed and jurisdiction given to a circuit court to hear land cases, with the elders acting as assessors for jury, their decisions binding on the court.[79] The third option would be to establish a Land Tribunal having a lawyer as Chairman and assisted by specially appointed elders together with a secretary.[80]

The third option is the most attractive out of the recommendations considered by the Law Reform Commission. The presence of a lawyer as chairman would ensure that the decisions do not conflict with the law. The Commission also felt that those sitting on the panel "should be paid some honoraria to guard against corruption."[81]

These recommendations would go a long way to improve the system established by the M. J. (A.) A. 1981 which remains discredited. However, they have not

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78 *Ibid.*, para. 1(b).

79 *Ibid.*, para. 2.

80 *Ibid.*, para. 3.

81 *Ibid.*, para. 4.

yet been implemented and it remains to be seen whether the system will be modified. The Commission did not consider the question raised by section 159 of the Registered Land Act 1963 with respect to the jurisdiction of the High Court. Although, as shown earlier, the High Court should have unlimited original jurisdiction over registered land, the Court of Appeal accepts that its jurisdiction is not concurrent with the Resident Magistrates Court. This is an another area that will require legislative clarification.

Chapter Ten

CONCLUSION

When it was enacted the Registered Land Act 1963 faced a huge task of bringing order to the chaotic system of land law and registration in Kenya. Has it lived up to its stated aims of making better provision for the registration of title to land and the regulation of dealings with such land? The purpose of this thesis has been to show that the Act has not fully lived up to its aims and its provisions have failed in several respects to provide an effective system of law to govern titles registered under the Act.

In determining whether the Act has established an effective system of law and practice this thesis has addressed itself to several key issues. First, how effective has been the process of land adjudication which brought onto the register land that was formerly under customary law; at the same time how successful has been the process of converting land that was subject to one of the pre-existing systems of registration, that is, the Registration of Documents Act 1901, the Land Titles Act 1908, the Government Lands Act 1915 or the Registration of Titles Act 1919, onto the register created by the 1963 Act? Secondly, how effective is the conveyancing machinery provided in the Act and to what extent are purchasers of registered land prejudiced by this machinery? Thirdly, are the

rights of registered proprietors, including those registered jointly or in common, as well as persons with third party interests in land adequately protected by the Act? Fourthly, to what extend have the provisions of the Magistrates' Jurisdiction (Amendment) Act 1981 undermined the provisions of the Registered Land Act 1963? In answering these questions the relevant provisions of the 1963 Act have been compared with the corresponding provisions in the English Land Registration Act 1925, and the law and practice that has developed over registered land in England, analysed. Key to this has been the judicial interpretation of the provisions of the Land Registration Act 1925, and determining to what extent such interpretation can assist in solving some of the problems created by the provisions of the Registered Land Act 1963.

In answering the first question, it was shown in Chapter Three of this thesis that while the speed at which land has been adjudicated and brought onto the register has been remarkable, to the extent that many areas in Kenya have now had their titles systematically brought onto the register, the land adjudication process governed by the Land Adjudication Act 1968 had many flaws. Such flaws have meant that the register of title created under the Registered Land Act 1963 is inaccurate, thereby prejudicing the interests of registered proprietors as well as those claiming third party interests over registered titles.

A lot of the blame can be attributed to the political decision of the colonial government in the 1950s to rush through with the programme of land consolidation and adjudication in a bid to extinguish the flames of the Mau Mau civil war. Consequently, people who were not present to have their interests in land recorded on the adjudication register by the adjudication committees within the statutory period, were viewed as having lost those interests, once the register was confirmed. This was compounded later by the fact that first registrations of title could not be rectified by virtue of section 89(1) of the Native Lands Registration Ordinance 1959, which was subsequently replaced by 143(1) of the Registered Land Act 1963. Many people in the 1950s lost their rights in the Central Province in this fashion, not being able to protect their interests due to the fact that they were in detention at the same time adjudication was progressing. Consequently, family members frequently took advantage of their absence and had themselves registered as proprietors in their place, thereby laying the basis for future disputes over the land.

The composition of the adjudication committees has also contributed to the inaccurate compilation of the register. Composed of lay people with a knowledge of customary law, the committees can be praised for having been responsible for the rapid spread of registration in Kenya at comparatively low cost. The committees have the important task of ascertaining all the

customary rights and interests affecting the land and correlating them with the interests recognised by the Registered Land Act 1963. This is a difficult task for it requires a knowledge of English law, since the interests of land capable of being protected under the Registered Land Act 1963, such as leases, licences, restrictive covenants, easements and mortgages, have their origin in English law. The committees are therefore responsible for converting land from a system that had been based on customary law into a system based on English law. One would therefore expect the composition of the committees to include at least one or more individuals with legal training. Alternatively, one would expect the adjudication officer to be a qualified lawyer. There is, however, no such requirement in the Land Adjudication Act 1968. The adjudication officer is an administrative official with little formal legal training. The bulk of adjudication committees are composed of lay members, many of them illiterate or semi-literate.

The absence of persons with some legal training has meant that committees have been unable to properly equate the customary rights or interests in land with their correlated interests in English law, and recognised by the Registered Land Act 1963. Consequently, those whose customary interests are being adjudicated have ended up having either greater or lesser rights than they had prior to registration. For example a person who was a muhoi under Kikuyu customary

law, and could therefore be evicted at any time, received a greater right when his customary tenancy was recorded, as was usually the case, as a right of occupation, onto the register; it was deemed a yearly tenancy under section 11(3) of the Registered Land Act 1963, which meant that the minimum period of notice was six months which was a greater period of notice than he would have had as a customary tenant. On the other hand a vendor of land subject to redeemable sale, would have the legal title shift from himself to the mortgagee, when the land was registered as subject to a mortgage. In effect, the vendor received lesser rights on registration.

The Lawrance Mission decried the failure on the part of the adjudication committees to record lesser rights in land. This problem could have been averted if individuals with legal training formed part of the adjudication committees. It is submitted that the above problems may have been averted if the Land Registry was wholly involved in land adjudication from the outset, with registry officials involved in helping the adjudication committees in examining the customary land. This is the fundamental problem with the land adjudication in Kenya. The Land Adjudication Act 1968 created a regime separate from that under the Registered Land Act 1963. The Land Registrar had no role to play in land adjudication apart from simply transferring the adjudication register onto the register created by the Registered Land Act 1963, once

adjudication within a section is complete. Land Registry officials could have assisted the adjudication teams in making the necessary correlations of customary rights and interests, and categorising them within the range of interests recognised by the Registered Land Act 1963. At present, the Land Registrar has no power under the Registered Land Act 1963 to query the validity of the adjudication register once it is handed to him by the Director of Adjudication under section 27 of the Land Adjudication Act 1968. He can only assume that the examination of the titles has been done properly.

It is submitted that the separate system of land adjudication has undermined the accuracy of the register of title under the Registered Land Act 1963. The Land Registry must play a role in the adjudication of land subject to customary law and this can be done by having Land Registry officials appointed as part of the adjudication teams. The solution is to integrate the adjudication procedure under the Land Adjudication Act 1968 with that in the Registered Land Act.

The adjudication committees should also be remunerated for their efforts, thereby preventing the temptation to submit to corruption. Although the Government has saved huge costs by not paying the committees, it has meant that the problem of corruption is now becoming acute. Committees are also prone to take less of an interest in the adjudication process

since there is nothing to motivate them to speedily complete land adjudication.

Chapter Six of this thesis has endeavoured to show that the development of the customary trust by the courts in Kenya has made it possible for persons whose customary rights were not registered during land adjudication to have such rights binding on a proprietor of land. However, it is submitted that the customary right that has so far been recognised by the courts is the right of a family member to inherit a portion of land belonging to the family, and that was registered in the names of one of the family members. It has been argued that such a right can be asserted as an overriding interest under section 30(g) of the Registered Land Act 1963 or, in the alternative be capable of being protected on the register by a caution. It was further shown that a person asserting any other interest recognised in customary law which was not protected on the register during adjudication can still protect such an interest but only if the requirements of the Act were fulfilled. A good example would be a person who claimed to be subject to a customary tenancy. He can succeed in protecting such an interest but only if he can show, within section 46 of the Act, that he was in exclusive occupation and he pays rent to the landlord. The customary tenancy would therefore be converted into a periodic tenancy, and therefore capable of being protected by the entry of a caution. The research has shown Land Registrars do

routinely register rights arising behind a customary trust, in view of the recognition of these rights by the courts. Therefore, the view put forward that customary rights are generally extinguished when land is brought onto the register must be distinguished on this basis.

It was shown in Chapter Three that the conversion of titles registered or subject to one of the pre-existing Registration Acts has yet to take place. It is submitted that the deeming provision in section 12(1)(a)(i) of the Registered Land Act 1963 - whereby certificates of title under the Registration of Titles Act 1919 are "deemed" to be "title deeds" under the 1963 Act, and the register of titles kept under the 1919 Act is "deemed" to be a register kept under the 1963 Act - does not make much sense. While the Registrar is given the power to prepare a new register for a title formerly subject to the Registration of Titles Act 1919, in reality this can only be done if a proprietor of such land voluntarily requests the conversion to be made. Since this is rarely done, what force do the deeming provisions have? In reality, nothing. Land Registered under the 1919 Act is still dealt with as if it was still subject to the Act. Conveyancers are conveying the land as if it was still subject to the 1919 Act. The Land Registry is still continuing to issue titles under the 1919 Act. Even the courts have failed to apply Registered Land Act

principles to the land supposed to be "deemed" to be subject to the Act.

This is an unsatisfactory state of affairs and reflects the fact that the Registered Land Act has failed to provide a proper regime for the conversion of titles subject to the pre-existing registration systems. Further problems will be encountered by the Land Registry when flats and horizontal units are brought onto the register under the Sectional Properties Act 1987. No recommendations have been made public as to how this is to be done.

It is submitted that this is a problem that urgently needs to be addressed. Clearly, the Land Registry has been preoccupied with the registration of land that has been the subject of land adjudication. Conversion of titles already under some form of registration has been accorded less priority. In view of the progress that has been made in land adjudication, detailed provisions should be made for the actual conversion of the other titles subject to the pre-existing registration systems. Since the systematic conversion of these titles, as has been the case with land adjudication, would create a huge volume of work for the land registries, it would be easier to provide for such titles to be registered when they are conveyed on sale, as is the case in England. More titles could probably be registered if voluntary transfers are included.

This is a problem that can be solved if more funds are made available to the Land Registry in order to train more officials in the art of converting such titles, and recruiting conveyancing lawyers who would assist in examining those titles that are subject to the Registration of Documents Act 1901, the Land Titles Act 1908 and the Government Lands Act 1915. If these measures are made then substantial progress will be made in converting all titles in Kenya into titles registered under the Registered Land Act 1963.

In answer to the second question, Chapters Four and Five of this thesis looked at the conveyancing machinery introduced by the Registered Land Act 1963. The Act was designed to provide a simple method of conveying land that would enable people to undertake their own conveyancing without the aid of lawyers. This research has shown that this is one of the remarkable achievements of the Act. Many members of the public undertake their own conveyancing whether purchasing or selling land registered under the Act, and are familiar with the transfer procedures provided by the Act. The role of lawyers is reduced to that of mere assistance in the execution of documents.

This reflects the success of government policy to ensure that not only were lawyers kept out of conveying land registered under the Act, but also ensuring that the populace were made aware, through public meetings held around the country, of the advantages of registration. People were encouraged to cooperate with

the land adjudication teams registering their land and to undertake their own transactions in the District Land Registry where their titles were registered.

This has been made possible by allowing the register to be open to public inspection. Registry staff are helpful and assist many parties to complete their transaction. The provision of national identity cards has been crucial to the success of the procedure on verification of execution. This limits the possibility of forgery and is therefore an important safeguard.

Though the goal of designing a registration system which enables anybody to undertake their own conveyancing is a worthy one, and it is indeed the case in Kenya that a vast majority of people undertake their own conveyancing, in contrast with the situation in England, this thesis has gone on to show that the provisions of the Registered Land Act 1963 provide little protection for such a purchaser.

At the outset, boundaries of land registered under the Act are inaccurate. This stems from the problems encountered in surveying such land, whether on the ground or from the air. Inaccurate ground surveys in Fort Hall meant that the whole area had to be re-surveyed again at great cost, and many boundaries in other areas are being found to have been inaccurately measured. Successful aerial photographic surveys, from which the Registry Index Maps are drawn, depended on hedges and boundary marks being visible from the air.

Since many farms did not have satisfactory hedges, proprietors were all encouraged to plant hedges which could be seen from the air. However, as the Lawrance Mission highlighted, many of these hedges failed to grow, with the result that the Registry Index Maps drawn from the photographs were highly inaccurate. This problem has not yet been rectified and consequently, purchasers have to rely on inaccurate maps which have continued to be a frequent source of dispute as proprietors discover that they have been registered with less or more land than they previously had. Consequently, individual plans for each title have never been reproduced. Purchasers therefore have to travel to the Land Registry to view the only copy there is of the Registry Index Map. To obtain a copy of the map they have to travel to the Survey Office in Nairobi, since that office has the large copiers capable of making copies of the Registry Index Maps.

This puts the purchaser at a disadvantage since he can only rely on hand drawn maps made by the vendor of the land, which cannot be relied on to properly identify the registered land. Although it has been recognised that re-survey has to be made of most of the titles registered under the 1963 Act, this process has not yet been started in earnest due to a lack of adequate funds. Nevertheless, it is a process that needs to be started urgently, if registered titles are to be adequately identified. This state of affairs has led to the paradoxical situation whereby titles

registered under the Registration of Titles Act 1919 have precise boundaries which are represented on plans drawn to scale, making it easier for a purchaser to know the exact extent of the boundaries.

A further deficiency of the Registered Land Act 1963, which prejudices purchasers, is that the Act does not imply covenants for title in a conveyance registered land. In contrast covenants for title are implied in conveyances of land registered under the Land Registration Act 1925. There is a difference of opinion as to whether such covenants do have a role to play in registered land. It has been argued in Chapter Five, with reference to English authorities, that covenants for title do have a role to play in registered land. In view of the fact that there are serious limitations on rectification and indemnity under the Registered Land Act 1963, the only recourse a purchaser may have would be to sue the vendor for breach of covenant. This may be all very well if the purchaser has contracted on the basis of the Law Society's Conditions of Sale - which will have been the case if he has used a lawyer - and he may have a claim in damages against the vendor for breach of one of the conditions incorporated into the contract. But as this research has shown, purchasers who contract to buy land on their own behalf do not normally incorporate the Conditions of Sale in their contract. If the vendor had no power to convey some of the land bought by the

purchaser, or he failed to disclose an overriding interest which would be binding on the purchaser the latter would have no recourse against the vendor.

A conflict between section 6(1) of the Land Control Act 1967 and section 27 of the Registered Land Act 1963 was exposed in Chapter Four. The effect of section 6(1) is to declare void a contract for the sale of agricultural land that has not been granted consent by a Land Control Board. A problem may arise if the Registrar registers a transfer by mistake which has not been granted consent by the Land Control Board. Should section 27 of the 1963 Act prevail over section 6(1) of the Land Control Act, or is the registration void too? The Land Registry view is that such a registration would be void. However, this can cause enormous complications if there is a chain of transactions *stemming from the original* void registration. The better view is that registration should confer validity on a void transfer, in the same manner that a forged transfer would confer valid title on a registered proprietor.

The conveyancing machinery under the Registered Land Act 1963 creates further problems for a purchaser. A purchaser not only has to make a search of the register of title, but has also to make a search for any local land charges that bind the land. In Kenya there is no register of local land charges, as there is in England under the Local Land Charges Act 1975, which makes it difficult for a purchaser to discover what

charges, such as payment of rates, bind the land, unless he makes inquiry of the local authority. Although a local authority is bound to produce a written statement to the Registrar that all rates and other charges to the land have been paid under section 86 of the Registered Land Act 1963 - if such rates have not been paid then the Registrar will refuse to register the transfer - a mistaken declaration that no charges are payable does not prevent a local authority from seeking payment from the purchaser since such unpaid rates are overriding interests under Section 30(e) of the Registered Land Act 1963. Such a purchase cannot be indemnified were that to happen, unlike his English contemporary who can be compensated for an unregistered local land charge under section 10(1) of the Local Land Charges Act 1975.

Indeed the problem of overriding interests is an acute one for a purchaser of land. It is further submitted that the conveyancing machinery created by the Registered Land Act 1963 fails to provide adequate protection against overriding interests. These interests, listed in section 30 of the 1963 Act are binding on a purchaser whether he is aware of them or not. For example, as shown above, a purchaser is bound by unpaid charges which are overriding interests even if he was unaware of them, Further problems arise where the rights of person in actual occupation are concerned. In England, sections 2 and 27 of the Law of Property Act 1925 create machinery of overreaching

whereby a purchaser is unconcerned with the interests behind a trust for sale for example, so long as the purchase money is paid to two trustees for sale or a trust corporation. As City of London Building Society v. Flegg[1] illustrates, a beneficiary behind a trust for sale cannot assert an overriding interest under section 70(1)(g) of the Land Registration Act 1925 if the purchase money has been paid to a minimum number of two trustees for sale, because the beneficiary's interest is overreached. Therefore, a purchaser of land registered under the 1925 Act benefits from the protection accorded by the overreaching machinery, although he still has to make inspection against other lurking overriding interests not capable of being overreached.

In contrast, overreaching is not provided for in the Registered Land Act 1963. A purchaser can only make careful inspection of the land he is about to purchase to discover the existence of overriding interests. He cannot rely on the "untrue *ipse dixit*" of the vendor. This may be difficult, particularly as is the case with land in the rural areas of Kenya, where numerous people have an interest in such land. As was shown in Chapter Seven of this thesis a purchaser may have a problem purchasing co-owned land. While he may pay the purchase money to those whose names are on the register, he may find himself subject

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1 [1987] 2 W.L.R. 1266.

to the rights of those whose names are not on the register, if they are held to have an overriding interest by virtue of being in actual occupation, their interests arising behind either a resulting, customary or constructive trust.

This thesis has gone on to show that the Registered Land Act 1963 provides an unsatisfactory regime for land that is subject to co-ownership. Section 101(3) of the Act provides that a maximum of five people can be registered as proprietors of land. The problem arises where more than five people own land but only a few of their number are registered as owners jointly or in common. The original solution in section 120(7) of the 1963 Act was to provide that the land was to be sold and the proceeds of sale shared between the co-owners. This was clearly an unsatisfactory solution and the provision was scrapped. However, no satisfactory provision replaced section 120(7).

It has been argued that three types of trusts may arise to protect the interests of those not on the register. First, a resulting trust either where the parties have contributed to the purchase of the property and have agreed to register it in the name of one of their number, or where property is voluntarily transferred in the name of another. Alternatively, a customary trust may be asserted where, as is usually the case, the co-owners all were entitled to a share of the land - usually family land - under customary law, but when land adjudication took place, many of the co-

owners were not present to assert their rights of ownership and the land was registered in the name or names of those who were present. Once those who are registered deny the existence of the co-ownership arrangement prior to registration, then the courts may be prepared to infer a customary trust. Thirdly, a constructive trust may be asserted, particularly where the land has been matrimonial property. The English authorities on the constructive trust were compared, since this is an area of law in Kenya that has not been the subject of much judicial pronouncement. In England the orthodox view that a constructive trust can be inferred where there is a common intention between the parties that they are beneficially entitled to the property, and one of the parties who is not the legal owner acts to his or her detriment, holds sway over the 'new model constructive' trust inferred where justice and good conscience requires it. A Kenyan court could be persuaded to apply the 'common intention constructive trust' on the basis that it leads to greater certainty in the law, particularly where property rights are involved.

The solution which the Kenya Parliament put forward to eradicate the problem of registering land co-owned by numerous individuals was the enactment of the Land (Group Representatives) Act 1968. The Act, however, has been a disaster. There is widespread dissatisfaction with the provisions of the Act and the fact that the Group Representatives appointed to take

care of the interests of members of a group or society, have misused the large powers given to them by the Act. Moreover, group members under the 1968 Act do not have the same rights as joint proprietors or proprietors in common of land under the Registered Land Act 1963. It is virtually impossible for a group member to sever his interest or order a sale of the land. In any event, if group land is sold it is unlikely that members can assert overriding interests against a purchaser, if the land was sold without their consent.

The widespread dissatisfaction with the Land (Group Representatives) Act 1968 has led to a call by the Government to groups to endeavour to start sub-dividing their land amongst the members in order to get out of the shackles of the 1968 Act.

Clearly, this is an area where legislative reform is necessary. In England co-owned land is subject to the trust for sale, whereby the trustees are under a duty to sell the land although they have a power to postpone sale. The interests of the beneficiaries are in the proceeds of sale under the doctrine of conversion. However, the trust for sale has been criticised as an artificial concept since, as is the case in a matrimonial home situation, property is acquired for the purpose of setting up a home, rather than as a commercial interest.

The English Law Commission has therefore proposed that the trust for sale should be abolished and replaced by a trust of land whereby the trustees have a

power to retain the land, rather than merely postponing sale. A purchaser would still be able to overreach the equitable interests of the beneficiaries if payment was made to two trustees for sale, such overreaching only taking place where the beneficiaries have given their consent.

This recommendation has merit since it strikes a balance between the protection accorded to a beneficiary behind the trust, and a purchaser who wishes to purchase the land free from the interests of the beneficiaries. It is a recommendation which may have practical application in Kenya in solving the problem created by the co-ownership provisions of the Registered Land Act 1963.

It has been questioned whether the provision in section 143(1) of the 1963 Act preventing the rectification of first registrations should remain in the statute book. This provision was inserted for political reasons, to prevent those who were caught up in the Mau Mau civil war and lost their land as a result of sympathising with the Mau Mau, from subsequently seeking rectification of the register and in the process rouse up the animosities that had been the cause of the civil war. Moreover, since adjudication was done in a hurry, many inaccuracies resulted, and the colonial government at the time was determined that the adjudication programme was not undermined by a flood of rectification claims, when people, such as Ethan Njau discovered inaccuracies in

their registered titles.

It is submitted that section 143(1) should be repealed and first registrations should be capable of being rectified. Many years have passed since the Mau Mau war, and the old political animosities have since faded out of sight. Moreover, many of those who were displaced by the war have been resettled on the land settlement schemes that the present government set up immediately after independence. Section 143(1) has prejudiced those whose claims for rectification have had nothing to do with the war, for it has meant that the Act can be used as a very effective instrument of fraud since a first registration obtained by fraudulent means cannot be rectified. Such a provision should have no role to play in a system of registered land. Nonetheless, the courts have endeavoured to go round this problem through the development of the customary trust. Despite the view to the contrary in Elizabeth Wanjohi v The Official Receiver (Continental Credit Finance)[2] the customary trust is now well established, and forms a convenient way of protecting the interests of those who failed to have them protected on the register during land adjudication.

It was further shown in Chapter Eight that section 143(2) of the 1963 Act may prejudice an innocent purchaser of land who, unaware of the fraudulent transfer committed by the vendor or even a mistake,

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2 The Nairobi Law Monthly, February 1989, p. 42.

presents the transfer documents for registration and is registered as proprietor. Rectification may be ordered against him 'since he will have substantially contributed' to the fraud or mistake 'by his act' or presenting the transfer documents for registration. This is evident from English authorities such as Chowood Ltd v. Lyall,[3] Re 139 High Street, Deptford[4] and Re Sea View Gardens.[5]

Rectification against the proprietor would be unfair in view of his innocence. A similar provision was contained in section 82(3)(a) of the Land Registration Act 1925 but was discovered to prejudice the innocent registered proprietors and has since been amended to provide that the proprietor loses his protection where he "has caused or substantially contributed to the error or omission by fraud or lack of proper care ...". This indicates that there would have to be fault on the part of the registered proprietor before he loses his protection from rectification. It is recommended that similar protection ought to be given to an innocent proprietor, thereby making the protection against rectification truly effective.

Lastly, it has been shown in Chapter Nine that the panels of elders created by the Magistrates'

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3 [1930] 1 Ch. 426.

4 [1951] Ch. 884.

5 [1966] 3 All E.R. 935.

Jurisdiction (Amendment) Act 1981 have undermined the provisions of the Registered Land Act 1963. These panels of elders are, in a similar manner to the adjudication committees, composed of lay individuals recognised as having a good knowledge of customary law. Although they have jurisdiction to determine certain disputes concerning land registered under the Registered Land Act 1963 by virtue of section 159 of the same, none of the elders have legal training and thereby equipped to apply registered land law principles. They do not seem to be aware of the provisions of the Registered Land Act 1963, or other provisions of the law which have a bearing on registered land. To compound the problem, lawyers are not permitted to represent the litigants that appear before the panels, and neither are the panels guided by a chairman who is a lawyer. This has meant that the panels have made numerous decisions where they have applied customary law principles which are in conflict with the written law as well as those in the Registered Land Act 1963. Such application of customary law is in danger of undermining registered land law, thereby endangering the security of registered proprietors.

It is submitted that the Act should be repealed. In the first place it is badly drafted. For example it is unclear from section 159 whether the jurisdiction of the High Court is limited to determining disputes where the subject matter of the land is not less than 500,000 K shs. This was certainly the intention of Parliament.

Nevertheless, limitation of the High Courts jurisdiction in such a manner would be contrary to the Constitution which provides in section 60 that the High Court has unlimited jurisdiction, and it has been shown that the High Court would be entitled to exercise jurisdiction over land below that value.
Moreover, section 9 of the 1981 Act which confers jurisdiction on the panels of elders to determine boundary disputes, conflicts with the power of the Land Registrar to determine the same where the land is registered under the 1963 Act. It is evident from several decisions that the panels often direct the Land Registrar to effect a transfer of the property, even though the title may be subject to a first registration which would prevent it from being rectified under section 143(1) of the 1963 Act. It was shown in Chapter Eight that decisions of the superior courts have held that such a transfer can only be effected where a customary trust situation arises. A rectification of a first registration in any other situation would therefore be a clear breach of section 143(1).

But many of the decisions of the panels where they have ordered rectification of land subject to a first registration, have had nothing to do with a customary trust. This has put Land Registrars in a difficult position as to whether to accede to the order or refuse to effect such a transfer. It has frequently been the case that a transfer in breach of section 143(1) is

made. It is to the credit of the Chief Land Registrar to have instructed Land Registrars to determine boundary disputes with the panels of elders thereby preventing the elders arriving at decisions which conflict with the 1963 Act. Unfortunately, this is mainly confined to the determination of boundary disputes. Many of the problems associated with the decisions of the panels could have been prevented if the provision was made for the chairman of the panel to be the Land Registrar.

The aim of the Registered Land Act 1963 was to introduce a new code of property law that was to apply throughout the country and that would eventually replace the substantive law contained in the Indian Transfer of Property Act 1882, as well as creating new registration machinery of registration that would replace the systems existing under the Registration of Documents Act 1901, the Land Titles Act 1908, the Government Lands Act 1915 and the Registration of Titles Act 1919. Moreover, land formerly subject to customary law would now be governed by the 1963 Act. This thesis shows that this has not been achieved. There is a long way to go before all land in Kenya is finally governed by the Act. The Kenya Law Reform Commission admitted that the aim of converting all land onto the Register under the Act has not been achieved.

The Commission revealed that the problem has been a lack of adequate resources, which has made it difficult to recruit enough personnel to do the work of

converting all the titles under the Act. This means that conversion will take a long time to achieve. Many of the problems revealed by this thesis can only be solved if adequate resources are made available. For example, the provision of extra Land Registry staff to assist the adjudication committees, as has been proposed in this thesis, can only be done if there are enough funds to pay salaries. Substantial funds would be necessary to effect improvements to the Land Registries, such as the Kiambu District Land Registry, and build new extensions. The answer may lie in allowing the Registries to be self-financing, so that fee income derived from registration can be ploughed back in order to improve services.

However, many of the problems highlighted in this thesis can be solved by legislative reform. Purchasers of land ought to have greater safeguards when purchasing registered land. On the other hand, the interests of registered proprietors and those with third party interests in the land ought to be well protected. The difficulty is striking a balance between these conflicting demands.

It is of interest to note that the English Law Commission has actively reviewed the Land Registration Act 1925 and has produced several reports making recommendations to improve the system of registered land. In its Third Report on Land Registration, the Commission recommended that the categories of overriding interests in section 70(1)(g) of the 1925

Act should be reduced to five categories, but more importantly, that a proprietor may apply for an indemnity if an overriding interest is asserted against him and the register is rectified to give effect to the overriding interest. This recommendation is contained in clause 45(1) in the Bill drafted by the Law Commission to replace the Land Registration Act 1925.

It is indeed an important provision, for overriding interests are the bug bear of registered land; a registered proprietor's title can be undermined by an overriding interest particularly where he was unaware of it. If enacted, this provision will repair the crack in the mirror, and it can truly be said that a registered title is State guaranteed. This would also be the case in Kenya were this recommendation to be made and implemented.

BIBLIOGRAPHY

Articles

Anderson, Stuart. Notice of Unprotected Trusts. (1977) 40 M.L.R. 602.

Aronson, M.E. Law Reform Seminar on Land Law. The Nairobi Law Monthly, September 1987, 20.

Baldwin, John. The Compulsory Training of Magistrates. [1975] Crim. L.R. 634.

Bayne, P.J. Government Liability for Torts by Public Officials. 6 E.A.L.J. 243.

Bently, Lionel, and Paul Couglan. Informal dealings with land after section 2. (1990) Legal Studies 325.

Cahill, Kevin. The Strange Secrets of Who Owns What. The Independent on Sunday, 11 February 1990, 57.

Chats with a Young Solicitor. (1899) Law Notes 335.

Coldham, Simon. Land Control in Kenya. [1978] J.A.L. 63.

------ Land Tenure Reform in Kenya: the Limits of Law. (1979) 17 J.M.A.S. 615.

------ The Effect of Registration of Title Upon Customary Land Rights in Kenya. [1978] J.A.L. 91.

------ The Settlement of Land Disputes in Kenya - An Historical Perspective. (1984) 22 J.M.A.S. 59

Editorial Note. [1989] Conv. 26.

Crane, F.R. Casenote. (1977) 41 Conv. (N.S.) 207.

Cretney, S., and G. Dworkin. Rectification and Indemnity: Illusion and Reality. (1968) 84 L.Q.R. 528.

Dresner, Richard. National conveyancing protocol: search validation insurance. (1990) 4 L.S.G. 20.

Emery, C.T., and B. Smythe. The Imposition of Trusts by

'Subject To' Clauses. (1983) N.L.J. 798.

Glazier, J. Land Law and Transformation of Customary Tenure, The Mbeere Case. [1976] J.A.L. 39.

Harbeson, J.W. Land Reform and Politics in Kenya, 1954-70. (1971) J.M.A.S. 231.

Harpum, Charles. Constructive Trusts and Registered Land. [1983] C.L.J. 54.

Hayton, David J. Purchasers of Registered Land. [1977] C.L.J. 227.

-------- Equitable Rights of Cohabitees. [1990] Conv. 370.

Howell, Jean. Informal Conveyances and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. [1990] Conv. 441.

Jackson, Paul. Estate Contracts, Trusts and Registered Land. [1983] Conv. 64.

Kenny, Phillip H., Overriding Interests and Implied Covenants. [1981] Conv. 32.

-------- Constructive Trust of Registered Land. (1983) 46 M.L.R. 96.

Marketing the New Conveyancing Protocol. (1990) 8 L.S.G. 16

Martin, Jill. Constructive Trusts of Registered Land. [1978] Conv. 52.

Megarry, R.E.. Review of Key and Elphinstone's Precedents in Conveyancing. (1941) 57 L.Q.R. 564.

Njuki, A.K., Cadastral Surveys in Kenya. The Nairobi Law Monthly, September 1987.

News:Transaction gathers momentum. (1990) 12 L.S.G. 14.

Partington, David. Implied Covenants for Title in Registered Freehold Land. [1989] Conv. 18.

Pettit, P.H., Farewell Section 40. [1979] Conv. 431.

Potter, H., Covenants for Title and Overriding Interests. (1942) 58 L.Q.R. 356.

Ruoff, Theodore, and Peter Meehan. Land Registration: The Recent Act. 35 Conv. (N.S.) 390.

Russell, M.J., Covenants For Title: Registered Land. [1982] Conv. 145.

Simmance, A.J.F., Land Redemption Among the Kikuyu of Fort Hall. [1961] J.A.L. 75.

Smith, Roger J., Registered Land: Purchasers with Actual Notice. (1977) 93 L.Q.R. 341.

Thompson, M.P., Registration, Fraud and Notice. [1985] C.L.J. 280.

-------- The Role of Evidence in Part Performance. [1979] Conv. 402.

Thorne, S.E., Livery of Seisin. (1936) 52 L.Q.R. 345.

Wilson, R.G., Land Consolidation in the Fort Hall District of Kenya. (1960) J.A.A. 144.

Wilson, R.J.A., Land Control in Kenya's Smallholder Farming Areas. (1972) 5 E.A.R.J.D. 123.

Books

Barnett, D.L., and K. Njama. Mau Mau From Within. Nairobi 1966.

Barnsley, D.G. Conveyancing Law and Practice. 1st ed. London 1973; 3rd ed. London 1988.

Biebuyck, D., ed. African Agrarian System. 1960.

Blundell, Sir Michael. So Rough a Wind. London 1964.

Brickdale, C.F., and Stewart Wallace. The Land Registration

Act 1925. 3rd ed. London 1927.

Cheshire and Burn's Modern Law of Real Property. 14th ed. by E.H. Burn. London 1988.

Cotran, Eugene. Restatement of African Customary Law. Kenya. The Law of Succession. Vol. 2. London 1969.

------- Casebook on African Customary Law. Nairobi 1987.

Cripps on Compulsory Acquisition of Land. 11th ed. by Harrold Parrish. London 1982.

Cross. Statutory Interpretation. 2nd ed. by Dr. John Bell and Sir George Engle. London 1987.

Davies, K. Law of Compulsory Purchase and Compensation. 4th ed. London 1984.

Dilley, M.R. British Policy in Kenya Colony. 2nd ed. London 1966.

Dowson, Sir Ernest, and V.L.O. Sheppard. Land Registration. London 1956.

Elias, T.O. The Nature of African Customary Law. Manchester 1956.

Eliot, Sir Charles. The East Africa Protectorate. London 1905.

Farrand, J.T. Contract and Conveyance. 2nd ed. London 1973.

Furley, O.W. The Historiography of Mau Mau. Hadithi. Vol. 4, edited by Bethwell A. Ogot. Nairobi 1971.

Ghai, Y.P. Law and Lawyers in Kenya and Tanzania: Some Political Economy Considerations. Lawyers in the Third World: Comparative and Developmental Perspectives, edited by C.J. Dias, et. al. Uppsala 1981.

Githumo, Mwangi wa. Land and Nationalism. New York 1981.

Gray, Kevin. Elements of Land Law. London 1987.

Halsbury's Laws of England. 4th ed. Vol. 12. London 1975

Hanbury and Maudsley. Modern Equity. 13th ed. by Jill E. Martin. London 1989.

Hayton, David J. Registered Land. 3rd ed. London 1981.

Hogg, J.E. The Australian Torrens System. 1905.

Holdsworth, Sir William. A History of English Law. Vol. III. 5th ed. London 1942.

Ingman, Terence, The English Legal Process. 3rd ed. London 1990.

Jackson, Tudor. The Law of Kenya. Nairobi 1988.

Johnston H.H. Britain Across the Seas: Africa. London 1910.

Joseph, Michael. Lawyers Can Seriously Damage Your Health. London 1984.

Jowitt's Dictionary of English Law. 2nd. ed. by J. Burke. London 1977.

Kaggia, B. The Roots of Freedom, 1921-1963. Nairobi 1975.

Kanogo, Tabitha. Squatters and the Roots of Mau Mau, 1905-1963. Nairobi 1987.

Kariuki, J.M. Mau Mau Detainee. Nairobi 1963.

Kenyatta, Jomo. Facing Mount Kenya. Nairobi 1979.

-------- Suffering Without Bitterness. Nairobi 1969.

Key and Elphinstone's *Precedents in Conveyancing*. Vol. 3, edited by T.U. Caswell. London 1954.

Kinyatti, Maina wa. ed. Kimathi's Letters: A Profile in Patriotic Courage. Nairobi 1986.

Leakey, L.S.B. The Southern Kikuyu Before 1903. Vol. 1. London 1977.

Lugard, F.D. The Dual Mandate in Tropical Africa. London 1922.

Maini, Krishan M. Land Law in East Africa. Nairobi 1967.

Martin, Jill E. Security of Tenure Under the Rent Act. London

1986.

Maudsley and Burn. Land Law, Cases and Materials. 5th ed.. by E.H. Burn. London 1986.

Megarry, Sir Robert, and H.W.R. Wade. The Law of Real Property. 5th ed. London 1984.

Odinga, O. Not Yet Uhuru. Nairobi 1968.

Offer, Avner. Property and Politics, 1870-1914. Land Ownership, Law, Ideology and Urban Development in England. Cambridge 1981.

Ogot, Bethwell A. Kenya Before 1900. Eight Regional Studies. Nairobi 1976.

Osogo, J.N.B. Educational Developments in Kenya, 1911-1924 (with particular reference to African Education). Hadithi. Vol. 3, edited by Bethwell A. Ogot. Nairobi 1971.

Oliver, Roland, and Gervase Mathew. History of East Africa. Vol. 1. London 1963.

Onalo, P.L. Land Law and Conveyancing in Kenya. Nairobi 1986.

Osborn's Concise Law Dictionary. 7th ed. by Roger Bird. London 1983.

Oswald, Ros. A Practitioner's Guide to Common Land. London 1989.

Penwill, D.J. Kamba Customary Law. Nairobi 1951.

Roseberg, C.G., and J. Nottingham. The Myth of Mau Mau: Nationalism in Kenya. Nairobi 1966.

Ruoff, T.B.F. An Englishman Looks at the Torrens System. London 1957.

Ruoff and Roper, Registered Conveyancing. 4th ed. by T.B.F. Ruoff and R.B. Roper. London 1979; 5th ed. by T.B.F. Ruoff, R.B. Roper and E.J. Pryer. London 1986.

Salim, A. The Swahili Speaking Peoples of Kenya's Coast.

Nairobi 1973.

Silverman, Frances. Searches and Enquiries, A Conveyancers *Guide*. London 1985.

Simpson, S. Rowton. Land Law and Registration. Cambridge 1976.

Snell, G.S. Nandi Customary Law. Nairobi 1954.

Snell's Principles of Equity. 28th ed. by P.V. Baker and P. St. J. Langan. London 1982.

Sorrenson, M.P.K. Origins of European Settlement in Kenya. Nairobi 1968.

-------- Land Reform in the Kikuyu Country. A Study in Government Policy. Nairobi 1967.

Storey, I.R. Conveyancing. 2nd ed. London 1987.

Thompson, M.P. Co-ownership. London 1988.

Throup, David. Economic and Social Origins of Mau Mau, 1945-53. Nairobi 1988.

Underhill and Hayton. Law of Trusts and Trustees. 14th ed. by David J. Hayton. London 1987.

Walker and Walker. The English Legal System. 6th ed. by R.J. Walker. London 1985.

Wanjala, Smokin. Land Law and Disputes in Kenya. Nairobi 1990.

Wilson, G.M. Luo Customary Law and Marraige Law Customs. Nairobi 1961.

Winfield and Jolowicz on Tort, 13th ed. by W.V.H.Rogers. London 1989.

Practice Instructions (Kenya)

Cautions: A Beneficiaries' Interest. Ref. No. 79696. K.D.L.R. Admin. File.

Chief Land Registrar to all Land Registrars. 11 March 1982.

K.D.L.R. Admin. File.

Magistrates' Jurisdiction (Amendment) Act 1981. Boundary Disputes and Partitions. 15 September 1982. K.D.L.R. Admin. File.

Removal of Cautions Under Section 133 of the Registered Land Act Cap. 300. K.D.L.R. Admin. File.

Practice Instructions (England)

Practice Directions [1954] 1 All E.R. 230.

[1981] 2 All E.R. 831.

Pamphlets

H.M. Land Registry, Registration of Title to Land, A Brief Guide. 1988.

------Explanatory Leaflet No. 1. 1988.

Reports

Second Report of the Royal Commission on Real Property. 1830.

Report of the Commissioners Appointed to consider the subject of Registration of Title with reference to the sale and and transfer of land. 1857, C. 2215.

Report of the Royal Commissioners appointed to inquire into the operation of the Land Transfer Act, and into the present condition of the Registry of Deeds for the county of Middlesex. 1870, c. 20.

Report of a Select committee of the House of Commons on Land Titles and Transfer. 1879.

Report of Sir Arthur Hardinge on the condition and Progress of

East Africa Protectorate from its Establishment to the 20th January, 1897. 1898, Cmd. 8683.

Report on the East Africa Protectorate. 1901, Cd. 769.

Second and Final Report of the Royal Commission on the Land Transfer Acts. 1911, Cd. 5483.

Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales. 1919, Cd. 424.

Report of the Committee on Native Land Tenure in Kikuyu Province. Nairobi 1929.

Report of the Kenya Land Commission. 1934, Cmd. 4556.

Report of the Sub-Committee of the Executive Council on Native Land Tenure. 1939, K.N.A. Lands 1/38.

Report of the Native Welfare Conference. 1940, K.N.A. Lands 1/38.

Report of the Nandi District Land Tenure Committee. 1952.

A Plan to Intensify the Development of African Agriculture in Kenya. Nairobi 1954.

Report of the East *Africa Royal Commission* on Land and Population. 1955, Cmd. 9745.

Report of the Conference on African Land Tenure in East and Central Africa. (1956) J.A.A. (Special Supplement).

Report of the Working Party on African Land Tenure, 1957-58. Nairobi 1958.

Historical Survey of the Origins and Growth of Mau Mau. 1960, Cmd. 1030.

Report of the Committee on Positive Covenants Affecting Land. 1965, Cmnd. 2719.

Report of the Mission on Land Consolidation and Registration in

Kenya, 1965-66. London 1966.

Final Report of the Royal Commission on Legal Services. Vol. 1. 1979, Cmnd. 7648.

Department of Settlement, Annual Report, 1983. Nairobi 1983.

Kenya Law Reform Commission, Fourth Annual Report. Nairobi 1986.

Report of a Working Group on Commonhold, Freehold Flats and Freehold Ownership of Other Interdependent Buildings. 1987, Cm. 179.

Report by the Chief Land Registrar to the Lord Chancellor on the work of H.M. Land Registry for the year 1988-1989. London 1989.

Report by the Chief Land Registrar to the Lord Chancellor on the work of H.M. Land Registry for the year 1989-1990. London 1990.

Reports of the English Law Commission:

Transfer of Land: Formalities for Contracts for sale etc. of land. Working Paper No. 92.

Transfer of Land: Implied Covenants for Title. Working Paper No. 107

Property Law. First Report on Land Registration. Law Com. No. 125.

Report on Positive and Restrictive Covenants. Law Com. No. 127.

Second Report on Land Registration: Inspection of the Register. Law Com. No. 148.

Property Law: Third Report on Land Registration, A. Overriding Interests, B. Rectification and Indemnity, C.

Minor Interests. Law Com. No. 158.

Deeds and Escrows. Law Com No. 163.

Transfer of Land: Formalities for Contracts for Sale etc. of Land. Law Com. No. 164.

Fourth Report on Land Registration. Law Com. No. 173.

Transfer of Land: Trusts of Land. Law Com. No. 181.

Transfer of Land. Overreaching: Beneficiaries in Occupation. Law Com. No. 188.

Unpublished Thesis

Coldham, Simon. Registration of Title to Land in the Former Special Areas of Kenya. University of London. 1977.

APPENDIX

Date received for registration ..... Presentation Book ..... Registration Fees: Sh. .....

....., 19..... No. ...../19..... paid. Receipt No. .....

R.L. 1

REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(*Cap.* 300)

TRANSFER OF LAND

TITLE NO. .....

I/WE .....

.....

in consideration of .....

.....

(the receipt whereof is hereby acknowledged) HEREBY TRANSFER to

.....

.....

of .....

the land comprised in the above-mentioned title.

The Transferees declare that they hold the land as joint proprietors/as proprietors in common* in the following undivided shares:—

Dated this ..... day of ....., 19.....

Signed by the Transferor
in the presence of:—
.....

I CERTIFY that the above-named .....

.....

.....

appeared before me on the ..... day of ....., 19.....

and, being known to me/being identified by* .....

of .....

acknowledged the above signatures or marks to be his [theirs] and that he [they] had freely and voluntarily executed this instrument and understood its contents.

.....
Signature and Designation of Person Certifying

*Delete whichever is not applicable.

[P.T.O.

R.L.28

Please attach your Postal Order, Money Order or Cheque (if you have made prior arrangements to pay by cheque) in payment of fees here.

For Official Use Only

RECEIVED:

ORIGINAL

The Conditions on the Back of this Form shall be Complied with

REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(*Cap.* 300)

APPLICATION FOR REGISTRATION

I hereby apply for the registration of the undermentioned instruments in the following order of priority:—

Date of Instrument	Description	Title Number	Fee	For Official use only
Please issue Land Certificate/Certificate of Lease.				
Additional fee at *Sh. 5, Sh. 25 each.				
P.O./M.O./Cheque attached hereto the value of Sh.				

The following documents are enclosed:—

Land Certificate
Certificate of Lease
Lease (duplicate and triplicate)
Charge (duplicate and triplicate)
Clearance Certificate
Estate Duty Certificate
Lessor's consent in terms of the lease
Divisional Land Control Board Consent
Chargee's consent in terms of the charge
.....
.....
.....

Special instructions, including in appropriate cases the name and address of the person to whom the documents are to be sent if other than the presentor:—

.....

.....

Signature .....

Name in Block Capitals.....

Postal Address.....

.....

Date....., 19.....

(The conditions on the back of this form must be complied with)

Signed by the Transferee
in the presence of:—

....

I CERTIFY that the above-named ....

.....

....

appeared before me on the ..... day of ....., 19.....

and, being known to me/being identified by* ....

of .....

acknowledge the above signatures or marks to be his [theirs] and that he [they] had freely and voluntarily executed this instrument and understood its contents.

.....
Signature and Designation of Person Certifying

REGISTERED this ..... day of ...., *19*.....

....
Land Registrar

*Delete whichever is not applicable.

REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(*Cap.* 300)

CERTIFICATE OF OFFICIAL SEARCH

TITLE NO. ..... SEARCH NO. .....

On the ..... day of ....., 19....., the following were the subsisting entries on the register of the above-mentioned title:

PART A—Property Section (Easements, etc.)

Nature of title .....

Approximate area .....

PART B—Proprietorship Section

Name and address of proprietor:

.....

.....

Inhibitions, cautions and restrictions—

.....

.....

PART C—Encumbrances Section (leases, charges, etc.)

.....

.....

The following applications are pending:

.....

.....

The certified copies requested are attached.

The fees now payable are Sh. .....; please detach the form below, and attach to it Postal Order/Money Order/Banker's Cheque/Cash for that amount and return to me within seven days of today's date.

*A stay of registration has been noted in the register.

Date ....., 19..... .....
Land Registrar

*Delete if not applicable.

To: The Land Registrar, Search No. .....

..... District Land Registry,

P.O. Box .....

.....

Postal Order/Money Order/Banker's Cheque/Cash for Sh. .....
attached hereto

Application for **a Personal Inspection of the Register.**

HM Land Registry

Form 111

(Rule 4 Land Registration (Open Register) Rules 1990)

Notes

1. A fee is payable for inspection of a title. An additional fee is payable if you do not enter in panel 1 in Part A below the title number of the register of the property you wish to inspect. However, if you are the registered proprietor of the title that you wish to inspect then neither of these fees is payable and the service is free.
2. Complete the appropriate numbered panels in Part A below - a separate form must be used for each title to be inspected.
3. Any writing at the public counter must be in lead pencil only and one will be provided on request. The use of any kind of ink or ball pen is strictly forbidden. The documents produced must not be marked in any way (Rule 291 of the Land Registration Rules 1925).

For official use only

Record of Fee paid

For official use only

Fee debited £

A I apply to make a personal inspection of the register of the property referred to below:-

1 **Title number** (if known)

(Use one character per box)

2 **Property description** - provide as much information as is available.

Postal number or description

Name of road

Name of locality

Town

Post code

District or London Borough

Administrative County

3 Enter X in the appropriate box:-

☐ I am the registered proprietor.

☐ I am not the registered proprietor.

Signed

Date

4 **PAYMENT OF FEE**

Where a fee is payable, please enter X in the appropriate box:-

☐ the Land Registry fee of £ ☐ accompanies this application,

or

☐ please debit the Credit Account mentioned below with the appropriate fee payable under the current Land Registration Fee Order.

FOR COMPLETION BY APPLICANTS WHO ARE CREDIT ACCOUNT HOLDERS

YOUR KEY NUMBER:-

YOUR REFERENCE:-

5 **Name and Address of applicant**

Daytime Telephone No.

Reference (If not a credit account holder)

B **For official use only**

Pending applications

Application dealt with by

Date

Enter X in the appropriate box:-

Signed

☐ Title number supplied by the applicant.

Date Time

☐ Title number not supplied by the applicant.

(6) The vendor does not give any covenant which would make him liable to the purchaser for a subsisting breach of any covenant concerning the state or condition of the property of which state or condition the purchaser has notice under Condition 12.

Freeholds

11. Where the title is freehold and held under the Registration of Titles Act or under the Land Titles Act title shall be shown either to the Certificate of Title or to the Grant, and in all other cases title shall be shown to the original conveyance under the Government Lands Act 1902.

Identity and Conditions of Property

12. (1) At the purchaser's request the vendor shall point out to him the survey beacons delimiting the property.
(2) Any beacon found to be missing or misplaced on inspection shall be replaced at the expense of the vendor but the fact that a beacon is missing or misplaced is not a ground either for rescission of the contract or for delay in its completion.
(3) Where the beacon has not been replaced on completion the purchaser may deduct from the purchase-money either the cost estimated by a licensed surveyor of its replacement or if no estimate has been made Shs. 1,000/- in respect of each missing or misplaced beacon.
(4) Any excess of the replacement cost over the amount deducted under sub-clause (3) shall be paid to the purchaser and the purchaser shall repay to the vendor any sum by which the amount deducted under sub-clause (3) exceeds the replacement cost.
(5) No claim may be made by the purchaser in respect of any beacon found to be missing or misplaced after completion.
(6) Subject to this Condition and after he has had an opportunity of inspecting the property the purchaser has notice of the identity of the property and of its actual state and condition and he takes it subject to such state and condition.

Easements, Liabilities, etc.

13. (1) Before contract the vendor must disclose to the purchaser the existence of all rights privileges latent easements or other liabilities which are known by him to affect the property and all present and contingent liabilities in respect of road and sewerage charges in respect of which liability is to be borne by the purchaser.
(2) The property is to be conveyed with the benefit of and subject to liability for all matters revealed under sub-clause (1).
(3) Where before completion the purchaser discovers any matter which should have been disclosed to him under sub-clause (1) and has not been so disclosed he may by notice in writing to the vendor rescind the contract whereupon the provisions of Condition 9 (3) and (4) apply.

Consents, etc.

14. (1) The property is sold subject to all necessary consents being obtained. The vendor is responsible for obtaining all consents and the purchaser shall where necessary join in making any application.
(2) The vendor is responsible for obtaining the discharge of any encumbrance to which the property is not sold subject.

Subdivision

15. Where the sale requires the subdivision of any property immediately on the signing of the contract the vendor shall at his own expense—
(a) apply for approval to the subdivision; and
(b) cause a survey to be carried out and deed plans issued by the Director of Surveys.

Misdescription and Compensation

16. (1) No compensation is payable nor may the contract be rescinded in respect of any description measurement or quantity which is substantially correct nor in respect of any matter of which the purchaser has notice under Condition 10(2), 12(6) or 18(1).
(2) Subject to sub-clause (1) where any misdescription, error, omission or misstatement in the contract is pointed out before completion the purchaser may either—
(a) rescind the contract by notice in writing to the vendor delivered within Fourteen days of the discovery of the misdescription, error, omission or misstatement in which case the provisions of Condition 9(3) and (4) apply; or
(b) by notice in writing to the vendor require the payment or allowance of compensation.
(3) Where the compensation under sub-clause (2) cannot be agreed between the parties it shall be referred to a sole arbitrator agreed between the parties or in default of agreement appointed by the Chairman or the Vice-Chairman of the Law Society of Kenya.
(4) Notwithstanding the foregoing provisions of this Condition where the property differs substantially from the property agreed to be sold and purchased the purchaser cannot compel the vendor to convey if the vendor would be prejudiced thereby.

Local and other Authorities' Requirements

17. (1) Where before the date of the contract the vendor had notice of any requirement proposal or request (whether or not subject to confirmation by any court or authority) made by or on behalf of any local or public authority compliance with which would involve the expenditure of money on the property the vendor shall indemnify the purchaser against all liability in respect thereof and if any liability is outstanding on completion the vendor shall covenant for indemnity in the conveyance.
(2) Where after the date of the contract notice of any such requirement proposal or request is given to the vendor he shall forthwith give notice in writing thereof to the purchaser.
(3) The purchaser will indemnify the vendor against liability in respect of any requirement proposal or request of which he has received notice under sub-clause (2) and will on completion pay to the vendor all sums which the vendor has had to pay in respect thereof together with interest thereon.