

Fixation with the Past or Vision for the Future:

Challenges of land Tenure Reform in Kenya with special focus on Land Rights of the Maasai and Boorana Pastoralists.

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## **Declaration**

I declare that this thesis is my own account of research except where acknowledged and that it has not previously been submitted for any degree at any university.

Signed.....

## **Dedication**

To my Aayoo, Tumeo Doyoo (1934-2007), your love, commitment and sacrifice shall always be remembered and cherished.



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## **Abstract**

The aim of this study is to discuss the challenges facing land tenure reform in Kenya, with special focus on the pastoral Maasai and Boorana communities. The question of land ownership has been one of the major issues in Kenya since the colonial period. The study examines some of the contemporary legal and policy concerns from an historical perspective with a view to understanding current legal and institutional constraints. The colonial land tenure policy that spans a period of over 100 years still endures in spite of the social, political and economic transformation the society has undergone. My main objective is to examine the extent to which land rights of pastoral communities have been and continue to be undermined by inherited statutory land tenure regimes. This study demonstrates that the introduction of the alien notion of land tenure diminishes rather than strengthens the access of communities to land and other land-based natural resources.

The study demonstrates that contrary to widely held views of policy makers and commentators, the conventional approach to land management, centralised statutory legal frameworks have not secured land rights for the pastoralists. The study assesses the effectiveness of this policy as applied by colonial and post-colonial governments. The failure by successive governments to undertake a comprehensive land reform has led to conflicts between communities, resulting in social, economic, and political repercussions. Inappropriate and irrational government policy of land tenure conversion from communal to private holdings has been the source of escalating conflicts, as demonstrated by this study. Finally, the study illustrates simmering new challenges confronting the pastoralists due to increasing encroachment of other land use such as agriculture, mining, oil exploration and ecotourism. It explores alternative policy and legislative reforms that will comprehensively address the unresolved historical and contemporary land grievances.

# CHAPTER 1

## Introduction

African pastoralists, like many other rural communities in the world have deep attachment to land and land-based resources. The pastoral people depend on land for their food, medicine, water and more importantly for livestock keeping and transhumance.<sup>1</sup> However, due to rapid social, political and economic changes over the last centuries, ownership and access to land resources have increasingly been compromised in many pastoral areas.<sup>2</sup> In Kenya, the state had played the major role in dispossessing indigenous communities of their land. The colonial government imposed legal and institutional mechanisms which placed land under their control and allowed them to alienate ‘native’ lands to European settlers. The settlers who had the famed ‘White Highlands’ exclusively created for them, dominated agricultural economy for almost seventy years of colonial rule.<sup>3</sup> The colonial government left an enduring legacy that anchored entitlements to land on laws and policies made by state authorities, with the sole intention of benefiting a particular interest group. In the process, the pre-existing customary landholders were dispossessed and denied their rights to sustainable livelihoods.

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<sup>1</sup> Salih, M.M. A., Ahmed, A.G.M (2001) (eds.) African Pastoralism. OSSREA, ISS. Published by Pluto in association with OSSREA; Pastoralism as Conservation in the Horn of Africa, 2007. World Initiative for Sustainable Pastoralism, UNDP. WISP Policy Paper Brief No.3.

<sup>2</sup> John Markakis (2004) Pastoralism on the Margins, p.22 Minority Rights Group International. Report.

<sup>3</sup> Bruce, J.W., Mighot-Adhola, E.S (1994) (Eds.) Searching for Land Tenure Security in Africa, p.119. Kendall/Hunt Publishing Company.

For indigenous communities land and property relationship is predicated on their customary practices and institutional arrangements such as Boorana's '*aadaa-seera*' (laws and customs) that, amongst other functions, ensures inalienable rights of members to land resources.<sup>4</sup> However, with the establishment of colonial rule, the authorities introduced new laws and policies, which in effect not only eroded indigenous peoples' access to land resources but also entrenched dualistic approaches to property laws. In Kenya, registered tenure system was and still is treated as formal untouchable tenure regime, hence comparatively presumed as more secure than the customary system, which is insidiously understood as informal, and therefore inferior.<sup>5</sup> However, in spite of that imposed tenure system some indigenous communities like the Maasai and Boorana pastoralists have enduringly preserved much of their traditional ways of life. The pastoralists are among the ancient societies who still practice one of the oldest human occupations: keeping livestock on a large scale in their natural habitats. Rangelands in Africa are home to many pastoral people who depend almost entirely on that production system.

The pastoralists, in common with many rural communities in Africa and elsewhere, rely heavily on land resources and conditions affecting the way those resources are managed, owned or accessed. Institutional and legal frameworks thus have significant impacts on social,

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<sup>4</sup> Tache, B.D (2000) *Individualising the Commons: Changing Resource Tenure among Boorana Oromo of Southern Ethiopia*, p.32.

<sup>5</sup> The contemporary nomenclature used in land and land tenure discourses refer to customary or communal land as 'informal' while private and registered land as formal. The meaning is not precise and mostly warped in assumptions that the formal is superior to the informal and therefore the need to evolve from communal to private to achieve security of tenure. Okoth-Ofendo has succinctly problematised the issue in his seminal paper, *Formalising 'informal' Property Systems: The prolegomena in land rights reform in Africa*. A Thematic survey paper presented in Oslo, Norway on 28 October, 2008. Hernando De Soto (2000) in his book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails everywhere Else*, talks about 'formalizing' the informal. Kwamena Bentsi-Enchill's journal article, *Do African Systems of Land Tenure Require A Special Terminology?* is a good starting point to rethink some of the deeply entrenched concepts used in African contemporary land tenure issues that needs to be questioned and clarified.

economic, cultural, and political aspects of the people. Land tenure is about certain conditions and terms, which in modern states are provided in statutory laws and policies. Whoever controls land controls the process which defines those terms and conditions.<sup>6</sup> It is evident in many cases that current land tenure regimes favour the state in the management and control of land resources, which more often than not operates against the rights and interests of groups such as pastoralists. The pastoral communities in Kenya today are facing many challenges, as government policies tend to encourage land alienation for private use, agricultural expansion, reserves for wildlife, exploration and exploitation of minerals, investments in ecotourism, etc.<sup>7</sup>

Pastoralists may be confined to the margins of political and economic spectrum in Kenya, but their land question cannot be underestimated. Of Kenya's 44.6 million hectares, only 20% is considered arable, earmarked for agricultural development. The remaining 80% is arid and semi-arid land, predominantly inhabited by the pastoralists.<sup>8</sup> This has important implications for natural resources development in pastoral areas. Successive governments of Kenya have mainly focused on the more productive agricultural areas for public investment, undermining development in the arid and semi-arid areas.<sup>9</sup> This policy goes back to colonial days. As early as the 1930s, J. Parkinson, one of the pioneer administrators of the region said that "Kenya may be divided into Kenya proper, familiar to the tourist and settler, and the

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<sup>6</sup> Alden Willy, L (2008) *Whose Land Is It? Commons and Conflict States: Why Ownership of the Commons Matters in Making and Keeping Peace*, pp 2-4.

<sup>7</sup> Fratkin, E (1997) *Pastoralism: Governance and Development Issues*, p.236. *Annual Review of Anthropology*, Vol. 26, pp.(235-261).

<sup>8</sup> *The Ninth National Development Plan, 2002-2008*. Nairobi. Government Printer.

<sup>9</sup> Okoth-Ogendo (1996) *Land Tenure and Natural Resource Management. The Kenya Experience*. Land Tenure in Development Cooperation. GTZ. Published by Sahara nad Sahel Observatory. Paris.

Northern Frontier Province, hot, parched, and dusty areas where access is barred unless by special permit.”<sup>10</sup> Frank Bernard, an American geographer whose research dealt with environmental issues in the mid 1980s, with particular focus on pastoral regions, described the situation in the north as follows:

With the exception of ethnic partitioning of Maasai and the imposition of quarantines to restrict animal movements, the colonial government neglected the African-occupied rangelands. Unless pastoralists came into conflict with wildlife or European-type ranching, they were generally left to their own devices.<sup>11</sup>

Pastoral areas also have a history of land-related conflicts, which have become a dominant feature in modern Kenya, as claims and grievances over land degenerate into political feuds and inter-communal violence. The land issue, which the late land law scholar Professor Okoth-Ogendo calls the ‘last colonial question’ is yet to be subjected to appropriate legal and institutional reforms many years after the end of the colonialism.<sup>12</sup> Since independence from Britain in 1963, various leaders and communities have constantly demanded land reforms but successive governments have either ignored or tactfully deferred them until very recently. Rather than being a neutral mediator, the state and government of Kenya has in fact been part of the problem.<sup>13</sup> The unresolved land question has also brought about rift, not only between communities but also between the state and society.

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<sup>10</sup> Parkinson, J (1939) Notes on the Northern Frontier Province, Kenya. P.162. The Royal Geographical Society with the Institute of British Geographers)

<sup>11</sup> Bernard , F.E (1985) Planning and Environmental Risks in Kenyan Drylands, p.63. Geographical Review, Vol.75, (pp.58-70)

<sup>12</sup> Other Kenyan scholars such as Dr. Karuti Kanyingi, (2000) Re-Distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya, and Prof. Paul Syagga (2007) Land Ownership and Use in Kenya: Policy of Prescriptions from an Inequality Perspective, have used the tool of ‘land question’ to discuss contemporary land issues in Kenya. See Prof. Okoth-Ogendo (2007) The Last Colonial Question: an essay in the pathology of land administration systems in Africa. Oslo.

<sup>13</sup> See for example Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004). The Commission was appointed the Government of Kenya in 2002. The Report roundly points out the

The historical assessment of the structure and functions of colonial land tenure regime is important in understanding the challenges that face Kenya as it deals with issues of land tenure reforms. It is now more than a century since the colonial government imposed alien land tenure regimes, replacing or compromising African customary tenure systems. The colonial rulers had applied the English notion of property laws which virtually gave them unfettered control of land resources.

The most visible pastoral community during the 'scramble' for land in the early phase of colonial occupation was the Maasai. The settler communities targeted temperate rangelands and demanded that authorities alienate the land for their settlement. The Maasai became the first indigenous community to fall victim of land settlement when their evictions took place after signing two agreements with the Protectorate representatives. On the other hand, the northern pastoralists such as the Boorana became part of the British East Africa Protectorate because of boundary delimitation aimed at controlling Italian and Abyssinian southern expansion. The colonial attitude of treating pastoralists as outlying and not fully part of its nascent state arrangement, while initially giving them with some sense of autonomy, progressively created a culture of marginalisation and control. The attitude soon coalesced into state policy that treated pastoralists as outsiders who required 'hemming in' and blending with mainstream society.

Theoretical assumptions that categorise societies into 'modern' or 'traditional' have to some extent played a role in the marginalisation of the pastoralists. The pastoralists have increasingly faced prejudice from not only state but also other powerful interests, including

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role of government in land crisis. It was accused of 'land grabbing' and 'laundering', especially with senior government officials from the head of state to the junior village heads allegedly involved in the scams.



multinational institutions that give financial support to government development projects.<sup>14</sup> In common with most states where there are sizable populations of pastoralists, there have been tendencies to design programmes aimed at changing their way of life in order to ostensibly be in league with other ‘modern’ societies. This kind of thinking has permeated into land tenure policies and legal frameworks in many African countries.<sup>15</sup> Programmes and policies implemented by successive governments from the colonial period clearly show the patterns of pervasive bias in favour of sedentarised and agricultural communities.<sup>16</sup> In the 1970s and 1980s there were large-scale development projects by international donor agencies many of whose policies, driven by the ‘tragedy of the commons’ theory, emphasised privatisation of the range, commercial ranching, and sedentarisation of nomads, particularly in Africa.<sup>17</sup> The ‘tragedy of the commons’ hypothesised that a communal system of land tenure would lead to the degradation of environments.<sup>18</sup> The highly centralised development planning is largely based on agrarian political economy, scantily taking into account the interests and rights of the pastoralists. Land and land tenure policies adopted over the years

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<sup>14</sup> See Frantkin, E, op.cit.236.

<sup>15</sup> Lund, C (2000) African Land Tenure: Questioning Basic Assumptions, IIED, Issue Paper no.100; Meek, C.K (1949) Land Law and Custom in the Colonies;

<sup>16</sup> Salih, M.M.A (1990) Pastoralism and the state in East African Arid Lands: An Overview. *Nomadic Peoples*, pp.7-18. No.25-27; Gilbert, J (2000) Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights, *Human Rights Law Review* 7;4, p.681-716; Frantkin, E(1997) Pastoralism: Governance and Development Issues. *Annual Review of Anthropology*, pp.235-261, Vol.26; Kituyi, M (1998), Kenya in Lane, C.R (ed) *Custodians of the Commons: Pastoral Land Tenure in East and West Africa*,pp.27-45; Campbell, D.J(1981) Land Use Competition at the Margin of the Rangelands: An Issue in Development Strategies for Semi-Arid Areas, in Norcliffe,G (ed) *Planning African Development*, pp.39-61), Adhi,G.D (2003) Land Tenure and Needs for Reform in Pastoral Areas of Kenya. Posted at [www.cbnrm.uwc.ac.za/papplr/docsPAPPR-Godana.pdf](http://www.cbnrm.uwc.ac.za/papplr/docsPAPPR-Godana.pdf). Accessed on 28 August, 2008.

<sup>17</sup> See Frantkin, op.cit.FN.8

<sup>18</sup> Garrett, H (1968) *The Tragedy of the Commons*, New Series, Vol. 162, No.3859, pp.1243-1248

failed to appreciate the importance of pastoralism in shaping the future of a segment of Kenyan society.<sup>19</sup>

The northern pastoralists such as the Boorana did not experience direct land alienation to the same extent as their southern counterpart, the Maasai, who had to contend with European settlers as early as 1903. However, the Boorana and other northern pastoralists are today facing an uncertain future due to inappropriate land tenure policy imposed by the state. The root cause of current tenure insecurity is linked to colonial policy that divested communities of their land. However, the turning point was when a Commission appointed by the colonial government singled out pastoral areas as unexploited resources to be utilised in future for non-pastoral purposes. This took place in 1933 when the Kenya Land Commission made a proposal to 'set apart' the land in northern Kenya to preserve its 'undiscovered' wealth for private investments by non-pastoralists.<sup>20</sup> The 'undiscovered' wealth is increasingly becoming a reality in the form of ecotourism, mining, and other rangelands resources that have steadily attracted external investors and speculators. Although customary land tenure systems have survived government policy onslaught for decades, the new wave of resource re-colonisation based on ecotourism is likely to break that resiliency. The well organised and aggressive investors in ecotourism euphemistically branded as 'conservancies' are growing rapidly, affecting pre-existing land use such as pastoralism. Some major investors in

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<sup>19</sup> Perhaps one of the key failures of development approaches and strategies in pastoral Kenya emanates from ignoring or misunderstanding the role of climate, environmental and ecological variability and the role they play in influencing pastoral land tenure and institutional arrangements.

<sup>20</sup> See Paras 800-805 Kenya Land Commission, Cmnd

‘conservancies’ have set up camps, sanctuaries, nature walks, bird shooting and other ventures in pasturelands with little or no benefit to local communities.<sup>21</sup>

## 1.1 Statement of the Problem

Controversies and dilemmas surrounding land have been the most critical concern in Kenya before and after independence and yet remain as an unresolved question to date. This study addresses land as one of the important factors that underlies social and economic struggles in Kenya. This factor is a legacy that pervades contemporary land tenure regimes in Kenya, especially among the pastoral communities who have been on the periphery of the Kenyan state.<sup>22</sup> Reforming the entrenched policy which relates to land tenure frameworks has posed the greatest challenge in Kenya since the early 1990s following the introduction of multi-party politics. Non-government Organisations and other civil society movements have played a key role in pushing for legislative and policy reforms but the government has squandered many opportunities including constitutional reform.<sup>23</sup> In the midst of this confusion, communities such as pastoralists continue to face social and economic instability as the scramble for land resources escalates. On many occasions, communities have used violence as they attempt to regain possession of ‘lost land’ or secure access to other land resources.

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<sup>21</sup> See Martha H (1998) *Ecotourism and Sustainable development: Who Owns Paradise?* The author supports the concept of ecotourism generally but laments about skewed nature of benefits derived from the land use, claiming that the local communities are in most cases ripped off by outsiders who control the industry.

<sup>22</sup> Minority Rights Group (2008) *Pastoralists in the Horn of Africa. Report of a Workshop on Social and Economic Marginalization*; Goldsmith, P (2006) *Social Policy and the Underdevelopment of Marginalised Pastoral Communities*

<sup>23</sup> Simel J (2008) *The Reality Behind Kenya’s Political Stalemate. Mainyoito Pastoralist Integrated Development Organization (MPIDO)*

Land has been and continues to be the most important asset of every human society since the beginning of time. Pre-colonial societies in Africa had organised their social, political, cultural, economical, and spiritual lives around land and natural resources for many centuries until they were disrupted by the colonial wave of the 19<sup>th</sup> century. The most potent consequence of the European colonization was the formation of state structures based on alien legal and institutional frameworks. Over the many decades of its rule, the colonial power systematically established new institutions and administrative systems that led to the erosion of indigenous land tenure organisations and land rights. Although the levels of contact with the colonial rule might have differed from one community to another, the impact on their land was significantly visible. For example, among the pastoral people, the Maasai had a direct and most controversial relationship with the Europeans which led to intensive loss of land. The pastoral Boorana had a weaker link with the colonial administration but today they are facing serious challenges to their traditional land due to the entrenched policy of land alienation known as the adjudication process.<sup>24</sup> There is a similarity between the old direct alienation by the colonial authorities and the new administrative land allocation. The consequence is the same for the communities who are largely dependent on land resources for their livelihood. Both the Boorana and Maasai are struggling to hold onto the ‘last frontier’ of their rangeland resources as the government continues to alienate their land through bureaucratic land adjudication and registration processes.

The study puts in greater perspectives the general patterns of colonial and post-independent land policy development. It interrogates the overall content of agrarian policy

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<sup>24</sup> In most cases, the government does not comply with laid down procedure of ‘setting aside’ land for public purposes in pastoral areas as stipulated under Trust Land Act, Chapter 288. When government ‘allocated chunk of grazing land in chirrup areas of Isiolo District for Chinese oil exploration, the local council, the local NGOs and the community complained to the government officials about the anomaly without success. See American Chronicle, 23 June, 2008, an article by Abdikadir Gumi, Oil Exploration in Isiolo: Fears and Fortune.

that effectively excluded and continues to undermine pastoralism as a form of production. The thrust of the arguments advanced in the study are, that because of failure by the successive post-independent governments to reform existing land tenure, pastoralists face serious challenges to maintain their way of life. The institutionalised discrimination against the pastoralists and subordination of the pre-existing indigenous land rights gives a compelling reason for land tenure reforms. For Kenya, the experience has never been so poignant than in recent years as land-related conflicts threaten the stability of the state and its long-term security.

## **1.2 Approach and Objectives**

This study adopts a ‘historical land question’ approach in addressing the issue of land tenure reform, which is a critical question in Kenya but often overlooked by government and mainstream agencies. The current land tenure approaches in Africa overemphasise market-based redistribution, regulatory frameworks, administration and management programmes, survey and cadastral systems, registration mechanisms; institutional capacities; and land information service.<sup>25</sup> Looking back 100 years since the British colonial authorities formulated land tenure laws and institutions, their character and objectives have largely remained the same, except for what Ahmed Mohiddin, a Tanzania political scientist calls ‘changing of the guard.’<sup>26</sup> So long as the status quo is maintained by the state, opportunity to

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<sup>25</sup> See for example, Pinckney, T.C., and Kimuyu P.K. (1994) Land Tenure Reform in East Africa: Good, Bad or Unimportant. *Journal of African Economies*, Vol.3, No.1. Augustinus, C., Deininger, K. (2005) Innovations in Africa: Pro Poor Land Approaches. A paper presented at the African Ministers for Housing and Urban Development (AMCHUD), Durban, South Africa. Land Tenure and Sustainable Development in Southern Africa (2003) ECA-SA Office, Lusaka, Zambia. The World Bank (2003) Land Policies for Growth and Poverty Reduction. A World Bank Policy Report. U.N-HABITAT (2003) Handbook on Best Policy Practices, Security of Tenure and Access to Land. Implementation of the Habitat Agenda. UN-HABITAT (2001) Land Information Service in Kenya.

<sup>26</sup> Mohiddin, A (1981) *African Socialism in Two Countries*, p.4. He is referring to replacement of colonial personnel by the Africans, though the structures of colonial institutions almost remained intact.

redress the historical land question will remain elusive and unfulfilled. From the beginning, political choices made by the African leaders during the decolonisation process in the 1960s was to safeguard policies and laws inherited from colonial administration. Kenya today, as with other African countries, has been beset by myriads of land-related conflicts between communities in many parts of the country. The land problem has become the most dominant social and political issue of the day and government appears ineffective, even when it attempts to intervene during violent flare-ups. Legal and institutional structures designed by government are similarly dormant in responding to land-related conflicts.

As I have indicated, my focus is mainly on pastoral Maasai and Boorana and it is therefore important to outline some aspects of terms used in relation to these communities. I have largely adopted current working definitions as used by scholars, government policy documents, and legal and development consultants.

## **1.2 Pastoralists and Pastoralism**

Available historical accounts indicate the presence of pastoralists in Kenya and the region dating back to the third millennium BC when herding livestock became the dominant part of their economy.<sup>27</sup> The region was historically a melting pot of various cultures and social diversity where different communities had occupied particular ecological niches, developing distinct dominance over the past centuries. The Eastern African pastoralists represent at least one-half of the world's pastoral people where thirteen million are predominately pastoral and another nine million are agro-pastoralists. They occupy arid and

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<sup>27</sup> See generally Spear, T., Waller, R (1993) (eds.) *Being Maasai : Ethnicity and Identity in East Africa.* ( Eastern African Studies)

semi-arid rangelands keeping and breeding domestic animals including cattle, camels, goats, sheep and donkeys. The animals were used for milk, meat, transport, and trade.

In Africa, some of the pastoralists whose economic mainstay is pastoralism include Tuareg, Fulani (Fulbe), Somali, and Boorana-Oromo, Nuer, Turkana, Karamanjong, Maasai, Samburu, and Rendile amongst others. Kenya's drylands constitute about 80% of the total land area and are mostly inhabited by pastoral societies supporting at least 20% of the total national population.<sup>28</sup> Like other indigenous populations across the globe, the pastoralists share land and utilise kinship ties for mutual social solidarity. Pastoralists are generally defined as people who rely heavily on production of domestic herds whose sustainability is based on mobility and the availability of pasture and water. In Kenya, the pastoral climatic conditions are in general terms similar to those prevailing in other African drylands. Low and variable precipitation, high evaporation rates, sparse vegetation and shallow soils are the main features that define the landscape. However, the lands are well suited for extensive rangelands production such as livestock.<sup>29</sup>

Frank Bernard, a Geographer who carried out ecological survey in pastoral areas, asserts that the climatic conditions have not been deterrence to those who are keen to exploit drylands resources. He observes: 'In spite of the harshness and ecological limitations, these drylands are now the destination of a substantial stream of migration.'<sup>30</sup> Although such

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<sup>28</sup>Lenaola,I., Jenner,H.,Wichert, T.(1996) Land Tenure in Pastoral Land in Juma,C. Ojwang, J.B. (1996) (eds.) In Land We Trust.

<sup>29</sup> Barrett, C.B., Chabari, F., Bailey, D.V., Little, P.D., Coppock, D.L (2003) Livestock Pricing in Northern Kenyan Rangelands, pp1-2. Journal of African Economies; 12(2): 127: 155

<sup>30</sup> Bernard F.E, (1985) Planning and Enviromental risks in Kenyan Drylands Geographical Review, p.58, 5(1):58-70.

migration has traditionally involved other pastoral groups in search of water and pasture, especially during drought, the contemporary practice is formalised through allocation and registration.<sup>31</sup> As shown in Chapters Six and Seven, pastoral communities like Boorana, Maasai and Samburu are currently facing stiff competition from increasingly expanding private conservancy projects. This has a critical implication for the future of pastoralists as a people and pastoralism as a production system. The reason for this is that livestock production, the mainstay of their economic activity, depends on ‘extensive grazing of native pastures’<sup>32</sup>, without which the future of pastoralists will be in jeopardy. The prevailing scenarios are reflective of a situation in many pastoral settings where a combination of factors have eroded land tenure systems and hence the quality of livelihood. Elliot Fratkin describes the current situation as follows:

Pastoralist societies face more threats to their way of life now more than any previous time. Population growth; loss of herding lands to private farms, ranches, game parks, and urban areas; increased commoditization of livestock economy; outmigration by poor pastoralists; and period dislocation brought about by drought, famine, and civil war are increasing in pastoralist regions of the world.<sup>33</sup>

Lord Hailey, a British land tenure expert observed, “The extent of the appropriation of indigenous lands has depended more on factors of climate or soil than on juridical argument”<sup>34</sup>. This in essence means that the issue of legitimacy of the colonial action was not considered as paramount in determining how the settlement and alienation of land would be

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<sup>31</sup> The migrants groups whose presence may be contested by local communities will more often than not produce allocation certificates or title deeds as form of documentary evidence, which normally complicates communal disputes than alleviate them. See Adhi, G.D (2002) Note, 13.

<sup>32</sup> Gefu, J., Gilles, J.(1990) Pastoralism, Ranchers and the State in Nigeria and North America: A Comparative Analysis, *Nomadic Peoples*, 25-27, 34-50.

<sup>33</sup> Fratkin, E(1997) Pastoralism: Governance and Development Issues. *Annual Review Anthropology*, 26, p.325.

<sup>34</sup> Hailey, Lord, M (1957) *An African Survey*, p.686



carried out in African territories. The pre-existing customary rights and institutions governing management of land resources were overlooked and deliberately undermined. As indicated in the preceding chapters, the British Protectorate policy during settlement in the early nineteenth century was heavily influenced by demand made by the settlers. Relationships with the African societies were heavily informed by their desire to access productive agricultural land for the European farmers. It was also the foundation upon which historical prejudices, stemming from the negative attitude towards the drier areas, such as those occupied by pastoralists was built. As I have discussed earlier, in comparison to the Maasai, the Boorana had little direct contact with the colonial government, and were able to enjoy some level of undisturbed land management. However, the legal and policy framework put in place by the authorities eventually caught up with the Boorana and other northern pastoralists. The Boorana had a long history of preservation of cultural and social systems within which communal resources were governed.

The Boorana who live in their ancestral land in southern Ethiopia have largely maintained the core traditional resources management systems, although Ethiopian state policy of land appropriation for commercial ranching is fast approaching. In Kenya multiple factors such as colonial rule, post-colonial state control, social and educational influence, have greatly eroded many aspects of ancient resource governance.

## **1.4 The Maasai**

The Maasai belong to Maa-speaking groups who consist of the Maasai of southern Kenya, north-central Tanzania as well as the Samburu and Chamus in Central Kenya. They are related to the Eastern Sudanic sub-family of the Nilo-Saharan phalanx such as the Bari and Lotuko of southern Sudan, Karamanjong and Teso of eastern Uganda, and Turkana of

northwest Kenya. According to anthropological records, the cradle land of the early Eastern Nilotes was probably situated east of the present-day Juba in Southern Sudan.<sup>35</sup>

It is recorded that the first Maa-speaking immigrants reached the Rift Valley region by the end of the ninth century and probably the territories that became Tanzania to the south, by the mid-sixteenth century at the earliest.<sup>36</sup> The groups in Kenya began a whirlwind of movement across the region and moved into the 'Nakuru-Naivasha area, south-westwards across Loita, Mara, Serengeti and south-eastwards to Ngong and across the Athi and Kaputieni plains as far as the foothills of Kilimanjaro.'<sup>37</sup> Although they are organised in territorial sections, the Maasai have shared socio-cultural and ritual organisations based on age-sets and age-grades, similar to Boorana and other Cushitic communities. Age-grades are status-based identities to which individuals are ascribed in the course of their lives. Age-grades comprise all those within a broad range of ages who are formed into a group of peers with their own separate identities. This socio-cultural organisation has immense implications on the community's socio-economic wellbeing and political stability.

Through this organised structure, the community had protected their land, territory from any external aggression. According to David Campbell, the most fundamental characteristic of the Maasai economy is its concept of land.<sup>38</sup> Similar to other pastoral communities, Maasai perceived land as communal territory to be accessed by all its members rather than for absolute exploitation by individuals. Land and land-based resources were

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<sup>35</sup> Vossen, R (1982) *The Eastern Nilotes: Linguistics and Historical Constructions*, p.468.

<sup>36</sup> *Ibid*,

<sup>37</sup> Sutton, J.E.G (1994) *Becoming Maasailand*, in Sperars, T., Waller, R. Op.Cit. p.39.

<sup>38</sup> Campbell, D. J (1994) *Land as Ours, Land as Mine*, in *ibid*, p.258.

managed through social and political conventions designed to reduce the risks associated with the unpredictable climate and environment. Nonetheless, one risk that was predicted by the eminent Maasai leader, Laibon Mbatian, and which Maasai was unable to stop, was loss of their land to the European settlement. The period coincided with the advent of the colonial rule, which radically transformed the pattern of land tenure systems and consequently diminished Maasai land rights significantly.

## 1.5 The Boorana

Boorana (sometimes spelled as Boran, Borana or referred by an old historical name Galla) community is a branch of the larger Oromo people who are one of the most populous language groups in Africa.<sup>39</sup> The Oromo, who predominantly live in Ethiopia are one of the most widespread ethnic groups in Africa and are estimated to number between 25-30 million people.<sup>40</sup> The Boorana live in the southern part of Ethiopia, as well as northern Kenya, straddling the borders between the two countries. The scholars of Oromo history and ethnography have placed a great premium on the Boorana as the repository of the *gada* system. In contemporary Oromo political, social and cultural dispensation, the concept of the *gada* plays the central role as an indigenous and egalitarian form of democracy.<sup>41</sup>

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<sup>39</sup> Melbaa, G (1988) Oromia: An introduction to the History of the Oromo People, p.8. The most recent available statistics derived from 1994 Ethiopian Population Census show that Oromo number 24.5 million people. See Refworld/World Directory of Minorities and Indigenous peoples online data, <http://www.unhcr.org/refworld/topic,463af2212,469f2d823b,49749d2620,0.html> . Accessed on 01/03/2009.

<sup>40</sup> See Refworld Web at <http://www.unhcr.org/refworld/topic,463af2212,469f2d823b,49749d2620,0.html>. Oromo population is stated to be 24.5 million. Accessed on 28/02/2008.

<sup>41</sup> See Legesse, A.( 2000) Oromo Democracy: An indigenous African Political System; Marco, B(2005) Decisions in the Shade: Political and Juridical Processes among the Oromo-Borana; Baxter, P.T.W, Hultin,J, Triulzi, A (eds.) (1996) Being and Becoming Oromo: Historical and Anthropological Enquiries

Unlike the Maasai, the Boorana contact with the colonial administration was minimal; however, today the prospect of their pastoral livelihood system is in jeopardy because of the incompatible nature of statutory laws that facilitate alienation of land for non-pastoral purposes. The Boorana are struggling to hold onto the 'last frontier' of their rangeland resources as governments heavily bureaucratized arrangements of land adjudication and registration are perpetuated. As I will illustrate later, such concepts such as trust land have mainly succeeded in transitioning land from indigenous communal systems to private ownership, thus consolidating extinguishment of pastoralists land rights.

During the partition of Africa in the 1880s and 1890s, Boorana were divided between Abyssinian (later Ethiopia) and the British East Africa Protectorate (later Kenya). Today the Boorana in Kenya predominantly live in the Upper Eastern districts of Moyale, Isiolo and Marsabit.

## **1.6 Northern Frontier Districts (NFD)**

Reference to Northern Frontier Districts (NFD) or Northern Frontier Province (NFP) is made frequently in this study. It is therefore important to give a synopsis of the historical background of this region, which was widely referred to NFD. The northern and northeast region of the British East Africa Protectorate (Kenya) was not clearly defined until 1925. The region became a theatre of rivalry between the Europeans on the one hand, and Europeans and Abyssinian (Ethiopian) Empire on the other. Between 1884 and 1897, Britain had secured control over Somaliland and East Africa Protectorate (Kenya). This included the Somali-inhabited area of the Juba and the parts that later became the Northern Frontier Districts. The north-eastern boundary extended up to the River Juba in what was under the Italian sphere of influence. In 1925, the Jubaland Province (12,000 square miles) was transferred to Italy in

conformity with the 1915 Treaty of London.<sup>42</sup> The remaining part was clustered with the northern part, which bordered the Abyssinian Empire. By 1891, Emperor Menelik of Ethiopia had extended his domain over the region, which was initially called Northern Frontier Province. It was inhabited by Somali, Boorana, Rendile, Sakuye, Gabbra, Turkana, Samburu and other smaller communities. These communities were predominantly nomadic pastoralists who practised livestock rearing, relying on seasonal grazing and other shared resources such as water, pastures, and saltlicks.

## **1.6 Why Maasai and Boorana?**

This study focuses on two communities who have many commonalities in their lifestyles. Both communities are pastoralists and like other pastoral people, are perceived by the mainstream policy makers and development agencies as irrational and anti-development, practising ‘outdated’ occupation.<sup>43</sup> The differences are more geographical location than status of development and socio-political conditions. Land and livestock are the backbone of the Maasai and Boorana economy as well as an expression of their identity. The Maasai live in southern Kenya, on the fringes of ‘developed’ highlands, while the Boorana live in the drier north, on the margin of the distant state. Both had a glorious past. The Boorana was a thriving nation in the eastern African region until the 18<sup>th</sup> century. Referring to the decline of Boorana Oromo Norman Leys had this to say: “About a hundred years ago the Galla thus rose to power in Eastern Africa only to sink again before any exact knowledge could be got of them.”<sup>44</sup>

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<sup>42</sup> Treaty between the United Kingdom and Italy (London, 1924) Cmd. 2194. R. Lefevre gives a brief analysis of the various Italian claims in his *Politica Somala* (Bologna, 1933) pp. 131-151.

<sup>43</sup> See Goldsmith, P (2003) *Perceptions of Pastoralisms in Kenya*. Meru, Kenya. Challenging the Myths: A Workshop on Perceptions of Pastoralism in East Africa, Reconcile/ IIED.

<sup>44</sup>Leys, N (1926) Kenya, p.103

The Maasai roved and ruled the great expanse of land in the East Africa region until the 19th century when a combination of diseases, internal strife and colonialism dealt a blow to their national identity. Norman Leys again said this of the Maasai: “Not a tribe of importance between Vaal and the sources of the Nile holds the position and occupies the area it held and occupied a hundred years ago.”<sup>45</sup> The Maasai have retained the vibrancy of its cultural milieu, which sometimes becomes lost in the abyss of the romanticised world of the tourism industry. The future of Boorana is uncertain as their famed rangelands increasingly recede in the face of encroachment by other land users. The Maasailand is being turned into a large ‘community park’<sup>46</sup>, while some part of the Boorana pastureland has been transformed into fledging gas and oil fields.<sup>47</sup>

This study describes the north-south pastoral rangelands to demonstrate the fact that the legacy of colonial land tenure does affect communities, whether they have had direct contact like Maasai or less dramatic relations like Boorana. Not even the celebrated Gada system of Boorana or the oracles of the respected Laibon Mbatian of Maasai saved their respective lands from the enduring ravages of the state policy of alienation.

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<sup>45</sup> Ibid, p.102.

<sup>46</sup> See Ndaskoi, N (2001) Maasai Wildlife Conservation and Human Needs: The Myth of “Community Based Wildlife Management.” The Maasai region has been the home of the famous Maasai Mara, Amboselli, Serengeti, Ngorongoro and other game attractions in Kenya and Tanzania. There is now worrying proliferation of so called ‘community-based conservations’ which in most cases are neither community nor conservations. As The MRG Report (see FN 33 of Chapter 7; Trouble in Paradise: Ecotourism nad Minorities) asserts, a local community organisation is used as aTrojan Horse to penetrate and access common resources for commercial conservancies.

<sup>47</sup> See Gumi, A.N (2008) Oil Exploration in Isiolo: Fears and Fortune. American Chronicle, 23/06/2008. Since 1980s the government has licenced international oil companies to explore oil in northern Kenya districts of Isiolo, Marsabit and Turkana. The Communities are either not consulted and it was done, no details such the total area or post-exploration restoration plan are divulged.. The companies enclose the grazing areas and deploy government armed securities to keep away ‘intruders.’ In Isiolo the Chinese have lireary turned the Cherrup grazing land in Merti into an oilfield.

## 1.7 Contextualising the Concept of Land Tenure

At the root of the indigenous African encounters with the European colonial powers in the nineteenth century, was the question of land. Before that historical contact, every community had its established ways of relating to land. The pre-colonial communities also shared some common features that reflected several dimensions of land as economic, social, political, cultural, intrinsic, and spiritual attachment. Land was an integral part of a community, serving its individual and collective needs. It meant not only physical soil but also all that grew on it, what was beneath its bowels, flowed on its surface and underground. Its soil was tilled for food, trees and grass for building homes.<sup>48</sup> Minerals, crystals and stones deposits were excavated for use as temples and tombs, ornaments and monuments, tools and pigmentations. Grass and fodder shrubs were used for livestock and construction of hamlets, huts and kraals. Wildlife was used for supplementary food and intrinsic significance. The community used labour as a means by which these resources were made available to members of a household. Social and political institutions were crafted to protect and preserve those resources.<sup>49</sup> Members were expected to abide by rules and norms regulating use, access, control and management of resources. Disputes over use and access were resolved through judicial systems often manned by wise elders.<sup>50</sup> Above all, communities knew their territorial resource borders and protected them from hostile neighbours. In spite of differentiated needs, dependable social structure operated to facilitate peaceful co-existence within and between

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<sup>48</sup> For comprehensive analysis of how the Africans perceived the land see Mungazi, D (1989) *The Struggle for Social Change in Southern Africa: Vision of Liberty*. He argues that there was a paradigm shift when the colonial powers saw land exclusively for its utilitarian value.

<sup>49</sup> *Ibid*, p.34-35.

<sup>50</sup> Chapter 2 discusses how the Boorana have developed elaborate rules to regulate use of land resources such as water and pasture. Tache, B.D (2000) *Individualising the Commons: Changing Resource Tenure among Boorana Oromo of Southern Ethiopia*. Addis Ababa University.

communities. Among pastoralists, those institutions and norms played important roles in regulating acceptance of social behaviour and served as the basis for rewarding compliance or repudiating deviance.

During the colonial era, land was primarily conceptualised and perceived through the colonial spectrum, thus undermining the local and indigenous values. Perhaps, no aspect of Kenya's history had been more misunderstood than the concept of land rights and land, as practised by various communities in the pre-colonial territories. A misconception that the indigenous peoples did not have inherent rights to land was eventually legislated.<sup>51</sup> The argument advanced was that most of the land was unoccupied or vacant space referred to as 'tabula rasa', which according to the early colonial authorities, could legitimately be alienated to European settlers. The pre-existing economic activities such as farming or livestock keeping practised by Africans were perceived as inferior and therefore untenable. Liz Alden-Wily, a renowned land tenure expert, observes that as far as the coloniser's mind was concerned, Africans land was 'un-own-able' and did not attain the level of tradable property.<sup>52</sup>

The contradiction about such attitude was more real than it seemed. The colonial mentality made it difficult for even the most reasonable colonising authorities to accept the fact that African communities did have their own way of life before the coming of the Europeans. For example, the territories that later constituted Kenya, were occupied by autonomous communities that had practised egalitarian systems. Those systems, had

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<sup>51</sup> Crown Land Ordinance 1902 as amended by 1915 became the most effective legal mechanism used by the colonial administration in dispossessing Africans in order to settle the European farmers and land speculators.

<sup>52</sup> Alden Wily, L (2008) *Whose Land Is It? Commons and Conflict States: Why the Ownership of the Commons Matters in Making and Keeping Peace*. Rights and Resources Initiative, 1238 Wisconsin Av. NSW Washington DC.



effectively ensured security and social and economic wellbeing of members of their society. To ensure fair and just access to resources, individual and collective use of land was regulated by customary norms. The communities had their own terms of expressing land used for different purposes and at different seasons such as dry and wet periods. The pastoral communities have systematically developed mechanisms of sharing fuzzy or contested resources where land borders had not been clearly demarcated. Niamer-Fuller, an academic who has written widely on pastoralism, describes the measures used to resolve potential conflicts that arose because of contested tenure rights as follows:

Overlapping territories, as managed jointly by neighboring groups, allow some room for expansion and function as fallback areas in difficult years. Buffer zones between groups, maintained for similar reasons, are more extensive and often used by more than two groups. The latter require *ad hoc* negotiations over use between the different groups when the need to use these areas arises.

In Boorana, land reserved for calves called ‘kaloo’ near the homestead cannot be used for grazing of other mature herds.<sup>53</sup> Such a concept may not have made any sense to a dominant agrarian economy that did not take into account subsistence practice. Such an arrangement might appear unpalatably confusing in a society that had a different worldview. In other words, different communities held land under different conditions. As Paul Bohannan, a well known critic of western concept of land tenure, observes, ‘the term ‘land tenure’ in its widest sense covers several implications and presents even more difficulty because it contains a more tangled ambiguity than does ‘land.’<sup>54</sup> Krishnan Maini argues that the lexicon used such as ‘own’, ‘sell’, ‘rent’, ‘lease’, ‘hold’, ‘mortgage,’ ‘easement’, ‘fixture’,

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<sup>53</sup> Tolera, A., Abebe, A (2007) Livestock Production in Pastoral and Agro-Pastoral Production Systems of Southern Ethiopia. *Livestock Research for Rural Development* 19(12). See also Tache, B., Irwin, B (2003) Traditional Institutions, Multiple Stakeholders and Modern Perspectives in Common Property: Accompanying Change within Borana Pastoral Systems. *Securing the Commons* No.4.

<sup>54</sup> Bohannan, P (1963) Land, Tenure and Land Tenure, in P. Biebuyck (ed) *African Agrarian System*, Oxford, Oxford University Press, pp.100-103.

and 'encumbrance' did not have African equivalent or denote the same thing under African customary systems.<sup>55</sup> A close examination of African customary aspects of tenure shows that there was as no distinction as such between property and possession, the sort of division known in English law. The scholars accustomed to English land tenure systems often perceive African customary practices as ambiguous and complex. For example, Daniel Biebuyck commenting on the nature of African land tenure stated as follows:

The analysis of the clusters of rights and claims, privileges and liabilities which are related to the ways in which African hold and work the land, live on it and use its products, is complex, on one hand, because of difficulties in evaluating the exact nature of the rights and claims, and on the other hand, because of the implication of economic and social, political and religious factors. It is, therefore difficult to characterize African systems of land tenure in terms of familiar legal and linguistic concepts.<sup>56</sup>

It is obvious that some scholars preferred to engage in misleading characterisation of the indigenous tenure systems, terming them ambivalent instead of owning up to their own knowledge gap. In the context of colonisation, it was not surprising for the authorities to distort the reality in order to justify expropriation of indigenous peoples' land. Such misconceptions could as well be deliberate, considering the fact that settler and locally based colonial officials intended to entrench their monopoly to control and alienate land. In Kenya, pioneer settlers and administrators aggressively pushed for legislations that declared the acquired territories as 'vacant' and 'wastelands'. Other confusing terms such as 'public land' were used to camouflage the intention of the colonial authorities. It was deliberately adapted to create a twisted sense among the purported 'beneficiaries' that there was need for a trustee or custodian. In reality it meant exclusive access to land resources for the ruling elites to enrich themselves at the expense of ordinary people.

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<sup>55</sup> Maini, K.M (1967) Land Law in East Africa pp 1-2. Oxford University Press. Nairobi

<sup>56</sup> Biebuyck, D (ed) (1963) African Agrarian System, p.52. London, Oxford University Press.

## 1.8 Current Debates and Dilemma

Kenya has been literally ‘hooked’ on an endless debate for two decades now without much progress in terms of legal and institutional reforms. Before that, it took about three decades since 1963 when Kenya became independent, for government to free up political space for Kenyans to engage in any sort of public debate. Kenyans were optimistic that their social, political and economic conditions would change for the better, especially in the aftermath of the 1992 General Elections. The political landscape looked promising with new crops of opposition leaders popularly known as ‘Young Turks’, many of them the doyen of the so-called “second liberation.”<sup>57</sup> The political euphoria did not last long as the fractious opposition parties failed to ensure the *ancien régime* of KANU (Kenya African National **Union**) undertook comprehensive legal and institutional changes in Kenya. Like 1963, the transition became a failure.<sup>58</sup> In his writing on multi-party transition in Kenya and other African countries, Julius Ihonvbere attributes the failures to leaders’ exploitative culture.<sup>59</sup> In Kenya, the early 1990s afforded politicians and policy-makers the best window of opportunity to address many unsettled issues. At that point, no agenda would have been more urgent and critical than land reform.

With the unresolved colonial and post colonial land question, many parts of the country continued to experience land related conflicts. Many observers agree that the unresolved land grievances date back to the colonial period, especially among the pastoral

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<sup>57</sup> See Ogot, B.A (1996) Transition from Single-Party to Multiparty Political System, 1989-1993, p.255, in Ogot, B.A.; Ochieng, W.R, Decolonization and Independence in Kenya 1943-1993.

<sup>58</sup> Ibid, p.255

<sup>59</sup> Ihonvbere, J.O (2006) Where is the Third Wave? A Critical Evaluation of Africa’s non-transition to Democracy in Mbuku, J.M., Ihonvbere, J.O (eds.) Multiparty Democracy and Political Change: Constraints to democratization in Africa. Africa World Press, Trenton, N.J.

communities such as the Maasai.<sup>60</sup> There exist visible tensions and conflicts between the imposed colonial systems and the pre-existing customary rules that often result in overlap and competing source of legitimacy. In relation to pastoralists, the root cause of current tenure uncertainty and insecurity in common with the rest of the country is traceable to the legacy of colonial land policy. Nevertheless, the turning point came with the proposal made to keep the northern pastoral region as a 'reservoir' for future use. This was in 1933 when the Kenya Land Commission under the leadership of Morris Carter, made a proposal to 'set apart' the land in northern Kenya, purportedly, to preserve its 'undiscovered' wealth for private investments by non-pastoralists.<sup>61</sup> Between these protagonists, which includes the state, itself a competitor for land resources, stands important but as yet unfinished business, the task of land tenure reform which successive Kenyan governments have failed to address. This is in spite of the fact that land related conflicts remain an important factor in socio-economic and political stability. The experience of the last two decades has shown that unless the government and other players make a significant move to address land issues, the political, social and economic security of Kenya will continue to deteriorate rather than improve.

Since the early 1990s, some leaders have been accused of exploiting emotive electoral environment in organising 'land clashes', especially in politically volatile Rift Valley Province.<sup>62</sup> During these periods, Kenya continues to experience orgies of killings, rape, mayhem and massive displacement of people that is a mirror image of a war-torn country. The last inter-ethnic conflict, following the bungled 2008 General Elections, was deadly in its

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<sup>60</sup> Kantai, P (2007) In the Grip of the Vampire State: Maasai Land Struggles in Kenya Politics. *Journal of East African Studies*.

<sup>61</sup> See Paras 800-805 Kenya Land Commission, Cmnd

<sup>62</sup> The Local and International press use various phrases to describes conflicts among and between ethnic groups in Kenya. They are called, 'ethnic clashes', 'land clashes', 'tribal clashes', 'ethnic cleansing'

gravity as well as effect on national psyche. The ominous sign was quite clear in 1991 when hot spots areas like Rift Valley, Coast and Western Kenya were gripped by ‘land clashes’ that had left many dead and displaced. The New York Times reporter captured one episode of flight from land clashes as follows:

Nowhere are those tensions more evident than in the Rift Valley of western Kenya, which has some of the most fabled and productive land in Africa but recently has been turned into a scene out of “The Grapes of Wrath,” with tens of thousands of desperate people fleeing in battered pickups piled high with beds, chairs, blankets and children. Some trucks are so overloaded their bumpers hang just millimeters above the road.<sup>63</sup>

Even in the face of such horrors and relentless campaigns for land tenure reform by civil society groups, the government is still reluctant when it comes to kick starting the process. Although the Kenyans had a high expectation of the ‘opposition’ governments that ended the KANU’s unbroken rule of 40 years, the hope has since dissipated as internal wrangling continue to rock the two-term Kibaki government since 2002. The land review process that began in 2004 has yet to be completed. Not even the political eruptions that followed the botched presidential election of 2007 and subsequent orgy of killings blamed on pent-up land grievances, seems to send any message to the ruling class. The National Dialogue and Reconciliation, chaired by Kofi Annan, placed the issue of land at the top of the agenda of political settlement.<sup>64</sup> The team that was appointed to mediate the post-elections political issues between the conflicting parties put the land and other issues in a broader perspective as follows:

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<sup>63</sup> Jeffrey Gentleman, ‘Signs in Kenya that Killings were Planned’, New York Times, 21/01/2008. <http://www.nytimes.com/2008/01/21/world/africa/21kenya.html>. Accessed on 15/03/2009

<sup>64</sup> Kenya National Dialogue and Reconciliation mediated by H.E. Kofi Annan, Chair of the Eminent African Personalities.

...we recognize that poverty, the inequitable distribution of resources and perception of historical injustices and exclusion on the part of segments of Kenyan society constituted the underlying causes of the prevailing social tension, instability and circle of violence.<sup>65</sup>

Since the signing of the accord signed, in which land and other pending reform issues were agreed to be instituted, the government has not taken any legislative step to deliver on its promise. This has become the norm rather than the exception. Even with former opposition ‘stalwarts’ in the government since 2002, numerous efforts Kenyans have put in place to jumpstart stalled reform processes have not produced the expected result. The same old paternalistic and self-serving interests seem to have crept into the way of reform agenda. The situation is even grimmer as far as land question is concerned.

## **1.9 The Structure and Scope of the Thesis**

The issue of land is as old as human civilisation. The historical land and tenure continue to dominate the socio-political sphere of Kenyan society today. The situation goes back over 100 years and involves a constellation of ethnic groups that is highly diverse in its composition, culturally and socially. Their lands were variegated geographically and ecologically with communities adapting different livelihoods systems amenable to their environment. The spontaneous ‘scramble and partition’ of territories by the European imperial powers who subsequently occupied the acquired territories, disrupted the lives of those communities. The colonial authorities introduced new laws and institutions that gave them powers to control people and their resources. The most intensive transformation was in relation to land and conditions attached to ownership, control, access and management of land resources. Whoever exercised the power to spell out those conditions arguably controlled the land. The lives and land tenure systems of the hitherto independent indigenous communities changed forever. This long and deep-seated issue cannot be exhaustively covered by this

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<sup>65</sup> Kenya National Dialogue and Reconciliation (2008). Statement of Principles on Long-term Issues and Solutions.

study. It however attempts to trace the important historical milestones that have manifestly affected and continue to affect the contemporary land tenure arrangements in Kenya. From the pedestal of historical legacy, the land tenure challenges and dilemma mirrors reflectively through every segment and section of the study. The objective is simple. Land and land tenure is intricately trapped in the cobweb of colonial history upon which contemporary land tenure policy and law is built. The central thesis of the study is that the historical land question is not yet settled and its socio-economic and political implications on the livelihoods of communities, especially those like pastoralists who depend on land resources for their livelihoods. The remainder of the thesis is divided into seven chapters.

**Chapter 2** illustrates socio-political institutions deployed by the Boorana and Maasai to ensure good governance of land and other land-based resources. The contemporary challenges facing these pastoral communities in the wake of colonial and post colonial political and economic order are also illustrated.

**Chapter 3** broadly traces the historical evolution of land tenure systems in Kenya beginning with the advent of the colonial rule and conversion of indigenous land tenure systems. The supplanting Western legal system and jurisprudence, aimed at justifying imperial power over territories and land in the early phase of colonial state, is discussed in detail.

**Chapter 4** describes the contact between the Maasai and the British colonial authorities. The two Maasai agreements that led to evictions of the Maasai and the subsequent case by the community to reclaim 'lost' lands are discussed in details.

**Chapter 5** examines the role of the Kenya Land Commission, whose proposals in 1933 became the foundation upon which much of pastoral land policy has been predicated and

perpetuated. It formed a critical turning point on pastoral land tenure, where the question of productivity of pastoral land and reservation for other non-pastoral uses was entrenched.

**Chapter 6** addresses the major land policy and legislations made as part of post-independence transitional arrangements. It demonstrates how the introduction of statutory land tenure frameworks has influenced the overall land rights of the pastoral Maasai and Boorana.

**Chapter 7** revisits current statutory laws and policies and their impact on land rights of pastoralists are examined. The focus is on some of the emerging land conflicts because of increasing volatility of relations between land users and compelling incidents of competing interests. The question of whether the post-independent government had any strategy to transform the colonial land tenure regimes or was happy to continue with the inherited legacy is discussed.

**Chapter 8** is a general summary of this study and points out some of the dominant assumptions that have influenced pastoral land tenure, which I believe is now a dominant notion in land laws in Kenya.

The scope of this study is in some respect limited by the nature of the subject of the research itself. Colonial and contemporary data on pastoralists, particularly those that are of legal nature dealing with land issues are not easily available. There are only a few administrative reports, which even when available have been scoured by poor storage in local repositories such as archives and museums. Furthermore, study on legal and institutional history of land in pastoral areas is hardly a trodden path. Anthropologists, ethnographers, ecologists, geographers, and other such social scientists have fairly covered their various areas of expertise extensively. However, the legal aspects of land and natural resource tenure have not



had such coverage. This study lays a foundation for further research that will explore many the untouched legal facets.

The next chapter will examine some of the important features in customary governance of land and natural resources of the Pastoral Boorana and Maasai. It is important to deepen our understanding of how the pastoral communities governed their land resources before discussing the historical and colonial background of land tenure regimes in Kenya. In spite of rapid land policy changes since the end of the nineteenth century, pastoral land tenure practices have remained resilient. However, the twenty-first century has been challenging as successive governments fail to reform land policy, which in the long run is expected not only to redress unresolved land grievances but also strengthen land tenure rights. The chapter deals more with land resources management system of the Boorana while land issues of the Maasai will be elaborately discussed in chapter 4.

## **Chapter 2**

### **Pre-Colonial Land Tenure Arrangements**

#### **2.1 Boorana system of managing resources**

The Boorana are among some of the indigenous East African peoples such as Maasai, Turkana, Somali, Barabaig, Karamanjong, and Pokot who have maintained their ancient social and cultural practices in spite of profound transformations since the formation of modern states. In contrast to the agriculturalists in central and western highlands who have been integrated into contemporary political and economic systems, the pastoral peoples still maintain much of the indigenous lifestyles, especially in management of their land resources. As I shall illustrate below, the Boorana have maintained their unique system of socio-political and economic organisation for over five centuries since the dispersal of the Oromo people in the sixteenth century.<sup>1</sup> Referring to this system, Abdi Umar commented as follows:

The Borana have elaborate indigenous rituals that have been admired by neighbouring people. They include Gada System, which is an age-grade generation system for organising society...The Borana have well established conflict resolution mechanisms that include organized courts, as well as an indigenous natural resource management system.<sup>2</sup>

Central to these well-organised social and political activities of the Boorana, including critical issues of land and resources governance, lays the system, or more precisely the

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<sup>1</sup> Tache, B.D (2000) *Individualising the Commons: Changing Resource Tenure among Boorana Oromo of Southern Ethiopia*. Addis Ababa University. An oral historical record shows that the Gada leaders have since Gadayoo Galgaloo Yaayyaa (1456-1464) consistently succeeded in handing over/taking over mantle of leadership every eight years. This is seen as a demonstration of Boorana's workable and democratic socio-political organisation.

<sup>2</sup> Umar, A (1997) *Herding into the New Millenium: Continuity and Change in the Pastoral Areas of Kenya*, p.52, *in* *Tradional Occupation of Indigenous and Tribal People*.

institution of Gada. Boku Tache, a pastoralist resources management expert, asserts that 'Boorana social structure provides the framework for resource management at two broad levels of traditional administrative structure.'<sup>3</sup> He defines the two levels as 'administration from above' and 'administration from within.' The administration from above is by gada and from within by clan arrangements. He quotes a Boorana maxim that enunciates this principle: 'Booranii gubbaa gadaan fidamaa, kessaa gosaan fidama.' The reference to gadaa as 'above' may conjure up an image of a superstructure that governs using 'top-down' approaches. However, as many studies illustrate this is not the case. Gadaa in its socio-political framework is an institution based on consensus and egalitarian processes.<sup>4</sup> As a diffused and decentralised system, the two levels coordinate affairs of the community through representational structures that go to the lowest units. Gudrun Dahl presents gadaa structure as follows:...a large number of officers are appointed by election or inheritance: a senior council consisting of the major *Abba Gadaa*, two *Abba Gadaa Kontoma* and three other senior councillors (*Hayyu*) plus four ritual officiants: the councillors are supported by voluntary deputy councillors (*jallaba*) and a large number of junior councils conscripts. For each of the two *Abba Gadaa Kontoma* there is an additional junior council consisting of a number of *Hayyu Medicca* councillors, who represent all Boraana clans and *Hayyu Garba* representing the clan as the *Abba Gadaa Kontoma* himself.<sup>5</sup>

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<sup>3</sup> Boku, T.D (2000). Op.cit. p.32

<sup>4</sup> Melbaa, G (1988) (repr. 1999) *Oromia: An Introduction to the History of the Oromo People*, p. 17.

<sup>5</sup> Dahl, G (1996) *Sources of Life and Identity*, p.171, in Baxter, P.T.W., Hultin, J., Triulzi, A.(eds.) (1996) *Being and Becoming Oromo: Historical and Anthropological Enquiries*, pp. 162-177.

The dividing lines between the two levels appear to exist in all but name. The gadaa system, as opposed to feudal /monarchical systems in other African societies, does not have dominant rulers at the top making rules and enforcing them through multiple layers of subordinates. Rather, a horizontal structure holds collective mandates for a limited period of eight years for the reigning council. Gadaa has a cardinal responsibility of overseeing Boorana land and resources (water, pasture, salt minerals, etc.) and ensure that laws, *seera* and customs, *aadaa* that regulate their source are respected.<sup>6</sup> Equitable access of resources by all members of the community is an important cornerstone of regulatory framework which individual clans or territorial units are expected to comply with.

The Boorana have conceptualised and developed institutional and regulatory frameworks to manage resources in their spatial and temporal conditions, using explicit rules and regulations concerning grazing patterns, water use, territorial and settlement planning. The concepts of *madda*, *dheeda*, *ardaa*, *reera* and *ollaa*, which are often used in the sense of administrative functions, play an important role in defining land tenure rights. The defining features of Boorana range management institutions are indigenous knowledge, equitable access, and decentralisation of governance, principles of subsidiarity, distributive and redistributive mechanisms and environmental sustainability. Development consultants in pastoral rangelands such as Watson argue that the Boorana indigenous institutional frameworks have been successful in the management of community-based natural resources. Referring to his seminal work in Boorana, Watson states that, ‘Boorana Zone in southern Ethiopia became the focus of this work because it is well known for its indigenous institutions...’<sup>7</sup>

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<sup>6</sup> Boku, T.D (2000) op. Cit. 32

<sup>7</sup> Watson, E.E (2003) Examining the Potential of Indigenous Institutions for Development: A Perspective from Borana, Ethiopia, p.291, *in* Development and Change 34(2); 287-309.

In spite of significant social, political and economic changes that have taken place over numerous generations, sometimes shaking the core attributes of the community; the Gada system has shown profound resilience. Difference of opinions may exist among scholars as to the nature and scope of Gada as a source of authority and governance but there is a general agreement that it plays a central role in social and cultural identity of the Oromo people as a whole.<sup>8</sup> There is no doubt that with the partition of Boorana into two colonial states, the Abyssinian-controlled Ethiopia and the British East Africa, the influence of Gada has gradually been on the wane. Gada system is institutionally challenged because of complex and interwoven social and political conditions that have occurred in the past one hundred years. The British and Abyssinian imposition of their hegemonic rule changed the power balance in favour of new rulers.

However, the role of gada in regulatory and institutional management of land resources, especially in the recent past decades where competitions over declining range resources have caused perennial conflicts, the residual power of gada leadership is more real than apparent. The Boorana continue to organise their range resources and adhere to laws and customs that preserve resources rather than waste them through uncontrolled extraction. Historically, the Boorana land and land-based resources management strategies were noted for their appropriateness and effectiveness. Johan Hellland, who has widely written on pastoral Oromo development issues, observes that:

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<sup>8</sup> Bassi, M(1996), Power's Ambiguity or the Political Significance of Gada pp. 150-152, *in* Being and Becoming Oromo, op cit. He observes that the Oromo nationalists view gada as the root of their culture and a symbol of Pan-Oromo national and plitical identity.

Compared with other pastoral areas in East Africa with similar natural conditions, the Borana rangelands have usually (i.e upto to quite recently) been assessed to be exceptionally good. Given that the Borana have occupied these areas for at least four hundred years, the implication is that the Borana pastoral production system contains a mechanism to solve the problem of growth in pastoralism , brought about by the natural propensity of animal populations to grow, particularly in response to favourable conditions.<sup>9</sup>

The reference to the period of four hundred years, has been alluded to by other writers, who specifically trace it to the ‘reign’ of Abayii Baabboo Horoo, who was Abba Gada (the gada leader ) of Boorana from 1656 to 1664.<sup>10</sup>

According to scholars and oral historians, the Gada of Abbayyii Baabboo coincided with a massive dispersal of Oromo in different directions in Northeast Africa which was said to have been triggered by overpopulation and environmental decline. The expansion and migration led to the separation of the Oromo into various ‘independent’ groups. Contemporary Oromo historians such as Mohammed Hassen trace the period of separation to the sixteenth century.<sup>11</sup> The Boorana have since established the sub-region as the ‘last frontier’ of the pre-colonial indigenous Oromo form of governance and ritual practices.

## **2.2 Boorana and Concept of shared resources**

Historically and recently, access to land and water resources have been extended to non-Boorana *émigré* who settled in Booranaland. Those who willingly desired to be part of Boorana were often co-opted into kinship and clan systems of the Boorana. For example,

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<sup>9</sup> Helland, J (1996) The Political viability of Borana Pastoralism: A Discussion of some feature of the political system of the Borana Pastoralists of Southern Ethiopia, in op cit Being and Becoming Oromo p.134.

<sup>10</sup> Legesse, A(1973) Gada: Three Approaches to the Study of African Society, pp 190-91. The same period is restated in his 2000(2006) book, Oromo Democracy: An Indigenous African Political System, p.267, Appendix 1. The event is also corroborated by other sources , for example Borbor Bulee, a reknown Boran historian, reckons that the ‘Soddoma Booro (the thirty families) ‘the prototype’ or ‘original’ group that ventured into present-day Booranaland during the gada of Abbayyii Baabboo Hooro.

<sup>11</sup> Hassen, M (1994) The Oromo Of Ethiopia: A History 1570-1860, p.18.

Professor Gufu Oba, who is an authority on pastoral resource conflicts, traces and explains how a complex migration and co-option mechanism was used to allow such neighbouring tribes as Garri, Gabra and Rendile to access grazing and watering resources. He describes one of the ways in which a non-Boorana family is incorporated into Boorana as follows:

...by clan or lineage, *gosa*, is when a family or a group of related families affiliate themselves to particular Boorana clan or sub-clan, in order to acquire access to its resources. The applicant must accept *aada seera Boorana* while they are utilising those resources but may go back to their own way of life when they recross the resource border. Some such groups however may settle among their hosts and become entirely integrated; as did the Rendile of Bach'eelo blacksmiths, *waar' ilmaani Bach'eelo*, during the gada of Guyo Gedo (1753-1761).<sup>12</sup>

These institutional arrangements broadly include settlement patterns and structures (*madda, dheeda, olla* etc), laws and regulations (*seera*), customary principles and practices (*aada*), and the whole range of socio-environmental, political-economy considerations and strategies that influence policy and decisions regarding access to land resources. Traditionally and functionally, land and range resources in Boorana are organized in the following territorial and tenorial order. *Madda*, literally refers to aquifer, indicating permanent water source.<sup>13</sup> In the case of Boorana, it normally refers to clusters of wells such as *Tula Sagalani* (the ancient nine wells complex in Boranaland, southern Ethiopia, well known for their rich source of water) or springs in the bed of seasonal rivers, which provide adequate access to water for human and livestock consumption.

In the context of Boorana land tenure, *madda* encompasses collections of villages that not only have access to well clusters and other range resources but also contain some significant bundles of rights and claims, privileges and liabilities, which emanate from how

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<sup>12</sup> Oba, G (1996) Shifting Identities along Resource Borders: Becoming and Continuing to be Booran Oromo, *in* Baxter, P.T.W., Hultin, J., Triulzi, A.(eds.) (1996) Being and Becoming Oromo: Historical and Anthropological Enquiries, p.121. Some other sources put the gada of Guyo Gedo between 1744-1752, See Tache, B (2000) Appendix1, p.123. Borbor Bulee interview by Areroo Goro, in 2004, confirms Tache's record.

<sup>13</sup> Bassi, M, *ibid*, p.91.

the resources are used. In other words, *madda* is a sub-set of the national structure, with distinct, autonomous territorial infrastructure that extends its scope of resource governance to a wider population. Each *madda* regulate the utilisation of water, pasture and other communal range resources through well organised institutional structures based on that particular *madda*'s sanction subsidiary administrative regulations which in normative principles must conform to the 'higher' *aada-seera* Boorana. Each sector has distinct laws that are promulgated at a national level by the Legislative Assembly or *Gummi Gaayoo* (it sits every eight years to review laws and other important affairs of the Boorana nation) which cannot be altered by *madda* or other sub-national structures until and unless the Assembly sanctions the changes as amendment. For example, a sectoral law and custom, *aadaa-seera bisaani*, regulates utilisation and management of water resources.

### **2.3 On the Periphery of the Empires**

Boorana colonial contact, compared to that of the Maasai, was remote and less dramatic. The two experiences were in marked contrast to each other, especially in the early part of colonial establishment. As illustrated in Chapter 3, the Maasai's initial contact with the colonial administration in the early twentieth century turned out to be intensely enmeshed in controversies over land. Under the guise of mutual agreements, Maasai were removed from their homeland in the sprawling central Rift Valley and ended up in drier areas reserved for their resettlement.<sup>14</sup> Boorana, like other northern pastoralists, did not face such drastic measures as the Maasai. For the most part of the colonial period the northern pastoralists such as Somali, Boorana and Turkana, who were early in the colonial period lumped together as Northern Frontier Province (later renamed Northern Frontier Districts, NFD), remained as

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<sup>14</sup> See Chapter 4 for detailed discussion on the 1904 and 1911 Maasai agreements. The agreements were used as the basis for removing the Maasai from central Rift Valley to a marginal and drier southern reservation.



outlying colonial stations. The Northern Frontier District Commission vividly captured the situation as follows:

Until the agitation for secession began there was hardly any political activity in the Northern Frontier District. The population was mainly preoccupied with the struggle for existence and was largely unaffected by Kenya politics in the south.<sup>15</sup>

The Boorana, in common with other Oromo-speaking groups such as Orma and Wardai, who currently live in the coastal district of Tana River, were sometimes known as “Galla” during the colonial period.<sup>16</sup> The Boorana’s first contact with the European and other foreign travellers coincided with the partition of Africa. The Boorana were by that time also drawn into the enraging competitions between the British, Abyssinians and Italians.

Before the British colonial administration was established in the area, a number of the Boorana had already settled in the adjacent lowlands of Kenya, locally known as *golbo* (the lowland grazing areas). However, the majority of people were entrapped eventually in Menelik’s side of the borders where the occupying army made it difficult for the people to interact between the two evolving states. The Abyssinian rulers instituted a system called *naftanya gabar* (lord-serf) which was a patron-client relationship where the indigenous people paid tribute to the armed settlers.<sup>17</sup> The Boorana recall that the Menelik conquest took place during the *gada* (reign) of Adii Dooyyoo Jiiloo.<sup>18</sup> Menelik granted the whole of the Booranaland to his famous military general and later Minister of War, *fitawrari* Hapte

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<sup>15</sup> Report of the Northern Frontier Districts Commission, 1962, Cmnd.1900.

<sup>16</sup> See Huxley, E (1935) *White Man’s Country, Through Gallalana 1896-1897*, pp.23-42

<sup>17</sup> Ta’a T (2002) *Bribing the Land: An Appraisal of Farming Systems of Macca Oromo in Wallagga*, pp. 97-113. *Northeast Africa Studies*, Vol. 9, Number 3.

<sup>18</sup> 1896-1904. A *gada* is one segment of generation- set that succeeds each other every eight years. *Abba Gada* (*hayyu aduula*-the senior council) leads each *gada*.

Georgis, as reward for his successful execution of the battle of Adua against the Italians in 1896.<sup>19</sup> It was purely a military outpost appended to the empire, with no civil administration or respect for communal civil rules. Many Boorana had to cross to British East Africa in order to escape what was described as harsh and repressive Abyssinian rule. Wilfred Thesinger wrote about what he had witnessed in 1913, a decade after the Boorana conquest by the Menelik army:

... the government divided all Boran as serfs or bondsmen among the soldiers, giving each officer and man so many families to support him...The native is obliged to pay a definite amount yearly in cash, kind and labour to his master, he is master, he is forbidden to leave his village, and consequently ...from being a freeman he has sunk to be the slave of Abyssinians.<sup>20</sup>

In the early period of the Protectorate administration the focus was on securing the boundary with the Abyssinians to form a bulwark against the southern expansion of the Abyssinians and Italians in the area. The region was annexed to the protectorate with the conclusion of Anglo-Abyssinian boundary agreements<sup>21</sup>. The administration conducted reconnaissance expeditions with the aim of ascertaining areas to be added to the protectorate. For example Major C.W.Gwynn undertook a long exploratory journey in 1908 from the tip of the Gulf of Aden through swathes of land in Somali and Galla (Oromo) countries, to the shore of Lake Rudolf ( Lake Turkana) and the border of the Sudan. This particular episode signifies the rudimentary ‘hands-off’ strategy used to deal with pastoral areas. One such boundary delimitation journey was elaborately described as follows:

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<sup>19</sup> Helland, J (1996) The Political Viability of Borana Pastoralism. P.142 in Baxter, P.T.W., Hultin, J., Triulzi, A.(eds.) (1996) Being and Becoming Oromo: Historical and Anthropological Enquiries, pp132-148.

<sup>20</sup> “Memorandum on Mr. Thesinger’s Journey to the Southern Frontier and Nairobi”, F.O 371/1880, quoted in D.C. Hickey “Ethiopia and Great Britain: Political Conflict in the Southern Borderlands, 1916-1935. PhD dissertation, Northwest University, 1984, p.140.

<sup>21</sup> The British Government hurriedly appointed a Greek, Philip Zaphiro, a ‘Hides and Skin’ trader in Borana area, to represent her in the initial boundary delimitation with the Abyssinians

It will be remembered that in the year 1902-3 Mr. A. Butler...organized an expedition to explore the southern frontier region of Abyssinia. Captain P. Maud...was attached to the expedition to carry out survey operations, and to make recommendations for the future frontier line.... A treaty based on Captain Maud's recommendations was concluded in 1907, defining in general terms the boundary between Abyssinia and our colonies of British East Africa and Uganda. It also provided for the settlement of the boundary in detail by a delimitation commission; and in May, 1908, I was appointed to carry out the work of delimitation. The frontier to be examined and marked out extended from the junction of the rivers Ganale and Dawa in the east, to the southern terminal of the Sudan-Abyssinian boundary...<sup>22</sup>

The British colonial authorities in practice divided the territories into ecological zones, where the settler commercial farming activities were given preferences over the African subsistence economies. The other reserves that were contiguous to European settlement, later attracted the attention of the authorities and plans for agricultural development were put in place. The pastoral areas were ignored and even suppressed on the basis of existing policy that favoured agriculture based economy.

## **2.4 Conflicts and Shrinking Land resources**

Many historical accounts have referred to the widespread presence and influence of the Boorana or Galla in the East African region before the advent of European powers in the region. Norman Leys, a colonial civil servant who wrote about Maasai during the early colonial period had this to say: "About a hundred years ago the Galla thus rose to power in Eastern Africa only to sink again before exact knowledge could be got of them."<sup>23</sup> Elspeth Huxley, an influential settler, wrote a detailed account about the Boorana contact with Lord Delamere during his 1896-1897 journeys through their land.<sup>24</sup> However, with the partition of territories between the colonising powers, including the Abyssinians, the Boorana found themselves under two or more competing powers. By the turn of the nineteenth century, Boorana had begun losing their grip over their land resources as

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<sup>22</sup> Gwynn, C.W.(1911) A Journey in Southern Abyssinia, Geographical Journal Vol.38, No.2, p.113

<sup>23</sup> Leys, N ( 1924) Kenya, 103

<sup>24</sup> Huxley, E (1935) White man's Country, pp.23-42, Chapter 11, Through Gallaland 1896-1897

European weaponry proliferated in the region. Imposition of colonial rule on the Boorana compounded the increasing pressure from westward Somali expansion at the beginning of the second half of the nineteenth century.<sup>25</sup> The situation became worse with the proliferation of arms, which mainly empowered the Italian supported Somali pastoralists. The British administration did not take as keen an interest in the area as the Italians did.

Lord Delamere and an American traveler who was the first to traverse the region, Dr. Donaldson-Smith, blamed the British for allowing Ethiopians and Italians to unleash havoc in the region.<sup>26</sup> The British colonial rule was established among the Boorana around 1905, when Philip Zaphiro opened British posts in Moyale and later at Marsabit in 1919.<sup>27</sup> The British took control of the Boorana that lived on their side of the border. Such administrative control contributed to further weakening of the Boorana in managing their rangeland resources. The Protectorate administration was mainly preoccupied with law and order on the borderlands that had hosted various competing interests both at local levels and between colonising powers. Locally, Boorana were disadvantaged by the British policy that stopped them from using mounted horses to ward off the rival groups that encroached on their land.<sup>28</sup>

The imperial powers did not involve the already subdued Boorana community when the British and the Ethiopians demarcated the boundaries between themselves. However, when they signed the agreement in 1907, provision was made for the partitioned Boorana to have unrestricted access to resources on either side of the frontier. Unfortunately, the Ethiopians flouted the spirit of the agreement by stopping Boorana from the British side to

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<sup>25</sup> Oba, G (1996) op.cit. p.127.

<sup>26</sup> Huxley, E, op.cit.p.39

<sup>27</sup> Tadicha, H.W (2006) Historical and Current Perspectives on Inter-ethnic Conflicts in Northern Kenya, p.62.

<sup>28</sup> Gunter, S (1989) Identities on the Move; Clanship and Pastoralism, p.47. Manchester University Press.

access pasture and water on the opposite side.<sup>29</sup> The restrictions not only diminished drought coping strategies of the pastoral Boorana but also disrupted the pre-existing communal land tenure practice that was premised on shared resources and social networks. This marked the beginning of the diminishing pastoral resources of the Boorana. Access to resources was the bedrock of their livestock based economy, which in turn was the source of livelihoods. The partition of the community under the Ethiopia and British territorial superstructure altered their resource governing system, as the decision no longer resided with them. The acclaimed territorial powers affected the local institutions and governance systems, especially weakening the responses to such issues as conflict between antagonistic ethnic groups.

However, the most challenging factor, which had an enduring impact on the Boorana resource borders, was the rising power of the Somalis in the 19<sup>th</sup> century. With acquisition of modern weaponry from the Italians, the balance of power in the region among the local pastoralists shifted in favour of Somali. Unlike the Abyssinians, they fell under the control of three European powers. However, the Abyssinians, shrewdly made use of the European powers to gain access to weapons. The influx of the Somali in the region began with migration to the south of the river Juba after 1860. According to Gufu Oba, the expansion of the Somali was largely triggered by internal clans and sub-clans conflicts and competition over access to grazing land. He suggested that the pastoralists devise a control mechanism of grazing access by ensuring effective occupation of an area, which gave a particular group a head start over the others.<sup>30</sup> Subsequent conflicts regarding grazing resources by neighbours

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<sup>29</sup> Oba, G (2000) "Where the bulls fight, it is the grass that suffers the impact of border administration on drought-coping strategies of the Obbu Booran during the 20th century. *Journal of Oromo studies* 7(1&2) 87-108.

<sup>30</sup> Oba, G (1996) *op.cit*,p.127

was countered either by invocation of prior investment in other labour-intensive assets such as wells and salt mines or alternatively by mounting organised defence. To emphasise the point that proliferation of arms played a critical role in the reconfiguration of resource borders, Oba quotes Ian Lewis, a renowned scholar on Somali, who stated as follows:

Thus in all cases of contested ownership, claimants lay stress upon the energy, labour and expense involved in their construction. And when not in use wells which are the sole property of individuals are usually covered over...Yet despite their existence and wide recognition, specific rights to water can only be upheld by force of arms...While pasture is thus not owned, and clans do not occupy determination territories at all seasons of the year, usage backed by effective fighting potential... creates some degree of customary association with particular areas.<sup>31</sup>

The conflicts between Boorana and the expanding Somalis was bound to occur in the borderlands between the lowlands escarpment of Golbo and Wajir areas where Boorana had established symbiotic relations with Ajuran in developing grazing settlement. The presence of numerous wells with an abundance of water attracted the Somali in the area. In the face of impending conflicts, the British administration was faced with the dilemma of how to deal with claims by the Somali over the area. The British, bogged down by the Somali resistance in the British Somaliland from 1893 to approximately 1920, were wary of engaging the Somali in another costly war. In the end, the authorities, on the pretext of grazing control, decided to move the Boorana out of the area and enforced strict compliance to redrawn boundary they called the Somali-Galla line.<sup>32</sup> The British Government had earlier moved the Orma from Wajir District across the Tana River to avoid clashes with the Somalis. The British conveniently overlooked the decree it had made in 1909 forbidding the Somalis from

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<sup>31</sup> Ibid.

<sup>32</sup> See Castagno, A.A (1965) The Somali-Kenyan Controversy: Implications for future,p.169. Journal of Modern African Studies 2, (2) 165-188.

crossing the Somali-Galla line after the pressure from Somalis changed the course of their grazing regulation.<sup>33</sup>

Matters became worse for the Boorana when the Italians defeated the Ethiopians in 1935-1936 and occupied the region. Castagno suggests this unexpected turn of event motivated the Italians to plan for the absorption of the Northern Frontier Districts (NFD) into a 'Greater Somalia' scheme that would have made it the supreme power in the region.<sup>34</sup> In what looked like a strategy towards that goal, the Italians recruited irregular local forces known as 'banda' (or bandits) to force the Boorana and other local groups to submit to their rule. The Boorana were particularly perceived as being sympathetic to Ethiopians and therefore singled out for harassment. 'Banda' outstations were put up in several settlements on the Ethiopian side to enforce orders that were made to restrict Boorana movement.<sup>35</sup>

The Italian geopolitical strategy that was aimed at the Ethiopians and the British caught up with Boorana. This had two major implications for the Boorana. Firstly, they Boorana virtually lost their grazing land to the now powerful Somalis who had the backing of the Italians. The British policy of security control favoured the Somalis whom the British had pacified rather than stretch their limited personnel to ransack the vast region. Secondly, as a result this weakened position of the Boorana resource management institutions became less relevant as government usurped the role of enforcer of laws. In the absence of clear land policy by the colonial powers, violence became an established norm in the northern region.

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<sup>33</sup> Ibid, p.170.

<sup>34</sup> Ibid.

<sup>35</sup> Tadicha, H.W (2000) op.cit.p.58. Many of these information were provided by Boorana oral historians such Borboor Bulee and Oba Sarite which are contained in personal collections deposited at the Obbu Library (OBLC).

The Boorana, who until much later did not have access to modern weaponry, were unable to defend their land. Conflict and warfare has since become an instrument that defines land tenure rights in northern Kenya as the state, in most cases appears to be overwhelmed or not seriously committed to intervene.

One of the features of African customary land tenure systems, including that of the Boorana, was the possibility to exclude those without access rights.<sup>36</sup> However, with the declined powers of custodians of commons, confusion reigned in many pastoral areas during the colonial time. As discussed in Chapter 2 the colonial project was centred in the agriculturally established highlands. In reality the government was exclusively focused on the so called high potential areas and did not pay much attention to Boorana and other pastoralists. What indeed became the paramount concern of the government was the policy aimed at containing pastoralists. Colonial garrisons and administrative outposts dotted the northern regions as a bulwark against the pastoralists' movement. The assumption was that 'national' security of the Protectorate was paramount in the administration of the region. For example, the Northern Frontier District was declared a 'closed area' under the Outlying District Ordinance in 1926.<sup>37</sup> Movement in and out of the northern region was restricted and those who were permitted to travel had to carry special passes.

The Special Districts (Administration) Ordinance of 1934, and Stock Theft and Produce Ordinance of 1933 gave the provincial administration extensive powers to arrest,

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<sup>36</sup> See Ostrom, E (1990) *Governing the Commons: the evolution of institutions for collective action*, Cambridge University Press, Cambridge.

<sup>37</sup> Outlying District Ordinance, No.25/1902. See Castogano A. A (1965) op. Cit.p.170



detain, and seize property of 'hostile tribes' in the northern region and other pastoral areas.<sup>38</sup> This detached and seemingly 'separate' policy approach made an American writer, James Negley Farson, whilst travelling in the region in 1950, to comment that the northern region was "one half of Kenya about which the other half knows nothing and seems to care even less."<sup>39</sup>

## **2.5 Maasai Socio-political Transformation.**

As mentioned in Chapter 1, the Maasai began their migration from the lower Nile Valley around the fifteenth century. Much of the historical and ethnographical accounts refer to their predominant presence in East Africa by the eighteenth century.<sup>40</sup> Without access to 'collective memory' of their primordial cultural and political organisations, much of what we know today is a complex web of many transformations that the Maasai went through since their arrival in the region. Sutton argues that usable oral traditions of the Maasai relating to the period before 1800 A.D did not exist.<sup>41</sup> Many writers, mainly European ethnographers and anthropologists, agree that Maasai's expansion in the region was assisted by their conquest and assimilation with the neighbouring communities. Above all their incredible assimilative strategies contributed to the contemporary identity of the Maasai. In their seminal work many

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<sup>38</sup> For more analysis, see Hassan, A.I (2008) The Legal Impediments to Development in Northern Kenya. A presentation to Members of Parliament, Naivasha, 22-23 August. The provincial Commissioner was given discretion to determine who hostile tribes were and declare them according for the security agents to conduct arrests and other forms of punishment. While Outlying Districts Ordinance (later Act) and Special District (Administration) Ordinance were repealed in 1997, the Stock Theft and Produce Act, Chapter 355 Laws of Kenya still remains on statute books.

<sup>39</sup> Farson, J. N (1950) Last Chance in Africa, p.260.

<sup>40</sup> Spears, T., Waller, R (1993) (Eds.) Introduction, p.20. Being Maasai: Ethnicity and Identity in East Africa. Eastern African Studies. James Currey.

<sup>41</sup> Sutton, J.E.G (1993) Becoming Maasailand, p.38, in Spears, t.,Waller, R (eds) Being Maasai: Ethnicity and Identity in East Africa. Eastern African Studies. James Currey.

social anthropologists, linguistics and ethnographers described the process of Maasai cultural and social transformation as ‘Being’ and ‘Becoming’ Maasai.<sup>42</sup> Spears and Waller observe that the early history of Maasai migration into the Rift Valley was based on accommodation and adaptation. The Maasai, according to them, produced “successive groups establishing, themselves beside, and intermixing with existing populations to produce the palimpsest of pluralist communities...”<sup>43</sup> Richard Waller vividly describes the Maasai integration process not just as assimilative, but also ‘replicative’, which showed a high level of interaction with other tribes or clans.<sup>44</sup>

The Maasai, in common with the Boorana and other pastoral communities had been defined and shaped by their ‘movement’ in search of better grazing land and other ecological, climatic conditions that provided for their livestock. During the formative years of the Maasai, settlement in the Rift Valley was thus interpreted as “rapid social, institutional and ritual development of self-conscious ethnicities as much as actual territorial expansion.”<sup>45</sup> The expansion coupled with a pastoral production system that involved hundreds of thousands if not millions of livestock, came to define the Maasai identity. The movement, which was not just a linear physical process of migration but involved many elements of settlements, conquests, displacement, and intermarriages with other ethnic groups ensured continued reconstruction of Maasai identity. In other words, the evolutionary nature of the Maasai

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<sup>42</sup> Ibid, Spears and Waller. See also Kituyi, M (1990) *Becoming Kenyans: Socio-economic Transformation of the Pastoral Maasai*. Act Press. Nairobi.

<sup>43</sup> Ibid, Spears and Waller, p.19.

<sup>44</sup> Waller, R(1985) *Ecology, Migration and Expansion in East Africa*, p.366. *African Affairs* 84: 347-370

<sup>45</sup> Sutton, supra, p.38. It is believed that movement of the Maasai settlement covered wide range of both savannah plains of northern Kenya to the foot of Mount Kilimanjaro. It then extended to the central highlands of the Rift Valley cover great expanse of land in Naivasha, Nakuru and Nairobi.

identity that of 'Becoming' took centre stage in the development and consolidation of pastoral systems in areas that later became the theatre of colonial land crisis.<sup>46</sup> By the nineteenth century, Maasai had developed formidable military and social organisation to secure land resources in the expansive Rift Valley and contiguous areas. Their way of life depended on maintaining military superiority in comparison with their neighbours that formed the basis of their defence as well as a threat to others.<sup>47</sup> The Maasai territorial units were gradually coalesced in the central Rift Valley where the combination of undulating ranges and savannah plains that were traversed by dependable streams provided the Maasai with immortalised and unrivalled pastoral sanctuary. It was here in the Great Rift Valley, that the Maasai developed what John Galaty calls "specialized pastoralism."<sup>48</sup> He observes the fact about the centrality of the Rift Valley, which not only provided a north-south axis of Maasai settlement but also created easy access for future expansion in any direction.<sup>49</sup> Galaty further recognises the diverse ecological and economic attributes of the Rift valley when he states that; "It is transacted by the actual semi-arid valley but includes highland forests and plateaus, and it is integrated into a single system through mobile resource use or trade."<sup>50</sup> Until their removal

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<sup>46</sup> We have discussed in Chapter 4 and other chapters that Maasai community was twice evicted from Rift Valley and their land which was endowed with good pasture and water alienated for European settlement. The area became subject to many political and judicial contests as evidenced by the Maasai case and also Maasai delegation to Lancaster House Constitutional Conference. In recent years the Maasai have demand 'return of lost' land as part of redress to historical injustice. So far all these moves and actions have remained at the level of contestation without much respite.

<sup>47</sup> A. H. Jacobs has fervently argued that the Europeans and neighbours who had coveted their land and were initially restrained by the fear that the Maasai would in retaliation spell doom on them exaggerated the image of Maasai as war-like warriors. See Jacobs, A.H (1979) Maasai inter-tribal relations: Belligerent Herdsmen or Peaceable Pastoralists? *Senri Ethnological Studies*, 3:33-49.

<sup>48</sup> Galaty, J.G (1993) Maasai Expansion and the New East African Pastoralism, p.61, *in* Spears, T., Waller, R (eds.) *Being Maasai: Ethnicity and Identity in East Africa*. Eastern African Studies. James Currey.

<sup>49</sup> *Ibid*, p.61

<sup>50</sup> *Ibid*, p.6i. See also Waller, R(1985) *ibid*, pp-347-370.

from the Rift Valley by the colonial authorities, the Maasai played an important role in the evolution of the Rift Valley as a regional economic and political hub.

The Maasai, unlike Boorana and many other pastoral groups (with partial exception of Somali and Gabbra) are divided into autonomous sectional and territorial units. Galaty contends that in the past, the divisions were based on larger alliance with prominent sections forming a sort of confederacy.<sup>51</sup> The four major alliances were the Kisongo, Loitai, Kaputiei, and Purko 'clusters', generated and regenerated by assimilation, expansion and migration. It was asserted that by the middle of the eighteenth century, two expanding vanguard groupings reflected the political and economic spectrum of the Maasai in Rift Valley. The first group, included the Damat, Keekonyoike, Loitai, and Matapato in the central Rift and the second group were comprised of Kaputiei, Loodokilani, Dalalekutuk, Salei, Loitayiok, Serenget and Siria.<sup>52</sup> The first group had concentrated their settlement in central Rift Valley where they became the dominant force for at least a hundred years until the advent of the colonial rule. The second group were more dispersed and dominated the plains adjacent to the other sections. There was also a third group who were referred to as 'frontier Maasai' because of their distance from the rest of the other sections.<sup>53</sup> They included the Loogolala/Parakuyo, Uas Nkishu, Losekelai, Laikipiak and Samburu. These sections occupied areas that lie deep in northern Kenya and central Tanzania.

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<sup>51</sup> Galaty, *supra*, p.70.

<sup>52</sup> *Ibid*, p.72.

<sup>53</sup> *Ibid*.

## 2.6 Maasai Land Resources

Maasai, as we have indicated above, were organised in territorial units based on sectional and clans alliance. I have also mentioned that Maasai migration and expansion over the years was underpinned by the need to access better pasturage and water for their livestock. The social and political structure of the Maasai was therefore influenced by an ethos of self-reliance and protection of land rights. The territorial unit formed the most important basis for land tenure rights and tenure access. The Maasai, through their livestock production system and the assertiveness required to manage overlapping interests associated with pastoralism, had inculcated collective behaviour of land protection based on age-sets organisation.<sup>54</sup> In congruence with other pastoral communities, the Maasai practised communal land use. According to Naomi Kipuri, a scholar who has done extensive research on pastoral development, states that "... defined community assumes usufructuary rights to a given territory." She further explains, "Each Community knew its boundaries although access to territories belonging to others was mutually negotiated."<sup>55</sup> As a precaution against the widely held misconception about 'communal' land tenure arrangement, she points out that it is different from 'open access,' which unlike communal tenure may not confer discrete rights and obligation on users.<sup>56</sup> Garret Hardin is blamed for having confused the difference between the two tenure practices, hence coming up with a theory that postulates "the tragedy

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<sup>54</sup> See Galaty (1993) *supra*, p.80.

<sup>55</sup> Kipury, Ole, N (1991) *The Scramble for Maasailand: Age, Gender and Class in the Case of No Precedents*

<sup>56</sup> *Ibid.*

of the commons,”<sup>57</sup> which is widely believed to have influenced governments’ policy towards pastoral communities in the region.

John Galaty further argues that age-sets are critically important in responding to exigencies of pastoral subsistence production systems, which were and still are prone to resource-based conflicts.<sup>58</sup> The Maasai age-sets are constituted over time. A new age-division (*Olporror or olporo*) is opened every seven years, a successive pair of divisions forming an age-set (*Olaji*) on a fourteen-year cycle.<sup>59</sup> Alternative age-sets form ‘streams’ which link older and younger in relation to authority and political affinity. Age-sets, based on time, cut across units of residential organisation from neighbourhoods to sections and territorial boundaries. The most pronounced age-sets that were bound by obligations to protect Maasai land and property are the Morans (*ol murrān*) whose lives were engaged in camps (*Imanyat*).and scouting.

The Maasai were in the league of other pastoral communities as far as social and political organisation was concerned. The pastoralists were an autochthonous society practising highly decentralised form of social and political organisation before the advent of colonial rule, which eroded the systems. Perhaps, to emphasise the centrality of the system in pastoral set up, Navaya Ole Ndaskoi, states that Maasai Laibon were viewed by the community as leaders but not rulers.<sup>60</sup> He outlines that for every sub-tribe each group had a leader, *Olaigwanani* (pl.*Olaigwanak*) ‘elected’ by the majority of the members in an assembly

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<sup>57</sup> Hardin, G (1968) *The Tragedy of the Commons*. Science, 1243-1248.

<sup>58</sup> Galaty, *ibid*, p.80.

<sup>59</sup> *Ibid*.

<sup>60</sup> Ndaskoi, N (2006) *The Roots Causes of Maasai Predicament*, p.5.

of that particular group.<sup>61</sup> The leaders of each group assume the role of spokespersons and not rulers, who are mandated with coordinating activities of the groups for the purpose of the community welfare. Land and secure access to resources is one of the major obligations of the group leaders and the members. They are the appropriate channels to deal with weighty issues that impinge on critical communal assets such as land. Ndaskoi argues that it was wrong to engage mediceman (Iloibonok) like the British did with Oloibon Lenana during the removal of Maasai from central Rift valley in early Twentieth century.<sup>62</sup>

The following Chapter will examine how the imposition of the British colonial rule and subsequent policy and institutional changes has radically affected the indigenous land tenure relations. The chapter traces the historical path of the colonial land tenure regimes and how the dominant position of the settlers has influenced land policy direction beyond the colonial period. With the exception of the brief period between 1903 and 1913, when Maasai land was alienated to the settlement of Europeans, the pastoral communities did not feature prominently in colonial administrative affairs. The government focus was on sedentarised agricultural reserves.

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<sup>61</sup> Ibid.p.5

<sup>62</sup> Ibid, p.6.

## **CHAPTER 3**

### **Kenya: A Colonial Construct and its Land Legacy**

#### **3.1 The Scramble and Sphere of Influence**

Contemporary grievances and crises about land in many societies in Africa are rooted in indigenous peoples' encounters with European colonialism in the nineteenth century. The dominant European powers of the British, French, Dutch and Portuguese had already occupied other parts of the world such as the Americas, Asia, and Pacific countries before extending their venture to Africa. Many of those territories and regions fell under the British, whose imperial expansion reached its zenith of power and prestige during the reign of Queen Victoria.<sup>1</sup> The European nations, led by Britain were motivated by relative economic developments that began towards the end of the seventeenth century that in turn bolstered their military, communication and diplomatic strategies to expand their imperial ventures across the world.

The so-called 'partition of Africa' was in fact fragmenting Africa into separate political entities of indigenous societies under the control of European powers. Colonial occupation was preceded by commercial companies formed in Europe and chartered for the purpose of administering acquired territories, called 'sphere of influence' on behalf of their

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<sup>1</sup> Louis, R., Brown, J.M (eds) 2001) The Oxford History of the British Empire: Vol. 1V: The Twentieth Century.



governments.<sup>2</sup> The ‘sphere of influence’ eventually came under the grip of established authorities based in territories that were gradually demarcated to avoid conflicts between European powers. The process that began in 1884 and 1885 at the Berlin Conference saw powerful European powers, namely; the British, Germans and French acquiring the largest shares of land.<sup>3</sup> The political map as we know it today did not exist before imperial powers had set foot in indigenous peoples’ territories. Robert Jackson and Carl Rosberg observe that, “the borders were usually defined not by African political fact or geography, but rather by international rules of continental partition and occupation established for that purpose.”<sup>4</sup> Ralph Austen further states that “Africa is perhaps the most ‘mapped’ of the world major regions.”<sup>5</sup>

The nineteenth century British colonialism, dubbed as the ‘Late Victorian acquisitions of new dependencies’ in Africa, saw a policy shift from an earlier period when the Imperial Government opposed any formal expansion in the continent.<sup>6</sup> Government officials and prospective European migrants later realised that the territories were important for their

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<sup>2</sup> In Africa the companies were based in regional or specific territories and had actively involved in the early phase of political establishments. They were such companies as the German West Africa Company (1882), the German East Africa Company (1884) the Royal Niger Company (1886), the British East Africa Company (1888) and the British South Africa Company (1889). The companies were formed mainly by merchant families and investors to underwrite profits from exploitation of resources usually under patronage of their governments. A company got incorporated and legitimised under a royal charter. A charter was a document that specified terms and conditions under which a company could trade, and other rights and obligations, including ownership, management and alienation of land.

<sup>3</sup> Young, C (2000) *The Heritage of Colonization in Africa*, p.23, in Haberson, J.W., Rothchild, D (eds.) *World Politics*. Westview Press.

<sup>4</sup> Jackson, R.H., Rosberg, C.J (1986) *Sovereignty and Underdevelopment: Juridical Statehood in the African Crisis*, p.6. *The Journal of Modern African Studies*, 24 (1), pp. 1-31.

<sup>5</sup> Austen, R.A (2001) *Mapping Africa: Problems of Regional Definition and Colonial/National Boundaries*, p.1

<sup>6</sup> See *Cambridge History of the British Empire* (1929) vol.1, *The Old Empire*, Introduction, Chapters V, X and XV; and Vol.11, *The New Empire*, Chapter XV.11.

economic benefits. Africa, contrary to what was earlier thought, as “inhospitable obstruction... for unhealthy quick profit, became target for permanent occupation.”<sup>7</sup> The perception that the continent was not worth investing in was rife even among the policy makers at the Foreign Office before the 1880s. To many policy and political advisors, Africa was but a ‘worthless possession’ that could not pass the test of a rigorous economic rational. The sceptics gave advice to the government not to make serious political and commercial investment in Africa.<sup>8</sup> Many theories have been postulated to explain Britain’s sudden change in attitude but the main one was international rivalry, which ultimately led to the partition of Africa among the European powers.<sup>9</sup> The early colonial architects, including Frederick Lugard, had fiercely supported linking of the new acquisitions to the British economic system once it was opened up for settlement. Reports from explorers and missionaries who did extensive investigations on the social, political and economic conditions prevailing at the time contributed to the policy shift, especially in Britain.<sup>10</sup>

Like many of its African colonial acquisitions, the British Imperial Government’s involvement in Kenya was initially slow and tentative. Although the policy-makers had agreed to safeguard their interests in the new acquisitions, they preferred to restrict their involvement to the bare minimum to avoid a costly administrative structure. A few pioneering parties of colonial administrators and expeditionist military bands were sent to man strategic

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<sup>7</sup> See Mungeam, G.H.(1966), *The British Rule in Kenya 1895-1912*, p.7

<sup>8</sup> For a comprehensive understanding of the debates by the British officialdom, see *The Cambridge History of the British Empire*, Vol.III, 1959 ( in particularly chapters IV, V and VIII).

<sup>9</sup> Palley, C (1966) *The Constitutional History and Law of Southern Rhodesia 1888-1965 with Special Reference to Imperial Control*, pp 2-4.

<sup>10</sup> *Ibid*, Introduction, xx.

camps, outposts and stations from where outreach to ‘native tribes’ were made. From those garrisoned camps and stations the Company and Protectorate agents made exploratory trips to find inland routes and navigational waterways, to enhance trade and administration.<sup>11</sup>

Although for Britain, some of these activities sent signals to other European powers, of its intentions to keep the ‘sphere of influence’, it was still unclear about the form of jurisdictions it wanted to exercise. It was also undecided on the nature of political structures it was going to establish. The British were well aware, based on their previous experiences in other dominions, that the nature of governance employed would determine the level of its political and financial commitments. M.P.K. Sorrenson, one of the leading historians on the European settlement in Kenya, broadly observed the government dilemma at the time as follows:

Because of its peculiar geography and variations in climate Kenya seemed to represent a confluence of several streams of colonial development, temperate and tropical. This was to be the cause of many of the troubles, which beset the country. No one was sure whether it was a temperate colony of settlement, which would become self-governing like Australia, New Zealand and South Africa, or tropical plantation colony with a handful of Europeans planters dominating the economy.<sup>12</sup> It was clear from the start that climatic and ecological patterns of different parts of the acquired territories were going to influence land policy direction to be adapted by the occupying British authorities... What mattered to the government and settlers were the

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<sup>11</sup> See generally Hobley, C.W (1929) Kenya, From Chartered Company to Crown Colony:Thirty Years of Exploration and Administration in British East Africa. London. A.F & G. Witherby. Charles Hobley who was among the pioneers ( served in the Company and joined the Crown service after the collapse of the IBEC) longest serving Crown administrator provided graphic details of how the company made efforts to open up communication in the sphere of influence, including trying steamship on River Tana.

<sup>12</sup> Sorrenson, M.P.K (1968) Origins of European Settlement in Kenya, p.5

potentialities of land resources. From their early activities it was apparently evident that their intention was to establish the parts of the 'country' that would be strategic to their long-term economic interests. The pioneer administrators were set to play the leading role in determining what kind of legal and institutional framework was going to be put in place. The combined efforts of the explorers, missionaries, settlers and imperial builders later paid off as a territorial entity gradually evolved to one of the hubs of the colonial ventures in Africa.

### **3.2 Kenya as Planters' Frontier**

British travellers and explorers saw the interior of territories that later became Kenya as a potentially important agricultural colony suitable for settlement. By the mid nineteenth century, the pioneer travelers' had traversed the territories from the coast to Lake Victoria and from the north to the southern highlands.<sup>13</sup> Their reports enthusiastically presented the region as important for commercial centres, large scale agriculture and pastoral production. The government was still keen to confirm the situation before taking steps to act on the numerous reports coming from the interior. Frederick Lugard was among the trusted lieutenants whose experience in Africa was recognised among his peers. He travelled throughout the region and confirmed that the highlands of East Africa were reliably conducive to commercial agriculture, emphasising the fertility of the soil and adequate rainfall.<sup>14</sup> For example, he described the areas that were later to be known as 'White Highlands' to have unlimited room for the location of agricultural settlement or stock-rearing farms....the new industries in

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<sup>13</sup> The travellers who included geographers, geologists, naturalists and agroscientists had been funded by government through such organisations as Royal Geographical Society to carry out investigations of these areas. They had filed reports that covered all aspects of climatic conditions to soil, vegations, wildlife and mineral resources. Anthropologists and sociologists historiographers were uses to stady African social and cultural behaviours nad possibility of 'taming them'. Pioneer travellers like Lord Delamere were convinced about economic prospects of the regioned and decided to settle, thereby attracting thousands more to follow suit.

<sup>14</sup> See generally Lugard, F.D (1929) *The Rise of Our East Africa Empire*. Frank Cass. London.

coffee, tea, indigo, fibre, tobacco, wheat, cotton and a hundred other tropical and sub-tropical products could be inaugurated here....and their success should rival or eclipse that of the Shire Highlands.<sup>15</sup>

Lugard, as one of the pioneer architects of colonial administration, was well aware of the economic opportunities these territories could offer Britain and its citizens. Economists and other experts have long provided empirical evidence, to support economic rationale of imperialism and colonisation. Richard Wolff provided statistical evidence, which showed that the British imperial intervention in the region was triggered by economic consideration.<sup>16</sup> He contended that changing international trade in the nineteenth century forced Britain to seek further expansion of its market. The British sources of raw materials, particularly those required for textile and steel industries, had been subjected to increased competition from other European countries and North America. Wolff argues that American or American-controlled sources of supply became unreliable because of hostile tariffs and speculative practices of intermediaries making import costs for Britain inordinately high. Wolff observes that, "...after 1870s the acquisitions of the new Empire commended itself to British statesmen as an economically reasonable course of action."<sup>17</sup> Africa and other parts of the continent, including East Africa thus became a strategic option for British investors and policy makers if they had to maintain the momentum that was spurred by the Industrial Revolution.

Lugard in his writing clearly confirmed the argument made by Wolff that Britain was forced to re-evaluate their international trade after facing stiff competition from America and the European countries like Germany. He tried to justify why the shift from America was important in financial terms when he specifically gave an example of coffee supply, which he

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<sup>15</sup> Lugard, F.D. (1893), *The Rise of our East Africa Empire*, p.421. The Shire Highlands were in Malawi, then known as Nyasaland.

<sup>16</sup> Wolff, R.D (1972) *British Imperialism in East Africa Slave Trade: Science and Society*, pp28-29, Table 1: 27.

<sup>17</sup> *Ibid*, pp.28-29.

said could be obtained in East Africa. He summarised the benefits accruable from the new acquisition as follows:

It has been stated that we pay forty millions yearly to America for our supply of raw cotton and yet confronted by hostile tariffs and fluctuations of supply. If it should be proved that throughout East Africa...cotton of the best quality can be grown, it would be a very great gain to Lancashire trade.<sup>18</sup>

Determined to convince the policy makers that the highlands of East Africa could rival any of the British traditional markets across the globe he emphasised that there would be no shortfall, including the possibility of a fruit export similar to that of New Zealand and California.<sup>19</sup>

It did not take long for Britain to venture into the acquired territories of the indigenous communities. Although the nineteenth century imperial and colonial move was radical and massive in its scope, covering the unknown interior of Africa, the concept was not new. Small nations such as Portugal, Spain and Holland had already experimented with occupation of foreign lands for hundreds of years before they were joined by British and French in the 'New World' in the seventeenth century. The British, probably having learned a lesson from their own Anglo-American colonies, were careful in its occupation of acquired territories in East Africa, lest financial and administrative costs became too demanding. However, the pioneer administrators and settlers were in a hurry to stamp their authority over land and indigenous people. They did not want or even expect to be constrained by their own rules of jurisdiction. Proponents of the settlement argued and convinced the British government that it was essential to prioritise effective control over territories to ensure that their strategic and

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<sup>18</sup> Lugard, *Supra.*, pp.408-409.

<sup>19</sup> *Ibid.*, p.419.

economic interests were secured.<sup>20</sup> Norman Leys, a colonial civil servant who was critical of the settlement policy had this to say: 'It seems quite incredible to us that Europeans were invited to Kenya as planters and farmers without investigation beforehand of native rights in land and without making of any arrangements for their settlement.'<sup>21</sup>

It was quite evident that Britain was more concerned with establishing its foothold in the area, rather than musing over the implication of its action and the long-term impact on the indigenous people. The only worry it had was about the extent and nature of its commitment, financially and administratively. That was why Britain decided, notwithstanding its apparent unpreparedness, to send a company to acquire and manage tribes and territories on its behalf.

### **3.3 Imperial British East African Company (IBEAC), 1888-1895**

As stated, the dilemma that faced the British government was not whether to venture into the region or not but what form of administration it had to deploy. The reason for this was simple. Whatever intervention Britain had decided was determined by any financial commitment it was going to make. According to historians, the government's lukewarm approach was not wholly surprising. The parliament and public opinion was oblivious of government massive investments in overseas colonial ventures whose returns were guaranteed.<sup>22</sup> The parliament emphasised the need to keep the expenses to the minimum and did not allow increases in the estimates.<sup>23</sup> This consideration largely explained why the

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<sup>20</sup> Okoth-Ogendo, H.W.O (1991) *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, p.9. ACT Press. African Centre for Technological Studies. Nairobi.

<sup>21</sup> Leys, N (1926) *Kenya*, p.113. Third Edition, Leonard and Virginia Woolf.

<sup>22</sup> See Palley, C (1966) *The Constitutional History and Law of Southern Rhodesia 1888-1965: With Special Reference to Imperial Control*

<sup>23</sup> *Hansard's Parliamentary History of England*, 23, Vol.13 16-17

government 'delegated' its sovereign powers to a chartered company, the Imperial British East Africa Company (IBEAC).<sup>24</sup>

The company immediately assumed its delegated role of an administrator of the British territories by signing treaties with the Sultan of Zanzibar in which 'all rights to land in his territory excepting private land were ceded to the company.' The company signed a fifty-year lease with the Sultan, and in principle, the areas along the 10 mile coastal strip and the hinterland came under the Company 'rule'.<sup>25</sup> According to the Founders' agreement, the Company was

to acquire from rulers, chiefs, or others, within, the districts reserved for British sphere of influence and elsewhere in Africa (with due observance of international obligations) lands, territories, and stations, with or without sovereign rights, by concession, purchase, or otherwise, and to administer and govern the same and to exercise all the powers and rights incidental thereto...<sup>26</sup>

.From the content of the Royal Charter<sup>27</sup> petitioned by the IBEAC, it is quite clear that its role was entangled in overlapping interests, that of a profit-making entity and of an empire builder. There was no fine line drawn between the dual mandates of the company. The Company was 'to carry into effect... grants, concessions, agreements, and treaties within the

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<sup>24</sup> IBEAC was chartered on 3 September 1888, to operate in territories which were within the sphere of British influence acknowledged by an Anglo-German Treaty 1886.

<sup>25</sup> See Mungeam, G.H(1970) Kenya:Select Historical Documents1884-1923, pp.60-62; Singh, C(1965) The Republican Constitution of Kenya: Historical Background and Analysis. The International and Comparative Law Quarterly, pp.878-879. As we have noted earlier the Company's interactions with the Sultan appeared to have been consummated by their past relationships based on extensive business dealings.

<sup>26</sup> I.B.E.A. Co. Founders' Agreement, April 18, 1888.

<sup>27</sup> I.B.E.A. Co. Royal Charter, September 3, 1888. The petition which was granted by the Government in October of the same year was a long and ambivalent document that gave the Company extensive powers to trade as well as manage the British sphere of influence. See Mungeam, op cit, pp.22-28 for the text of the IBEA co. Royal Charter



districts already reserved for British sphere of influence and elsewhere...with view to promoting trade, commerce, and good government in the territories and regions'<sup>28</sup> There was apparently no legal framework that explicitly and systematically guided the IBEAC to concurrently carry out those duties. As it subsequently happened, the Company was within a short period overwhelmed by its role of an empire builder and forced to revert the territories to the government in 1895.

The company also went into numerous treaties with the local chiefs to allow it to assume occupation and management of resources in their respective areas. The actions were also pre-emptive in the sense that once the British government agent entered the area, other competitors, especially Germany was expected not to interfere with those areas in which the Company had its operation. The Company was ideally pushing the frontier of the sphere to the north, towards the interior, which later proved crucial to the British colonial settlement.

The groundwork by the Company had brought many different areas occupied by indigenous communities together with the aim of creating a territorially integrated 'country' built on the foundation already laid by the leased coastal strip. The company, with the support of the Sultan of Zanzibar, drew the future architecture of the colonial structure. The 10 miles Coastal strip, which was recognised in international law as part of Sultan's suzerainty, was ceded to the Company in 1888. The territories that laid between Tana delta and Juba in the semi-arid northern part was also explored and retained by the company.

The other region which was generally referred to as the 'interior' constituted large tracts of land stretching from the coast to Lake Victoria basin in the west. The Kikuyu, Kamba ad

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<sup>28</sup> Ibid, p.23

Maasai countries and the Rift Valley covered the central regions, which were linked to surrounding areas. The Imperial British East Africa Company began the process of treaties with local chiefs in the interior, paving the way for the expansion of the territory and formal occupation by the government.<sup>29</sup>

### **3.4 Controversies of Jurisdictions**

The most contentious question at the time in other British dependant territories was, how did the concept of chartered company and its delegated executive powers to ‘govern’ come into being? When the question of legitimacy arose in 1884 in relation to the role of the Royal Niger Company, the Law Officers of the Foreign office in London advised that the Crown must enjoy jurisdictions in an area before it was competent to charter a company exercising governmental powers and operating within such an area.<sup>30</sup> In other words, the British Imperial Government could not justify any action claiming to have vested powers to a third party while it was aware that it did not possess such powers. That was why Britain made it clear to the Dutch Government in 1879 that by chartering the British North Borneo Company, it had no ‘present intention’ of assuming dominion or protectorate.<sup>31</sup> The Foreign Secretary Lord Granville, made the Government position on the matter unequivocally clear. He stated that the

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<sup>29</sup> The Company concluded 21 ‘treaties’ during 1887 entitling it to sovereignty for a distance of 200 miles from the coast. McDermott, P.L. *British East Africa Company (IBEAC)* (Chapman & Hall, 1893), p. 10.

<sup>30</sup> Robinson, R., Gallagher, J., with Denny A. (1961) *Africa and the Victorians: The Official Mind of Imperialism*, p.181. It was suggested that a formal declaration of protectorate was a prerequisite

<sup>31</sup> See Footnotes 12 for a comprehensive discussion of jurisdictional power and validity.

British Government had assumed 'no sovereign rights whatever in Borneo' and the Company would administer the territories under the suzerainty of the Sultan of Brunei and Sulu.<sup>32</sup>

The international law dimension as to the legality of sovereign powers being exercised by the European nations or their appointed agents such as chartered companies became an important aspect of domestic debates. In Britain, Parliament and the Foreign Office went to great lengths to discuss the validity of their own Government action in relation to acquired territories, which were not yet declared protectorates. In addition to questioning the validity of governmental powers granted to a chartered company, the Law Officers went further and queried whether the declaration of protectorate would *ipso facto* confer jurisdiction.<sup>33</sup> In territories that became Kenya, this question was not very prominent and it did not deter the colonial authorities from undertaking an extensive land alienation policy. Having realised the inevitability of its responsibility to keep the territorial possession, the Government worked out an arrangement with IBEAC to safeguard the sphere of influence by engaging other rival groups such as Germans and Italians. Nevertheless, as John Mugambwa, a land and property law scholar has observed, the legal position of the company was not clearly settled, even by the time it had handed over the administration to the government.<sup>34</sup> He was of the opinion that the clearest exposition surrounding the question of legality was the one made by Sir William Harcourt, who argued that:

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<sup>32</sup> Lindley, M.F (1926) *The Acquisitions and Government of Backward Territory in International Law*, p.106, see also British Foreign Service Papers (BFSP), Granville, 7 January 1882, where it was stated that the grant of a charter does not in any way imply the assumption of sovereign rights in the quoted *in Palley*, C (1966) *The Constitutional History and Law of Southern Rhodesia*, p.19.

<sup>33</sup> See F.O Conf.5246, No.106, James to Herschell to Derby, 7 March 1885. Quoted in Palley, *ibid*, p.18.

<sup>34</sup> See footnotes, 38 below.

A sphere of influence confers no rights, no authority over the people,...or authority over the land of any kind...Every act of force you commit against a native within a sphere of influence is an unlawful assault; every acre of land you take is robbery; every native you kill is murder, because you have no right and authority over these men, except as in any particular spot may have been given you by treaty with any particular Chief<sup>35</sup>

### **3.5 IBEAC Land Regulations, 1894**

In spite of a cloud of doubt hanging over the company's legal validity to exercise 'governmental' authority over the sphere of influence, for about seven years it exercised powers over land and other resources. Even though there was no significant amount of European settlement during the Company's tenure, it did set the pace for the policy of land alienation. Some Indians and a few Europeans were granted land around trade stations and garrisons protected by the Company. An English missionary and settler, James Stuart set up a fruit farm near Machakos, which became successful and later attracted the attention of other Europeans to move into the area.<sup>36</sup> Hundreds of acres were also allocated to the East Africa Scottish Industrial Mission at Kibwezi.<sup>37</sup> The Company, which had by 1894 commenced surveying land for a proposed railway line, for which it failed to attract funds from the government, began to grant land to individuals who applied for purposes of farming or building. Some officials became uncomfortable with the policy of haphazard allocations which had caused many untold sufferings to the indigenous communities. Some were even openly opposed to such policy, arguing that it was not in the best interests of the natives. They probably shared the original stance taken by pioneers like Lugard, who once maintained:

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<sup>35</sup> 1 March, 1892, House of Commons debate, 4<sup>th</sup> Series 55 Victoria, 1892, Vol. 2 col. 71. Quoted in Mugambwa, J. T. (1986) Evolution of British Legal Authority in Uganda with Special Focus on Buganda: 1890-1938, p.27, PhD Thesis, Australian National University.

<sup>36</sup> Hobley, C.W (1940) Kenya: From Chartered Company to Crown Colony.p.27. London, Witherby.

<sup>37</sup> The Mission was established by William Mackinnon, the founder of the IBEAC. Apart from the Mission, Mackinnon personally got thousand of acres between Mombasa and Kibwezi. The area near Mombasa is now named after him.

It has been laid down as a principle from which no civilised government would think of departing, that in countries acquired by conquest or cessation, private property, whether of individuals or communities, existing at the time of cessation or conquest, is respected.<sup>38</sup>

The Company reacted to this notion of respecting pre-existing rights of the Africans by formulating a land policy that would enhance predictability of the actions of agencies. The company also wanted to avoid legal complication in future that might put it on a collision course with the government. It came up with a policy contained in Land Regulations, 1894. The Regulations provided that:

For 'country plots' on lease not exceeding twenty-one years, but renewable, no fixed rate being specified. For grazing leases, not more than 20,000 acres could be had in one block, and the annual rent was one half anna or ½ d an acre. On agricultural land, leases of not more than 2000 acres might be had at a rent of ½ anna an acre for the first five years... Homesteads were of 100 acres at a rent of 4 annas an acre for the first five years, during which occupation was compulsory.<sup>39</sup>

Although there was no specific legal authority being vested in the Company to make laws and regulations, it might have taken advantage of the broad mandate it was given under the Charter to manage land in the area. Unfortunately for the Company and for those who had wished to use the regulations for purposes of land accumulation, time was not on their side. The Company lasted only a few months and ceased trading before it could implement the policy.

The Company did not manage to attract European settlement in the region having been bogged down by resistance and competition from the Germans. However, as stated previously the Imperial British East Africa Company played a pivotal role in the consolidation of Britain's interests in the territories. The Company managed to enter into agreements with the Sultan of Zanzibar and acquired interests in land in the coastal strips that provided the

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<sup>38</sup> Lugard, F. Lord (1922) *The Dual Mandate in British Tropical Africa*, p.288. London, W.Blackwood.

<sup>39</sup> See Land regulations, June 1894. F.O.C.P 6557, Nos. 266, 322, IBEA Co. To F.O June 8th, 21st 1894.

base from where further expansion was made into the interior.<sup>40</sup> Although the Company was principally a commercial entity, it exercised executive and legislative powers which had enabled it to deal with sovereign powers, such as the Kabaka of Buganda to advance the British interests in the area.<sup>41</sup>

### **3.6 Protectorate and Land Policy Debates**

The IBEC officially transferred the territories that were under its control to the British government in 1895. The territories came to be known as the East African Protectorate, which technically meant that the 'sphere of influence' was now under legal authority and protection of the British government.<sup>42</sup> However, the government was handicapped to deal with land because the Concession that was entered into between the Company and the Sultan of Zanzibar was only extended to the ten-mile coastal strip of mainland. Technically, it had no power to deal with land outside these areas, particularly since the many treaties concluded by IBEC with indigenous groups did not give rights in land.<sup>43</sup> This was a difficult situation for the government because the objective of the administration was to access land and other

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<sup>40</sup> The Concessions with Sultan of Zanzibar was signed on October 9, 1888, the year the Company got the official Charter to exercise 'governmental' jurisdiction in the British Sphere of Influence'.

<sup>41</sup> Bennett G. (1963) Kenya: A Political History, p.4.

<sup>42</sup> The Protectorate status was declared on the 15th June 1895.

<sup>43</sup> There were almost 100 treaties the Company had entered into with local chiefs in the areas that were under its jurisdictions. The Company officials carried treaty form wherever they went and signed onto them after talking to some 'chiefs'. A Typical form read as follows:

Let it be known to all whom it may concern that-----has placed himself and his territories, countries, people and subject under the protection, rule, and government of Imperial British East Africa Company, and has ceded to the said Company all his sovereign rights of government over all his territories,countries, people s and subjects and that the said Company have assumed the said rights ceded to them as aforesaid, and that the said Comapany hereby grant their protection and the benefit of their rule and government to him, his territories, countries, peoples, peoples and subjects, and hereby authorise him to use his flag of the said Comapnay as a sign of their protection. Dated at -----this -----day of-----18-----

resources. The government was well aware, through the advice of the Law Officers of the Crown that the only option at the time was to make appropriate treaties with indigenous peoples.<sup>44</sup>

The option of negotiating treaties or sales with the Africans did not appeal to the Protectorate authorities at the time. It was seen as laborious and a waste of time. His Majesty's first Commissioner, Arthur Hardinge, complained to the Foreign Office, under which the affairs of Protectorate fell, that making treaties was a mockery, requiring signatures of 'several thousand petty chiefs and headmen.'<sup>45</sup> The possibility of sales was also dismissed with the claim that Africans did not have individual titles to land but only occupational rights that could be transferred to others. Hardinge had made up his mind not to engage the indigenous community in discussing about land and instead made forceful arguments that government needed to exercise its power regardless of the consequences it might have on the locals. His response to Salisbury, his boss in London, who in March 1896 asked him to obtain treaties from the African chiefs, was quite telling of his firm position. He bluntly stated that:

...abandon altogether, at any rate in Ukamba [Province], the fiction of our acting under delegation from, or treaty with, the native chiefs, and simply lay down the principle that her majesty, having taken these people under her protection, enacts, in their own interests, that no alienation by them, collectively or individually of any lands or other rights, shall be recognised by her as valid unless ratified on her behalf by officers to whom she committed the Government of the country.<sup>46</sup>

This actually laid down the foundation of the colonial policy in Kenya as the question of alienation and control of land became the single most important preoccupation of the government.

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<sup>44</sup> As early as 1883 the legal experts in the UK had argued that jurisdiction of a protecting power was limited to political affairs such as diplomatic and external relations of the territories under their control. The power to deal with land could only be attained by conquest, cession, sale or treaty with native peoples.

<sup>45</sup> See F.O 107, 53, Hardinge to Salisbury, 11 th June 1896, quoted also in Sorrenson, 1968, p.47.

<sup>46</sup> F.O. 107/53, Hardinge to Salisbury, 11 June, 1896. Qouted in Sorrenson, supra,p.47.

According to Hardinge and other Protectorate officials, the only way around this entanglement was for the Foreign Office to abandon its legalistic approach to the status of the Protectorates and assert unlimited powers of the Crown to deal with land.<sup>47</sup> The anticipation was that once such powers were asserted, the authorities would formulate legislation that would facilitate compulsory acquisition of land to be granted for settlement and agricultural purposes. The demand of the local officials in Nairobi at first was not popular with their superiors in the Foreign Office who preferred a more cautious approach in dealing with the vexing land question. For a while, a heated debate ensued between London and Nairobi over not only land policy direction but also treatment of indigenous people.<sup>48</sup> For the local authorities, there was another front to deal with. Pressure on them was increasing as potential settlers demanded land for commercial and agricultural purposes.

The Foreign Office was in a quandary and did not have a concrete policy plan. According to Sorrenson, it “had little idea of the most appropriate policy and legislation to adopt”, other than ‘wanting to sell and lease land’.<sup>49</sup> The debate was often triggered by demand made by the few Europeans who had planned to settle in the Protectorate to be allocated some free land. For example, in April 1897 Charles Kitchen, an employee of Smith, Mackenzie and Company, applied for 10, 000 acres of land at Donyo Sabuk, thirty miles north of Nairobi. His intention was to conduct coffee growing experiments on behalf of the

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<sup>47</sup> The legal term used to refer to Crown power was ‘original title’ or ‘radical title’ which connotes ultimate form of ‘dominium’ or effective jurisdiction.

<sup>48</sup> Even before controversial encounters with Africans which included many expeditions and removals such as that of the Maasai, the early colonial officials debated about land and settlement without any consultations with indigeneous inhabitants. For example, the discussion about settling Indians, Europeans or even Jews in occupied territories had not in one moment mentioned the implications of such actions on the Africans. See Sorrenson, M.P.K (1968) *Origins of European Settlement in Kenya*, pp.31-40.

<sup>49</sup> Sorrenson, op cit. p.53. This was in spite the fact that officers in the Foreign Office had continuously tried to address the issue of legality and validity of government action in relation to land.



firm. He made it clear that he was not going to accept anything less than a freehold. The Commissioner of the Protectorate, Sir Hardinge, stood by his position, arguing that supporting such an application was necessary to attract *bona fide* capitalists.<sup>50</sup> The Secretary of Foreign Office, Lord Salisbury, allowed the Commissioner to make a special arrangement for Kitchen. In a way, this was a victory for Hardinge. He had been putting pressure on London to allow European farmers to take up land. To avoid spontaneous intervention on an individual basis, the government formulated legal framework that would ensure orderly administration of land, especially for future settlement of European farmers.

However, the nature and the extent of the Protectorate power to deal with land, especially in setting aside land for railways and other purposes was not clear. Furthermore, the local authorities were still unsure whether they were obliged to refer to London whenever there was a need to dispose of land for private ownership as demanded by some potential settlers. The local officials understood that with legal backings they would have a free hand to deal with land without referring to London whenever a decision was required.

### **3.7 Declaration of Radical Title.**

Having convinced the officials in London that the interest of the Crown was more important than moral indulgence about indigenous rights, the Protectorate authorities focused their attention to entrenchment of their power to alienate land. In 1896 the Indian Land Acquisition Act, which had been used in Zanzibar, was extended to the interior. As discussed earlier, the interior had not been explored extensively compared to the coastal region, which had been a bastion of Arab trade for many centuries. The extension of the Act had a political

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<sup>50</sup> F.O, 107/77, Hardinge to Salisbury, 5 April 1897.

ramification for both the Protectorate authorities and the indigenous communities. The indigenous groups who had lived separately and independently in their own territorial borders were now under one dominant state power. The Protectorate authorities interpreted the extension of political jurisdiction to mean an assumption of ownership of land.<sup>51</sup> There was clearly a deliberate shift from the Foreign Jurisdiction Act, which envisaged a limited sovereignty as far as land and communities in the acquired territories were concerned. Hardinge actually argued that in any case the administration had acquired enormous leverage that the territory was His Majesty's sovereignty except in name.<sup>52</sup> The officials in Nairobi strongly propagated the notion that Africans did not own land but only held occupational rights, leaving the rest of unoccupied and waste land as property of the Crown.<sup>53</sup>

The Foreign Office eventually pandered to the demand of the Nairobi-based protectorate officials and agreed that in accordance with the Foreign Jurisdiction Act, 1890 Her Majesty was empowered to control and dispose of 'waste' and 'unoccupied land' in the Protectorate. The Act provided that, 'Her Majesty might, if she pleased, declare them to be crown lands, or make grants of them to individuals in fee or any term'<sup>54</sup> The underlying motive was to pave the way for the settler economy to succeed and, as officials argued, pay for the construction of a railway. The role of legislative and institutional frameworks thus became the keystone in the engine of imperial land administration. The thinking among the Crown law officers was that in the absence of specific legislations, the authorities could apply the

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<sup>51</sup> See note 47 above to understand correlations of the terms used to express acquired power of the Crown.

<sup>52</sup> See a memo to the law officer of the crown, quoted in Soorenson, *supra*, p.51.

<sup>53</sup> Okoth-Ogendo, (1991), *supra*, p.11.

<sup>54</sup> Foreign Jurisdiction Act, 1890, Article 1.

Foreign Jurisdiction Act. According to them, the Act allowed agents of Her Majesty to exercise power over ‘waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals.’<sup>55</sup> This viewpoint heralded the beginning of land tenure regime based on the notion of the domain power of the Crown during the colonial period.

Under the English doctrine of tenure, the Crown owned all land in England. There was no land which was allodial or owned by a subject and not held either directly or indirectly by the Crown. The Crown’s title is variously described as the ‘radical’ or ‘absolute’ title.<sup>56</sup> The doctrine of tenure was introduced in England following the Norman invasion in 1066, when William 1 declared all lands in England as his by conquest.<sup>57</sup> Although the English Revolution of 1688 abolished much of the outdated system that ended the privileged status, the Imperial Government used the notion of ‘radical title’ or ‘Crown ownership’ to alienate indigenous land rights.<sup>58</sup> Using the notion of crown land rights, the pioneer agents of the government in the acquired territory occupied and expanded the territory to cover large swathes of land that later became Kenya.

### **3.8 Legal Frameworks, 1897-1901**

To avoid further confusion, the government embarked on formulating some form of legislation and regulations that gave the authorities in the Protectorate powers to take control

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<sup>55</sup> Sorrenson, *supra*, p.51.

<sup>56</sup> *Amodu Tijani v Southern Nigeria* (1921) 2 AC 399.

<sup>57</sup> See Tan, P.L., Webb, E.A., Wright, D (1997) *Land Law*, pp.22-23.

<sup>58</sup> According to *Salmond’s Jurisprudence* (10<sup>th</sup> ed, Appendix V, pp 520 – 521, cited Robert-Wray, *Commonwealth and Colonial Law*, London, Stevens & sons, 1966, pp 625-626), upon the introduction of the common law in a colonial protectorate (like Kenya), all land in the territory was vested in the Crown.

and management of land. The first in a series of laws that empowered the Commissioner of the Protectorate as agent of the Crown was the Land Regulations of 1897. It gave the Commissioner the power to grant any person a certificate of occupation, authorising him to hold and occupy a prescribed land for a term not exceeding twenty one years.<sup>59</sup> The settlers were not happy because the certificate was an administrative act, which gave right to occupy but not power to transfer title. They concluded that the certificate of occupation was unsuitable and demanded freehold titles.<sup>60</sup> This demand resurrected the earlier debate about the extent of Protectorate power over land. The legal advisers had repeatedly insisted that ‘the acquisition of partial sovereignty in a protectorate does not carry with it any title to soil.’<sup>61</sup> The Colonial Office reiterated this view when it informed the Foreign Office that:

While Her Majesty the Queen acquires powers of control and rule, more or less complete, the property in the soil and minerals does not necessarily pass to her by the act of extending Her protection. So far as the natives had the enjoyment of the land they continue to enjoy it, subject to any laws which Her Majesty may subsequently make for public good, and subject of course to any transfer of their title in the land to Her Majesty which they make as a distinct act.<sup>62</sup>

However, by the end of the nineteenth century it was quite clear that Nairobi-based officials did not understand or deliberately ignored the principle that the Crown power was limited in an extra-territorial jurisdiction such as a protectorate. Their relentless pursuit of power and glory made the policy makers in London almost redundant as their orders and advice failed to make any impact. Although technically Kenya was still a protectorate, the

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<sup>59</sup> See F.O.C.P. 6951, No.13, Salisbury to Hardinge, January 1897. See also F.O 2/805 Treasury to F.O, May, 31, 1902. Quoted in Githomo, M W (1981) *Land and Nationalism: The Impact of Land Expropriation and Land Grievances Upon the Rise and Development of Nationalists Movements in Kenya, 1885-1939*.

<sup>60</sup> F.O 107/77, Hardige to Salisbury, 19 April 1897, quoting Ainthworths’s statement. Quoted in Sorrenson, *supra*, 50.

<sup>61</sup> F.O.C.P. 6861, no,214, C.O. to F.O, 4 Sept.1896. Quoted in Sorrenson, *supra*, pp.47-48.

<sup>62</sup> F.O. Conf, print 6613, No.31 Colonial Office to Foreign Office, 1894.

policy practice of the local officials had given it all the attributes of a colony. Ghai and McAuslan, in their observation of evolution of the colonial administration stated that ‘in the East African Protectorate such complete sovereign rights were asserted over land that when title to the country was finally claimed in 1920, it made no difference at all to indigenous rights to the land or lack of them ...’<sup>63</sup>

East Africa (Acquisition of Lands) Order in Council, 1898<sup>64</sup> vested in the Commissioner a special power to acquire land, in trust for Her Majesty, which made it legally possible for the Commissioner to sell land in the railway zone. The Protectorate authorities expected to use the Order to resolve the now profuse demand of settlers for freehold titles. Some of these powers had already been exercised as land was compulsorily obtained from Africans under the Indian Land Acquisition Act.<sup>65</sup>

### **3.9 Crown Land Ordinances, 1902 and 1915**

According to the East African (Lands) Order-in-Council of 1901, ‘Crown Lands’ were defined as;

All public lands within the East Africa Protectorate (Kenya), 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, and all lands which have been or may hereafter be acquired by His Majesty under “the Land Acquisition Act, 1894” or otherwise howsoever.<sup>66</sup>

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<sup>63</sup> Ghai, Y.P., McAuslan, J.P.W.B (1970) Public Law and Political Change in Kenya: A study of the legal framework of government from colonial times to present, 27. OUP.

<sup>64</sup> The East Africa (Acquisition of Lands) Order in council , 1898. British and Foreign State Papers, 90, 280.

<sup>65</sup> The Indian Land Acquisition Act, 1894 was first applied in Zanzibar but later extended to the interior to facilitate compulsory acquisition of land from Africans.

<sup>66</sup> East African Protectorate, Ordinances and Regulations, January 1<sup>st</sup> October to December 31<sup>st</sup>, 1901, Vol. 111 (Mombasa, Government Printing Press, 1902), p.19

The Power to expropriate land in areas already occupied by Africans was also defined and given to the Commissioner (later renamed as a Governor), who was the top government administrator in the Protectorate. The Order provided that, 'The Commissioner, or any other such trustee or trustees, may make grants or leases of any crown lands, or he may permit them to be temporarily occupied, on such terms and conditions as he may think fit...'<sup>67</sup>

These and other questions preoccupied the colonial administration during the early part of its rule. Some of those questions did not appeal to some of the local colonial officials in the Protectorate who were prepared to use any means to avoid legal or moral responsibility for the consequences of their actions. In fact, they had dismissed any attempt by other officials who were inclined to seek protection for native communities.<sup>68</sup> As far as they were concerned, the Africans had no system of land tenure and could not therefore be considered as rightful owners of land. In his own words, Charles Eliot declared that "The interior of the Protectorate as a white man's country...it is mere hypocrisy not to admit that white interests must be paramount, and that the main object of our policy and legislation should be to found a white colony."<sup>69</sup> Ewart Grogan, one of the pioneer settlers who later amassed thousands of acres of land had no qualms in thinking that indigenous Africans deserved no protection at all. He dismissively responded to those officials and even missionaries who raised the issue of indigenous land rights as follows:

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<sup>67</sup> See S.4 of the Order. See also East Africa Orders-in-Council of 1897, and 1899. See also East African (Lands) Order-in-Council which defined the status of all mines, and minerals in the Protectorates. See also Article 5 of the same Order.

<sup>68</sup> For example, Charles Eliot, the then Commissioner of the Protectorate was infuriated by his juniors like F. Johnson and S.S. Bagege who after pressure from government senior officials changed their mind later, had questioned the excesses of the official policy toward the Maasai and opposed the planned removal from their land. See Sorrenson (1968), pp. 190-193.

<sup>69</sup> Eliot. (1905), p. 103.

I will ignore Biblical platitudes as to the equality of men, and take as a hypothesis that the African is fundamentally inferior in mental development and ethical possibilities to white man...There was no need for 'mawkish euphemisms' to wrap up European land grabbing scheme.<sup>70</sup>

The colonists, especially the hawkish luminaries like Lord Delamere and Ewart Grogan, encouraged by powerful government officials led by Charles Eliot, had not hidden their agenda to dispossess the indigenous peoples of their land. With the Foreign Office, brow-beaten into accepting the inevitability of the settlers' power and privilege, the question was no longer the legality but the length of the landholding in the areas favourable for agriculture. The first in the series of legal mechanisms to consolidate the power of the Crown to alienate land in the Protectorate was the East Africa (Lands) Order 1901,<sup>71</sup> which effectively vested crown lands in the Commissioner as a trustee of Her Majesty. The Commissioner was empowered 'to make grants or leases of crown lands on such terms and conditions as he may think fit, subject to the directions of the Secretary of State.' Crown Lands were defined as

all public lands within the East Africa Protectorate which for the time being are subjects to the control of his majesty by virtue of any Treaty, Convention, or Agreement or by virtue of His Majesty's Protectorate and all lands which have been or may hereafter be acquired by Her Majesty under the Land Acquisition Act or otherwise howsoever.<sup>72</sup>

The Crown Land Ordinance, 1902 was evidently the most predominant piece of legislation adopted by the authority to assume the overall control and management of land in the Protectorate. With the promulgation of the Ordinance any veneer that existed about protection of native land rights was brought to an end. For the first time the Crown took full

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<sup>70</sup> Grogan, E.S., Sharp, A.H (1902) From Cape to Cairo; The first traverse of Africa from South to North, pp.350-365.

<sup>71</sup> S.R.O.661. Quoted in Sorrenson

<sup>72</sup> Section 1.

charge of disposal of indigenous land. The demand by the settlers for speedy alienation was addressed by the Ordinance. The Ordinance 'gave the Commissioner the power to grant just the sort of interests that the settlers were clamouring for.'<sup>73</sup> While the Ordinance did not go further than the 1901 Order-in-Council in defining the crown lands, the Ordinance gave the Commissioner of the protectorate substantial powers to deal with land. With this legal provision the authorities assumed the overall 'sovereign power' to alienate land in what was becoming an expanded but unified territorial entity. Until 1920, when the protectorate was declared a colony by the Kenya-Order-in-Council<sup>74</sup>, the local British officials used assortments of land laws and regulations that made the 'sphere' as Charles Eliot liked to call it, 'practically an estate of His Majesty's Government.' Once the claim of 'crown title' was made legal, procedural and institutional changes were incrementally put in place with the objective to radically alter land tenure rights of indigenous communities. The Commissioner and later Governor of the protectorate and colony had been a 'law unto himself' and made the laws that mainly affected the indigenous population. A government publication which recorded some of the official actions of the colonial authorities' in the British East Africa Protectorate stated that:

The Commissioner was the sole law making body, but in 1906, a Legislative Council was established and from then on Ordinances were enacted by the Governor "with the advice and consent of the Legislative Council". In fact, of course, since until 1948 the Government had an official majority in the Legislative Council, any measure which the local and home governments were determined to have enacted could not fail to be brought into law. In 1957

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<sup>73</sup> Ibid.p.13

<sup>74</sup> Kenya(Annexation)- Order-in –Council, 1920 and Kenya Colony-Order-in-Council, 1921, renamed the British East Africa Protectorate as Kenya Colony and Protectorate until 1963 When it became Kenya, an indepedent political entity.



the form of the enacting words was changed to "enacted by the Legislature of the colony and the Protectorate."<sup>75</sup>

### 3.9.1 Crown Ownership

Indigenous ownership of land became the hotly contested subject for the rest of the period during the colonial rule. Charles Eliot, who aggressively promoted European settlement in the Protectorate, fired the first salvo. In his determination to realise a policy of land alienation, he created the notion that land was 'vacant' and that Africans could not make any claim over it. In his own words, Eliot stated that: "We have in East Africa the rare experience of dealing with a *tabula rasa*, an almost untouched and sparsely inhabited country, where we can do all as we will, regulate immigration and open or close the door as it seems best."<sup>76</sup>

The concept of land ownership was dramatically altered when the Crown Land Ordinance was promulgated to give enormous power to the representative of the British Government to take charge of land alienation in the protectorate. The Ordinance was instrumental in dismantling African customary land jurisprudence and imposed a colonial notion of land ownership. It stipulated that the Commissioner had no power to "sell and lease land in the actual occupation of the natives."<sup>77</sup> Although the meaning of the phrase 'actual occupation' was undoubtedly vague in the absence of any further explanation, the intention of the authority was implicitly clear. It was a deliberate statement to defeat the pre-existing customary land rights of the indigenous people and to radically change land tenure as always understood by the African people.

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<sup>75</sup> Morris, H.F (Ed.) (1976) Government Publications Relating to Kenya (including the East African High Commission and East African Common Services Organization) 1897-1963 in Government Publications Relating to African Countries Prior to Independence.

<sup>76</sup> Eliot, C. (1905), The East Africa Protectorate, p.103

<sup>77</sup> Section 30 of the Crown Land Ordinance, No. 21/1902

Some scholars faulted the government authorities for distorting land tenure concept as understood by the indigenous Africans in order to suit their own interests. Mwangi Wa-Githumo, a Kenyan historian, is very critical of colonial land policy for the confusion it created. He wrote: 'It must be remembered that before the conquest of Kenya there was no distinction between the ownership of the country and the ownership of land...'<sup>78</sup> It was clear that the government policy was to divest the indigenous peoples of the power to deal with land. For example, the Commissioner of the Protectorate was vested with power to appropriate crown land settlers as freeholds.<sup>79</sup>

The Crown Land Ordinance, 1902 was the pre-eminent piece of legislation which, in a sense, was the turning point in terms of consolidating the way the colonial authorities assumed the overall control of land in the Protectorate. The Ordinance 'gave the Commissioner the power to grant just the sort of interests that the settlers were clamouring for.'<sup>80</sup> The gap which the settlers felt was created by the East Africa (lands) Orders-in-Council was presumably filled by the promulgation of Crown Land Ordinance. While it did not go any further than the 1901 Order-in-Council in description of the crown land, the Ordinance made a substantial and radical change as far as the tenure rights of the indigenous people was concerned.

The significance of this extension is that it completely transformed the structure of property in relation to the protectorate. A new and essentially alien perspective in state land relationship began to emerge. It was asserted that the protectorate as a political entity owned

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<sup>78</sup> Wa-Githumo, M. (1981) *Land and Nationalism*, p.199.

<sup>79</sup> Section 4 of the Crown Land Ordinance, No.21/1902.

<sup>80</sup> *Ibid.* p.13

land, while based on English property relations, the land users merely held certain former rights constituting property in the land<sup>81</sup>. The official view as expressed by the Attorney General of the Crown was that the indigenous land had ceased to exist as soon as the Crown assumed territorial control.

The Protectorate Attorney-General, R.M. Combe, explained that the definition of crown land was extended “to remove any doubt as to the power of the government to legislate the occupation of such lands occupied by native tribes”<sup>82</sup> The proposal made in the Bill caused some anxiety among the opponents of the British Imperial land policy. T.E. Harvey, a Labour Member of Parliament, called the Bill, “a monstrous act of theft.” Drawing the experience of the Maasai evictions and the subsequent decisions by the courts, he went on to state that:

As the court at present hold that the Masai are not even British subjects, they could have no redress if, under this new ordinance, the Governor, decided to reduce their reserve, or change the terms of the treaty or agreement under which they held it.<sup>83</sup>

The opposition notwithstanding, the Bill was enacted in 1915 with the proposed definition of crown land unaltered in the redrafted 1913 Bill. The process that began in the 1900s culminated into what Okoth-Ogendo called ‘legal organisation of the reserves’ whose objective was “simply to make way for European settlement.”<sup>84</sup> After all the rhetoric about African land rights, the concern of the 1915 Crown Land Ordinance and all the contributions

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<sup>81</sup> The feudal maxim of *Nulle terre sans Seigneur* was replicated here.

<sup>82</sup> *Ibid.*

<sup>83</sup> C.O.C.P. 1016, no. 39 enclosures 1 and 2 in Belfield to Harcourt, 8 Jan. 1914 No.58, Harvey to Harcourt, 26 Feb.1914.

<sup>84</sup> Okoth-Ogendo, H.W.O. (1991) *Tenants of the Crown*, p.53

to the debates on the Bill, the bottom-line was to protect the interests of settlers as the report by the committee of the Legislative Council stated its intention as follows:

The extension of this definition so as to include native reserves having been criticised in England, the committee wish to record emphatically their opinion that the definition as drafted should stand. It must be remembered that many if not most of the native tribes have no individual or even tribal tenure of land as tenure in generally understood in England, and it is of the utmost importance that the land in the reserves or occupied by native tribes should be definitely vested by statute in the Crown, thereby giving the Crown power to afford the natives protection in their possession of such land...if such lands are vested in the Crown it will be possible for the Crown to regulate their occupation in the interests of the natives and finally to evolve a system of tenure for the natives thereon giving them real and definite right to the land.<sup>85</sup>

The Crown Land ordinance of 1915 marked the beginning of the second major historical development as far as African land tenure was concerned. Any pretence of protecting African land rights was absolutely buried in the sand of this legislation. It was the turning point in the way African affairs were reshaped by the government. The implication was soon illustrated by the government approach in deciding whether or not Africans owned their pieces of land. A few years later, the government intervened in a case between two Kikuyu families to perhaps demonstrate that land was now under its absolute control. The court interpreted the ordinance as having sealed the radical title of the crown and Africans' claim to ownership of land was not tolerated. The case of Wainaina Wa Githomo was a clear demonstration of how African interests in land and tenure rights enjoyed under the African customary law had been systematically undermined. The facts of the case were as follows: One Wainaina wa Githomo and another, both Kikuyu, claimed that they were entitled to possession of a piece of land in Kabete, which they alleged had been subject of a trespass by one Murito Wa Indangara, and another, also Kikuyu. The plaintiffs' claims rested on derivation of title by purchase from the Ndorobo before colonial settlement. In the alternative

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<sup>85</sup> Para.13 of the Committee's Report presented to the Legislative Council on 4th August 1914.

the plaintiffs' alleged that the defendants had been tenants at will on the shamba and that such tenancy had been determined by notice.<sup>86</sup>

The 1915 Land Ordinance insidiously countenanced rather than defused the growing tension, as the government appeared to have left no room for Africans to hold any land rights, making them utterly divested of any claims to land in the protectorate. At the peak of this controversy, a person of significance, Chief Justice Barth, the head of judiciary, made the surreal proclamation that African right to land was literally dead and buried. He, with a sense of finality declared:

In my view the effect of the Crown Lands Ordinance, 1915 and the Kenya( Annexation) Order-in-Council, 1920 by which no native private rights were reserved, and the Kenya colony Order-in-Council, 1921...is clearly *inter alia* to vest land reserved for the use of a native tribe in the Crown, if that be so then all natives in such reserved land, whatever they were ...disappeared and natives in occupation of such Crown land became tenant at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier-such land would include that fallow....<sup>87</sup>

Although such a decision would naturally trigger a new wave of land alienation, it did not create any excitement in the settler-community or within the officialdom. This was understandable. Without legal sanctions, much had been achieved to enhance European settlement and this particular court decision would do little or nothing to change the status quo. With all the institutions aggressively encouraging colonial land policy, the Africans, particularly in the central highlands became fidgety and there were signs of resistance, especially in Kavirondo and Kikuyu.<sup>88</sup> There was a heightened level of political consciousness among the Africans, hence clear opportunity for organising nascent political

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<sup>86</sup> Isaka Wainaina Wa Githomo and Kamau Wa Githomo v. Murito Wa Indangara (2) Nanga Wa Murito (3) Attorney –General, (1922-23), 9KLR 102.

<sup>87</sup> Ibid

<sup>88</sup> See Okoth-Ogendo(1991) p.55

movement. Some of the colonial officials viewed the emerging situation as a harbinger for instability and social upheaval.

The authorities might not have publicly admitted that their actions were mainly influenced by growing restlessness in African reserves. The colonial government apparently realised that it was obliged to initiate reform programmes aimed at winning confidence among certain groups of Africans. In 1924, the government appointed the East African Commission under the Chairmanship of W.G.Ormsby-Gore to investigate, among other things, African land grievances. The Commission looked at the problems in a broader perspective and recommended that the solutions lay in accelerating the economic development of East Africa and addressing social conditions, labour and taxation issues among the native communities.

More importantly, the Commission admitted that ‘there was probably no other subject which agitated the African mind more continuously than the question of their rights in land.’<sup>89</sup> In response to the Committee’s recommendation, the government began to review the situation in African reserves. An amendment was made to the Crown Lands Ordinance to demarcate boundaries of the African reserves and put a stop to further alienation of land in there.<sup>90</sup> In other words, the government officially gazetted African reserves for over twenty years since 1904 when the idea of reservation was mooted in response to the eviction of the Maasai. In 1927, the Hilton-Young Commission began its inquiry and like the Ormsby-Gore Commission before it, recognised the squalid conditions in African reserves. It recommended that the government needed to formulate a policy that would ‘guarantee the African sufficient

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<sup>89</sup> The Report of the E.A.C (1925) p.28

<sup>90</sup> Cmd. 2387, p.29; See also the Government Notice No.394 in the Official Gazette, Oct.1926.

land to maintain themselves through programmes to be created by the government.<sup>91</sup> The government again published the Native Lands Trust Ordinance, which was enacted in 1930. The Bill was dismissed as a half-hearted attempt to restore the land rights of the Africans, but it turned out to be a legislative instrument to control African reserves without excluding possible future expansion of settlement. The Board, which was obligated to limit the power of the Governor in the allocation of land in reserves, would be constituted by government and settler representatives with only one African to be included 'if a suitable one could be found.'<sup>92</sup> The court once again offered its unflinching support to colonial land policy.

The notion that the protecting power had the noble goal of protecting the native tribes in her jurisdiction came to a grinding halt as the Imperial Government capriciously gave in to the protracted demand of the settlers. According to Okoth Ogendo, the Ordinance was seen as 'a secure foundation for the organisation of the settlement.'<sup>93</sup> The most salient provision of the Ordinance was the creation of almost a perpetual ownership of land by a lessee because of the inordinately lengthy period of leasehold that was capable of keeping a particular land within a family for hundreds of generations. It gave the settlers 999-year leases.<sup>94</sup> The holders of agricultural lands under the Crown Lands Ordinance of 1902 were permitted to convert their land titles from the 99-year leases into the now longer terms of 999-years.<sup>95</sup> The ordinance had added a new pitch to the political influence of the settler groups as they now took control of land and economic enterprise that was to be driven for the remainder of the

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<sup>91</sup> Cmd.3234, 1929, p.40.

<sup>92</sup> Section 3 of the Ordinance.

<sup>93</sup> Okoth-Ogendo,(1991) Tenants of the Crown, p.41.

<sup>94</sup> Section 34, Crown Land Ordinance, No.12 of 1915.

<sup>95</sup> Ibid Section 32.

colonial tenure in the East Africa Protectorate and colony. The settlers' voracious demand for more advantage in the political and administrative affairs of the government seemed to have paid off through the enactment of this law.

### **3.9.2 The Birth of Reservation Policy,**

An amendment to the 1902 Crown Land Ordinance was ostensibly made to address the excesses of the Crown power in alienation of African lands. The idea was to entrench the notion of African reserves so that the continued expansion of the White Highlands was at least minimised. The Bill was passed by legislative council in 1909 to enable the Governor to set aside for the "Aboriginal natives tribes" of the Protectorate any crown land which, in his opinion, was required for their use or support. The Bill provided for the concept of a 'trustee' who would manage reserves on behalf of the Governor. One of the key features that among others the drafters brought on board was the 'non-alienability' principle. This was included in case it was retained in the approved law, to offer a radical departure from the pervasive practice of the last decade, where expropriation of land was the top agenda of the government policy.

However, even this was watered down by a qualification that "unless made with the consent of such person or persons as the Governor may appoint."<sup>96</sup> The Bill had other weaknesses, for example, it provided for a clause that hampered legal and institutional arrangements proffered to protect the indigenous peoples' rights to land. This was again blamed on the settlers whose influential position swayed the Legislative Council to insert specific provision which required prior consultation of their representatives before reserves were established.<sup>97</sup> After sustained back and forth debates between Nairobi and London, and some alterations, the Bill was redrafted in 1913. The redrafted version made yet again one of the most controversial aspects of land governance that arguably took the debate backwards

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<sup>96</sup> C.O 5533/59, enclosure in Jackson to Crewe, 29 April 1909.

<sup>97</sup> See Sorrenson p.222



rather than forward. The government was vested with “all lands occupied by the native tribes of the Protectorate and all lands reserved for the use of any members of any tribe.”<sup>98</sup>

The government policy of establishing reserves was generally presented as an interventional measure to protect Africans from further alienation of land. It was actually touted as a strategy to protect African land rights.<sup>99</sup> The Foreign Office had constantly used the notion of ‘reserves’ since the policy of settlement was aggressively pursued in the early 1900s, including the massive evictions of the Maasai pastoralists from central Rift Valley. While the Maasai treated the move as a vicious disruption of their lives, the government and settlers saw it as a resounding success. Sir Lansdowne of the Foreign Office was upbeat about the policy when he commented that: “definite acceptance of the policy of native reserves implies.....an absolute guarantee that natives, will, so long as they desire it, remain in undisturbed and exclusive possession of the areas ‘set aside’ for them.”<sup>100</sup>

The idea regarding reserves appeared quite prominently in discussions that followed the hasty decisions made by Governor Donald Stewart to move the Maasai despite the Foreign Office’s initial resistance. The London imperial bureaucrats were forced to accept Stewart’s position as “the right one.”<sup>101</sup> However, the Foreign Office later organised an ad hoc committee meeting to discuss the pros and cons of reserve policy.<sup>102</sup> The meeting curiously agreed to further eviction of the Maasai as proposed by the Nairobi officials who manipulatively convinced their superiors in Britain that the Maasai were “willing and anxious to move.”<sup>103</sup> The Foreign Office thought that the move would benefit the Maasai. Hopley,

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<sup>98</sup> Ibid, p.223

<sup>99</sup> Sorrenson, p.210

<sup>100</sup> F.O. 2/841, Lansdowne to Stewart, 21 Oct. 1904

<sup>101</sup> F.O 2/842, Minute on 16 Aug.1904, Stewart to Lasdowne.

<sup>102</sup> See Sorrenson(1968) p.195.

<sup>103</sup> F.O 2/842, Hollis note on F.O meeting of 19 Aug. 1904, and minute by Lasdowne.

who was a senior administrator and an ardent supporter of settlement policy, once remarked that, as a rule, settlers were “ very antagonistic to the natives and convinced that it was imperative that they should be pushed out to make room for the Europeans. The more rabid of the opinion that they should...be blotted out, at the first opportunity.”<sup>104</sup> The alienation of indigenous communities’ land was viewed as a response to ‘claims’ made by the settlers, especially along the railway line. It was evident that whatever formula the government was going to adopt in response to such ‘claims’ would result in a favourable outcome for settlers rather than the ‘native’ Africans. The inevitability of removal was ideally difficult to fathom even among the local administrators and was difficult to either defend or implement. Hopley observed that unless a structured system was put in place to carry out reservation policy the administration would be ‘in an unenviable position of having to drive out a tribe who had entrusted implicitly in the word of various officers-entrusted with their administration.’<sup>105</sup>

A few officials went out of their way to support retention of the pre-existing rights of the Africans, particularly in resisting the settlers whom they accused of “trying to seize the pick of the Masai grazing grounds.”<sup>106</sup> According to Jackson, the Sub-Commissioner for the Naivasha Province, the European settlers believed they could ‘stake out huge areas embracing all the very best grazing grounds on both sides and for the greater part of the length of four out of five rivers that run into Lake Naivasha, Elementaita, and Nakuru, regardless of the established...claims of the Masai, and sublimely indifferent as to how and where they are to

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<sup>104</sup> Land Office Report 260, Hopley to Hopley to Eliot, 11 Feb. 1904.

<sup>105</sup> Ibid.

<sup>106</sup> Unquoted source in Sorrenson (1968), 192

feed their enormous flocks.”<sup>107</sup> Hobley actually predicted that once the settlers established their own herds, they would inevitably demand the removal of the Maasai and their stock. Charles Eliot had persistently argued that for the settlement to succeed, the Maasai had to give way. Even those who initially showed some sympathy for the Maasai eventually became inconsistent. For example, Jackson and Hobley changed their minds when it became clear that the imperial home government was supportive of the policy. The pro-settlement coalition in Nairobi was equally a force majeure that could not be easily resisted.

In the next Chapter, the focus is on the Maasai pastoral people whose proximity to the seat of the colonial state (the areas that became White Highlands) made their encounters with the British the most controversial and consequential in Kenya’s history. Their encounter was relatively brief (between 1903-1913) during which two of the most devastating moves (which can also be described as evictions) took place. The Maasai attempts to seek redress in the courts did not succeed. Tucked into the inferior reserves away from the settlers who occupied the land from which they were removed, the Maasai tried to reclaim their rights through the courts of law which as shown in the next Chapter remained not only nonchalant but deeply identified themselves with political decisions made by the colonial authorities.

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<sup>107</sup> F.O. 2/847, Bagge to Jackson, 29 July 1903; and memorandum by Jackson, 15 Aug. 1903.

## CHAPTER 4

### Maasai and the Enduring Land Question

#### 4.1 The ‘Coming of the Black Rhino’

I have no desire to protect Masaidom. It is a beastly, bloody system, founded on raiding and immorality, disastrous to both the Maasai and their neighbours. The sooner it disappears and unknown, except in books of anthropology, the better.<sup>108</sup>

Sir Charles Eliot

...the conflict between nomads and settled society is fundamental to humankind. Civilization, from Latin *civis*, a townspeople, means the culture of those whose homes do not move. The horde, from Turkish *ordu*, a camp and its people, is its antithesis, which both defines civilization and threatens it. We the stayers, detest the movers, be they Huns, Mongols, Kurds or Gypsies. This is partly because we feel they threaten us or our property. But I have come to believe that there are more substantial reasons for our disdain. We hate them because they remind us of who we are.<sup>109</sup>

George Monbiot

Tradition and oral history of the Maasai people would not be complete without the mention of the famous Laibon, Mbatiany Ole Supet, a most respected medicman and charismatic leader. Mbatiany was said to have ‘lived at the dawn of the white man’s entry into central Africa, at a time when the Maasai were perhaps at the peak of their formidable strength.’<sup>110</sup> Mbatiany had a premonition, which unlike many leaders was not about mourning

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<sup>108</sup> F.O. 2/835, PRO, Elliott to Lansowne, April 19, 1904

<sup>109</sup> Monbiot, G (1994) No Man’s Land: An Investigative Journey through Kenya and Tanzania, p.1.

<sup>110</sup> Coates, F (2004) Tears of the Maasai, p.5

his own infirmity or death but rather about a terrible episode that was going to threaten his community, the Maasai people. According to oral historians, Mbatiany called a meeting of the Maasai elders and in a hushed gathering revealed the terrible visions he had dreamt of saying, 'I am about to die. I see a large black rhino cutting a line across the land. I see the end of my children and of the land. Do not move from your land, for if you do you will die of a terrible unknown disease, your cattle will perish, you will fight with powerful enemy and you will be beaten'.<sup>111</sup>

Mbatiany died seven years later and was succeeded by his son, Lenana, who promised his people that by giving some of their best land to the white man, they would appease the invaders and avoid further tragedy. He was wrong. The 'black rhinos', carriages and caravans, did arrive and they were 'filled with fire, panting and bellowing plumes of smoke as they rolled on iron rails into the heart of the Maasailand.' On the back of the rhinoceros were 'strange pink people.'<sup>112</sup> It was just a matter of time before the strangers who 'visited' them demanded their hosts to be removed to pave way for European settlement. This part of the history is hardly mentioned in the mainstream narrative of land tenure discourse in Kenya. As we have pointed out in Chapter 7, the policy makers could go to the extreme by dismissing it as a 'myth'. As far as pastoral Maasai is concerned, land has always been part of the socio-cultural, economic, and spiritual aspects of their life.

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<sup>111</sup> Quoted in Coates, *ibid*, pp.5-6

<sup>112</sup> Quoted in Monbiot, *op cit*, p.52

## 4.2 The Maasai's 'Splendid Pasture'

The early contacts of the Maasai were not colonial officials or settlers in a hunt for land. They were unsuspecting nineteenth century travelers, missionaries, and explorers who had happened to pass through Maasai land on their way to other destinations, particularly the Lake Victoria basin and Uganda. However, seductive reports they wrote played a significant role in attracting the attention of their fellow Europeans who had required eyewitness accounts about the regions in Africa that might suit them for settlement. The initial survey of the area found that the land was 'high, green and sweet, its climate a cool relief from the humidity of the coast and a great deal healthier.'<sup>113</sup>

Among those early travelers, none had left more impressions than Joseph Thomson, a geologist who was sent by the Royal Geographical Society on an expedition in 1883-1884 to find a direct route between the eastern coast to the northern shores of Lake Victoria.<sup>114</sup> The Society was in essence doing the survey on the bidding of the Imperial Government. The early traders had demanded a route that would avoid the allegedly fearsome Maasai and the hostile Germans who were competing for trade in the area. The expedition set out a few months after the rival German expedition of Guestav Fischer, who was forced back by the Maasai.<sup>115</sup> After difficulties experienced in penetrating the Maasai country, Thomson still managed to discover the great Rift Valley, which was graced by exotic panorama of Lake Nakuru, Lake Naivasha and Lake Baringo, Elementaita and other scenic features.<sup>116</sup> His

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<sup>113</sup> Quoted in Hughes, L ( 2006) *Moving the Maasai: A Colonial Misadventure*, p.23

<sup>114</sup> Johnson, H.H (1891) *A History of the Colonization of Africa by Alien Races*, Adamant Media Corporation (repr. 2004), pp. 220-221.

<sup>115</sup> Hughes, L, op. cit p.23

<sup>116</sup> See Johnson, H.H, op. Cit, p. 220

accounts painted a glowing picture of the Maasai country. “A more charming region is probably not to be found in all of Africa.” Drawing a parallel to his home country, Scotland, he described the Maasai land as a ‘park-like’ country complete with ‘flowering shrubs’, ‘noble forests’, babbling brooks and streams’, and ‘pine-like woods [where] you can gather sprigs of heath, sweet-scented clover, anemone, and other familiar forms’.<sup>117</sup>

Nevertheless, what had really captured the imagination of the settlers and government officials was more than the description of the landscape. Thomson and other travelers reported that the land was ‘vacant’. The potential settlers therefore could easily occupy ‘uninhabited’ land without facing resistance. Thomson, as if stoking the already burning desire of those Europeans who intended to find new land within Britain’s sphere of influence, gave selective information about the Maasai people and the country. Writing on the situation in Laikipia (Lykipia) where civil war among the Maasai had occurred about a decade before his venture in Maasailand, Thomson asserted that the land was ‘empty’ because the Maasai have had suffered self-inflicted decimation.<sup>118</sup> The Iloikop war, as the Maasai conflicts was referred to, probably took place between 1874 and 1876.<sup>119</sup> Thomson was right about the war and the devastating effect it had on the original inhabitants of the area, the Laikipiak Maasai. The combined force of the Purko-Kisongo Maasai attacked their tribesmen in the 1870s and inflicted heavy losses on them, to the extent that some of the remaining survivors had to flee

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<sup>117</sup> Hughes, op. Cit. P.24

<sup>118</sup> See Hughes. L. op. cit., p.24

<sup>119</sup> Berntsen, J (1979) Pastoralism, Raiding and Prophecy: The Maasai Land in Nineteenth Century, p.243. Unpublished Ph.D Dissertation, University of Wisconsin. See also Waller, R (1979) The Lords of East Africa: The Maasai in the Mid-Nineteenth Century c. 1840-1885, pp.240-243, 388-389. Unpublished Ph.D Cambridge University; Thomson, J (1885) Through the Maasai Land (repr. 1968) pp. 240-243) See also S. S. Ole Sankan (1971) The Maasai, pp.5-6. East African Literature Bureau.; Heine, B., Vossen, R (1980) The Kore of Lamu: A Contribution to Maa Dialectology, Afrika und Ubrsee, 62, 272-288

to distant and unknown territories. Bernd Heine and Rainer Vossen, two German linguists, who wrote about Kore, a small tribe who now live in the Kenyan coastal town of Lamu, reveals the story behind their migration from Somalia to current residence in Kenya as follows:

...Laikipia Maasai fleeing their homeland eventually reached their presentday Sampur-Rendile area, where they were taken prisoner by the Somali and sold as slaves in the Kismayu area of Somalia, at the mouth of Juba River.<sup>120</sup>

However, Thomson had exaggerated the fact about habitation of the Laikipia after the civil war. The survivors of the Purko-Kisongo internal warfare assimilated with the powerful clans that had maintained their presence in the area.<sup>121</sup> While there was low population density, it was not entirely true that the land was uninhabited. In any case, Thomson's own accounts indicated 'great herds of cattle or flocks of sheep and goats are seen wandering knee-deep in the splendid pasture'.<sup>122</sup> Lotte Hughes, in her latest contribution to Maasai history, pointed out the contradiction in Thomson's accounts, when she stated; "There are no herds without the herders, but unwittingly or otherwise Thomson seemed to overlook transhumant pastoralists' seasonal occupation and use of land."<sup>123</sup> The notion expressed by the travelers was later carried forward and reinforced by the agents of the British Imperial Government who were tasked with the inaugural duty of setting the pace for colonial establishment. Fredrick Lugard, one of the foremost architects of the colonising mission in Africa had a similar view as that of Thomson about another part of Maasai rangelands, the Mau

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<sup>120</sup> Heine, B., Vossen, R (1980) *The Kore of Lamu: A Contribution to Maa Dialectology*, p. 172. *Afrika und Ubrsee*, 62, 272-288

<sup>121</sup> Hughes, L, op. Cit.p.24

<sup>122</sup> Thomson, J (1885) *Through Maasai Land*, pp.407-408

<sup>123</sup> Hughes, L, op.cit. p.24.



escarpment. “This area is uninhabited and of great extent: it consequently offers unlimited room for the location of agricultural settlements or stock-rearing farms.”<sup>124</sup> In the Sphere of Influence that became the British East Africa (and later Kenya Colony), the notion was aggressively operationalised by Charles Eliot, a pioneer administrator (he was the second Commissioner of the Protectorate, 1900-1904). Eliot openly proclaimed that: “We have in East Africa the rare experience of dealing with a tabula rasa, an almost untouched and sparsely uninhabited country, where we can do as we will...”<sup>125</sup>

By 1902, the period in which the settlement of Europeans was picking up tempo, the Maasailand had become a prime target. The Maasai power in the region had waned significantly and their land sparsely populated. According to Sorrenson, other major factors had led to this decline.<sup>126</sup> First, the rinderpest and bovine pleura-pneumonia epidemics of 1889-1890, almost wiped out Maasai herds. The drought of 1891 was severe and almost wiped out the remaining herds. This was followed by the smallpox outbreak in 1892 which reduced the Maasai population by half. And finally, a consortium of other sub-tribes waged a bitter war against the Loita and Siria sub-clans over the feuds that pitted two brothers, Lenana (Olonana) and Sendeyo (Sedeu) over succession of their deceased father’s (Mbatian) ritual leadership. To crown it all, the Maasai who were previously feared by the neighbours as fierce warriors became subservient and even sought assistance from the Kikuyu , Kamba and other tribes.<sup>127</sup>

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<sup>124</sup> Lugard, F.D (1893) *The Rise of our East African Empire*, p.419. Edinburgh: WilliamBlackwood & Sons

<sup>125</sup> Eliot, C (1905) *The East Africa Protectorate*, p.3. London, Edward Arnold.

<sup>126</sup> For Comprehensive accounts of the Maasai decline in 1880s, see Sorrenson, *op. cit.* pp. 190-191.

<sup>127</sup> *Ibid*, p.191

Maasai was at its weakest point at the onset of colonial settlement. However, that was not to say that the settlement was any more spurred by the situation of the Maasai than the overall situation. The colonial occupation was taking place irrespective of political or economic power of the occupied people. The point made above was just to contextualise the interplay of factors that might have facilitated speedy settlement. In any case, the recovery of the Maasai from the social and economic infliction was reported to have accelerated fast enough by the time settler occupation was taking place. The Maasai had actually become the trusted ally of the British and even joined the British expeditionary raids against other allegedly recalcitrant native tribes such as Kikuyu and Nandi and restocked themselves with ‘proceeds’ from looted stocks.<sup>128</sup> But it was not long before the Maasai found themselves on the wrong side of colonial venture as settlement policy began to roll.

A more complex and intractable set of challenges faced the Maasai from 1903 onwards. The Europeans had, according to Fredrick Jackson, one of the moderate Protectorate administrators, began demanding the best of Rift Valley pastureland inhabited by the Maasai.<sup>129</sup> By 1903, it was established that there were 9,000 Maasai with 45,000 cattle and 750,000 sheep in the Rift valley. The settlers and Protectorate officials had cast their eyes on Maasailand and the mechanics was put in place to carry the plan to completion. Moving the Maasai from the Rift Valley to create room for the Europeans settlement became the major preoccupation in the next decade from 1903. The Maasai land was found to be suitable for farming, especially large-scale ranching preferred by the pioneer colonists like Lord Delamere. As S.S. Bagge stated in his official report, it had taken ‘many years and large

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<sup>128</sup> Sorrenson, op.cit. p.191

<sup>129</sup> C.O 533/61 Jackson to Crewe, 19 Aug. 1909

flocks to have brought the pasture into its present condition which has proved so alluring an attraction to the land hunter.’<sup>130</sup>

Some of the settlers saw an early opportunity to stake a claim to Maasai land both individually and through dummying companies. For instance, Major Burnham and some other settlers formed the East Africa Syndicate (EAS) and applied for hundreds of thousands of acres in Maasai land. “The EAS got 500 square miles of land at Naivasha, in the heart of the Maasai grazing ground.”<sup>131</sup> In short, a micro-scramble for Maasai had begun in earnest by 1903. Lord Delamere, the scion of the settler community, applied for 100,000 acres. Initially his application was rejected on the ground that it violated the Maasai land rights.<sup>132</sup> He led other settlers in pushing the government to grant them land in the Rift Valley for freehold or long leases. The local administration was soon under pressure to respond to their demand. Delamere’s application was eventually accepted and in November 1904, he was granted a lease for 99 years at Njoro, west of Nakuru.<sup>133</sup> In addition to encouraging swift settlement of the Europeans in the highlands, Lord Delamere advocated for the removal of the Maasai from Rift Valley. He asserted that conflicts were bound to happen between settlers and warriors, the Maasai.<sup>134</sup> He had the support of senior officials of the Protectorate such as Charles Eliot who did not hide his motive of creating European monopoly in the region. After considering several options, including intermingling between Maasai and settlers, it was decided that

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<sup>130</sup> F.O. 2/847, Bagge to Jackson, 29 July 1903, in Jackson to F.O, 3 March 1904. Quoted in Sorrenson,, op.cit. FN.4 p.191

<sup>131</sup> Sorrenson, op.cit. p.191

<sup>132</sup> Hughes, L, op.cit.p.27

<sup>133</sup> Huxley, E (1935) *White Man’s country: Lord Delamere and the Making of Kenya*, p.104, Vol.1. London, Macmillan.

<sup>134</sup> Hughes, L, op.cit. p.28.

Maasai had to give way. It was agreed that the ‘final solution’ was to move the Maasai to a reserve in Laikipia.<sup>135</sup>

Charles Hobley, who in 1904 was the Assistant Deputy Commission and acting Commissioner following acrimonious departure of Eliot, began to work on the modalities of moving the Maasai. He visited Laikipia and confirmed that it was suitable for relocation of the Maasai.<sup>136</sup> When a new Commissioner, Donald Stewart, arrived in 1904, he was presented with what was virtually a *fait accompli*.<sup>137</sup> Stewart, accompanied by those seasoned administrators, John Ainsworth and Charles Hobley, organised a meeting with the Maasai to ostensibly elicit their support. However, the fact of the matter was that those meetings were intended to be eviction notices because the decision to evict the Maasai had already been made. A few ostentatious public baraza (gathering addressed by Protectorate officials) were hurriedly organized in Maasai areas of Ngong, Naivasha and other parts of Rift Valley. It was reported that the Maasai had accepted the idea of the impending move. Hobley reported that the ‘chiefs and elders ...expressed their acquiescence with the scheme, and was without any promise of bribe.’ Ainsworth met Lenana, the ritual leader, at Ngong and reported that the Maasai Oloibon agreed to ‘raise no objections.’<sup>138</sup> To formalise this ‘agreement’, the next step was to prepare a written document to be signed by all parties.

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<sup>135</sup> Ibid, p.29

<sup>136</sup> Soorenson, op.cit. p.194.

<sup>137</sup> Ibid, p.194

<sup>138</sup> Ibid, p.194

### 4.3 The Maasai Agreement 1904

The widely reported meetings held with the Maasai leaders about their removal from their home in the central Rift Valley were in reality a cover up that were methodically organised by the top colonial administrators in Nairobi. What had appeared as prior consultative processes were then reported to London as negotiated accord approved of by the Maasai leaders and by extension, the Maasai communities. The leading architects of the plan, Charles Hopley and John Ainsworth carefully mobilised local officials in the Protectorate who were sent to different Maasai clans with distorted message that it was being done in the interest of the community, to ostensibly protect them from further alienation land. Before Sir Donald Stewart took over the office as the acting Commissioner, Hopley and Ainsworth had, drafted the main content of what was later to be known as the Maasai Agreement.<sup>139</sup> The so called ‘acquiescence of the Maasai was also stage-managed by the two officials. Although most of the thinking and planning was done before the arrival of Stewart, he showed a lot of enthusiasm in joining the bandwagon. He recommended to London that the ‘only thing to do was to move the whole tribe out of the Rift Valley, and away from the railway , and that as the area remaining to the tribe north of the Rift Valley was too small, and that to the south too poor watered ,two reserves should be created.<sup>140</sup>

The Foreign Office added a spin of its own by demanding from the Nairobi officials a drawn up agreement that would make the plan appear diplomatic, negotiated, and hence suggestive to an outsider that the Maasai actually moved out of their own accord. The secretive manner in which the Protectorate officials worked on the removal of the Maasai did

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<sup>139</sup> Hughes, op.cit. p.33

<sup>140</sup> Leys,N.(1924) Kenya, p.101

not allow full disclosure to London, especially the planning aspect. For example, Stewart sent a telegraph to the Foreign Office about the conclusion of the agreement a day after the signing and did not include much detail. “All the chiefs readily assented to these proposals which were really their own wishes.”<sup>141</sup> A provision was also added to the agreement that Maasai consent was sought and acquired with the pledge on the part of the government never to disturb the settlement again.<sup>142</sup> The Foreign Office went along with the Protectorate’s official decision. Lansdowne, the secretary of State for Foreign Affairs affirmed the agreement but was still perturbed by the speed with which Stewart had rushed it through.<sup>143</sup>

By 10th August 1904, the colonial officials had prepared for the signing of the agreement. Those who were chosen Maasai representatives by the Maasai signatories were Lenana (Olonana) Ole Mbatiany, Masikonde, Ole Gilisho (Legalishu) and 17 others who had purportedly agreed with the content of the agreement and appended their signatures ( they were actually fingerprinted) as an affirmation. It was signed in Nairobi on the 15<sup>th</sup> August 1904. It was not clear what criteria was used to pick the so called ‘chiefs and elders’ as representatives of the Maasai. Who had nominated them to represent the Maasai? Were they genuine leaders or imposters forced on the Maasai? There was a generally-held assumption that they signed the document prepared by His Majesty’s representatives on behalf of the whole tribe and the individual clans or sections.

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<sup>141</sup> F.O 2/842, Stewart to Lansdowne, 16, August 1904; F.O 2/841, lansdowne to Stewart, 2 Aug.1904

<sup>142</sup> Ibid.

<sup>143</sup> Chamberlain to Eliot, 12 March 1904, f79, and 21 June 1904, f110; Chamberlain to Eliot, ff107-8, in response to Eliot’s telegram telling him of his resignation, Chamberlain Papers, RHO. Quoted in Hughes, L, op. cit. p.34.

However, it is widely accepted that the ultimate objective was to benefit the settlers at the expense of the whole Maasai tribe. The created reserves were intended to keep away the Africans from the white highland, one in the north in Laikipia and the other to the south of the railway line.<sup>144</sup> According to the terms of the 1904 agreement, the designated two reserves were to remain exclusively in the ownership and occupation of the Maasai people “so long as the Maasai as a race shall exist, and that European or other settlers shall not be allowed to take up land in the settlement.”<sup>145</sup> The government made a solemn promise that once the Maasai agreed to move to Laikipia and the southern reserve, they would remain undisturbed, without further intrusion.

This was not to be. Although there was doubt about the settlers’ wishes to settle far away from the railway lines, it soon became clear that they were overwhelmingly attracted to the rangelands. In fact, Stewart had forewarned that when the Maasai herds “grazed down the grass and got it sweet, envious eyes will again be cast on their lands.”<sup>146</sup> He expressed his fear when he wrote to the Secretary of State after the conclusion of the signing of the 1904 agreement<sup>147</sup>. He further suggested the need to make Laikipia an “absolute native reserve” after the move in 1904 but there was no legal or administrative mechanism put in place to protect the Maasai from further encroachment by the settlers. The prying settlers, who saw another opportunity to exploit land resources, soon turned this failure into a boon. They demanded the removal of Maasai from Laikipia.

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<sup>144</sup> Buell,R.L(1928), *The Native Problems in a*,Vol.I, p.312.

<sup>145</sup> East African Protectorate, *Correspondence Relating to the Maasai*, Cmd No.20360, Received 28<sup>th</sup> March, 1910. House of Commons Parliament Ppers,1911 Volume LII 1 730-731

<sup>146</sup> Sorrenson, *op.cit.* p.195

<sup>147</sup> Ross, W. M (1927), *Kenya From Within: A Short Political History*, p. 135

The colonial administration caved in and started working on the strategy to move the Maasai once again. Secretary of State Lansdowne and other senior officials in the Foreign Office anticipated a closure on the question of Maasai, and hoped that no further disturbances would occur. Moreover, Lansdowne, “emphasised the fact that definite acceptance of the policy of native reserves implied an absolute guarantee that natives would, so long as they desired it, remain in undisputed and exclusive possession of the acres set aside for their use.”<sup>148</sup> The insertion of the phrase, “so long as Maasai as a race shall exist...” was an apparent attempt to protect Maasai from further evictions.

The Agreement also provided some other developmental support to ease settlement of the Maasai in the two reserves and facilitate movement of their livestock. The Maasai requested a road to link the two reserves that would serve as a corridor for the movement of livestock. According to Norman Leys, this was a half-mile wide stock-track that would have linked the sixty miles distance between the two reserves.<sup>149</sup> The linkage was important not only to maintain the Maasai cultural and filial relationship but also facilitate sharing of common resources. Furthermore, the southern reserve, where the majority of the Maasai were moved had acute water shortages.<sup>150</sup> The authorities in principle agreed to facilitate the Maasai to access their cultural and spiritual sites in Kinangop (5 square miles) where annual circumcision rites took place. The Maasai also demanded to be compensated for land which was lost to European farmers in the vicinity of Nairobi and, finally, they proposed construction of a government station in Rumuruti to serve the Maasai in Laikipia.

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<sup>148</sup> Quoted in Hughes, L , op. Cit. P.84

<sup>149</sup> Leys, N (1924) Kenya, p. 118. Edinburgh, R and R Clark, Limited.

<sup>150</sup> Ross, W,M (1927) Kenya from Within, p.134. George Allen & Unwin Ltd. Museum Street. London



The majority of the Maasai, except for a few pockets of clans who remained in the area, were removed to the two reserves.<sup>151</sup> There was no doubt among the Maasai and other observers at the time, that the deal utterly disadvantaged the Maasai. Both reserves were of poor quality compared to their original land. Norman Leys described the land from which the Maasai were to be evicted as an “ area, though small is as fine a piece of country as there is in Kenya, with rich soil and perennial streams, vastly superior in every way to the country south of the Rift Valley where it was now proposed to send the whole tribe.<sup>152</sup> Several years after the removal of the Maasai, none of those assurances provided for in the 1904 Agreement were respected. The connecting road was not constructed as promised because the settlers complained that Maasai livestock carried the risk of spreading diseases. In fact, since August 1908, all movement of cattle between the two reserves was absolutely prohibited.<sup>153</sup> Similarly, the Government forbade ritual ceremonies to take place in Kinangop for fear that; the animals they brought there for sacrifice might spread diseases to Europeans cattle.<sup>154</sup> No wonder, before the Maasai settled down in their new homes, especially the northern reserve of Laikipia, another alarm bell was being sounded. Percy Girourd, the new Governor who was posted to the Protectorate in 1909 began to make overtures about the impending move. Rumours soon spread around that the settlers were again demanding the land in Laikipia. The Maasailand was once again gripped by fear and anxiety.

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<sup>151</sup> Sandford, G.R. (1919), *An Administrative and Political History of the Maasai*, pp. 25-26. The Damat and Loita clans who occupied the Loita plains and the southern slopes of the Mau plateau remained on their lands. See F.O 2/915, Stewart to Lansdowne, 9 Feb.1905: C.O 533/11, Sadler to Elgin, 6 Jan. 1906.

<sup>152</sup> *Ibid*, Leys, p.120. Norman Leys, a medical doctor who served in the administration was very critical about the settlement policy. In His book, *Kenya*, he particularly criticised the administration for abusing its power to mistreat the Maasai.

<sup>153</sup> *Ibid*,

<sup>154</sup> Leys, *op. Cit.*p. 118. Initially the administration discouraged the settlers from moving away from railway line, arguing that it was economically unwise and might also posed serious risks to them.

Sorrenson asserts that two groups of settlers were involved in the plan to remove Maasai from Laikipia. The first was a group of seven claimants who had applied for land in Laikipia before the 1904 Agreement and had their applications rejected.<sup>155</sup> The government rejected the application then, but when they reapplied again, the government listened to them. Among them were Lord Delamere and his brother-in-law, Cole. In April 1910, the Land Office recognised those claims.<sup>156</sup> The second group consisted of twenty-four settlers on the southern Guaso Nyiro, to whom the government intended to give land in Laikipia, close to the southern reserve occupied by the Maasai. By October 1911, when Harcourt instructed Governor Girourd not to grant land or promise European land in Laikipia, the land office had already prepared for the eventual removal of the Maasai to pave the way for further European settlement.<sup>157</sup>

#### **4.4 The Maasai Agreement 1911**

The man the colonial administration hosted as the Paramount Chief of all the Maasai, Oloibon Lenana, played a critical role in the manoeuvres used by the authorities to evict the Maasai from Laikipia. It is important to note that since the first move in 1904-1905 (that divided Maasai into two reserves), Lenana's power had waned and he had virtually lost control of the Maasai in the northern reserve, Laikipia.<sup>158</sup> Nevertheless, the Protectorates officials found him still useful in luring the Maasai to leave the remaining part of the southern

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<sup>155</sup> See Sorrenson, op. Cit. p.126

<sup>156</sup> C.O.C.P. 985, no. 43, Girourd to Harcourt, 14 Feb. 1912.

<sup>157</sup> Sorrenson, op.cit.p. 127

<sup>158</sup> Hughes, op.cit. pp. 36-37. Soon after death of their respected father Mbatiany in 1889 the rivalry between him and his brother Sendeyo created disharmony among clans. And as a result some clans deliberately distanced themselves from him.

reserve. By 1908, the administration was ready to roll out the plan following the expected approval from the Colonial Office. The Officials, as shown by different dates on the 1911 Agreement, had sought support from a few Maasai leaders to sign the document before it was officially unveiled. Actually, some of the leaders had signed the document by 1907.<sup>159</sup> The Colonial Office was initially kept out of the plan. The Protectorate authorities secretly handled the situation, but the matter came into the open and as a political embarrassment to the Government, when the budget they had prepared for the exercise raised the alarm in London. To shield his office and to galvanise support for the move, Sir Girourd informed the Colonial Office that Lenana had wished for the reunion of the Maasai in the southern reserve.<sup>160</sup> When Lenana died in March 1911, before the removal took place, it became the “wish of a dying man,” which according to the Maasai custom was supposed to be fulfilled.

In preparation for the second eviction, the Protectorate authorities organised a series of meetings with the Maasai leaders, beginning with those in the circle of Lenana. Lenana was still influential among the southern Maasai, although he lived in Ngong, a short distance from Nairobi. On 24 February 1910 at Kiserian camp, in the neighbourhood of Lenana’s home Jackson, deputising in the absence of the Governor, convened a meeting. The leaders including Lenana, Legalishu, Masikonde and other prominent elders were informed that the northern Maasai had agreed to move. This was not true, as the subsequent meetings in northern reserve had shown. The administration was aware that Lenana and his supporters had been looking for an opportunity to ‘reinstate’ his rule over some of the recalcitrant clans, like

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<sup>159</sup> See the 1911 Agreement, appendix 4, some of the signatories, especially those from southern reserve and Ngong had affixed the marks by 1907. Others signed in Rumuruti on 13 April 1911. The Officials, including the Governor signed on 4 April 1911. Yet the Maasai allegedly agreed to move after the meeting held in Kiserian in February 1910. How comes the Agreement bore signatures of 1907? This clearly shows that there was a trail of manipulation taking place.

<sup>160</sup> Ross, W.M, op. cit. p.137.

the Purko who were in the northern reserve. Jackson's explanation of the reason for the second move was to keep Maasai 'safe from cattle diseases' and, according to him, the Loita country in the southern reserve was safe for all the Maasai.<sup>161</sup> Like the first move, this one was also being considered "in the best interest of the Maasai and not because (the government) wishes to take back the land already given to them." The only leader who showed some level of dissatisfaction was Ole Gilisho (Legalishu) but the government was aware that as a recipient of government's "subsidies" he and some of the leaders had no option but to support the authorities. Ole Gilisho and Masikondi, who had previously rejected government's policy against the Maasai, capitulated soon after being threatened that their stipends would be stopped, if they opposed the plan.<sup>162</sup>

The second wave of the move began in April 1910. The Secretary of State stopped the plan through a cabled order on 20 April 1910 before a full-scale eviction took place. By this stage, the Colonial Office did not treat the matter lightly. The Governor was rebuked and informed that no suggestion of any alteration would be accepted unless it came from the Maasai themselves.<sup>163</sup> That was icing on the cake for the local authorities who had already worked on propaganda about Lenana's dying wish. However, in a meeting organised to 'inform' the Maasai of the impending move, which took place in Laikipia on 27 August 1910, the Maasai said "they would leave Laikipia under compulsion but not otherwise."<sup>164</sup> The Maasai had already expressed a strong opposition against any further removal in a meeting

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<sup>161</sup> Hughes, L, op.cit. pp. 42-43.

<sup>162</sup> Ross, W.M, op.cit.p. 138

<sup>163</sup> Leys, op.cit.p. 119.

<sup>164</sup> Ross, W.M,Op.cit. p.136

held by the Governor in Nakuru on 10 March 1910, when he raised the question of opening up Laikipia for European settlement.<sup>165</sup> After that, the authorities met Lenana in Nairobi where he was severely sick to use the opportunity to influence his succession. As soon as he died, the officials hurriedly summoned Maasai ‘regents’ and elders from both southern and northern reserves and impressed on them the need to fulfill the wish of their departed leader. As it turned out, the Maasai leaders had to approve the move, or else they might appear to have invited the curse of their leader.

After another meeting with Ole Gilisho and other leaders in April 1911 and final signing by the group, the Governor cabled the Secretary of State on 29 May 1911 briefing him about the final conclusion of the Agreement. The move was approved on the basis that the Maasai had agreed to it. The move, which had been stopped in 1910, resumed at the beginning of June 1911. Due to poor logistics and haphazard mass evacuation, the move became a disaster. Thousands of cattle died as they were trapped by heavy rains and muddy tracks. Weak men and women and many children reportedly died of hunger and exhaustion. The medical officers sent to investigate the situation estimate the loss of life at two to four percent of the population that was being moved.<sup>166</sup>

In the 1911 Agreement, the government dropped any pretension that it owed the community protection from further interference in their land as it had in the 1904 agreement. The controversial clause stipulated that the agreement was binding “as long as the Maasai as a race shall exist”, was not repeated in 1911. Laikipia reserve was a well-endowed area with adequate water and pasture compared to the more arid southern reserve where all the Maasai

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<sup>165</sup> Ibid, p.137.

<sup>166</sup> Leys, N. Op. cit. p.127.

were supposed to re-converge. From the text of the Agreement, the Maasai voluntarily agreed to vacate Laikipia. For example, part of the 1911 Agreement categorically stated: “We agree to vacate at such time as the Governor may direct the Northern Maasai Reserve which we have hitherto inhabited and occupied and to remove by such routes as the Governor may notify to us, our people, herds, and flocks to such area on the south side of the Uganda Railway as the Governor may locate to us...”<sup>167</sup>

The two historical evictions not only altered the pre-existing customary land tenure rights but changed the course of Maasai political economy as a community, with issues of land occupying the central place in their lives to the present day. It was definitely hard to believe that any community anywhere in the world could deliberately bring upon itself such a huge burden with devastating consequences. The assertion by colonial authorities that the Maasai willingly participated in their removal and that they were happy to relocate was contradicted as propaganda to sanitise illegitimate policy. Lotte Hughes, one of the leading authorities on Maasai encounters with British colonialism, contends that the Maasai had always protested about moving from their ancestral land to other areas, which were not suitable for their livestock. ; “Thousands of Maasai were forcibly moved from the Rift Valley and Laikipia, a territory they called Entorror, to a Southern Reserve; it was an inferior substitute.”<sup>168</sup>

The government employed what Okoth-Ogendo described as a quasi-legal mechanism to enforce a pre-planned strategy of removing the Maasai from the expansive and fertile Rift

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<sup>167</sup> The 1911 Agreement. See Appendix 4.

<sup>168</sup> Lotte Hughes(2006) Moving the Maasai , pp.36-49

Valley sub-region they had been occupying for generations<sup>169</sup>. Initially when Lord Delamere applied for concession, he was denied because of what was argued as the need to protect the Maasai.<sup>170</sup> This fundamental *raison d'être* which was used to forestall unjust allocation of land in the pastoral Maasai area soon fell apart and it was difficult to fathom why something which had appeared to be a subtle cause was suddenly consigned to the backwaters.

Some observers saw the removal of the Maasai as unjustified and one of them, John Staffacher, wrote the following about the removal of the Maasai: “The Government officers are intolerably cruel with the natives. They are driving the Maasai from the favourite pasture grounds which were always theirs to a little barren strip of the country on which their large numbers of sheep and cattle cannot possibly live, simply that a few wealthy snobbish English lords may buy up the land for their own selfish interests.”<sup>171</sup> The physical movement of people and livestock from Laikipia was described as a bewildering episode. Charles Miller described it as follows: “Napoleon’s retreat from Moscow may have been a dress parade by comparison. Planned routes were forgotten as 10,000 Maasai, 175,000 cattle and over one million sheep sprawled out across the Rift and its two escarpments like nails spilled from a giant’s keg.”<sup>172</sup>

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<sup>169</sup> Okoth-Ogendo (1991), *Tenant of the Crown*, p.30

<sup>170</sup> Sorrenson(1968),p. 70.

<sup>171</sup> King, K, (1971), Cited in the journal of African History, p.121, Vol, No.1.

<sup>172</sup> Hughes, L. (2005). Cited Charles Miller, *The Lunatic Expressm* (1971), p.495, in *Moving the Maasai*, p.50.

#### 4.5 The Maasai Case: The High Court<sup>173</sup>

The decision by the Maasai to go court arose out of the frustrations of the Maasai community following the two agreements they had entered into with the British Imperial Government. On both occasions the agreements required the Maasai to vacate the land they inhabited in order for the government to settle European farmers. After the conclusion of the second agreement in 1911, some Maasai leaders sought intervention of the court, claiming their right to return to Laikipia, the Northern Reserve from which they had been moved when the 1904 Agreement was concluded. Led by Legalishu (Gilisho) who had asked his son-in-law, Murket Ole Nchoko (Ol le Njogo) to be the main plaintiff, the Maasai filed a civil suit at the Supreme Court to claim that the 1911 Agreement was a breach of 1904. The Case was presided over by Justice Hamilton (later Chief Justice of the Protectorate).<sup>174</sup>

Although the validity of the so called ‘Agreement’ was questioned by the Maasai, the main plea put forward by Ol le Njogo and others was that the government had ‘breached’ the 1904 Agreement by removing the Maasai from Laikipia. The plea rested on the argument that the signatories to the 1911 Agreement did not have consent of the Maasai tribe as whole, and therefore were not representatives of the community. They pleaded that the government was still bound by the 1904 Agreement and as such, their rights to Laikipia should be restored. There were other subsidiary pleas, which were related to the main one; a claim for £5000 damage for the government failure to construct a road linking the two reserves; a claim for losses of livestock while being removed from Laikipia. They also contended that the 1904

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<sup>173</sup> Ol le Njogo V. A.G of the British East Africa. Civil Case No. 91 of 1911 at the High Court, Mombasa.

<sup>174</sup> The fact of the case was restated fully by the Appellant Court ( see Appendix 4) in its ruling of the appeal by the Maasai.



Agreement was a legal contract and government purported annulment by 1911 Agreement was a breach. They further claimed that the 1911 Agreement was obtained under duress.

The court did not appear to be interested to hear the case in its own merit but rather allowed the executive to meddle in the matter, thus through the Attorney General. Justice Hamilton instead allowed the counter-plea raised by the Attorney General, which stated that claims made by the Maasai could not be heard by a municipal court. The Attorney General argued that both agreements were entered into by the representatives of the Crown in the East Africa Protectorate, in which the King exercises powers by virtue of the Foreign Jurisdiction Act, 1890, and from the advice of the Privy Council, His Majesty ordered in 1902 that-

The Commissioner shall administer the Government of East Africa in the name and on behalf of His Majesty, and shall do and execute in due manner all things that shall belong to his said command, and to the trust thereby reposed in him, according to the several powers and authorities granted or appointed to him by virtue of this Order and of his commission, and according to such instructions as may from time to time be given to him under His Majesty's Sign Manual and Signet, or by Order of His Majesty in Council, or by His Majesty through a Secretary of State, and according to such laws as are or shall hereafter be in force in the Protectorate." (Order in Council 1902(3).)

The Attorney General further argued that claims against government officials for breach of the 1904 Agreement could not stand because, according to him, they acted on behalf of the Crown. According to him the agreement they entered into were treaties and treaties being the Acts of State, were not recognisable in the court of the Protectorates.

He further contended that the Maasai tribesmen, living within the limits of the East Africa Protectorate, were not subjects of the Crown. He stated that the territory was a protectorate in which the Crown had a jurisdiction, which in essence rendered the Maasai as protected foreigners owing allegiance to the Crown (in return for protection) but not subjects of the crown. The Attorney General made a broadly brushed statement that created more confusion than clarity in the Maasai case. He tried to argue that the Maasai were a sovereign

people who willingly signed a treaty with the British government. This was issue which even by a modest standard did appear contestable in a colonial context where the colonized people were treated as subject of ruling authorities. As to the controversial legal status of a protectorate, the Attorney General retreated to usual legal cascade. In explaining the circumstances leading to acquisition of the Maasailand, the A.G referred to the Foreign Jurisdiction Act as to the meaning of Protectorate. This presupposed that acquisition of Maasai land was separate from the rest of the Protectorate, a sui generis. To his mind, Maasai land "... has never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty, or recognized by His Majesty as part of his dominions."

The court was in total agreement with the Attorney General and it upheld the counter-plea made by the Attorney General on behalf of British East Africa. The merits of the issues raised by the Maasai were thus not heard by the court. Furthermore, all the other subsidiary pleas they made were also dismissed. As to the claims of civil contract, Justice Hamilton had this to say:

In my opinion, there is here no legal contract as alleged between the Protectorate Government and the Masai signatories of the agreements, but the agreements are in fact treaties between the Crown and the representatives of the Masai, a foreign tribe living under its protection.) I will now consider the plaintiffs' claims and the acts of which they complain.

The Maasai appealed the verdict of the High Court. As it turned out, the appeal also did not succeed as the superior court took a similar stance to the High Court. However, it is important to briefly interrogate the arguments of the Court of Appeal as well as the general aspects of judicial and executive interventions in the Maasai case.

## 4.6 The Court of Appeal for Eastern Africa<sup>175</sup>

The Bench that constituted Morris Carter, C.J. Uganda, Bonham Carter J and King Farlow, J.J. heard the appeal in December 1913. Alexander Morrison appeared for the Appellants; R.M Combe, Attorney General, for the Government. Mr. Morrison made strong rebuttals of the defence counter-claims to which the High Court showed unrestrained acquiescence. In a well-articulated opening statement, he brought to the Appeal Court's attention the changed circumstances in the Protectorate since the passage of the Foreign Jurisdiction Act. He asserted that the British rule and British courts had been fully established which applied to the Maasai as the subjects of the Protectorate.

Morrison argued that a treaty could only be entered into with an independent sovereign state, which the Maasai, according to him, had ceded when the East African Order Council 1902 came into operation in the Protectorate. He further illustrated that with the creation of the Legislative Council, the laws that emanated from it applied to the Maasai as it did to all other subjects. He rebutted the High Court reliance on *Rex v. Crewe*<sup>176</sup> to support the argument that the Maasai were not subjects of the Crown. Morrison argued that the circumstances between Bechuanaland and East Africa Protectorate were different and in the case of Sekgome the issue of whether he was a British subject did not arise.

On the question of treaty or agreement, he cited many cases from India ( a country that had provided many benchmarks for various land laws in Kenya) where he stated that the governing principle the courts applied was that government had jurisdiction to make

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<sup>175</sup> *Ole Njogo v. Attorney General* (1914) 5 E.A.L.R. 70

<sup>176</sup> *R v. Crewe (Earl), ex parte Sekgome*, (1910) 2 K.B. 576

agreements but not enter treaties with protected tribes or nations. Here he referred to several precedents; inter alia, *Huri Sadashir v. Shaikh Ajmuddin*<sup>177</sup>, *Nawab of Carnatic v. East India Company*<sup>178</sup>, *Forrester and others v. Secretary of State for India*<sup>179</sup>, *Rajah Saligram v. Secretary of State for India*<sup>180</sup> and *Cook v. Spring*.<sup>181</sup> Morrison argued it was not open to the Crown to reorganise any part of the territory as exempt from the jurisdiction of the court by an arbitrary action. He criticised the lower court for refusing to take evidence from the witnesses and making decision the status of the Maasai as sovereign state. That was a powerful restatement of facts and law from the Maasai lawyer but the Attorney General and the court stood their ground. They insisted that the Maasai were not subjects of the Crown and that the court was not competent to force the authorities to acquire territory and subjects. However, the unanswered question was, why did the government choose to go into agreements it never intended to respect? Was it just naive or morally constrained to go it alone? Ghai and McAuslan agree that the government had actually unimpeded authority over land and did not need to enter into a treaty. They captured the contradiction of the colonial land policy that used both ‘carrot and stick’ in stripping people of their land rights. “There can be no fuller exercise of sovereignty over the land than to compel, by legislation, a people to vacate their own traditional lands.”<sup>182</sup> The assertion by the government was that those who signed the agreement were not only assumed to be but also treated as “persons whom the Commissioner

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<sup>177</sup> L.R. 11, Bom.325

<sup>178</sup> 2 Vesey junr., 56

<sup>179</sup> L.R. Indian App. Supplementary Vol. 1, p.10

<sup>180</sup> L.R. Indian App. Supplementary Vol.1. 119

<sup>181</sup> 1899 app. Cases 572

<sup>182</sup> Ghai and McAuslan(1970) p.27

and Governor, acting on behalf of the Crown chose as representatives of the Maasai with whom the Crown could enter into such agreements”<sup>183</sup> The implication was clearly unsettling. The government did its business with those it had hand picked and therefore rendered the outcome of any task performed by such individuals as wanting. The lawyers attempted to demystify the girded wall erected by the court in respects of what it described as ‘subjects’ and ‘foreigners’ by arguing that at that point in time the Protectorate had assumed every characteristic of a colony.

As discussed in Chapter 3, the question of jurisdiction, particularly the nature and extent of powers of the protectorate authorities had not been settled. In the early phase of the settlement, lawyers and officials in London had sent different signals in respect of powers of the authorities to alienate indigenous land.<sup>184</sup> The situation that ensued at the time was described by Morris and Read in their book, as a ‘constitutional anomaly’ because there was not a fine line drawn to differentiate a protectorate from a colony.<sup>185</sup> The court was correct in arguing that protection of the Maasai was tied to the status and jurisdiction of the protectorate. However, what it did not mention was the fact that many questions that would have impact on the lives of the indigenous people were not resolved because of indefinite legal and constitutional framework at the time.<sup>186</sup> The Foreign Jurisdiction Acts, 1843-1890, had in fact given the British authorities an open-ended power to deal with the native communities and

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<sup>183</sup> Hughes, L.(2006) Moving the Maasai, uncited source, p.93.

<sup>184</sup> See Chapter 3 on discussion that involved the Protectorate officials and Law Officers in Foreign Office over the legality of Crown ownership and general concern about alienation of land to European settlers.

<sup>185</sup> Morris, H.F., Read, J.S (1972) *Indirect Rule and the Search of Justice: Essays in East African Legal History*. Clarendon Press. Oxford. The authors were not being cynic when the question the nature of the protection at the time, whether it was, ‘protection or annexation’. See Chapter 2 of the book, pp. 41-

<sup>186</sup> Ibid, p.45

their land. Although powers conferred upon protectorate authorities were limited under the Act, it was argued that this limitation did affect certain measures in use for effective control over the native population.<sup>187</sup> The Act further expanded the parameters of the powers of the Crown in a protectorate, which clearly encompassed many facets of social, economic and political affairs, which arguably transcended all ‘subjects’ of Her Majesty.

The spirit of the Act captured the fact that the judicial function of the Protectorate was not mutually exclusive, considering the extant power of His Majesty at the time of the Maasai Agreement. This was confirmed by the 1889 Africa Order in Council, which provided that within a local jurisdiction, Her Majesty had power and authority over British subjects. ‘Subjects’ by definition of the Order included ‘persons enjoying Her Majesty’s protection, foreigners who submitted themselves to this jurisdiction.’ The Maasai, who were said to be ‘foreign subject’ by the court, still should have enjoyed judicial protection or at least fair hearing within its precincts. The British Government had power over the Maasai as far as the Order was concerned. The supposedly ‘foreign subject’ like Maasai were further defined as people ‘with respect to whom any state, king, chief or government has treaty or otherwise agreed or consented to the exercise of power or authority by Her Majesty.’ In the context of the Maasai, there was, at least conventionally, an agreement to cede sovereignty to the British Government.<sup>188</sup> The complete repudiation of the Maasai as foreign subject, therefore, created doubts with respect to both the terms of Foreign Jurisdiction Acts and in the context of the Maasai Agreements that removed them from their land. In a broader sense, the situation for

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<sup>187</sup> Ibid, p.43.

<sup>188</sup> Since sovereignty was basically defined by territorial integrity of whoever claim it, what sovereignty or even residue of the same remained in Maasai after their removal from central Rift Valley, which in essence was supposed to be their sovereign ‘state.

the communities in the British East Africa was the same. By the turn of nineteenth century the Crown had, in effect, exercised unlimited jurisdiction of the indigenous people.<sup>189</sup> It is therefore ludicrous for the British Empire to hide behind a nebulous claim that the Maasai were not subjects of His Majesty and as such were precluded from seeking justice in a British court.

From the beginning, there was clear inclination by British commentators towards the argument that the British Government did not exercise full powers over ‘foreign subjects’ or ‘state’ like Maasai, unless such jurisdiction was transferred to the crown by treaty.<sup>190</sup> Hall and Jenkyns for example, belonged to the school of thought that the British did not extend its jurisdiction beyond its subjects.<sup>191</sup> The Law Officers of the Crown were veritable disciples of Jenkyns and Hall in the 1880s, until a decade later when there appeared to be a change of mind as to the indivisibility of ‘country’ once it came under the jurisdiction of the British Crown. Sir S.T. Reid and Sir Frank Lockwood contended that unlike the 1880s, Britain had changed its approach in the later decades. France and Germany, who believed “that the existence of a protectorate in an uncivilised country imparts the right to assume whatever

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<sup>189</sup> Morris and Read, *supra*, p.45.

<sup>190</sup> There was quite a monumental confusion created by legal opinions on the question of jurisdictions over British protected persons. The pervasive tendency at the time was to see the indigenous Africans as being in separate ‘country.’ The question of foreign subjects arose when native Africans were perceived to be outside their own native territory as happened to Maasai when they came before the court manned by British Protectorate. . And yet by virtue of declaration of ‘sphere of influence’ and later declaration of protectorate, the pre-existing sovereignty was duly supplanted by the occupying powers. See Parry, C (1965) (ed.) *A British Digest of International Law*, pp. 440-448 Vol.5. London.

<sup>191</sup> See Hall, W.E (1894) *A Treatise on the Foreign Powers and Jurisdiction of the Crown*. Oxford. In explaining the nature and extent of jurisdiction, he made a distinction between what he called ‘semi-civilized or barbarous countries’ and those ‘with established government’. See Morris and Read, *supra*, p.47. See also Jenkyns, H, Sir (1902) *British Rule and Jurisdiction Beyond the Seas*, p.194. Oxford.

jurisdiction over all persons may be required for its effectual exercise,”<sup>192</sup> had been pushing the British to adopt that position. The position was subsequently strengthened by case law, as the courts maintained the notion of unlimited jurisdiction. In the Bechuanaland case of *R v. The Earl of Crewe, ex parte Sekgome*, Vaughan Williams, L.J. dismissed as untenable any suggestion that British jurisdiction was limited to its subjects.<sup>193</sup> The unlimited jurisdiction of the crown power was similarly restated in the case of *Sobhuza 11 v. Miller*.<sup>194</sup> In this case, the court actually introduced the notion of plenary power of the Crown, which among other things exercised unlimited jurisdiction to legislate retrospectively.<sup>195</sup> The notion of plenary power was extensively invoked by the courts in the United State of America. Nevertheless, in the American situation the invocation of plenary power of the federal government or congress was to emphasise their accountability as trustees of the indigenous people’s rights in land, not to repudiate it. Chief Justice Marshall was very influential in the 1830s as his opinions in such cases as *Cherokee Nation v. Georgia*<sup>196</sup> and *Worcester v. Georgia*<sup>197</sup> became important dicta in understanding relationships between Anglo-American dominated government and the indigenous people, and in the process laying the foundation of the doctrine of trust.

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<sup>192</sup> A.H. Oakes in his Memorandum, ‘Respecting the Advantages or Otherwise of Protectorates as Compared with Colonial Possession’, which was an advisory note for the Secretary of State for Colonies Lord Lansdowne, 4 March 1902. Oakes was a reknown Foreign Office Librarian and Keeper of Papers. See Foreign Office Confidential Print 7716. Quoted in Morris and Read, p.48.

<sup>193</sup> (1910) K.B.576.

<sup>194</sup> (1926) A.C.518.

<sup>195</sup> Quoted in Paley, C (1966), *supra*, p.55.

<sup>196</sup> *Cherokee nation* (1831) 30 U.S (5 Pet.) 1

<sup>197</sup> *Worcester v. Georgia* (1832) 31 U.S (6 Pet.) at 557.



Looking at the Maasai case, one might ask whether the court allowed its decision to be influenced by political considerations or was only concerned with judicial probity. The court did not hide the political imperative of the case when it clearly alluded to the fact that the objective of the law in the Protectorate was to protect the interest of the settlers rather than native rights. One of the presiding judges of the court of appeal, King Farlow had this to say:

It was obvious that the Masai, with their roving habit, and warlike traditions, were not desirable neighbours for whites settlers, and that their pleasure along the vacantly constructed railway was hardly consistent with public interest...<sup>198</sup>

Failure by the court to dispense justice in the Maasai case was an important issue of a historical and monumental proportion. The court had the opportunity to establish a test case, which could have set authoritative legal principles that went beyond the narrow confines of Maasai and clarified the nature and scope of protectorate government and indigenous peoples' relationship. The protectorate officials overstepped their powers by undermining the promise they made to the Maasai. It was not enough to declare an act of state, which was one of the 'other lawful means' mentioned in the preamble of the Foreign Jurisdiction Act. The inevitable consequence of such a blanket application was to render the whole indigenous peoples without recourse to justice. If the legal basis for moving the Maasai was the Foreign Jurisdiction Act, 1890, which provided for an 'Act of State', why then did the Crown bother to enter into agreements with the Maasai? In a ceded territory like that of the Maasai, the Crown had unfettered powers of every kind. It was then imprudent and actually an exercise in futility for the Protectorate authorities to organise all those meetings in Maasailand. On the question of treaty, the contention that Maasai was a sovereign entity was a legal fiction. Carter CJ, in an attempt to justify the court's decision, found that "a remnant of sovereignty still remain(ed) in Masai..."<sup>199</sup> to enter a treaty with the British Government. He did not explain the nature and scope of powers a 'remnant sovereign' carried vis-a-vis the Imperial British Government.

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<sup>198</sup> Ol le Njogo & Others, op cit, see note 33 p. 55

<sup>199</sup> See Ol le Njogo case.

The next chapter discusses one of the most important historical milestones in colonial land policy, which was an attempt to classify land tenure into different and hierarchical categories. The Kenya Land Commission (popularly known as Carter Commission) which was appointed to investigate the land crisis, made recommendations that had long-term ramifications, especially on pastoral land rights.

## Chapter 5

### Classification of Land Tenure and its Effects on Land Rights

#### 5.1 Intervention in Reserves Land Crisis

The colonial land policy of expropriation of African land substantially increased political resistance by the Africans, especially those living in the overcrowded reserves. The government's determination to maintain the status quo continued unabated into the 1920s and 1930s leaving the African divested of any claims to land rights in the protectorate. Although it was apparent that resistance to this policy was obvious after the First World War, the colonial government still appeared oblivious to the emerging land crisis. It was surprising that in the midst of the emerging crisis the Africans land rights were declared non-existent. Chief Justice Barth delivered a ruling that dealt a blow to native land rights.

In my view the effect of the Crown Lands Ordinance, 1915 and the Kenya( Annexation) Order-in-Council, 1920 by which no native private rights were reserved, and the Kenya colony Order-in-Council, 1921...is clearly *inter alia* to vest land reserved for the use of a native tribe in the Crown, if that be so then all natives in such reserved land, whatever they were ...disappeared and natives in occupation of such Crown land became tenant at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier-such land would include that fallow...<sup>200</sup>

With all the colonial institutions marshaled against indigenous land rights, the Africans, particularly in the central highlands became frustrated and low-level resistance started in some areas in Kavirondo and Kikuyu.<sup>201</sup> The political landscape was changing as peasants' resistance to colonial land policy, compounded by the agrarian crisis causing food

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<sup>200</sup> Isaka Wainaina Wa Githomo and Kamau Wa Githomo v. Murito Wa Indangara (2) Nanga Wa Murito (3) Attorney-General, 1922-1923), 9 KLR 102.

<sup>201</sup> See Okoth-Ogendo(1991), supra p.55

shortages in African reserves, gained momentum. Some of the colonial officials viewed the emerging scenario as a harbinger for instability and social upheaval.

It was in view of this growing restlessness in African reserves that a prospect for change was anchored. There was genuine desire in some quarters to initiate reform programmes aimed at the pacification of Africans. In 1924, the government appointed the East African Commission under the Chairmanship of W.G.Ormsby-Gore to investigate, among other things, African land grievances. The Commission looked at the problems in a broader perspective and recommended that the solutions lay in accelerating the economic development of East Africa and addressing social conditions, labour and taxation issues among the native communities. More importantly, the Committee admitted that ‘there was probably no other subject which agitated the African mind more continuously than the question of their rights in land.’<sup>202</sup>

In response to the Committees recommendations, the government began to work on a flurry of activities whose objectives were to facilitate changes in African reserves. First, it promulgated the Crown Lands Amendment Ordinance<sup>203</sup> to specially demarcate and secure the African reserves from further land alienation, ostensibly to protect indigenous land rights. In 1927 the Hilton-young Commission began its inquiry and, like Ormsby-Gore, it was stunned by the squalid conditions in African reserves. It recommended a policy that would ‘guarantee the African sufficient land to maintain themselves through programs to be created by the government.’<sup>204</sup> The government again published the Native Lands Trust Ordinance that was enacted in 1930. The Bill was criticised as a half-hearted attempt to restore the land rights of the Africans, but it turned out to be a legislative instrument to control African reserves without excluding possible future expansion of settlement. The Board, which was expected to limit the power of the Governor in the allocation of land in reserves, would be constituted by government and settler representatives with only one African to be included ‘if

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<sup>202</sup> The Report of the E.A.C (1925) p.28

<sup>203</sup> Cmd. 2387, p.29; See also the Government Notice No.394 in the Official gazette, Oct.1926.

<sup>204</sup> Cmd.3234, 1929, p.40.

a suitable one could be found.’<sup>205</sup> The court once again offered its unflinching support to the colonial land policy.

## **5.2 Kenya Land Commission**

In April 1932, the Secretary of State for Colonies, Sir Philip Cunliffe-Lister appointed the Kenya Land Commission (otherwise known as the Carter Commission (and herein the Commission). The Commission was chaired by Sir Morris Carter, who had served as Chief Justice in Uganda and also sat on the bench that heard the Maasai appeal case.<sup>206</sup> The other members of the Commission were R.W.Hemsted, Capt. F. O’B. Wilson, and S.H. Farzan as the secretary.<sup>207</sup> The Commission’s work marked an important milestone in the legal and administrative evolution of land tenure systems in Kenya.

From an historical point of view, the Commission stands at the centre of two important colonial eras. The first one, which for the purposes of this analysis, can be termed as phase one, was from 1895-1932, representing the single-minded determination of the British Imperial Government to consolidate its rule in the acquired territories. Phase two, which could be said to have taken place between 1933-1963, could be discerned as a ‘wake-up’ period when the colonial government realised the futility of continued suppression of the indigenous Africans in reserves that were sagging under demographic and economic pressure. Many keen observers of political development in the colony had recognised the fact that since the end of the First World War, Africans’ agitation for political changes was becoming increasingly visible, especially among the Kikuyu squatters. The government felt threatened

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<sup>205</sup> Section 3 of the Ordinance.

<sup>206</sup> The Maasai Case, *supra*, Ol Njogo, 1913

<sup>207</sup> The appointment was published in the Official Gazette of the Colony under Governmental Notice No. 418 of the 11 June, 1932.

by the political awakening among the African peasantry and thus expected the Commission to lay a firm foundation for future land policy.

The first phase was mostly defined by what happened between 1902 and 1915. During this period, the British colonial authorities were largely preoccupied with creating policies and laws aimed at altering land tenure relationships in the occupied territories. The Protectorate pioneer administrators' first assignment, in addition to securing the geographical borders and setting up administrative structures, was to mobilise European settlement. The Imperial Government conveniently vested itself with unlimited power of sovereignty to alienate land and other land resources.

As illustrated in Chapter 2, as soon as the European settlement in the White Highlands got underway, the demand of the settlers went beyond the acquisition of land. There was equally high demand for African labour on European farms. Many African peasants' families who were driven either by landlessness or by poverty opted to work on farms, particularly in the sprawling plantations in the Rift Valley. In the process, a new class of African labourer-tenants emerged. Suffice to say, the labour issue became another source of conflicts. By 1932, there were 150,000 labourer-tenants living on European estates and their squalid social conditions gradually triggered conflicts with the settlers and the colonial authorities. The oversupply of labour had, in the opinion of the colonial authorities and the settlers, complicated land tenure in the White Highlands and as such there was urgency to address the matter.<sup>208</sup>

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<sup>208</sup> See Meek, C.K (1949) Land Law and Custom in the Colonies, p.82

The complication mentioned was related to access to land. Africans who worked on the European estates had no rights to land.<sup>209</sup> Those who had employment had access to use land temporarily for subsistence crops and keeping a limited number of stock. The offshoot of this was that those who had not been absorbed into the labour market were rendered undesirable squatters. In addition to the problem of squatting in the White Highlands, there was the simmering danger of overpopulated reserves. The cumulative effects of land alienation to European settlers and the creation of African reserves had caused intractable congestion in some parts of the colony. The Kenya Land Commission was thus tasked to investigate land issues against this bleak background.

### **5.3 Mandate of the Commission**

The principal mandate of the Kenya Land Commission was to inquire into matters concerning land and report to the colonial government with recommendations on what measures needed to be undertaken to resolve them. The Government outlined the tasks to be carried out in the Terms of Reference. It appeared that the focus was on some aspects of land problems in some parts of the colony, while neglecting the rest. The Terms of Reference (TOR) stated that the Commission was “to consider and report upon certain land problems in the colony of Kenya.”<sup>210</sup> Further reading and analysis of the Report as a whole reveals that the authorities had intended to restrict land issues to certain aspects. It is important to look at the

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<sup>209</sup> According to the Resident Native Labourers Ordinance No.5/1925 and subsequent amendements, No. 28/1928 and the Ordinance to Regulate the Residence Labourers on Farm, No. 30/1937 as amended by No. 18/1939, and No. 38/1941, native may reside on a farm, or has entered into contract with the owner, or was otherwise authorised. The Ordinance stipulated that “if he has entered into a contract he may be accompanied by his family. ( The word family as defined as “the wife or wives and the unmarried children. But Africans families normally extended to other relatives such grandparents, siblings, cousins etc.

<sup>210</sup> Kenya Land Commission Report, (1933) (Cmd No. 4556) p. 1

TOR spelt out by the British government in order to understand the full import of the Commission's work.

In general terms, the Commission was set up to address what the authorities perceived as unresolved land issues relating to both the native Africans and the European settlers.<sup>211</sup> The Commission had specific terms of reference to deal with both the African and European land question. For example, TOR numbers 1-5 and 7 dealt with the native Africans' land issues. The TOR 6 was specifically provided to cater for the land rights of the Europeans in the White Highland. Overall, it appears that the government had tasked Kenya Land Commission with three aspects of land issues with regard to the Africans. The first aspect, which could, at that particular period, be categorised as future land tenure policy was covered under the TOR 1 and 2. Under the TOR 1, the Commission was, "To consider the needs of the native population, present and prospective with respect to land, whether to be held on tribal or on individual tenure. Under the TOR 2, the Commission was, "To consider the desirability and practicability of setting aside areas of land for the present or future occupancy by (a) communities, bodies or individual natives of recognized tribes, (c) detribalized natives. The detribalized natives referred to were described as 'natives, who belong to no tribe, or have severed connexion with the tribe to which they once belonged'.

The second aspect of concern by the colonial government about the African land question could be termed as the need to deal with historical injustice. The government did not directly call it so but it could be inferred from the way it was put under TOR 3, and 4. Under the TOR 3, the Commission was, "To determine the nature and extent of claims asserted by natives over land alienated to non-natives and to make recommendations for adequate

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<sup>211</sup> Ibid, pp. 1-2



settlement of such claims whether by legislation or otherwise.” Under the TOR 4, the Commission was, “To examine claims asserted by natives over land not yet alienated and to make recommendations for adequate settlement of such claims.”

The third aspect of concern could be interpreted as a desire by the colonial authorities to review or reform land laws and policies that existed at the time. This was addressed under the TOR 5 and 7. Under 5, the Commission was, “ To consider the nature and extent of the rights held by the natives under section 86 of the Crown Land Ordinance, chapter 140 of the Revised Edition), and whether better means could be adopted for dealing with such rights in respect of (a) land already alienated, (b) land to be alienated in future. Under the TOR 7, the Commission was, “To review the working of the Native Lands Trust Ordinance, 1930, and to consider how any administrative difficulties may already have arisen can be best met whether by supplemental legislation or otherwise without involving any departure from the principles of the said Ordinance.”

Term of Reference 6 was provided to address specifically the land tenure security of the European settlers in the White Highlands. The Commission was, “To define the area, generally known as Highlands, within which persons of European descent are to have a privileged position in accordance with the White paper of 1923.” As indicated later in the chapter, the authorities were setting the stage for a long-term protection of the settlers ‘land’ that had been massively accumulated over the years at the expense of the indigenous groups.

A brief analysis of the Mandate of the Commission, particularly the way the government formulated the Term of Reference provide an idea of whether the proposed reformation of land policy was political gimmickry to forestall the simmering revolt by the landless Africans or was indeed genuine land tenure reform. There was no doubt that the

British Imperial Government showed some level of willingness to deal with African land problems. The question was how far the government was willing to go. However, the approach adopted by the Kenya Land Commission raised more doubt than a cause for optimism. In fact, one could be forgiven for thinking that the Commission was more a ‘ploy’ than a genuine agency established to address the prevailing land grievances. Looking at the Terms of Reference relating to native Africans, it was clear that the Terms were vague, narrow, and evasive. Considering the magnitude of the land crisis caused by decades of colonial land expropriation, it seems that it would have made more sense to prioritise a radical reform of colonial land policy as a whole rather than selective sections of laws as provided in TOR 5 and 7. Due to the restrictive nature of the TOR, some of the most controversial land laws such as the Crown Land Ordinance, which overlooked the rights of the Africans and cumulatively made them tenants-at-will of the Crown,<sup>212</sup> were not addressed by the Commission.

The Commission was also to be blamed for some of the confusion that might have emanated from the way the Terms of Reference were framed. The Commission did not interpret them, as would have been expected in such an important task. For example, the Royal East African Commission had dealt with similar land issues and it clearly interpreted its TOR.<sup>213</sup> Such an interpretation would clarify not only the intent and scope of the inquiry but also defined issues and terms employed in TOR. It was not clear what, for example, ‘detrribalized native’ stood for as used in TOR 2.

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<sup>212</sup> The Crown Land Ordinance which was first enacted in 1902 was the the most substantive piece of legislation used to assert the policy of crown ownership of land, thus repudiating the pre-existing land rights of the indigenous Africans. The notion of Crown or government as an holder of title surived the colonial rule and persist to this day.

<sup>213</sup> Royal East African Commission Report, 1953-1955, Cmd 9475. Chapter , pp.2-4 was dedicated to interpretation of the Terms of reference.

To contextualise the gravity of African land rights, as late as 1932, the Chief Native Commissioner (who chaired the Native Land Trust Board, charged with protection of native land rights) attacked the same Africans he was appointed to protect, by undermining the customary ownership of land. In defence of the government land policy, he ridiculously oversaw the disempowering of the Native Council and the Board he was chairing. The Chief Native Commissioner said:

I am afraid that we have got to hurt their (the natives) feelings, we have got to wound their susceptibilities and in some cases I am afraid we may even have to violate some of their most cherished and possibly even sacred traditions if we have to move natives from their land on which according to their own customary law they have an inalienable right to live, and settle them on land from which the owner has under that same customary law indisputable right to eject them.<sup>214</sup>

That kind of attitude was unfortunate at the time when the administration was promising to deal with the land question that had completely disrupted the lives of many African communities. The government initiative was not actually new, considering that a couple of years before the Kenya Land Commission was appointed, a similar body, the Hilton-Young Commission, decried the state of African land issues. It made a wide range of recommendations that would include a comprehensive land reform to effectively redress African land grievances. In its Report<sup>215</sup>, the Hilton-Young Commission made it clear that there was an urgent need to address the issue of inequality that existed between the settlers and the indigenous Africans. The existed policies were criticised for being discriminative against the Africans. It recommended, as an irreducible minimum, that there should be no

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<sup>214</sup> Mr. A de. V. Wade, p.511 of the Leg. Co Debates 1932. One of the foremost and acerbic c opponents of the African land rights, Lord Francis Scott, who a member of the Native Lands Trust Board, argued that the measure was for the benefits of the native Africans (p.513). He was supported by H.R. Montgomery, Nyanza Provincial Commissioner who claimed that Africans were happy about the changes because they were ostensibly tired of prospectors who were invading their land (515). Quoted in Okoth- Ogendo, *ibid*, (1991) p.58.

<sup>215</sup> Report of the Commission on Closer Union of Dependencies in Eastern and Central Africa, Cmd 3234, 1929. The Commission was chaired by Sir Hilton Young and other members were R. Mant and J.H. Oldham.

ambiguity on the principles that govern the allocation of land. The method by which land was allocated to the native population and subsequent land title granted to them should provide unequivocal security of tenure.<sup>216</sup>

The policy of native reserves, as one of the most prejudicial colonial measures taken against the native inhabitants, should have been on the table. If there was good intention in the whole exercise, the Commission should have dealt with the most controversial land, especially in the White Highland, and recognised the legacy of ‘land grabbing’ on which it was founded. With their failure to deal with that important aspect of colonial acquisition and the need to restore the rights of the indigenous peoples such as the Maasai who lost their land to the settlers, the Commission confirmed the fear that it was, after all, an instrument of distraction formed to deflate growing political tensions among the Africans.

#### **5.4 Conduct of the Inquiry and evidence**

It is clear from the Report that the Commission was more interested to set the stage for the settler friendly land tenure system and to also integrate the Africans in the colonial economic structure rather than to resolve the endemic land question. The Report could be summarised as a precursor to modernisation of land tenure which would be predicated on the western concept of land ownership. The idea was to divide African areas into tenure categories that favoured one group against the other thus taking pressure off the classes, proposing individualisation and registration, which was modelled on the notion of the English property law. Based on both historical and agricultural proximity to the dominant settler

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<sup>216</sup> Ibid pp. 42-46. The Commission discussed Africans land problems in some reasonable depth. Their recommendation raised the ire of the settlers who did not like the growing consciousness and possible political empowerment of the Africans. The settlers reaction was captured by the East African Standard,, a newspaper that proved a valuable mouthpiece, in February 13, 18, and 19,of 1929.

economy, the Commission ranked the African reserves into categories, which were arranged in pecking order, with the 'top' classes eventually expected to feed into the evolving colonial land tenure structure. For other areas, in particular the pastoral lands in the northern part of the country, the Commission adopted a strategy that generally 'set aside' the land for future use by the state and private enterprises. For the most part, the Commission concentrated on boundaries between African communities, delving into old and odd so-called eyewitness accounts by European explorers, without mentioning whether there were claims or counter-claims made by concerned communities.<sup>217</sup> Like in the case of the Kikuyu, the Commission produced a lengthy report covering many pages describing boundaries of three Kikuyu districts, quoting dozens of travellers' accounts, yet showing no relevance to the important tenure issues in question.<sup>218</sup>

The Commission also went to great lengths to record incidents of raids and conflicts between neighbouring African communities without indicating how they affected 'tribal' tenure or their implication on the future tenurial arrangements.<sup>219</sup> The report is replete with accounts of incidents witnessed by European administrators, explorers, missionaries and traders and not the same level of attention was accorded to the Africans' views, though they

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<sup>217</sup> There is innumerable amounts of purported evidence given by the early explorers who made journeys through certain African countries, claiming to have known who the first dwellers were and what they saw as their historical footprints. See for example the accounts by Von Hohnel Teleki 'entry into Kikuyu country, Joseph Thomson 'Through Masailand', Major Macdonald, 'Soldiering and Surveying in British East Africa', MacLellan Wilson's kikuyu salt-lick, etc, See para. 35, 36, 37 on page 17 to get glimpse of 'witnesses' stories.

<sup>218</sup> See Chapters 11, 111, and IV of the KLC, describing the boundaries of the Kikuyu country covering Western, Southern and Eastern and Northern borders 'when the Protectorate was delared', pp16-70, paras.32-214.

<sup>219</sup> See for example attacks Kikuyu attacks on Masai, at para. 40 and Kikuyu and Kamba raids at para.43

were said to have overwhelmingly participated in the process.<sup>220</sup> The report is largely reflected in the light of statements made by visitors such the following:

The evidence of Mr. A.C. Hoey, who was the first European to visit these parts, is of interest on this point. He states that before the advent of Government the Elgeyo were confined to the forest and did not use this land.

We believe in Mr. MacLellan Wilson's views<sup>221</sup> or 'the only European witnesses who can speak of that period are colonel Ainsworth and Mr. C.W. Hobley, and their evidence shows conclusively that up to till 1894 practically no cultivation and no natives other than Masai were seen outside the forest belt in the general neighbourhood of the site where Nairobi now stands.<sup>222</sup> "Further significant evidence concerning the native of the Kikuyu occupation in this area has been given to the Commission by Mr. Bathscombe, the Hon. Charles Dundas, Mr.A.G. Baker and Mr. Isaac.<sup>223</sup> The report was evidently more influenced by the views of the Europeans rather than the said 'natives' whose occasional inputs were vaguely described as 'claims' made in public 'baraza (loosely organized gathering).

## 5.5 The Report

The Report<sup>224</sup> of the Commission was presented to the Parliament in May 1934 and was accompanied by a White Paper<sup>225</sup> in which the Government approved the recommendations put forward by the Commission. The Commission produced a report within one year of the commencement of its work. It was a comprehensive document, which consisted of a main Report (running in excess of 600 pages, with three voluminous evidence

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<sup>220</sup> According to the KLC Report's breakdown, out of 736 witnesses that were heard, 507 were Africans, and the remainder were the non-Africans, including 94 government officials. See KLC Report(1933) p. 3, para.6

<sup>221</sup> KLC Report para. 38.

<sup>222</sup> KLC report para.45

<sup>223</sup> Ibid para.111.

<sup>224</sup> Report of the Kenya Land Commission, Cmd. 4556, September 1933. Presented by the Secretary of State for the Colonies to Parliament of His Majesty May, 1934.

<sup>225</sup> The White Paper was an 8-page 'Summary of Conclusions reached by His Majesty's Government'. It was attached to the Report.

annexure). The approach adopted by the Commission was to deal with each region or tribe based on what it considered as being either collective concerns or individual claims.<sup>226</sup>

The Commission principally adopted a tribal approach in its attempt to address land tenure in native areas, by dividing them into 'Nine Native Units.'<sup>227</sup> The Commission did not only divide the land into pecking order along regional and ecological lines but also along ethnic and racial hierarchies. The classification was based with tribal consideration in mind to address the simmering problems in some native reserves such as Kikuyu where land claims and population density were putting pressure on the colonial government.<sup>228</sup> This approach was possibly aimed at achieving two important objectives. Firstly, the Colonial Office had to reassure the African population in the reserves that the government would not encroach on the reserves land any more. Each tribe, according to the report, would be secure if they kept their reserve. It was partly intended to pacify the already angry population. Secondly, by securing reserve for each community or tribe, the Commission would have been justified in demarcating the White Highland as a home for the settlers and therefore forestall future claims by Africans who lost their land. The Commission had this to say:

We consider that it would be invidious if the native reserves were to be protected in this manner and no similar security be given to the Europeans Highlands. We recommend therefore that external boundaries of the European Highlands be defined under the Order in Council, and be subject to analogous safeguards as to exclusions, additions and exchanges.

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<sup>226</sup> KLC, *ibid*, Introduction, pp 2-6.

<sup>227</sup> The areas the Commission recommended as 'Units of native Lands' were in the so called native reserves which clearly were based on pecking order based on proximity to the 'White Highland' and their agricultural potentials.

<sup>228</sup> See KLC, para. 2077. What Commission implied was rather than redress historical acquisition of lands by the colonial authorities, it was prudent to for a tribe to expand to other tribal area and find land there. It was clearly a political strategy to avoid claims against the colonial government.

Although the semi-official reference to “White Highland” had somehow entrenched itself exclusivity as a special reservation for European settlers, it had no definite boundaries. In pre-1920 Kenya, the undefined territorial had served the settlers well because they could expand their boundaries, without fear of being accused encroaching on African areas. However, what they forgot to realise was the fact that Africans knew the extent of the borders, and they had always resisted the forceful occupation facilitated by the colonial government. Soon population pressure in reserves and growing population of labourer-tenants (squatters) on European farms was becoming a cause for concern both in the government and among the settlers.<sup>229</sup>

According to the Commission, it was desirable for the land tenure to evolve towards privatisation, beginning with what it described as ‘advanced natives’.<sup>230</sup> The underlying assumption was that Africans would eventually ‘emerge from tribalism’<sup>231</sup> and take up individualised tenure system, which, according to the Commission was a sort of antidote of common or communal tenure. The Commission was equally unequivocal in what it regarded as ‘uncompromised’ and ‘non-negotiable’ place of the government in legal and institutional tenure arrangements in native areas. According to its own classification of native lands, Class A was supposedly constituted exclusively of native lands which would cease to be Crown lands.<sup>232</sup> The Commission made a proposal that advocated for the overriding domain of the

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<sup>229</sup> The European settlers practiced what was termed as “kaffir” farming where landless Africans were offered pieces of land for accommodation and subsistence farming on European farms in exchange for labour. This form of resident labour guaranteed the individual settler-farmer a pool of labour that easily controlled. The Resident Native (Squatters) Ordinance of 1918 was later used to regulate the system and brought it within the broader policy of government control of natives labour.

<sup>230</sup> KLC para. 1462

<sup>231</sup> KLC 1466.

<sup>232</sup> See KLC 1440



Crown over land. For instance, while it suggested that the *nuda proprietas* was deemed to lie with natives' population generally, the land was to be vested in a trust subject to the sovereignty of the crown and its general power of control.<sup>233</sup>

The widely used colonial notion of 'repugnancy test' was used to entrench the subservience of African customary law. The Commission stated thus: "The rights of families, and individuals should be covered by a declaration but they shall have all the rights and powers in respect of land which they have under native custom (as it is, or as it may become), in so far as they are not repugnant to the Lands Trust Ordinance or rules under it, or any other law or ordinance of the colony."<sup>234</sup> The Commission adopted a disingenuous approach in what it might have considered as panacea in resolving internal boundary disputes among Africans. Its proposal to merge marginal land to be taken over by a larger tribe was a recipe for displacement of smaller tribes by more powerful and larger tribes. In a cleverly camouflaged tenure terminology, the Commission justified such takeovers as 'exchange', 'additions' and 'interpenetration'. It was an attempt to confine the issues of land redistribution as an African problem without raising the underlying historical land issues for which government was responsible. The Commission came up with alien concepts such as 'surplus territory' and 'inter-tribal lease' as a solution to land claims. It ominously stated:

Drastic remedies for securing a better distribution are not open to us. To take surplus territory from one tribe and give it to another is a step only justifiable in extremities, which has not risen or may not rise. To affect a similar result by a process of inter-tribal case may be more practicable and we would not rule out as a method should circumstances ever require it.<sup>235</sup>

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<sup>233</sup> KLC 1639

<sup>234</sup> Ibid

<sup>235</sup> KLC 1381

While the Hilton-Young Commission had vehemently rejected the idea of alienating land from one tribe and appropriating to another tribe, the Kenya Land Commission supported the policy that encouraged encroachment of what it called ‘advanced tribes on others who underutilized their lands.’<sup>236</sup> The Commission was not even embarrassed to borrow the example of South Africa in an attempt to advance its prejudicial standpoint. It referred to Professor E.H. Brooke’s History of Native Policy in South Africa.<sup>237</sup>

The ten years after the Report of the Commission of 1852-53 were devoted mainly to quiet administration, But steps were being taken...towards the legal securing of the Location Lands to the tribes inhabiting them. The first scheme...was granting of separate titles for each tribal location, the land to be alienated by Crown to separate boards of trustees. Such a trust was created by indenture of the 27<sup>th</sup> May, 1858, in respect of the tribe (the Amatuli) occupying the Umnini location: under the name of the Umnini Trust still exists...But on mature consideration it was decided not proceed with the scheme, which would have taken from Government the power of reallocating land between tribes.

The Commission was infatuated with the notion of internal re-arrangement of land rather than addressing the historical root cause of the problems. The intention was to justify government entrenched power to alter a native tenure arrangement, which was essentially based on common land rights, and instead vouch for individualised tenure. It presented with a confusing suggestion that was more opportunistic than a realistic solution to Africans land problems. This was what it stated:

“We have seen that the possibilities of inter-tribal adjustments are very limited, but chances are more hopeful for a penetration by individuals. By this means, surplus members of a congested tribe may be able to find some relief by going to live as tenants in the territory of another tribe, into which they will eventually be absorbed.”<sup>238</sup>

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<sup>236</sup> KLC 1384

<sup>237</sup> Brooke, H.E. (undated) History of Native Policy in South Africa, p.57 Quoted by KLC at para.1385.

<sup>238</sup> KLC 1387

The strategic manoeuvre of ‘interpenetration’ appeared to be a distraction that was aimed at safeguarding the interests of the crown and the settlers. It was a reverse mode of sorts it engaged in with realising the risk it might cause by igniting inter-tribal scramble for land. Those weaker groups at the end of the spectrum would always lose their land to stronger neighbours who would be encouraged and supported by government. The government was expected to then entrench its dominant position as the holder of the radical title. The Commission asserted that the legal position of the natives as tenants at will “was only created in order that native rights might be better safeguarded and defined.”<sup>239</sup> The Commission also supported the ‘Barth Judgment’<sup>240</sup> which had confirmed the provision of the Crown Lands Ordinance that regarded the indigenous communities as mere tenants. In the same vein, the Commission strangely claimed that the natives misunderstood the objective of the Crown Land Ordinance. It defended the government explaining, “it must be admitted that to deprive a man of his rights in land for the sake of protecting him is a method of procedure which is liable to be misunderstood.”<sup>241</sup> The Commission unremittingly stretched its self-indulgence beyond belief. The government itself had never explicitly made a claim of that kind.

The Commission was clearly biased towards areas that it perceived as significant to the political economy of the colony in the future. It was well aware that it could not deal with the issues of boundaries, without delving into historical claims by victimized groups such as the Maasai, whose land became the nuclear upon which Eurocentric agrarian policy was built.

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<sup>239</sup> KLC p.418, para.1635.

<sup>240</sup> The judgement referred to the case of *Isaka Wainaina Wa Githomo and Kamau Wa githomo v. Murito Wa Indangara(2) Nanga Wa Murito(3) Attorney-General*, (1922-23), 9KLR 102. See also KLC Report, p.418, para.1635 ( Original Civil Case 626/1921, reported in Vol.IX, East Africa Law Reports, pp.102-103.

<sup>241</sup> KLC p.418, para.1636.

## 5.6 Agrarian State

The goal of the pioneer settler community and the administrators such as Charles Eliot was to constitute a colonial economic structure based on agricultural development. Settlement was encouraged with the aim of investing as an elevated farming sector expected to grow into exportable industrial level as opposed to African 'rudimentary' practices. However, economic historians rejected the suggestion that the colonists were driven by economic objectives and pointed out the fact the African had not proved any sound technical or practical experience in agriculture.

The settlers and syndicated concessionaires were motivated by the speculative accumulation of land. The Kenya Land Commission was mandated to review the situation of all the natives' land in the Colony. Its task was to 'consider the needs of the native population, pre-set and prospective, with respect to land.'<sup>242</sup> However, the report clearly shows that the Commission was more focused on the so-called 'high potential' areas, that comprise European reserve and contiguous African areas, to the detriment of the more arid and semi-arid regions. The Commission gave unparalleled attention to central and Rift Valley highlands to which the colonial administration had directed much of its policies. Those areas were treated as central to the long-term colonial vision of the colony. The undisputed objective of the colonial government was to entrench agrarian economic structure.

The Commission skillfully pre-empted the question of disparity between indigenous communities and regions to ward off possible criticism as to why such differences existed (reference to the Commission's lopsided concentration on one region). The Commission was quick and upfront in defending its position. Referring to the highly differentiated tribal land

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<sup>242</sup> KLC Terms of reference, p.2 para.1.

tenure arrangements it had recommended, it stated as follows: ‘The above arrangement, which sets Kikuyu Province in one part, and all the other provinces in another part, may suggest that we attach more importance to the needs of the Kikuyu in respect of land than the needs of other tribes.’<sup>243</sup> The Commission justified its inclination by adding that: “This is not the case, but the exceptional degree of individualism to which this tribe has attained in its conception of landholding, in conjunction with other considerations which we shall explain, have rendered the just settlement of the kikuyu land problems especially intricate, and have demanded examination in greater detail than has been the case for other tribes.”

It is not by coincidence that throughout the report, the Commission vouched for individualised tenure type and had nothing positive to say about other systems, particularly the indigenous ‘common’ practice that pre-dated ‘modern’ private tenure. The sustained attack on what the Commission kept referring to as ‘tribal life’ illustrates the negative impulses attached to African systems. The main thrust of the Commission proposals revolved around the ‘protection given to private rights of individuals, families or groups’, and secondly, support for natives, who have emerged from their ‘tribal state’ and wish to ‘hold land on some more individualised form of tenure than possible to them in the reserves.’<sup>244</sup>

We now turn to the question of how the Commission dealt with issues of land in the predominantly pastoral rangelands in Maasai and Northern Frontier Province.

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<sup>243</sup> KLC para.14

<sup>244</sup> KLC p.5 para.16

## 5.7 Ignoring Maasai Land Question

In Chapter 2, we saw how the Maasai were forced out en masse from their original homeland in the sprawling central Rift Valley. The Maasai were bitter about the removal from their ancestral lands to the two reserves that were inferior in pasturage and water.<sup>245</sup> The colonial officials, in cohort with settlers, once again plotted to remove the Maasai from Laikipia, (an area the colonial authorities set aside in place of the lost ancestral lands) for them under the pretext of uniting under their ritual leader Oloibon Lenana, who was said to be in favour of the removal.<sup>246</sup> The Governor, Percy Gillourd, misled the London Colonial office suggesting that it was necessary to have all of the Maasai together so that Lenana could exert his authority more easily, to stop the movement of the Maasai between two reserves, facilitate administrative control, and to ‘liberate a large tract of country suitable for European settlement.’<sup>247</sup>

The use of Lenana, according to a letter sent by a sympathetic colonial civil servant to Professor Gilbert Murray, one of the acerbic critics of the government policy towards the Maasai, to provide a bait for the Maasai into conceding the second eviction.<sup>248</sup> The outraged Maasai did not accept this second eviction without protest. In spite of the unknown terrain of the British legal sophistication, the Maasai contested the eviction and what they saw as the breach of the 1904 Agreement that pledged an entreated inviolability of their land once they

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<sup>245</sup> The maasai had to venture out of the two reserves to drier areas in search of water and pasture. See Sorrenson (1968) p.196.

<sup>246</sup> Oloibon Olonana ( misspelled as Lenana) became the leader of the Maasai were moved to the Southern Reserve ( south of the railway), while Ole Legalishu, became the leader of the the Northern Reserve or Laikipia from which the second eviction took place. See Sorrenson (1968) p. 197.

<sup>247</sup> See sorrenson( 1968) p.197.

<sup>248</sup> Sorrenson( 1968) p.200.

moved to the two reserves. They might have lost the case in the corridors of the colonial courts but the Maasai never gave up on the land question during and after the end of colonial rule.

How then did the Commission address such a critical historical claim? In the first place, the Commission paid scant attention to the Maasai land question, compared to such communities as the Kikuyu. The concept of 'reserve' was borne out of the Maasai land debacle, after their two massive evictions, where northern and southern reserves were identified with them. The Maasai land issues were, in comparison to Kikuyu, largely ignored and indeed dismissed. This was again despite the fact that the Foreign Office was forced to debate about reserves policy after the decision to move the Maasai was made.<sup>249</sup> The concept, which may have been borrowed from the North Americans' native Indians reservation policy, was applied to the Maasai before it became a central plank of the colonial land policy.

In the end, it was in Kikuyu and other mainstream areas that the policy was perfected to suit colonial and post-colonial tenurial arrangements. The concept was also viewed as a governmental measure to protect the native Africans from further alienation of their land. The reserves were once again targeted by various pieces of legislation such as the Native Lands Trust Ordinance purportedly to serve the interests of the Africans.

The historically controversial reserve policies for those like Maasai who suffered forced evictions and justifiably expected the Commission to address the issue were inexplicably overlooked. The Commission appeared to have discerned the concept in a different light even from the colonial administration, which at least attributed to it a form of

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<sup>249</sup> There was intensive discussion between senior officials at the Foreign Office to discuss 'pros and cons' of a reserves policy. Ibid, p.195,

protective strategy. What the Commission widely referred to as ‘native reserves’ apparently looked like a euphemism for tenure conversion from the African communal system to private landholdings. Communities and individuals who were adept in adopting the ‘new’ system were encouraged and even ‘earmarked’ for government support. The Commission also saw fit to openly vouch for communities and individuals who were inclined towards the English property system. Those who were perceived to ‘cling to tribal life’ were to be sidelined. In addressing the land problem of the Kikuyu and Maasai, the Commission showed a sense of affinity towards the former and was more ready to pacify them rather than the latter. To contextualize the Kikuyu land question, the Commission stated:

“to convince the Kikuyu of Government’s desire to discharge all moral obligations which possibly be considered to exist towards them, that a ‘profit and loss’ account should be made setting off the areas of ‘unequivocal Kikuyu territory’ which have been granted, and that block additions should be made to the reserve equivalent to the balance of Kikuyu losses.”<sup>250</sup>

The Commission was convinced that tenure arrangement or the policy that government envisaged for the Kikuyu was inherently advantageous. To the Commission, “it would be ridiculous for the Kikuyu to make grievance out of circumstance from which they have benefitted so greatly...”<sup>251</sup>

For the Maasai, the Commission’s approach was hinged on a sense of indifference and apprehension. It largely borrowed the colonial prejudice against the Maasai that led prominent government representatives, for example Charles Eliot, to scornfully brand the Maasai as arrogant and primitive. The Commission viewed Eliot as the most informed of the Maasai and widely quoted his mostly prejudicial statements such the one he made in 1901: ‘I regard the

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<sup>250</sup> KLC, p.14, para. 30(5).

<sup>251</sup> KLC p.14, para.30(4).



Maasai as the most important and dangerous of the tribes with whom we have to deal with in East Africa, and I think it will be long necessary to maintain an adequate military force in the districts in which they inhabit.’<sup>252</sup>

The colonial administration was deliberately engaged in the process that was aimed at safeguarding the future interests of the settlers. The Africans’ fervent political activism was fostering in the background and threatening to tear down the commercial and industrial empire of the settlers. The colonial government was forced to employ a long-term strategy to protect those interests. Instead of objectively addressing the underlying land conflicts between the Africans and the colonists, the government chose to engage such Commissions as the Kenya Land Commission to distract the people from the real issues. It was not surprising that the Commission treated the Maasai land question from a narrow view of grazing rights, a misconception that was widely perpetrated against them. Contrary to the Commission’s position, scholars such as M.P.K Sorrenson, who wrote widely on the colonial settlement in Kenya, have argued that the land question was at the heart of the Maasai-British relationships. “Once European settlement began in earnest from 1903, it was evident that the Maasai, rather than the Kikuyu, were the centre of controversy over native rights to land”<sup>253</sup>

The Commission started by defining what it called the Maasai land claim. It was solely based on the then existing boundaries, rather than considering the many factors such as forced evictions, indigenous tenure practices, conflicts with other communities and other environmental and livelihoods systems. Even for the boundaries, the cut-off date for the Commission to review them was 1911 and not beyond. History is replete with the fact that the

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<sup>252</sup> KLC, p.187. para.640

<sup>253</sup> Sorrenson (1968) p.190.

turning point in the Maasai land issue was 1904 or thereabouts when their first eviction took place. The Commission's 1911 starting point was problematic because it was aware of completely locking out the Maasai historical land claims. Responding to Maasai claims of certain lands lying between Athi River and Sultan Hamud (which historically belonged to Maasai before their evictions), the Commission dismissed them arguing that 'the claim is not included in the Agreement of 1911 or any other agreement with the Maasai.'<sup>254</sup> The Commission was factually wrong on both accounts. The 1911 Agreement, as one-sided as it was, never explicitly provided for the boundaries in detail, and the Maasai had always used the extensive Athi plains as grazing areas. The overarching objective of the 1911 Agreement was to remove the Maasai from Laikipia. The 1911 Agreement annulled the previous Agreement of 1904 thus all earlier 'negotiated' boundaries, which in essence shredded and consigned government policy on the Maasai as null and void. After having failed to consider Maasai's historical claims to land, the Commission dwelt on such notions and exchanges that it mainly proposed to ease congestion in densely populated reserves that bordered Maasai areas.

The objective of the Commission was obviously not to protect the pastoral livelihoods system of the Maasai but rather to accelerate their extinguishment in order to pave way for 'advanced' agricultural economy. What was more apparent in the Commission's approach was its willingness to engage in a policy roller-coaster that appeared to damage Maasai rather than ameliorate their land claims. The Commission appeared to choose deliberately to undermine the Maasai way of life. It stated that the Maasai's 'strictly pastoral way of life' was the cause for presumed underutilisation of land. It was proposed that farming

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<sup>254</sup> KLC para.677.

communities could make better use of land than the Maasai tribesmen did. The Commission thus asserted: “Without doubt, this land would be of great value to other tribes or communities who may require scopes for expansion or agricultural development.” And it continued. “We consider that it would be of advantage to the Masai, should they be willing, to cede some of this land in exchange for the Chyulu triangle, or any other area and which they may desire be available.”<sup>255</sup>

It was therefore difficult to understand why the Commission did not find any traction with that incredible history of the Maasai and instead chose to focus on issues and proposals that would lead to loss of more the Maasai land. Except an insignificant reference to a purported support for the Maasai to access a ritual site in Kinangop, there was virtually no substantive proposal to redress historical injustice that the Maasai had suffered. The warped idea about exchanges of land between Maasai, European farmers and neighbouring communities was a ploy to remove the Maasai from more productive areas. For example, in a proposal known as the ‘Mau Forest Exchange’, the Maasai was to “give up some forest to Forest Department in exchange for an area of grazing on the southern extremity of the Eastern Mau Forest Reserve.”<sup>256</sup>

What the Commission did not mention was that the move to the drier southern edge of the forest would expose the Maasai to more vulnerability. The Commission went further and proposed that some rich agricultural areas within the Maasai reserve be set apart for use by other farming communities to purportedly make better use of land. “In the north-west corner of the Maasai Reserve there is an area of dense forest, which protects the head-waters of the

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<sup>255</sup> KLC 682

<sup>256</sup> KLC, para. 693.

Mara and Kipsonoi Rivers. This forest, nearly 200 square miles, is probably more than is required for this purpose, and a considerable acreage of good agricultural land, of which the Maasai are unable to make any use, could profitably be set aside and leased to others, who are prepared to make use of it.”<sup>257</sup>

It appears that the Commission did not take into account the fact that pastoralism, which naturally requires vast, well watered, and pasture-rich land would make equally as good returns under sustainable environmental conditions. Ironically, the Commission proposal on wildlife, which in contemporary settings in Kenya is synonymous with the Maasailand, was contemptuous. The Commission did not make any plausible proposal on how the Maasai and their wildlife resources should be managed in a sustainable way. The Commission made a ludicrous suggestion that once the Maasai accepted “improved pastoral or agricultural methods, any obstacles which the existence of a Game Reserve presented should not be allowed to stand in the way of useful development and the game reserve should be limited or abolished as circumstances dictate.”<sup>258</sup>

## **5.8 The Northern Frontier District (NFD)**

The wet and agriculturally potential rangelands occupied by the Maasai in the central Rift Valley attracted the resource hunting settlers while the drier and shrubby north did not attract much attention in terms of European settlement. However, the colonial government, even though it had no significant short-term developmental plan for the region, recognised the regions’ geo- strategic and future resource exploitation.

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<sup>257</sup> KLC para. 713.

<sup>258</sup> KLC para.718

The combined size of the arid and semi-arid land formed more than two-thirds of the country and was home to sprawling wildlife resources and other rich and indigenous fauna and flora. At the top of the Commission's priority list was government and investor future interest in the vast land that might contain mineral resources. It saw no sense and urgency to propose land tenure policy that could secure pastoralists interests within the colonial and post-independent legal and policy framework. Did the natives in the vast pastoral rangelands deserve tenure security to their land? The Commission was half-hearted and was not committed. "These natives clearly have rights in the land, but they can scarcely be said to have exclusive rights."<sup>259</sup> Unlike other non-pastoral areas where the Commission took a holistic approach to discuss land tenure issues within broader social and economic conditions of communities, the Commission did not consider baseline survey of pastoral areas.<sup>260</sup>

The Commission began its work by categorising native lands into different classes and units. As was illustrated, the classification was in a 'pecking' order they appeared to give the so called 'native lands'. The Northern Frontier Province and Turkana were not included in any of the native reserves category. The regions were omitted from a policy strategy of securing land rights for the natives against further alienation and dispossession. From the Commission's own interpretation, native reserves were supposedly to be the last refuge against land expropriation. Why then were the northern pastoral regions overlooked? The

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<sup>259</sup> KLC para.797.

<sup>260</sup> In its consideration of land issues in Kikuyu districts, the Commission made a comprehensive social and economic situational analysis. This holistic approach was important in gauging the past difficulties as well as arriving at more balanced present and future needs. Although as a whole the Commission was engaged in a pacification strategy among those communities who seen to be political threatening to colonial rule, it gave them an edge over the others in determining the future land policy in Kenya. See Kenya Land Commission Report, ' Conditions Obtaining in the Kikuyu Country ' Chapter 11 pp.16-28, para. 32-72, 'Economic Needs, a Preliminary Statement of the Issues, chapter X11, pp.139159, para. 487-558.

Commission had posited some justification as to why it left out the region out of protection measures. The main reason it gave was:

While it is clearly our duty to propose means for the protection of the natives in the secure occupation of the land, we are averse from recommending that any native reserves should at this time be declared in either the Turkana or Northern Frontier Province...”<sup>261</sup>

It is clear from the Commission’s perspective, that the means for such protection could include a declaration as ‘native reserves’ which should have definite boundaries. The communities in particular reserves were to be protected from further loss of land. However, further analysis of the Commission’s proposal show that the idea that it wanted to preserve the customary practices of access to grazing was ludicrous. The reason was more about other interests that were more appealing to the Commission than that of the pastoralists. According to the Commission it was more profitable to preserve the region for future exploitation by others, including government, capitalised corporations and syndicated companies rather than protecting the rights of the indigenes. It thus stated:

In the first place the areas are so vast in proportion to their populations that it would amount to an unjustifiable locking up of land, if it were devoted in perpetuity to the exclusive use of the occupant tribes. It is true that a great of the country is so arid and inhospitable that it is difficult to see to what better use it can be put than to afford a home for nomadic pastoralists. But there may be undiscovered sources of wealth, and it would be wrong to put unnecessary obstacles in the way of development of such possibilities as the land may possess in minerals or otherwise.”<sup>262</sup>

There is no doubt that the said ‘unnecessary obstacles’ included the declaration of native reserves, which in other parts of the country were used as a legal measure to protect the communities. The Commission in essence was rooting for the interests of non-pastoralists, especially those ‘investors’ who would in future be interested in resources exploitation.

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<sup>261</sup> KLC para.799.

<sup>262</sup> KLC para.800.

Pastoralist occupation was only tolerable so long as the land remained 'harsh and inhospitable.' Future discovery and generated mineral wealth was proposed to be for the benefit of those felt to be within the economic structure of the government. The Commission did not envisage other dynamic and alternative land and land-based resources tenure security for the pastoral areas. It was obviously limited by its prejudicial assumption that pastoralists could not adopt changes that could be beneficial to them. While the indigenous communities in the colony practised land tenure systems that were different from other farming communities, the Commission had no excuse to set up pastoral areas for a future legal lacuna. How else could one explain the Commission's assertion that; "While it is necessary that the native rights be safeguarded, the elaborate safeguards which we shall propose for the protection of Native Reserve under the Lands Trust Ordinance would be unworkable in such a region and quite inappropriate."<sup>263</sup>

The Commission did not offer any explanation as to why that piece of legislation was unworkable or inappropriate. Nevertheless, the reason for non-protection of pastoral communities becomes more apparent as the Commission made further proposals. In the first place, the picture it painted of the pastoral areas as unproductive barren lands, was mundane. In its own account, it qualified its own assertion when it said: "...the Northern Frontier Province, while generally of that character, has also extensive areas of valuable pasture-land, parts of which are also suitable for agriculture. These areas are worthy of much better use than nomadic tribes can give them."<sup>264</sup> Furthermore, the Commission chose to rely on the notion

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<sup>263</sup> KLC Para,800.

<sup>264</sup> KLC para.801

that the land in pastoral areas was 'vacant' and as such, the state had rights to alienate land for non-pastoral use in the future. This was how the Commission justified it;

We do not feel bound to reserve such land exclusively for the natives, since we do not consider that they have established a claim to exclusive possession either on historical or economic grounds, and we believe that it might be in the best interest of the colony that considerable areas should be leased to non-native individuals and companies, who have the capital to improve and develop them.<sup>265</sup>

The next chapter focuses on major changes that took place on the eve of Kenyan independence. The colonial government made extensive land policy changes, not to address past grievances among the Africans but to perpetuate its skewed policy beyond its eventual departure, thus preserving colonial agrarian structure.

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<sup>265</sup> KLC para. 802.



## Chapter 6

### Road to Independence: Land Reforms or Containment Policy?

#### 6.1 Consolidating colonial land policy

In the previous chapter, the role of the Kenya Land Commission (KLC) in reinforcing the fundamentals of the colonial land policy was broadly discussed. It was argued that the recommendations were aimed at incorporating non-European crop farmers (agriculturalists) into the colonial economic structure. The policy was meant to serve two important objectives. The first and most important aim was to forestall emerging scenarios of Africans' resistance to colonial land policy.<sup>266</sup> The second reason was to ensure continuity of colonial land policy even after Africans' land rights were nominally recognised. Although Kenya's independence came exactly thirty years after the Kenya Land Commission was appointed, there is a sense that the Commission looked beyond the colonial rule. Its findings, especially those related to pastoral land, had envisaged tenure typologies that would fit individualised or privatised regimes.<sup>267</sup>

It was also illustrated that some statutory legislation were formulated for the purposes of implementing the recommendations of the Kenya Land Commission. However, what was

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<sup>266</sup>By early 1920s, African political movements have sprung up in certain parts of the country, especially among the Kikuyu people. The Kikuyu had by then formed the bulk of labourers on the European farms where they squatted because they had no lands in the highlands or African reserves. The Kikuyu Central Association (KCA) and Young Kavirondo Association (which operated in western highlands, mostly led by the Luos) had started agitating for African rights.

<sup>267</sup> Although the colonial authorities had also been guided by principles of freehold ownership of land, it was the Kenya Land Commission which concretised the concept. This fact was recognised even by the east African Royal Commission( EARC), 1953-55 which was otherwise very critical of the KLC Report. See EARC Report, Chapter 6, pp.53-56.

more important to the colonial authorities were the measures taken to ascertain and entrench the boundary of White Highlands, as an exclusive reserve for the European settlers.<sup>268</sup> The Commission therefore laid the foundation upon which subsequent legal and institutional frameworks were founded. As I shall demonstrate, the colonial administration took further steps, especially during the decade before independence to entrench colonial land tenure regimes. In those last decades of the colonial rule, the issues of the pastoral lands were evidently not part of the colonial equation. The government focused its attention on the settlers and was later forced to deal with growing resistance in the African reserves bordering the White Highlands.

As illustrated from the beginning of this chapter, the Colonial government had prioritised settler-controlled agricultural activities over the African development challenges since the ‘White Highland’ was created as an exclusive European zone. The authorities, in most cases under the pressure of economically and politically influential settlers, had been inordinately preoccupied with their interests.<sup>269</sup> Julian Huxley, an academic who was critical of the government policy towards the Africans, observed the relationship between the officials of the state and settlers as follows:

The governor is subject to great political and social pressure from the white community of Kenya. His position is one of exceeding difficulties... Few, if any, governors have been able to

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<sup>268</sup> See KLC Report, paras. 1979 and 2152. For purpose of emphasis we restate the recommendation as made by the Commission under para.2152. “ We consider that it would be insidious if the native reserves were to be protected in this manner and no similar security be given to the European Highlands. We recommend therefore that the external boundaries of the European Highlands be defined under Order in Council, and be subject to analogous safeguards as to exclusion, additions and exchanges.” The recommendation was implemented via Kenya (Highlands) Order-in-Council, 1939.

<sup>269</sup> See for a comprehensive analysis of the state and settler relations and how the latter dominated, though not wholly usurped political powers like Rhodesians,( British migrants in Rhodesia, later Zimbabwe), Boers and British in South Africa. generally Berman, B (1990) Crisis and Control in Colonial Kenya: Dialectic of Domination. See also, Redley, M.G (1976) The Politics of Predicament: The White Community in Kenya, 1918-1932. Cambridge University PhD, Dissertation.

withstand organized white pressure, and native rights have been violated, and native interests neglected.<sup>270</sup>

Since the policy of reservation was entrenched as part of colonial control mechanisms of the Africans population, there was little evidence that the government was concerned about improving their lives. This was in a complete contrast with the Europeans who had since the 1920s increased their agricultural outputs and prosperity from the export of various cash crops.<sup>271</sup> By the end of World War II in 1945, the situation in the African reserves were on the brink of massive social and economic precipice as a combination of internal conflicts over land and food shortages took toll on the indigenous peoples. Sir Philip Mitchell, the Governor of the Kenya, alarmed by the state of the African reserves wrote to the colonial office as that:

the native reserves are just frankly going to the devil from neglect, and if the problem is not strongly tackled and at once you will have a frightened problem of conflicting land interests in a very few years, for what with White Highlands, native reserves and the rest, there is a very little flexibility in the position such as the most countries gives scope for coping with land problems.<sup>272</sup>

The colonial administration wrongly diagnosed the challenges confronting the Africans as problem related to poor food sector, where African agriculture was dismissed as rudimentary husbandry that was not sustainable.<sup>273</sup> Attempts were therefore made in the mid- 1940s to ‘teach’ selected Africans farmers methods of good husbandry to boost their agricultural outputs. A number of ‘land improvement’ programmes were undertaken for this purpose. The new agricultural techniques,

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<sup>270</sup> Memorandum from Professor Julian Huxley to the ‘Joint Select Committee on Close Union in East Africa, King’s College, University of London. Vol.111 Appendices 1000657, London, HMSO, 1931. Cited i Berman, B, supra, p.190.

<sup>271</sup> By 1913, export of coffee and maize, two major settler crops, although were worth mere £65,000 ( i.e 16% of total domestic export) was heavily supported by the colonial state. The Africans in the reserves who had been farmig on subsistence basis were not encouraged or supported to partake in export economy. See Berman, B, supra, p.78.

<sup>272</sup> Quoted in Berman, B, supra, p.274.

<sup>273</sup> Okoth –Ogendo (1996) Land Tenure and Natural Resource Management: The Kenya Experience. Sahara nad Sahel Observatory Workshop Presentation Report.

according to the authorities, would save more land for farming, especially among the Kikuyu peasants.<sup>274</sup> Although the Kikuyu community was generally amenable to the learning from their European neighbours, this strategy could not appease them because there was more to land problems than mere farming techniques. The authorities then changed course and decided that the panacea to this problem was the removal of the customary land tenure system practised by the indigenous people.<sup>275</sup> According to the officials, the African land tenure practice was inherently defective and as such incapable of sustaining better production. The assumption was that because the Africans owned lands in common, disputes over access and allocation for individual use might have hampered better agricultural production. On the other hand, it was contended that the Africans land tenure could not confer indefeasible and secure rights in land because it was not based on individualised tenure arrangements. Although this particular claim was based on sheer ignorance, the government authorities were convinced that the only alternative was to embark on individualising the ‘commons’ among the farming communities in the reserves.

Contrary to those assumptions, the highlands communities such as Kikuyu had been practising shifting cultivation where each family and individual members owned their individual plots.<sup>276</sup> Furthermore, according to Pinckney and Kimuyu, the indigenous land rights were rarely communal in areas where the communities practised cultivation. They argued, “Individual households were usually allocated plots of land that remained theirs to cultivate as long as they wished; in addition, land was inheritable by sons.”<sup>277</sup> Again, contrary to the official thinking at the time that the

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<sup>274</sup> Inukai, I (1974) *African Socialism and Agricultural Development Strategy: A Comparative Study in Kenya and Tanzania*, p.5. *African Economies*, Vol.12, No.1,

<sup>275</sup> *Ibid*, p.5.

<sup>276</sup> Kikuyu were said to have expanded their cultivation as early as 1860s in response to demand for grains, especially by the Swahili caravans moving through their land. See Moor, J.de., Wesseling, H.L (eds.) (1997) *Imperialism and War: Essays in Colonial Wars in Asia and Africa (Comparative Studies in Overseas History)*, p.105.

<sup>277</sup> Pinckney, T.C., Kimuyu, P.K (1994) *Land Tenure Reform in East Africa, Good, Bad or Unimportant*, p.4. *Journal of African Economies*, Vol.3, Number 1

economy of the colony depended on large farming enterprises fed by African labour, small-scale farming in African areas, given appropriate support, would still have contributed substantially to the economy. A minority voice that supported that idea existed even among the government officials. For example, F.W. Isaac, an administrator with practical farming experience, argued as far back as 1908 that it would economically make more sense for the government to support Africans small-scale agriculture than to have them work for the European large-scale farms. He argued that, ‘The method of land tenure that brings in the greatest revenue to the state is small holdings’ and it was better than having ‘one hundred natives cultivating 500 acres for a European.’<sup>278</sup> Unfortunately, such rational argument went unheeded because the official policy was based on consolidation of European settlement and agriculture.

Between 1954 and 1963, before the Kenya colony became politically independent a series of policy and legislative actions took place with the aim of reforming agrarian policy. We shall briefly look at the policy intervention that has had enduring influence even long after independence.

## **6.2 East African Royal Commission (EARC) 1953-1955**

The East Africa Royal Commission was appointed in 1953 to investigate multifaceted social, economic and political problems in the three countries of East Africa: Kenya, Uganda and Tanzania.<sup>279</sup> This broad mandate covered such issues as overpopulation, land tenure, economic opportunity, labour, infrastructure, industry, commerce, etc. The Royal Warrants dated 1<sup>st</sup> January 1953 and 9<sup>th</sup> February 1953 specify the main tasks as follows:

Having regard to the rapid rate of increase of the African population of East Africa and the congestion of population on the land in certain localities, to examine the measures necessary to be taken to

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<sup>278</sup> F.W.Isaac, Acting Provincial Commissioner in Ukamba Province Annual Report, 1907-8, Kenya National Archives, PC/CP.4/2/1.

<sup>279</sup> Command No.9475, London, HMSO, 1955

achieve an improved standard of living, including the introduction of capital to enable peasant farming to develop and expand production; to frame recommendation thereon...<sup>280</sup>

In addressing issues affecting Kenya, the Commission had relied heavily on propositions made by the Governor, Sir Philip Mitchell in an official dispatch to the Secretary of State for Colonies.<sup>281</sup> The dispatch set out in detail the major problems that confronted the Africans and why it was important for the government to intervene before they ‘exploded out of control.’ As this study has already pointed out, the major concern raised by Sir Philip Mitchell was related to the overall land question, which included access to agricultural land. He pointed out that the emerging class differentiation even among Africans was causing further pressure on land as rich farmers purchased land from the poor.<sup>282</sup> The despatch largely emphasised ‘modification’ of tribal land tenure in order to integrate the Africans into cash economy. To this end, the Governor proposed “government endeavour control, divert, or assist this process of agrarian change, as part of their inescapable responsibility for seeing that land is not reduced to desert as a result of over-population by man and his stock.”<sup>283</sup>

The Commission concisely heeded the propositions made by the Governor. One of the issues it significantly addressed was the question of land tenure. The Commission strongly vouched for individualised land tenure based on statutory laws. Although the Commission recognised the fact that customary land tenure systems were deeply rooted among the

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<sup>280</sup> Ibid, Royal Warrant, x-xi.

<sup>281</sup> Despatch No.193 of 16th November, 1951. The despatch was reproduced in the Report, Chapter 1, para.2. Note that Sir Philip Mitchell had earlier despatched an equally incisive report about the situations in African reserves. See, Despatch by the Governor, Sir Philip Mitchell on the General Aspects of the Agrarian Situations in Kenya as it Affects the African Population, No.44 of 1946.

<sup>282</sup> EARC Report, Chapter 1, para. 2(c).

<sup>283</sup> Ibid, para. 2(d).

indigenous communities, it still blamed the society for clinging to them.<sup>284</sup> The Commission was of the view that changing customary law was of such critical importance that the colonial government should take charge, whether communities were ready for that or not. In its own words, the Commission stated as follows:

A lead must be given by governments to meet requirement of the progress elements of society by applying a more satisfactory land tenure law wherever a fair measure of support exists. So also the breaking down of exclusive tribal and clan boundaries cannot be left entirely to a process of evolution under economic pressure. Positive action must be taken by governments to induce these exclusive communities to put land to within their boundaries to full use themselves, or to make it available for others.<sup>285</sup>

Even though the East African Royal Commission dismissed the Kenya Land Commission Report of 1934 for addressing the African land question from ‘tribal standpoint’, it fully endorsed its position on individualisation of land tenure. For example, the Kenya Land Commission’s recommendation about the Maasai land elicited support from the East African Royal Commission even when it was clear that pastoral land rights were being exposed to further seizure. The Kenya Land Commission proposed that Maasai needed to cede more land to other land users, meaning agriculturalists, rather than reclaiming land, which was lost as a consequence of the Maasai agreements.<sup>286</sup> The EARC Commission singled out this as the

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<sup>284</sup> EARC Report, Chapter 23, para.4.

<sup>285</sup> Ibid, Chapter 5, para.5

<sup>286</sup> Kenya Land Report, supra, para.711, The S.F. Deck, Provincial Commissioner, whose jurisdiction covered Maasai area pushed for the other neighbouring communities to occupy part of Maasai land because according to him pastoralism amounted to underutilisation of land.. In his evidence ( para.1264) he recommended to the Commission thus: “ It cannot be to the advantage of the community in general that vacant lands reserved for specified tribes should be left unpopulated when adjoining reserves are seriously overcrowded, It is probable that the Maasai will vacate additional areas in the near future between Kisserian River and Kajiado: and it is advisable that Government should visualize this position and take powers to deal with it.”

most valuable recommendation made by the KLC and added that, “What may be called individual rights of land tenure must replace the tribal controls which now exist.”<sup>287</sup>

The other notable similarity between the Kenya Land Commission and the East Africa Royal Commission was the fact that they both showed very little interest in pastoral land rights. In fact, the Royal Commission went further in its distaste of pastoral communities by being contemptuous of their livelihood system. It enumerated specific pastoralists such as ‘Samburu, Boran, Somali, Galla, Masai, and some of Kamba in Kenya; and the Maasai, Gogo, Barabaig, and others in Tanzania.’ Referring to all these groups, the Commission stated that

Their pastoral way of life portends both a danger and deficiency. The danger is that they may turn their lands into desert; the deficiency was that without management of their herds and in some cases better usage of their land than mere pastoralism, they will contribute far less than their land’s potential to their growing needs of the community.<sup>288</sup>

It was evident that the standard principle applied to the pastoralists by successive colonial governments was to blame their way of life.<sup>289</sup> This was in contrast to other sectors, including farming where needs such as technical or financial supports were identified as the means to ameliorate social and economic problems. However, the Commission pushed the agenda of individualisation of land tenure. It repeatedly emphasised many ingredients of this category of tenure such as adjudication, disposition, registration, etc. The Commission suggested that for the registration process to succeed, it must be based on a policy of land alienation, which in turn facilitated transferability of titles. It therefore recommended a

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<sup>287</sup> EARC Report, *supra*, Chapter 26, Conclusions, para.17, p.394.

<sup>288</sup> *Ibid*, chapter 21, Present Use of Land, Pastoral Communities, para.4, pp.280-283

<sup>289</sup> In contemporary sense this is a form of attribution biases called victim blaming where instead of confronting systems that breed inequality such as colonialism, the victims and their way of life is blamed for being inherently malfunctional. It is like saying ‘people do what they do because of the kind of people that they are, not because of the situation they are in.’



process of adjudication. The Commission emphasised the urgency of this process when it stated:

The administrative machinery of government must ensure that the action to carry out policy decisions is quickly initiated and that the technical staff to carry them out. The land tenure officer will require the services of officers of a number of technical departments. The services of offices familiar with the technical processes of adjudication of interests in land, of registration, of boundary demarcation and survey and of land valuation will be required.”<sup>290</sup>

From the way government-planning agents used the EARC as the reference point, there is no doubt that it held a great sway in influencing land policy in Kenya. This is particularly so in relation to such central land tenure principles as adjudication, consolidation, registration and other cadastral regimes. Based on the work of the EARC, the other commissions established by colonial governments adapted at various times the approach of the Kenya Land Commission, entrenched the concept of individualised tenure. Soon after the Commission Report was adopted, the government sprung into action to implement recommendations made. It was such an entrenched concept that successive colonial governments ensured evolution of the customary tenure to individual landholdings.

### **6.3 Swynnerton Plan, 1954**

By the early 1950s, the political environment in Kenya colony was getting out control as African political movements took a proactive stance in demanding nothing less than total freedom from the British Empire. There was discernible fear that unless the government took drastic measures to reform land policies, the cost of maintaining security would be untenable. Many among senior government bureaucrats had no illusion that the government must start land planning that went beyond the imperial rule, to take into account future protection of the settlers land interests. Driven by this consideration, the government took swift action to

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<sup>290</sup> East Africa Royal Commission (1953-1955), p.362, para.48

implement the recommendation made by the East African Royal Commission. A policy document known as 'Plan to Intensify the Development of African Agriculture in Kenya' (popularly called the Swynnerton Plan) was immediately formulated to solely focus on African agriculture.<sup>291</sup>

The objective of the Plan was to accelerate agricultural development in African areas through extensive re-organisation of land tenure and market. This was to be carried out through a process of land consolidation and individualisation of tenure. The Africans' ownership of fragmented plots were said to be detrimental to optimal agricultural productivity and as such were required to be consolidated and titles issued for registered land. According to Swynnerton, titles were useful in accessing credits for development of land because they would be used as security.<sup>292</sup> The Plan, *inter alia*, recommended the appropriation of £5 million over a period of ten years for this purpose. It also recommended relaxation of policy that restricted African farmers from growing cash crops, provision of credits, extension services and infrastructure. The government implemented much of the recommended steps swiftly and the outcome of the policy shift was immediately realised with massive growth of sugar and other crops in African areas.<sup>293</sup>

Since the Plan was unveiled, it was assumed that it could be applied in pastoral areas in the same way as the agricultural areas, regardless of differentiated potentialities in those

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<sup>291</sup> Swynnerton, R.J.M (1954) A Plan to Intensify the Development of African Agriculture in Kenya. Government Printer, Nairobi.

<sup>292</sup> Ibid, p.9.

<sup>293</sup> Okoth-Ogendo (1991) *supra*, p.141.

areas.<sup>294</sup> At the beginning of the colonial rule, the government's written and unwritten policy of 'segregated development' was conspicuously visible. Geographical and ecological classification of land areas were used as the basis of colonial development and future capital investment. The agricultural areas were ecologically categorised to be in medium and high potential zones while pastoral areas were in dry and low potential zones. The latter were hardly recognised as having potential for agricultural or any other form of development, thus receiving a raw deal in government policy and development interventions. The process of individualisation was implemented in the Maasai districts of Narok and Kajiado soon after Kenya achieved independence and they have since experienced a large influx of agriculturalists cashing in on the system.

#### **6.4 Agriculture Ordinance, 1955**

The government, encouraged by the growing potential of agriculture in formerly neglected areas, attempted to seal the gains by enacting laws that would promote the emerging agrarian development. The Agriculture Ordinance of 1955,<sup>295</sup> which had been in preparation since 1949, was a milestone in this process. According to the preamble, its objective was "to promote, and maintain stable agriculture, to provide for the conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry." There was no doubt that with renewed commitment to assist African farmers, initial apprehension that led to the failure of the previous programmes to 'teach' good husbandry was reversed. However, the colonial

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<sup>294</sup> Okoth-Ogendo, H.W.O, Oluoch-Kosura, W (1995) Land Tenure and Agricultural Development in Kenya, p.44. Report of the MOALD and Royal Netherlands Embassy. Nairobi.

<sup>295</sup> Agriculture Ordinance, No,8 of 1955.

government ensured that the regulatory regime was in place to control the direction and pace of development of African agriculture. On the other hand, the emphasis placed on European agriculture was a regime of producer control.<sup>296</sup>

The Agriculture Ordinance of 1955 was specifically designed for the evolving African agriculture and the colonial government was clear about its target areas. The agricultural areas in the colony were divided into scheduled and non-scheduled areas. The former comprised the 'White Highlands' while the latter referred to the native reserves. The pastoral lands belonged to none of the categories outlined in the Ordinance. The Minister for Agriculture was empowered, after consultation with the Board, to elevate the non-scheduled areas to scheduled areas. The government was now fully behind the policy to co-opt the emerging classes of African farmers into the colonial agrarian economy. The girded wall that was built around the White Highlands was gradually relaxed, to allow Africans who had the means to buy land there to do so. Although it did support claims of land by Africans in the White Highlands, the EARC contemplated reopening the Highlands, thus contesting the 'privileged position' of European settlers.<sup>297</sup> Although agricultural credits and other facilities were not immediately extended to those designated African areas, Swynnerton still argued that such investment by the government was contingent upon adoption of tenure reform. The policy was poised to discourage any element of indigenous practice of communal ownership.

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<sup>296</sup> Okoth-Ogendo, *supra*, p.144.

<sup>297</sup> EARC Report, Chapter 6, para.15, p.59.

## 6.5 Native Land Tenure Rules, 1956

By 1952, the process of individualisation had earnestly begun in the so-called ‘emergency districts’ of Central Kenya, where political movement had already picked up momentum. The government was under pressure to curb the growing rebellion (known as Mau Mau and its successor organisations such as the Kenya Land Freedom Army) operating mainly in Kikuyu areas and other affiliated regions such as Embu, Meru and in Rift valley. The movement targeted not only the government (and by extension, Europeans) but also the Kikuyu loyalists (mostly chiefs, headmen and landowning classes).<sup>298</sup>

The authorities confiscated land from those who were perceived to be members of the insurgent groups or those sympathetic to their cause.<sup>299</sup> The process of individualisation of tenure was escalated, partly to shut out those who were suspected to have taken part in the uprising. The Native Land Tenure Rules<sup>300</sup> was formulated to facilitate land tenure reform in those African reserves that were now teeming with land rights struggles. The rules empowered the Minister for African Affairs to set up a process for adjudication and consolidation of particular areas of the native lands ‘...within which the minister considers

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<sup>298</sup> The history Mau Mau is widely written by Kenyans and Foreigners alike. See generally Maloba, W.O (1998) Mau Mau and Kenya: Analysis of Peasant Revolt, Elkins, C (2005) “Imperial Reckoning”: The Untold Story of Britain’s Gulag, Kershaw, G (1997) Mau Mau from below, Anderson, D (2005) History of the Hanged: The dirty War in Kenya and the end of Empire.

<sup>299</sup> See generally Percox, D.A (1998) British Counter-Insurgency in Kenya 1952-1956: Extension of internal security groups or prelude to decolonisation? Cass, Routledge.

<sup>300</sup> The rules were effected by s.64 of the Native Lands Trust Ordinance via Legal Notice 452/1956. The minister for African affairs was vested with power to make rules *inter alia* in matters of native tenure.

that a private right holding exists.’<sup>301</sup> The Rules worked quite effectively because by 1960 almost all lands in central Kenya had been alienated and registered under individual titling.

## **6.6 Working party of African Land Tenure, 1957-1958**

A Working party of African Land Tenure<sup>302</sup> was appointed in 1957 to recommend necessary measures to introduce a system of land tenure that would eventually lead to the registration of individual titling. The Working Party began its task on the premise that some parts of the country had accepted the policy of individualisation of land tenure, and hence the need to find legal formula for its universal application. The Terms of Reference stated that:

Having regard to the emergence of individual tenure in certain areas of the Native Lands of Kenya and to the growing demand for the consolidation of fragmented holdings, enclosures and the issue of title to individual landowners, to examine and make recommendations as to the measures necessary to introduce a system of land tenure capable of application to all areas of the Native Lands...<sup>303</sup>

The Terms of Reference were specific about the requirement for substantive legislations to be used to determine ownership of land by expanding and effecting registration of titles. As to the general form of titles to be granted to Africans, the Working Party was satisfied that “the rights enjoyed by individual Africans in many cases had now evolved to something like full ownership and should be registered as such.”<sup>304</sup> To probably legitimise the process and win the confidence of the indigenous communities, their own committees were to be vested with the power to ascertain individual rights in land, which would be recognised as being owned

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<sup>301</sup> Rule 2(1). According to Okoth-ogendo(1991),p. 72, the notion of ‘rightholding’ referred to here is probably no different from the settler notion of absolute title. He suggested that in colonial parlance, however, this phrase was meant to describe something inferior to its British equivalent, even though substantive legislation was finally passed in 1959, they called it a ‘fee simple absolute.’

<sup>302</sup> It was appointed in February, 1957.

<sup>303</sup> See the Terms of Reference (i) of the Working Party of African Land Tenure.

<sup>304</sup> See Report of the Working Party on African Land Tenure in Kenya (1959), p.2. Journal of African Law, Vol.3, No.1, pp.2-6.

by that person. The ascertained land would then be registered as an estate in fee simple.<sup>305</sup> Accordingly, once the land was registered customary law could no longer apply to that person.<sup>306</sup> This was simply a measure proposed to strengthen the concept of adjudication.

More importantly, the Working Party drafted a Bill, The Native Lands Registration Bill, 1958. The Bill proposed freehold title as the preferred tenure under the law, which made the registered rights of the proprietor indefeasible and inalienable. This Bill became the Registered Land Act, Chapter 300 Laws of Kenya, at independence in 1963.

## **6.7 Constitutional Conference, 1960-1963**

The period between 1960 and 1963 was the busiest time for the British Government as it prepared the country for political independence. It was a period of transition where the parties involved not only looked at the short term arrangements, but worked on long-term constitutional framework in order to entrench their interests. The British Government organised a constitutional Conference that, among other important issues of governance, dealt with the question of land. The period could be conveniently termed as a time of transitional arrangements.

The Maasai leaders and communities have persistently raised the issue of the historical land question. The Maasai community had always made its intention known to the colonial and later Kenya government of the community's rights to reclaim the land from which they were removed in the early 1900s. The Maasai delegation made frantic efforts to convince

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<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

other delegates at Lancaster House Constitutional Conference to put the Maasai land issue on the agenda. A section of Lancaster Report was quoted as follows:

The Representation made by the Maasai delegation was to the following effect...lands, which the Maasai vacated in accordance with the Agreements, belonged to the Maasai .The Maasai wanted their ownership to be recognized and have first claim on these lands when they are vacant by the Europeans who now farmed them ... The Maasai delegation did not accept that they had no claims in respect of the lands which the Maasai had vacated under the Agreements.<sup>307</sup>

The Lancaster House Conference although generally recognized as having facilitated a smooth transition to Kenya's political independence, failed to resolve the controversial land matters. The leaders of minority groups such as the Maasai in the Rift Valley and Mji Kenda from the Coast Province had strongly differed with the leaders of the mainstream political party, Kenya African National Union (KANU) dominated by the Central and Nyanza Provinces. It appeared that the British Government, although initially uneasy about nationalists' tendencies of KANU, later felt more comfortable with its centralists land policy. It is argued that Britain was more concerned with the settlers' future prospects in the post-colonial Kenya.<sup>308</sup> While the minority groups had preferred management of land to be under devolved regional governments (Majimbo), the mainstream groups pushed for a more centralised approach, which in effect, meant the existing colonial arrangement.

The settlers and their British backers also preferred the latter position. According to Ghai and McAuslan, the Europeans were motivated by the fact that under a centralised authority it was easier to access foreign funds for government to buy out their lands or

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<sup>307</sup> Quoted in a Paper presented by Joseph Ole Simel at the Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples. It was organized by the Office of the United Nation High Commissioner for Human Rights in Geneva on 15-17 December 2003.

<sup>308</sup> See Waseerman G, *supra* for comprehensive analysis of the pre-independence negotiation between African leaders and the British Government.



reliably deal with them rather than devolved regional of governments.<sup>309</sup> They aptly explained why the settlers required that sort of guarantee as follows: ‘The confirmation was important at a time when there was a slight uncertainty as to the continued validity of titles due to demands from certain sections of the population that those titles should not be recognised after independence.’<sup>310</sup>

Kenya was thus ushered into political independence without much paradigmatic shift in land policy framework. While land was the critical issue of contention between Europeans and indigenous Africans at the onset of the colonial rule, it became the rallying point of consensus between the incoming and the outgoing governments at the beginning of the African political reigns. It was at this point that the first opportunity to generate a genuine land tenure reforms in Kenya was lost. Gary Wassermann observed the situation as follows:

“Land reform was an integral feature of the decolonization process in Kenya. By mid-1962 with entrance of the KANU nationalists into government and the agreement to establish a Million-Acre Scheme for transferring part of the European Highlands to African ownership, the “independence bargain” had been made....The implementation of the land schemes was designed to “seal the bargain”; the colonial bureaucracy’s attempt to insure the continued functioning of a political economy under an altered authority structure.”<sup>311</sup>

## **6.8 Trust land and alienation policy**

The enactment of the Trust Land Act (TLA)<sup>312</sup>, the Land (Group Representatives) Act (LGRA),<sup>313</sup> and the Land Adjudication Act (LAA) in 1960s<sup>314</sup> was part of the strategy to

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<sup>309</sup> Ghai Y.P., McAuslan, J.P.W.B (1970), Public Law and Political Change in Kenya, p.201.

<sup>310</sup> Ghai and McAuslan, p.201.

<sup>311</sup> Wasserman G, (1973) Continuity and Counter-Insurgency: The Role of Land Reform in Decolonizing Kenya, 1962-72.

<sup>312</sup> Ibid, Chapter 288 Laws of Kenya.

<sup>313</sup> Land(Group Representatives) Act is Chapter 287 Laws of Kenya.

continue the policy of individualisation of tenure. It demonstrated the fact that the African-led government was more preoccupied with maintaining the status quo rather than undertake effective land reform. Contrary to the expectations, the independent government adapted radical steps to align the pastoral land tenure to the agricultural land, further perpetuating tenure insecurity in pastoral communities. The Trust Land Act, 1963 was considered as the main legislation that applies to pastoral areas such as the Upper Eastern and North Eastern Province while the Land (Group Representatives) Act, 1967 which is commonly known as ranches, is associated with Maasailand. The latter legislation was a response to the apparent weakness of 'trust' principle to protect communal rights. The impact of this legislation, as shown in the penultimate Chapter, has been failure in resolving endemic presence of land tenure insecurity in pastoral areas. While these two principal laws are often identified in relation to land in pastoral areas, the least mentioned but the most operationalised law is Land Adjudication Act (LAA), and Physical Planning Act.<sup>315</sup> We shall later revert to these statutes, to illustrate how the application in pastoral areas has diminished pastoralists land rights.

The Trust Land Act is, as we have earlier mentioned, inherent in the colonial policy proposed by the Morris Carter's Kenya Land Commission that pastoral areas should be preserved as 'reservoir' for other non-pastoral land uses in the future. The adjudication and planning laws, whose combined effect has eroded the principle of trust, were in response to the East Africa Royal Commission's recommendation to speed up the individualisation and privatisation process.<sup>316</sup> The colonial Government made last ditch efforts to accelerate the

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<sup>314</sup> Land Adjudication Act, Chapter 284, Laws of Kenya.

<sup>315</sup> Physical Planning Act XXX

<sup>316</sup> See EARC, Chapter 23, Tenure Disposition of Land where it was restated that 'policy concerning tenure should aim at the individualisation of land ownership.'

process in the White Highlands and contiguous farming areas. These areas became the agricultural and industrial hub of post-colonial Kenya. As reflected in successive pre-independent negotiations between the colonial authorities and the emerging African political elites, the focus was on the preservation of the agrarian economic structure based on private property land. As pointed out earlier, Kenya's customary tenure conversion was well under way at the beginning of the twentieth century, beginning with the Central Province in the 1950s. Initially, this was carried out without legal backing but in 1956, a set of 'Native Land Tenure Rules' were formulated to embark on the registration of land and by 1960, the objective was almost accomplished. The Native Lands Registration Ordinance was passed in 1959<sup>317</sup>, which eventually became the Registered Land Act<sup>318</sup> at independence in 1963.

For areas that were designed to come under the 'trust' tenure jurisdiction in 1963, there was no detailed planning, not even some form of negotiations like the ones that had preceded the 'registered' tenure regime.<sup>319</sup> At least there was a traceable footprint of how land tenure in 'registered' areas was developed. It all began with the policy of native reservation and tenure categories exclusively designated for them to promote agricultural development by taking measures against soil erosion.<sup>320</sup> Legislation such as the Native Lands Trust Ordinance was promulgated in order to improve and accommodate reserves areas. To cap it all, the

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<sup>317</sup> Ordinance No.27 of 1959, later renamed the land Registration(Special Areas) Ordinance.

<sup>318</sup> Chapter 300 Laws of Kenya.

<sup>319</sup> Even before the final settlement during the Lancaster House Constitutional Conferences, the colonial authorities made numerous contacts with communities in 'natives reserves' since 1920s. The most influential ones included, the Hilton-Young Commission(1927-29) and Morris Carter's Kenya Land Commission(1933-34) which was almost synonymous with people of the highlands(especially Kikuyu) and which had no any positive agenda for the northern pastoralists.

<sup>320</sup> Coldham,S ( 1978) The Effect of Registration of Title upon Customary Land Rights in Kenya. Journal of African Law Review, p.91, Vol. 22, No.2.

Swynnerton Plan proposed the Africans provided with secure title to land as this would encourage them to invest in development that would in turn, guarantee returns on capital borrowings.”<sup>321</sup> The East African Royal Commission recommended the adjudication and registration while a Working Party was appointed to consider legislation. As a result of this report, the Native Lands Registration Ordinance was passed in 1959. In 1963, it became the Registered Land Act, the epitome of contemporary private land tenure. As for the pastoral areas, there was no clear rationale as to why the incoming post-colonial government decided to place them under ‘trust’ tenure arrangement. There was no record of prior discussion or consensus arrived at to take into account the social, ecological and environmental needs of the communities living in those areas. Without such evidence, one may argue that the decision might have been made hurriedly and haphazardly in an attempt to ensure the centrality of the nascent state in controlling land and resources.

The Native Trust Land Ordinance, which in 1963 became the Trust Land Act, was previously applicable to the pastoral region of Northern Frontier Province and Turkana. Although the original reason for the establishment of reserves was to pave the way for secure European settlement, it became the ideal instrument to integrate Africans into the colonial economic system. The pastoral region was not part of this, except much later as part of Maasailand, which was absorbed because of its proximity to the centre of the European operation. For example, Simon Coldham who wrote scholarly work on the land registration process in Kenya, observed of the land consolidation and registration programmes as follows: “Although it was originally devised in response to a very specific situation in the Kikuyu Land Unit, it now covers virtually all agricultural areas of the former Native Lands and has

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<sup>321</sup> Ibid, p.91.

recently been extended to the pastoral areas of Maasailand.”<sup>322</sup> However, as soon as Kenya’s political independence became official, the Native Lands Trust Ordinance, which was enacted in 1938, following recommendations of the Kenya Land Commission, became the Trust Land Act. Until then, land in pastoral was in a legal limbo.<sup>323</sup>

Land and property law scholars like Okoth-Ogendo have been ambiguous in their attempt to explain this lacuna.<sup>324</sup> For example, in evaluating the organisation of reserves in Kenya, Okoth-Ogendo stated that since the Carter Commission did not consider the northern region as native lands or reserves, it had a special arrangement for it.<sup>325</sup> The colonial Government had what he called ‘special arrangements for the region. He did not say what these special arrangements could be. Ogendo’s ambiguity was not surprising because there was no special arrangement. That was why the post-independent government took advantage of the existing void to legislate irrelevant laws for pastoral areas. Carter’s Kenya Land Commission clearly stated that the areas were to be preserved for future non-pastoral exploitation such as oil and mining.

What numerous commentators on contemporary legal and institutional arrangements in pastoral areas have failed to point out is the fact that trust land areas, as they are today, are the most unpredictable and insecure tenure regime. It is the only forms of tenure which,

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<sup>322</sup> Coldham, S.(1978), Effect of Land Registration of Titles upon Customary Land Rights in Kenya. *Journal Of African Law*, p.92, Vol.22, No.2.

<sup>323</sup> The land tenure arrangements in those areas were various called ‘native reserves’, temporary reserves’, temporary native reserves’ and leasehold areas’

<sup>324</sup> Okoth Ogendo has never explained the historical anomaly of how the Native Lands Trust Ordinance, which originally excluded pastoral areas was later(at independence) transformed into Trust Land Act which currently mainly operate in northern pastoral areas.

<sup>325</sup> Op. cit Okoth-Ogendo, H.W.O.(1991) *Tenants of the Crown*, p.60.

despite its glaring weaknesses, is entrenched in the Constitution. No other categories of tenure, private (registered) or public (government) lands are provided for in the Constitution.<sup>326</sup> The provisions of the Constitution and Trust Land Act are almost identical word by word and it only shows the desire and determination of the Government to take control of the disposal of land for private and 'public' use. The substantive law, the Trust Land Act, contemplates the temporariness or transient nature of trust land itself.<sup>327</sup> It is not surprising then that the main defining feature of both the Constitution and the Trust Act is alienation or 'setting apart'<sup>328</sup> of land by the government and the county council which is supposed to be the custodian of the local interests.

To facilitate effective extinguishment of the customary tenure rights, a legislative mechanism was created through the Land Adjudication Act. The concept of adjudication presupposes government intervention to resolve existing disputes among the customary landholders. The evidence is that this does not occur. The Act is simply a converter of customary land tenure rights into registered proprietary interests based on the English property model. However, nearly forty years after the Act came into operation, the outcome has been anything but orderly. In pastoral districts such as Marsabit, Moyale, Isiolo and Tana River and Kajiado, the process of land adjudication has led to massive cases of conflicts,

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<sup>326</sup> See S.208 of the Independence Constitution as amended by Chapter 9 of the 1969 Constitution and most recently Chapter 1X (ss. 114-120) as amended by No.3 of 1999.

<sup>327</sup> Trust Land Act, Chapter 288 s.3, in this section which ought to indicate the scope of its application, the Act states that it 'applies to all land which for the time being (emphasise is mine) is Trust Land. The authors of the legislation obviously expected the life span of the trust land to be as short as possible.

<sup>328</sup> The Constitution 's Chapter 1X which deals with Trust Lands has six sections out of which four deal with 'setting apart', see ss.115(3),116,117, 118, and 119, while none of the remaining provide for inalienability of local peoples' rights and/or interests. Trust Land act elaborately outlines the procedures for 'setting apart' both by the county council and the Government. See ss.7,13 and 51 and the rest of sections deal with incidental issues related to alienation such powers and indemnity of Government or its officers who may commit certain offences in the course of dealing with trust land, see s.54.

confusion and corruption. Bonaya Godana, the late scholar and politician, wrote how the adjudication process in Marsabit and Moyale was mired in irregularities in the 1970s.<sup>329</sup> In Tana River District, the pastoralists and farmers have been engaged in perennial conflicts over access to land and water, often after the government declared the district as an adjudication area.<sup>330</sup> The Loodoriak and Mosiro land adjudication in 1979 remains one of the most controversial and unresolved case where the local Maasai communities lost hundreds of acres of their land through unscrupulous adjudication officials who had tampered with the land register.

Kenya is widely perceived as the epitome of the British government's successful delivery of a post-colonial state, astutely designed to preserve the colonial political economy. Professor Gary Wasserman, one of the leading scholars of the decolonisation politics in Kenya, wrote widely about the issues that informed the political independence of Kenya between 1960 and 1965. This was the period when the First Lancaster Constitutional Conference was held (1960 in London) and the first major policy blueprint, the African Socialism and its Application to Planning in Kenya (Sessional Paper No.10 of 1965) was formulated by the independent African government. Wasserman graphically described what he saw as the most influential stakeholders in the decolonisation process as follows:

On one side was the European farming community perched at the top of the political-economic hierarchy they had largely established. Though less than one per cent of the population, they owned twenty per cent of arable land, produced eighty five per cent of the agricultural exports and generated most of the taxable income in the colony."<sup>331</sup> In addition to

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<sup>329</sup> Godana, B.A (1976) Setting Apart of Land in Marsabit District of Kenya, LL.B Dissertation, University of Nairobi.

<sup>330</sup> Adhi, G.D (1998), The Crisis of Land Adjudication in Pastoral Areas, A Paper presented in a Workshop organized by the Kenya Pastoralists Forum at Mashallah Hotel, Isiolo on 25 November,1998.

<sup>331</sup> Wasserman, G (1976) Politics of Decolonization. Kenya Europeans and the Land Issue 1960-1965, p.2

that, the group had up to that point in time maintained the alienated and appropriated approximately eight million acres of land in the 'White Highland' for exclusive European use. On the other side of the divide, there were the majority African land hungry peasants whose expectation of the impending independence was first return of the 'lost lands.

The decolonisation process, contrary to the deeply held assumption that it brought to an end the colonial dominance; it in reality was an adaptation and co-option device whose operational function was to perpetuate historical land issues. The so called nationalists, who assumed the role of negotiators during the transition period, were themselves constrained by the internal and personal competition for political power. The rivalry was mostly ensconced in ethnic and regional interests which individual leaders were assumed to represent in bargaining for a share of political power. The decolonisation process was not defined by neither the land issues nor the other historical injustices against the indigenous Africans, but used as an induction of the political socialisation of Kenya's new leaders in managing the inherited colonial system.

The colonial policy, which concentrated powers over land in the imperial crown was transmitted to the executive authority headed by the president. Successive Kenyan presidents have used these powers for personal or public aggrandisement as reported by various commissions of inquiries in the recent past.<sup>332</sup> If the president is not involved personally in land allocations, he delegates this task to the Commissioner of Land to exercise the powers on his/her behalf. Despite local councils being vested with the power to administer Trust Lands, the real power rests with the President, who could allocate Trust Land at will. The Minister of Local Government, can impose government decisions on district councils, which are manned by council clerks. Their loyalty rests with the minister rather than the council. The Commissioner of Lands, who has wide administrative authority over Trust Land, does not

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<sup>332</sup> See Ndungu Report and Njonjo Commission Reports of 2002 and 2004 respectively.



refer to the council concerned when dealing with land in a local jurisdiction. The Minister for Lands can declare any Trust Land an ‘adjudication’ area to be subdivided without consulting a local council of affected area. The process of allocating and sub-dividing land in the pastoral areas rangelands to individual owners, as opposed to common access, is gaining acceptance among the pastoralists.

The next chapter discusses contemporary challenges affecting pastoral land rights, especially in the context of the emerging land use practices such as mining and ecotourism. These practices involve large investments projects and top businesspeople in the corporate world. The ongoing debate on land reform and national land policy is also examined in view of increasingly shrinking pastoral land resources.

## CHAPTER 7

### New challenges Undermining Pastoral Land Rights

#### 7.1 Unresolved Land struggles

The pastoralists and other minority groups such as hunter-gatherers, forest-dwellers, and riverine farmers have continuously struggled with land issues since the colonial period and yet nothing seems to have changed for the better. The most critical ingredient of the contemporary land question is related to legal and policy constraints in determining the land and land-based resources rights of these groups. This explains why land has been the most contentious issue, often causing open defiance of government policy actions such as land allocations, demarcation of boundaries, and resettlement.<sup>1</sup> Many of these conflicts can be traced to many years, including, the period of colonial administration. Many pastoralists such as the Maasai, Pokot, and some Kalenjin sub-groups have been directly affected by colonial land alienation and claim it as a significant historical injustice.<sup>2</sup> This study has addressed the Maasai land issue comprehensively as an old colonial question that has not been resolved.

The Maasai, as we have discussed in chapter 3, took their land struggles to the colonial courts and set a historical record as the first indigenous tribe in Kenya to challenge an oppressive colonial land policy. The policy, which was founded on alienation of land, had the

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<sup>1</sup> Currently there is a fierce debate going on in some parts of the country regarding such issues as repossessing catchments areas which were allocated to individuals by previous governments, The case of Mau Forest Complex has been at the centre of debates between political parties, landholders and the Government. In recent months issue of land appears in mainstream daily newspapers in Kenya. See for example, The Standard, for coverage of Mau forest complex. 18/06/09, 'Mau Complex is Our Land, Claim Ogiek', 19/06/09, 'Deputy Speaker Orders House Probe into Mau Forest Controversy', conflict over access to pasture among pastoral communities have become 'normal' and most time go unreported. Resettlement of landless squatters, refugees and Internally Displaced Place (IDPs) have in most occasion attracted controversies.

<sup>2</sup> Kenya Land Alliance ( 2004) The National Land Policy in Kenya: Addressing Historical Injustices, p.10. Issue Paper No.2/2004.

disastrous consequence of dispossessing indigenous owners. Loss of land was not confined to the pastoralists, it also affected the other indigenous farmers and agro-pastoralists that tilled and used land for different activities. Nomadic pastoralism depended on the extensive use of rangelands, covering large swathes of land to facilitate opportunistic utilisation of drylands resources. The colonial land alienation policy resulted in the diminishing of livelihoods system of communities that depended on drylands resources.

The cumulative experiences over the years illustrates that a number of factors have combined to militate against the attainment of secure land rights by the pastoralists in Kenya. First, the government which has overbearing and interventionist powers has made trust land less secure. The communities have no control over the government frequent interventions.<sup>3</sup> As I have pointed out, since 1963 when the Trust Land Act was enacted to administer land in pastoral and other marginal areas, the government or parliament has not taken any initiative to review the Act.<sup>4</sup> The Act adopts a significantly contradictory approach to communal land tenure rights. Blanket application of the Trust Land Act, diminishes rather than preserving pastoral land. The Act as it stands today is a conveyor belt or a conduit through which customary land tenure is converted to private regime. Under the pretext of ‘public purposes’, the pastoralists have lost critical land resources such as seasonal pastureland and wetland to private use.<sup>5</sup> As for the Land (Group Representative) Act, which was legislated in 1968 to

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<sup>3</sup> For a general overview of weakness in customary interests in Trust Land Act, see Migai, A.J.M (2001) Rescuing the Indigenous Tenure from the Ghetto of Neglect.

<sup>4</sup> The most notable alteration was made by the Minister of Lands vide Legal Notice 43/1968 which included s.7 that empowers the Government to set aside trust land for public purposes. The same Legal Notice introduced s.13 which vested the County Council powers to set aside land for public purposes and extraction of minerals. This was a subsidiary amendment, therefore did not afford members of parliament the opportunity to discuss the merits of such powers whose obvious ramification was more alienation of pastoral land.

<sup>5</sup> Adhi, G.D (2001) The Role of County Council in Management of Trustland in Isiolo. A Workshop Report of Waso Trustland, 22 August.

curb illegal allocation of trust land in Maasai areas, the situation has been worsening rather improving. The objective of the Act is to enhance collective holdings of land through group ranching, however, due to the weakness of the law and apparent laissez faire approach by the policy makers, groups are sub-dividing land and selling tracts of land to individuals. The emerging scenario of subdividing group ranches was initially resisted by some government agricultural planners but practice has become the norm rather than the exception.<sup>6</sup>

There is also the issue of boundaries. The European colonial powers and Abyssinian Emperor Menelik agreed to partition and place the predominantly pastoralist-inhabited territories in the region under their respective domain. The Somali, Maasai, Boorana and several indigenous groups were divided into two or more states which meant that some groups would have lost access to some important 'common pool' resources like wells (e.g. Boorana's Tula Sagalan wells complex in Ethiopia).<sup>7</sup> This arbitrary redrawing of the existing resource boundaries had negative implications on pastoralist' long-term land and resources rights. Access to such resources, often depended on the goodwill of a particular government institution rather than the customary networks such as clans and kins on the other side of the border. However, the most critical boundary issue today is that of administrative levels within a country rather than between states. In pastoral areas in the north, grazing lines were drawn to restrict movement of pastoralists within designated areas. For example, the Galla-Somali line was used to demarcate the land resources boundary between Boorana and

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<sup>6</sup> Mwangi, E (2006) Subdividing Commons: The Politics of Property Rights Transformation in Kenya's Maasailand. CGIAR Systemwide Program on Collective Action and Property Rights.

<sup>7</sup> According to Buxton, D (1967) Travels through Ethiopia, p.91, Tula Sagalan (nine famed wells) were "... among the most remarkable things in southern Ethiopia...believed to have been excavated in the distant past, by the ancestors of these same Boran tribesmen." Quoted in Tache, B.D (2008) op. cit. p.16.

Somali.<sup>8</sup> The colonial boundary demarcation in pastoral areas was intended to avoid the cost of administering the vast and factitious region. Until the 1950s successive government did not address development needs of the pastoral regions, including livestock production. In this respect, A. Castagno observed the situation as follows: “There were no serious attempts made to alleviate the situation by improving pastures and by expanding water facilities.”<sup>9</sup> The post independent government followed the same path in demarcating administrative boundaries between communities, mainly for political reasons, without taking into account established customary resource borders. Numerous conflicts in pastoral areas are caused by such arbitrary actions that may have served the political interest of one group against another.<sup>10</sup> The situation is exacerbated by inter-ethnic or intra-clan competition for ‘our own’ location, division, district and even province. National and party politics play a key role in this seemingly emotional charged.

Another major factor that has undermined pastoral land tenure rights is the increased level of encroachment by agriculturalists and other land users. In many predominantly pastoral districts and areas where ‘oases’ of wet land is to be found, government and other land users tend to take land up. Many pastoral areas have experienced conflicts over competing land use between farmers and pastoralists.<sup>11</sup> The encroachment of land in Maasai

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<sup>8</sup> Oba, G (1996) op.cit.p.130. There was a heated debate in the British official circle from 1918 as to justifiability of moving the Boorana from Wajir as part of controlling the borderlands between Boorana and Somali. At the time the British colonial administration was under pressure to control westward influx of the Somali.

<sup>9</sup> Castagno A.A (1965) op.cit.p 170.

<sup>10</sup> Wario, H.T (2006) Historical and Current perspectives on Inter-Ethnic Conflicts in Northern Kenya. Norwegian University of Life Sciences, Norway; Roba,S.B (2007) Land Ownership and Conflicts in Isiolo District, Kenya. See also Comparative Research on Crossborder Conflicts in the East African Region-Case Studies of Ethiopia, Kenya, Sudan and Uganda, 2006. UNECA., Addis Ababa.

<sup>11</sup> Fratkin, E (2001) East African Pastoralism in Transition: Maasai, Boran, and Rendile Cases, pp 1-25. African Studies Review, Vol.44, No.3. See Ndaskoi, ole N (2005) The Roots Cause of Maasai Predicament. Widespread 178

is particularly historical dating back to the colonial days. As early as 1913 an influx of farmers, particularly Kikuyu, moved into Maasailand and started cropping in higher potential areas, including those on the slopes of the Ngong Hills, the foothills of Mount Kilimanjaro, Ol Donyo Orok near Namanga,, and Nguruman on the western wall of the Rift Valley. Although the area of land involved was small, it nevertheless denied the herders critical dry-season fallback grazing.<sup>12</sup>

Over the past two decades in particular, conservation policy and politics have put pastoralists on the losing side as their land is literally ‘padlocked’ to avoid what is popularly framed as human-wildlife conflicts.<sup>13</sup> Wildlife conservation did not seem to appeal to colonial administration considering that it started 50 years after it established its rule. However, when it began to consolidate wildlife reserve policy, the administration targeted the pastoral rangelands, which were vast and home to a variety of flora and fauna. Under the National Parks Ordinance of 1945, the Kajiado Maasai lost access to two areas bordering the District: Nairobi National Park and Tsavo National Park. This Ordinance also established a game reserve in Amboseli (3248 km<sup>2</sup>), and game conservation areas at Kitengela (583 km<sup>2</sup>) and West Chyulu (368 km<sup>2</sup>), restricting the use of these areas by the Maasai. As more grazing lands were fenced off for national reserve and game parks, the communities began demanding

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conflicts were reported in Mai Mahiu in Naivasha areas between Maasai and Kikuyu. See also Roba, S. B (2007) *ibid*, cases of Boorana, Meru and others in Isiolo

<sup>12</sup> Grandin, B.E (1987b) Land tenure, sub-division, and residential changes on a Maasai Group Ranch. *Development Anthropology Bulletin* 4 (2) 9-13. See Also Grandin, The Maasai Socio-Historical Context and Group ranches, FAO Documents Repository. FAO Publication index 2009.

<sup>13</sup> Omondi, P (1994) *Wildlife-Human Conflict in Kenya: Integrating wildlife conservation with human needs in the Maasai Mara Region*. Ndaskoi, N (2001) *Maasai Wildlife Conservation and Human Need: The Myth of “Community-based Management.”*

access to pastures in protected areas.<sup>14</sup> There are about sixty-five national reserves, game parks and wildlife sanctuaries covering almost 50,000 square kilometers or 8% of the Kenyan land mass.<sup>15</sup> Most of these protected areas are located in pastoral districts. Population growth and scarcity of pasture in marginal areas contiguous to wildlife reserves have necessitated pastoralists to fallback on these lands, resulting in conflicts with authorities. On many occasions, the wildlife, by straying out of their reserved areas, cause damage to communities by preying on their livestock. Conservation has thus become very contentious, necessitating proper policy reforms.<sup>16</sup>

In recent years, there has been a proliferation of ecotourism projects in pastoral areas, especially in Maa speaking areas of Maasai and Samburu. In pastoral areas ecotourism has become part of the tourism industry 'cashing in' on natural environment romanticised as safari destinations. The controversial marginalisation of local communities by more organised actors in the industry such as hotels, tour agents, government bodies and even local county authorities are blamed for land and environmental pressure on pastoralists.<sup>17</sup> The industry has exponentially flourished in recent years and is among the leading sources of revenue for government and business. According to the Ministry of Tourism, the tourism/ecotourism industry accounts for 10% of Gross Domestic Product (GDP) making it the third largest

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<sup>14</sup> Campbell, D.J.; Gichohi, H.; Mwangi, ; Chege, L (2000) Land use conflict in Kajiado District, Kenya. Land Use Policy, Vol.17, Issue 4.

<sup>15</sup> Mwanjala, J.M (2005) An Overview of Wildlife and Tourism Management in Kenya. A Presentaion to the 3rd African Conference on Peace through Tourism. Lusaka, Zambia.

<sup>16</sup> Woodroffe, R.; Thirgood, S.J.; Rabinowitz, A. (2005) People and Wildlife,

<sup>17</sup> Tourism Reform in Kenya. Development of Maasai Ecotourism Principls. Maasai Environmental Resource Coalition (MERC). <http://maasairoyaladventures.com/mercindigenous.htm>. Accessed 19/04/09. See also Elliott, J., Mwangi, M.M (1998) Developing Wildlife in Laikipia, Kenya. Who Benefits?

contributor to the economy following agriculture and manufacturing.<sup>18</sup> The Ministry states that it earned approximately 850 million US dollars or 65.4 billion Kenyan shillings in 2007.<sup>19</sup> It is also said to be the third largest foreign exchange earner after tea and horticulture. Pastoralists are reportedly not enjoying the wealth created by tourism industry.<sup>20</sup> Financial and economic benefits aside, the ecotourism industry has deeply encroached on pastoral rangelands, diminishing access to pasture, water, woods, and other resources that are the lifeline of communities. In communities such as Boorana, Samburu and Rendile, where the concept of ecotourism is a new phenomenon, unlike Maasai, tensions are already rising as the 'news' trickles through regarding impending loss of grazing lands.<sup>21</sup> Former settler ranchers such as the current owners of Lewa Downs Conservancy, which also runs the Northern Rangelands Trust, have been steadily expanding into pastoral areas.<sup>22</sup> According to Lucy Hannan, a researcher who has been critical of the tactics employed by conservancy groups, found the notion of community-based conservations as being harmful to futures of the pastoral community unless the interests of the locals become paramount. She elaborately described the emerging scenario as follows:

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<sup>18</sup> Ministry of Tourism. Facts and Figures. [http://www.tourism.go.ke/ministry.nsf/pages/facts\\_figures](http://www.tourism.go.ke/ministry.nsf/pages/facts_figures). Accessed 19/04/09

<sup>19</sup> Ibid.

<sup>20</sup> Nyambura-Mwaura, H. Wild Game herds of Serengeti: Wonder or Worry? Reuters, 08/01/2007. One of the local community member lamented that the Maasai do not benefit from the industry. He stated that: "The local people are not benefiting at all, we are being exploited. The revenue collected is not being pumped back," said Peter Sapalan, a Maasai employed by Governor's Camp.

<sup>21</sup> Adhi D.G (2003) Pastoralists Under Siege: Expansion of Ecotourism in Rangelands. A Presentation at Workshop for Local NGOs on 19 May at Northern Resources Centre, Isiolo. Northern Rangelands Trust is an NGO founded by the Lewa Downs family that operates the biggest ecotourism projects in areas that now transcend Isiolo, Meru, Samburu and Rendile.

<sup>22</sup> For more information about these projects see the website of the Northern Rangelands Trust, <http://northernrangelands.wildlifedirect.org/category/communities/>



White settlers are a minority group with disproportionate access to land, wealth and influence, who are feeling pressure to establish good relationships with their pastoralist neighbours, in order to retain huge swathes of land originally acquired through the colonial system. Community based ecotourism is one of the ways forward; but there is enormous imbalance between the two groups. The obvious vulnerability of indigenous communities within this relationship is their lack of political and economic standing, and the ease with which they can be exploited. The Lewa conservation vision incorporates a huge area of land known as the Northern Rangeland Trust, and is a good example of how diverse the notion of 'community' can be. It includes the Mugokogodo and Laikipia Masai, the Borana, Rendile, Samburu and Turkana pastoralist minorities.<sup>23</sup>

The land reform issues in pastoral areas have not received adequate publicity in mainstream institutions such as parliament, press and other forums but there is currently better understanding and recognition across the spectrum, The Government which has previously been adamant in ignoring pastoral land question later initiated a broad-based policy that recognises the inappropriateness of current land tenure frameworks.<sup>24</sup> This is a pointer that communities have for an inordinately long time been exposed to policies that have negatively affected their land rights. A new ministry has been established since 2008 to specifically focus on development of pastoral regions of Kenya.<sup>25</sup> Such recognition is important in setting future agenda for legal and institutional changes in pastoral areas. Some national and local Non-Governmental Organisations have made significant contributions by highlighting the concern of the pastoralists, particularly during national reform processes. However, both Maasai and Boorana areas have tried to deal with some specific cases of historical and contemporary nature, as part of the continuous land struggles.

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<sup>23</sup> Hannan, L (2008) *Trouble in Paradise: Tourism and Minorities. A Kenya Case Study*. State of World Minorities 2008. Climate change Special, events of 2007. Minority Right Group, London.

<sup>24</sup> Draft National Policy for Sustainable Development of Arid and Semi Arid Lands of Kenya. See part 4.1.6 Reviewing Land Tenure Policy. Republic of Kenya, December 2004.

<sup>25</sup> Ministry of Development of Northern Kenya and other Arid Lands.

## 7.2 Contemporary Maasai Land Campaigns

On one side of the fence line, the farmed grass grows thick and trembles in the wind. On the other side, the ground is nearly bare, chewed down in places to the rocky topsoil. In between are splintered fence poles and scattered strands of electric wire that, until last month, closed off a 20,000-hectare central Kenyan commercial ranch from the communal grazing lands of Maasai herdsmen.<sup>26</sup> TIME Magazine, 2006.

The land struggles of the pastoral communities such as Maasai are as old as the state of Kenya. As has been illustrated in Chapter 3, the Maasai did not meekly resign themselves to their fate when the second eviction was carried out by the colonial administration in 1911. They fought back in the corridors of courts, although they did receive justice they had sought in respect of the land in Laikipia. Nevertheless, their action sowed the seed of enduring determination to fight for land rights. Unfortunately, for them the wheel of justice grinds incredibly slow, even today the struggles continue. After 1911 the next time the Maasai took up the matter was in 1932 during the review process of the Kenya Land Commission. The Maasai leaders, including Legalishu (Ol-le Gelesho/ Gilisho who was a signatory to both Maasai Agreements) gave evidence before the Commission and petitioned their loss of land.<sup>27</sup> The Commission's attitude to Maasai land was to say the least, dismissive. In its Report, the Commission had stated that compared to Kikuyu, Maasai land was "entirely of minor character" and therefore did not hold as much significance.<sup>28</sup> As I have discussed in Chapter 5, the Commission refused to address the Maasai land claims ostensibly because the Maasai

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<sup>26</sup> Quoted from the Time, a weekly magazine based in United States of America, 19<sup>th</sup> September 2004.

<sup>27</sup> Hughes, L ( 2006) Malice in Maasailand: the historical roots of current political struggles. The Ferguson Centre fo African and Asian Studies. Open University,Uk. Ole Gilisho gave his evidence in Naroki on 19 October 1932.

<sup>28</sup> Kenya Land Commission, Cmnd 4556, para. 675.

had more land than they required. It actually proposed that Maasai should cede some of their land to “other tribes or communities who may require scope for expansion or agricultural development.”<sup>29</sup> The petition was lost.

The next viable opportunity came another 30 years later at the Lancaster House Constitutional Conference. The Lancaster talks were in three phases i.e. 1960, 1962 and 1963. The second Conference that took place in 1962 was the most critical phase where the constitutional frameworks for independent Kenya were being negotiated, including the structure under which land management was to be placed.<sup>30</sup> In the Conference the Maasai were represented by a delegation led by Justus Ole Tipis and John Ole Konchellah who were members of Legislative Council (Legco). In a Memorandum to the Conference the Maasai leaders demanded redress of the historical land question in relation to the 1904 and 1911 Agreements.<sup>31</sup> A special Committee was formed to deal with Maasai land but there was no evidence it made any concrete proposal which satisfied the Maasai delegates.<sup>32</sup> In fact the Maasai, in protest, refused to sign the final agreement made at the end of the Conference and instead walked out.<sup>33</sup> It appeared that the KANU leaders and the British Government had their priority elsewhere; thrashing out political structure that suited African leaders and protection of the Europeans land property respectively. According to Gary Wasserman, the farmers and European delegates representing the interest of settlers made sure their land interests took

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<sup>29</sup> Ibid, para.682.

<sup>30</sup> Ghai, Y.P., McAuslan, J.P.W.B (1970) op. cit. p. 201.

<sup>31</sup> ‘Memorandum on Maasai Land in Kenya’. Quoted in Hughes, L (2006) op.cit.p.4

<sup>32</sup> See Parliament of Kenya: History and Development. The Second Lancaster House Constitutional Conference. [http://www.bunge.go.ke/parliament/history\\_steps\\_2\\_independence.php](http://www.bunge.go.ke/parliament/history_steps_2_independence.php). Accessed 23/04/2009.

<sup>33</sup>Ndaskoi, N (2006) The Roots causes of Maaasai Predicament.

precedence over demands by others. This was not just about security of title and getting compensation for those who were leaving but also interest in future agrarian policy.<sup>34</sup>

The political competition among the mainstream parties was so intense and fluid that it was easy to manipulate the leaders into submitting the demand of the colonial negotiators regarding sensitive land issues. Some African leaders used land as a stump card to derive better deals for themselves in future political arrangements. As far as the Maasai land question was concerned, the bet paid off for the British Government and centralist KANU leaders. It was easy for KANU to sweep the Maasai demand ‘under the carpet’ in exchange for political favours from the departing colonial government. After all, if the KANU stalwarts dithered, the British could still use regionalists KADU, who had initially got support from settler community wary of KANU’s ‘nationalist’ stance. Both ways the land issue was posed to serve the interest of the dominant settler groups and emerging African political and economic bourgeoisie. Nasieku Tarayia, a Maasai lawyer and women rights activist analysed the outcome of the Lancaster House Constitutional Conference, stating as follows:

The African leaders were stream-rolled into granting enormous constitutional and economic concession to European settlers in exchange for a speedy transfer of political power-to disappointment of the African masses, and more, particularly, the Maasai. Recognition of colonial land titles became the bedrock of transfer of political power.<sup>35</sup>

Parselelo Kantai, a Maasai Journalist who has written widely on land and environmental issues in Maasailand, vividly describes the Maasai contemporary struggles as follows:

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<sup>34</sup> Wasserman, G (1976) Politics of Decolonization: Kenya Europeans and Land Issue 1960-1965, p.101. London,. Cambridge University Press.

<sup>35</sup>

Moving forward fifty years, the Maasai arrived at decolonisation in early 1960s in much the same way as they entered the twentieth century; weakened once again, this time by severe drought that had killed off two-thirds of their stock and consigned many to famine relief, they had begun to see the patterns of their history with sharper clarity.”<sup>36</sup>

The epigraph stated above of the TIME magazine was from an article written at the height of a confrontation between Maasai on the one hand, and the Government and European ranchers in Laikipia on the other. This was in 2004, another milestone in Maasai land campaigns 40 years after the Lancaster House Constitutional Conference. The article figuratively contextualized the contrasting situation between the sprawling ranches and desolate grazing land from which Maasai herders eked out a living. Driven to the despair by drought and dying stock, the Maasai forced their way into the lush ranches in search of pasture. Alarms were raised and the government sprung into action to mainly protect the barricaded ranchers. The Maasai, in a bid to showcase their historical claims, marked the 100 years since the 1904 Agreement, that heralding the loss of land. Numerous community members participated in organised demonstrations in August 2004. The popular thinking at the time was the lease for ceded land was for 99 years and therefore the land was supposedly to revert to the Maasai owners upon the expiry of the lease period. The government had a different view. Although he did not produce any evidence, the then Minister for Lands, Amos Kimunya, argued that the lease was for 999 years and “the Maasai will have to wait a lot longer”<sup>37</sup> The Minister, displaying an aura of arrogance, asked the Maasai that “they should come back in another 900 years and we can discuss the matter...” The attitude of the Minister was not overly shocking to the Maasai and larger public because it was a mere restatement of government policy since independence to dismiss claims made on an historical basis. The first

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<sup>36</sup> Kantai, P(2007) In the Grip of the Vampire State: The Maasai Land Struggles in the Kenyan Politics. Journal of East African Studies, pp.108-109.

<sup>37</sup> Quoted in Otieno Aluoka (2004) Maasai Demands Return of Ancestral Lands. IC Publications Ltd.

President Jomo Kenyatta in a rather curious gesture that was devoid of a balanced view regarding land, reassured the settlers by giving them personal guarantee. In his own words, he stated; “I am a politician, but I am a farmer like you... I think the soil joins us all and therefore we have a kind of mutual understanding.”<sup>38</sup> As the Time Magazine aptly describes, the herders in Kenya continuously faced deprivation long after the departure of the colonial administration empire, because the succeeding government of Kenya was adamant in preserving the status quo. To make his compelling case, Kantai adds the political dimension of the recent development in Maasailand in the context of Kenya’s broader political discourse. He stated the heightened expectations as follows:

Under the regimes of Jomo Kenyatta and Daniel arap Moi, Maasai were denied the political space in which to revive their claim to the ‘lost lands’. Public silence over these years did not betoken acquiescence, however, and within a few months of the election defeat of the Kenya African National Union (KANU) in December 2002, Maasai protagonists were gain stirred into action, with expectations that the ‘new dispensation’ of Kenya politics might afford opportunities to revisit a distant but still potent history”<sup>39</sup>

The situation in Kenya heavily contrasts with other developing former colonies in Africa and the East African region. According to Liz Alden-Wily, at least thirty countries in Africa<sup>40</sup>, have begun land tenure reform processes during this period, and the situation in Kenya is still in a state of flux and confusion. Although the debates about legal and policy reforms started in earnest much earlier than most of these countries in early 1990s, the achievement on critical issues like land is barely noticeable. The neighbouring East African

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<sup>38</sup> Kenyatta addressed a sizeable crowd of European settlers in Nakuru, the de facto capital city of the settler community in the sprawling Rift Valley region. The gathering was surprised and charmed by Kenyatta apparent “transformation” from what they had all along believed was a revolutionary “devil”. See Widner, J (1993) *The Rise of a Party-State in Kenya: From “Harambee” to “Nyayo.”* University of California Press.

<sup>39</sup> *Ibid*, p.109.

<sup>40</sup> Alden-Wily, Liz (2003) *Community-based Land Tenure Management: Questions and Answers about Tanzania’s new Village Land Act, 1999.* IIED, Issue Paper No.120, p.2.

countries such as Uganda and Tanzania<sup>41</sup> have made strides in addressing land policy and legal reforms, while Kenya has been missing out on crucial transitional opportunities since that time. Professor Gary Wasserman has correctly and assertively shown in his writings on Kenya's political transition how the so called 'nationalists' betrayed the trust bestowed upon them at the altar of the political expediency and self-aggrandisement. His writing on Kenya's decolonisation period aptly describes how the outgoing and incoming political elites reconfigured the state of Kenya at the country's independence into a sheer transfer of powers. Even the Presidential Commission of Inquiry into Land Law System (Njonjo Commission) confirmed Wasserman's assertions when it stated:

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy. This however did not materialise. Instead what happened was a general re-entrenchment, hence, continuity of colonial land policies, laws and administrative infrastructure."<sup>42</sup>

As indicated in this study the pastoralists are the most disadvantaged group in Kenya as far as land and resources development is concerned. Many factors that have been triggered mainly by external interventions have contributed to the marginality of the pastoralists in the Kenyan state. One observer summarised the current condition of pastoral peoples as follows:

Pastoralist societies face more threat to their way of life now than any previous time. Population growth; loss of herding to private farms, ranches, game parks, and urban areas;

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<sup>41</sup> The Government of Tanzania established the Presidential Commission Inquiry into Land Matters, in 1991, headed by its well known critic and land rights advocate Prof. Issa Shivji which did an extensive collection of views throughout the country. The Community, though, later developed cold feet in implementing the Shivji Report, borrowed heavily from it in formulating a parliament approved national land policy in 1995. Two major statutes, Village Land Act, No.7 of 1999 and Land Act, No.6 of 1999 were enacted to comprehensively apply to land in Tanzania's Mainland. Zanzibar has its own set of laws to take care of the autonomous Island.

Uganda had a comprehensive constitutional in 1995 which provided for land and tenure reform principles. Uganda's Land Act, 1998 attempts to install an accessible and participatory framework of land administration through elected boards and tribunals.

<sup>42</sup> Republic of Kenya(2002) Report of the Commission of Inquiry into the Land Law System of Kenya.p.30, para.90.

increased commoditisation of livestock economy; out-migration by poor pastoralists; and periodic dislocations brought about by drought, famine, and civil war.”

The grim picture about loss of land due to accelerated privatisation of common resources reflects the reality of current situation of pastoralists in Kenya. A well documented example is the Maasai case in Kajiado District who have been pushed to the dry margins of the district as massive influx of townspeople encroach on their grazing land.

### **7.3 Land Issues in the Boorana sub-region**

A study commissioned by the Government-run and the World Bank-funded Arid Lands Resources Management Project, Land Tenure and Resource Management in Kenya<sup>43</sup> presented a report that underscored how insecurity has negatively affected access to resources such as grazing. The failure of the government to intervene by implementing relevant programmes to support pastoral communities has forced them to resort to their own devices.

The Report broadly expressed the situation as follows:

“It is an established fact that inter-ethnic feuds over a dwindling resource base and subsequent renewal of territorial land claims and counter claims among different ethnic groups are prevalent in the arid lands of Kenya (examples of Tana River, Baringo, Samburu, Isiolo and Marsabit). Consequently, a state of insecurity has emerged, thus restricted, and even totally blocked access to common resources by certain pastoralist groups. Insecurity has distorted the original grazing patterns and forced pastoralists to resort to environmentally unsustainable resource use systems.”<sup>44</sup>

In Isiolo, the situation is even more complicated as competition among multiple land users from disparate background exerts pressure on shrinking land resources. While the Boorana-Somali conflicts over grazing rights are historically recorded, the new entries into the fray are the Meru farmers. With the setting of intense competition between various land

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<sup>43</sup> The Report entitled Policy and Legal Framework on Pastoral Land Tenure and Resource Management in The Arid Lands of Kenya was written in February, 1999.

<sup>44</sup> Ibid, 18.



users, claims have been either based on historical land rights, particularly by pastoral groups, or statutory 'laissez faire. rights of owning property 'anywhere in Kenya' normally made by agro-farmers. In the case of *Kenyanga and Three Others v Isiolo County Council*, the two paradigms (historical versus statutory) clashed. In a long and acerbic ruling that was definitely directed at the pastoralists, the Presiding Judge, Alex Etyang had this to say:

There is a class of people in this country, as it is clearly demonstrated in this suit, which believes that certain areas of this country, Kenya, should exclusively be inhabited or occupied by a particular community of people so as to promote the welfare and well being of that community. This class of people believes that Kenya should be divided into convenient units to be occupied exclusively by members of its community. An example of this class are the plaintiffs in this suit who hold this stupid notion that the suit land ought to be declared by a court of law, in the present Kenya, as an area exclusively to be occupied by them, and everybody else is a trespasser who ought to be removed from that area. To this class of people, including the plaintiffs and any other person whosoever and wheresoever's, I say this: any intended division of this country into tribal or community in order to promote particular tribe or community welfare, well being of tribal interests, be they of a commercial or political nature, would be unconstitutional and unacceptable.<sup>45</sup>

The ruling of the court was not surprising because the idea of pastoral people owning land was still held in apprehension by the majority of Kenyans who view pastoralism as a practice that is inimical to national development. The conservancy groups have for a long time adopted similar approaches in claiming land for exclusive ecotourism ventures. It is hardly surprisingly that conservancy groups and big ranchers are seemingly unstoppable today.<sup>46</sup> The conservancies are private enterprises enjoying full protection of the government security agents, and heavily funded by international agencies and Western corporate and

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<sup>45</sup> *Kenyanga and Three Others v Isiolo County Council*, Civil Suit number 11 of 1995 at Meru High Court.

<sup>46</sup> The conservancies have its roots in the sprawling ranches in Laikipia plateau where settlers reoccupied the land from which Maasai pastoralists were evicted following the 1911 Maasai Agreement. One of the conspicuous and contentious conservancies, Lewa Wildlife and its subsidiary, Northern Rangeland Trust, is owned by Craig family who came a decade after the Maasai Agreement in 1922. The Conservancy which is now being run by the Ian Craig, the well-connected aristocrat of ranching settler ancestry.

individual donors.<sup>47</sup> For example, one of the most established conservancies, Lewa Wildlife Conservancy which initially began as a ranch in 1922 owned by the Craig/Douglas family has since the mid 1990 sprawled into the exotic eco-tourism industry attracting sizable and prized western tourists.

Propelled by this windfall of wildlife prosperity, the family is using its financial power and political connection to expand its wildlife 'colony' to encroach into the prime grazing lands in Isiolo, Samburu, Laisamis and Marsabit through the recently established Northern Rangeland Trust (NRT).<sup>48</sup> The most recent target of NRT are the prime grazing areas of Bisan Biliko/Bulesa in northern part of Isiolo District that Boorana has depended on for generations, especially during dry seasons. A corridor of conflicts has now been opened between Borana and Samburu pastoralists allegedly fuelled by alleged extension of conservancy that is said to overflow into one another's resource border.<sup>49</sup> According to a recent media source the Lewa Wildlife Conservancy through its Trojan horse Northern Rangeland Trust, is pushing the frontier of the conservancies its running in Samburu into the Boorana grazing areas of Kom, Nyachiis, and Sabarwawa. The East African Standard carried the report as follows:

In a month, 12 people have been killed in ugly battles between nomadic communities in Isiolo District. A herder in Merti searches for pasture for livestock. It is found the violence, caused by competition over pasture and water, and could get out of hand, as drought pushes herders to move to areas occupied by communities regarded rivals. And a local conservancy has been

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<sup>47</sup> For example, according to the Daily Telegraph of the UK dated 29 September, 2008, Lewa Conservancy, one of the leading establishments has a well oiled donor basket such as; USAID, Task Trust(UK), Sandstorm, WSPA, WWF, etc. Task Trust alone has so far funded Lewa to the tune of US\$ 10,000,000. The other major conservancies are Solio Game Reserve, Ol Pejeta Conservancy and Borana Ranch..

<sup>48</sup> Northern Rangeland Trust which is managed by Ian Craig, was inaugurated in a ceremony presided over by the US Ambassador in January 2005. Its initial projects were funded by the USAID to the tune of US\$ 400,000.

<sup>49</sup> See Oba, G (1996) op.cit. Shifting Identity, pp.117-131. He describes 'resource borders' simply as water and pasture envelop that exists in a particular pastoral setting which could be ascertained as belonging to a specific community but is in a state of flux depending on the ability of the neighbours to oust one another hence the shifting identities.

drawn into the row, with Kenya National commission on human Rights moving in to probe claims its scouts were involved in the chaos.<sup>50</sup>

This particular phenomenon of ‘eco-tourism’ that is increasingly spreading in pastoral rangelands in some parts of northern Kenya and Maasailand may not be surprising. There is a considerable historical antecedent of destructive practice by the European adventurers at the dawn of colonial settlement. For example, pioneer colonialists Hugh Cholmondeley, the Third Baron of Delamere (later Lord Delamere, and the patriarch of the well-established settler clan in Kenya) travelled across from Somaliland through to Marsabit in 1897, where he engaged in elephant poaching for financial gain..<sup>51</sup> The settlers used their influence to fence off a swathe of land, especially in wildlife rich pastoral rangelands. Jeffrey Gentleman, writing in the New York Times, in 2006 following two separate incidents of murders on the family’s two expansive ranches, retraced its Kenyan ancestry as follows:

That settler, Hugh Cholmondeley (pronounced CHUM-lee), the third Baron of Delamere, took chunks of the Rift Valley from local (and illiterate) Masai tribesmen in the early 1900s, turning the area into playground for white. He rode horses through bars, and shot chandeliers at fancy hotels and went on to become a leading dairy farmer and politician. Nairobi’s main street was named Delamere Avenue until independence in 1963.”<sup>52</sup>

There is no argument about economic benefits of tourism and its contribution to national state revenue. The question is how much damage it causes to land and environment of the communities, especially in pastoral areas where most of those business projects are located. There is an obvious imbalance between economic benefits derived from tourism and land and human rights of the communities. The Minority Rights Group in a report mentioned

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<sup>50</sup> See East African Standard, 13/10/2008.

<sup>51</sup> Trzebinski, E(1985)Kenya Pioneers, p.27

<sup>52</sup> The New York Times, 5,September, 2006. The murder incidents referred to by the NYT occurred in separate occasions in 2005 and 2006. In April, 2005, an undercover ranger working for the Government’s Kenya Wildlife Services, Samson Ole Sissina was allegedly murdered by Thomas Patrick Gilbert Cholmodeley, the Great Grand

above contends that, ‘...tourism industry too often leads to land loss, destruction of traditional livelihoods, impoverishment of indigenous communities and violations of human rights.’<sup>53</sup>

#### **7.4 Policy Debates: Fixation or Vision?**

This study has so far demonstrated that successive Kenyan governments used their unfettered powers to create a political and economic structure that marginalised the majority of the indigenous people. Systemic legal and institutional mechanisms were created to facilitate colonial dominance and subjugation of the pre-existing land rights of various communities. The imposition of the British rule established entirely new structures based on a command state, which included a variety of legal traditions, rules, and administrative practices alien to the natives. For close to four decades debate about land reform was either coercively thwarted or deliberately ignored by government, sometimes with the tacit support of donor countries or multilateral organisations. Political dissent was heavily repulsed especially during the height of KANU regimes from the 1960s to 1980s.

When the Government finally agreed, after well-coordinated campaigns by Civil Society Organisations (CSOs), Non-Government Organisations (NGOs), and the donors to a comprehensive review process, many Kenyans supported the agenda. Many organisations mobilised communities, especially in rural and pastoral areas and provided them relevant information for effective participation in the process. The government set up a secretariat for National Land Policy Formulation Process, which was based at the Ministry of Lands in Nairobi.<sup>54</sup> The donors led by the Swedish International Development Assistance (SIDA) and

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<sup>53</sup> Minority Right Group, *supra* note 23.p.29.

<sup>54</sup> National Land Policy Secretariat, Ardhi House, Nairobi

Britain's Department of for International Development (DFID) provided financial backings for the process. Much of the activities regarding official consultations were almost entirely concentrated in Nairobi. Except initial publicity and regional workshops, public participation during the formulation was limited. Moreover, there were a good measure of input from NGOs and scholars, whose influence is clearly reflected in the final draft.<sup>55</sup> To fill the gap of public outreach, organisations like Kenya Land Alliance provided alternative communication platform to some rural communities.<sup>56</sup> To that extent, the process was fairly and significantly successful. At a philosophical and practical level, the mere attempt to formulate the 'first' national land policy was in itself a bold move on the part of the government.

The 'Draft' National Land Policy was launched in May 2007 but before the full implication of the policy and proposals reached the public domain for discussions and further deliberation, the wave of general elections, which were due at the end of that year, eclipsed whatever momentum National Land Policy had gathered. The Draft Policy was however widely distributed by Non Governmental Organisations and other civil society groups who took part in the process. It is worthwhile to make a brief overview and assess whether the critical issues at the heart of this study have been dealt with by the proposed policy. The other important question is whether Kenya, with the draft policy already in place, has broken the gridlock that has stymied the prospect of land tenure reforms.

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<sup>55</sup> In fact four out of the six Thematic Groups that facilitated consultations, review and formulation of policy were drawn from experienced representatives of civil society. Kenya Land Alliance even independently engaged land tenure experts whose views were incorporated in the final inputs. A number of prominent land law and rural land development experts such Prof. Okoth-Ogendo, Prof. John Syanga, were widely consulted during forulation process.

<sup>56</sup> Kenya Land Alliance is a network of organisations that focuses on land issues in Kenya, particularly among marginal groups. The organisation was at the forefront in campaigning for land policy reform and published information kitties to keep the public informed on major thematic issues such as historical injustices against pastoralists, gender inequality etc.

In general terms, the proposed policy has successfully demystified the notion expressly and implicitly and propagated that land is an untouchable and explosive issue that would shake the country to the core. To a great extent many people will now view that as an excuse not to resolve many issues pertaining to land, the government creates ad hoc commissions and committees every time land crises arise. The policy unequivocally restated the fact that 'Kenya has not had a clearly defined or codified National Land Policy since Independence.'<sup>57</sup> This in a way is an indictment of the top political leadership who denied for many years that Kenya required or lacked a policy framework. It was also a vindication of those who had consistently campaigned for such a policy. The draft policy adequately recognised the major land issues including those that are of critical importance to pastoralists, such as historical injustice, restitution, communal land tenure and security.

One of the fundamental features of the draft policy is the stated vision, values and principles of equity, justice, security, sustainability, transparency, inclusiveness, and access to information.<sup>58</sup> Perhaps, the most striking and honest admission made in the draft policy was about the origins of land problems in Kenya, particularly the failure by the post-independent governments to take advantage of that early opportunity to resolve colonial land question. This is succinctly stated as follows:

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonisation process of the country represented an adaptive, co-optive and pre-emptive process, which gave the new power elites access to European economy.<sup>59</sup>

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<sup>57</sup> Draft National Land Policy . National Land Policy Secretariat, Ministry of Lands.

<sup>58</sup> NLP, *ibid*, paras.3, 7, 8.

<sup>59</sup> NLP, *ibid*, para.25

Again, the critical issues that lie at the heart of colonial and post-colonial land tenure regimes which was mostly based on principles of individualisation and privatisation was pointed out as 'wanting' in some aspects. The recommendation under para.73 may eventually recognize and restore legitimate rights of spouse and children, which have been diminished under private registration. There are many cases where some members of a family were denied rights in land because one of its members registered the land in his or her name before the others. The legal menace that disinherited many in Kenya is exemplified by the widely cited case of *Esiroyo v. Esiroyo*,<sup>60</sup> and *Obiero v. Opiyo*.<sup>61</sup> In both cases, registered rights overturned the customary rights to part of family land.

If the National Land Policy endorsed and necessary legislations were enacted, such anachronistic provisions as currently contained in the Registered Land Act that makes first registration of land an absolute sanctity<sup>62</sup> should be repealed. Furthermore, the effect of the registered Land Act is that an extended family is legally restricted to own land in common as no more than five persons can be registered as co-proprietors.<sup>63</sup> In the context of an African family and the preponderance of its customary values and practices, such exclusive and individualised notion of property can cause damaging social disruption and disharmony.

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<sup>60</sup>*Esiroyo v. Esiroyo* [1973], E.A. 388.

<sup>61</sup>*Obiero v. Opiyo* [1972], E.A. 227

<sup>62</sup> Registered Land Act, 1963, Chapter 300 Laws of Kenya. The Act is generally perceived as an embodiment of land laws in Kenya and was promulgated at independence to consolidate all the fragments of laws used to entrench private landholdings.

<sup>63</sup> See s.101 (3) and (4) of the RLA, 1963.

However, the draft policy has serious shortcomings that could immeasurably compromise its good intention. The crafters of the draft policy used a broad brush in approaching the issues. While land is a common problem in the whole country, and a national strategy may be desirable, there should have been sectoral -specific and prioritised approach rather than the one-size-fits-all framework. For example, a commission that can separately deal with unsolved historical and increasing complex land question of the pastoralists should have been proposed. In other jurisdictions such as Ghana, the land reform project focus on customary lands, although like Kenya the powerful influence of donors' may be a cause for concern.<sup>64</sup>

One of the major weaknesses of the draft policy is with respect to pastoral land where the recommendations made are vague, generalised, and irrelevant and take an approach of 'business as usual'. The historical land question, which has been the bane of many pastoral land issues in areas like Maasai and Pokot, has not received the serious attention it deserved. Paragraph 53 which deals with restitution states that the 'Government shall develop a legal and institutional framework for handling land restitution' which is clearly a vague statement and does not illustrate how it could be operationalised. In any case, there is no timeframe provided to fast-track compensation and restitution for affected individuals and groups.

Based on this historical watershed the absence of predictable and transparent policy frameworks is hardly surprising. The post-independence approach and attitudes of the ruling elites have been a source of disconcerting 'ethnicised' political rivalries, and was a matter

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<sup>64</sup> Land legal and institutional reforms in africa nad other developing countries are by and large donor funded. Multilateral institutions like the World Bank has been involved in land reform and development aspects since 1960s, most supporting market-oriented policies and programmes. For example countries such as Kenya and Ghana are heavily supported by a corsotium of donors which include, British DFID, World Bank, Swedish SIDA etc.



openly negotiated and bargained between Britain and leaders as preconditions for independence.<sup>65</sup>The abiding principle was to maintain the status quo. A constitutional protection for acquired private property was guaranteed in a more elevated section of the document which, in a contemporary sense, is equivalent to a bill of right.<sup>66</sup> The ‘status quo’ policy in essence implies that successive independent Kenyan governments must ensure respect for the existing laws and institutions that regulate land ownership and tenurial systems.

J. Forbes Munro, in his review of books on land and politics in Kenya asserts that ‘... from at least governorship of Eliot onwards, officialdom worked on the basic premise that the future lay in European settlement without holding any clear ideas about the long term implications of such a policy.’<sup>67</sup> Wassermann further describes how this policy was secured during the independence constitutional settlement.<sup>68</sup> In a nutshell there had never been any commitment to reform land and land tenure policy in Kenya during 40 years of KANU governments, even though the pressure of multi-party politics pressurised former President Moi to initiate reform debates in 1999 with little effect

The historical land question of the pastoral communities has yet to be addressed by the government even though evidence are abundant as to the extent of the struggles and suffering these group continue to face. The laws and administrative policy continue to expose the

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<sup>65</sup> Okoth-Ogendo, *ibid*,

<sup>66</sup> Chapter V, The Independence Constitution, 1963.

<sup>67</sup> Munro, J.F (1968) Review: Land and Politics in Kenya: A Review Article. *Canadian Journal of African Studies*, p.205, Vol.2, No. 2, (pp 203-209). Charles Eliot, the most controversial and unrepentant supporter of European settlement was a Governor from 1900-1904.

<sup>68</sup> Wasserman, G (1973) Continuity and Counter-Insurgency: The Role Of Land Reform in Decolonizing Kenya, 1962-70. *Canadian Journal of African Studies*, pp. 133-148.

common land resources to massive transfer of land to private land owners and corporate investments, leading to diminished livelihood systems for pastoralists. Since independence successive governments have been alienating vast pastoral rangelands for projects that mainly serve the interests of big businesses such as ecotourism and resources mining.

The final chapter of this study summarises the issues that have been identified as being of fundamental importance to Kenyan society, particularly the pastoral Maasai and Boorana communities for whom land still remains their source of livelihood. The concluding chapter stresses the fact that challenges to land tenure reform are monumental and is deeply rooted in historical nuances.

## Chapter 8

### Conclusion

This study commenced at a time of unprecedented social and political instability in Kenya. The year 2008 will go down into the annals of history as the most tumultuous period when the country edged towards political and social turmoil. The gravity of violence left many unanswered questions in its wake. Although many parts of Kenya have been experiencing some level of ethnic violence since the early 1990s, the post-elections violence of 2007-2008 was by far the most critical political dilemma to have shaken the foundation of the state. Professor Makau Mutua, a legal scholar and critic on contemporary governance issues, in an article regarding the 2008 violence stated that; ‘although post-election violence appears to have been triggered by the allegations of fraud, the fundamental cause is the failure of the state to create a viable democratic nation.’<sup>1</sup> As this study has pointed out, most of these violent eruptions have been attributed to the historical land question. As many observers have indicated and this study has emphasised elections had only ‘triggered’ latent grievances over land. The study has put land and land tenure debate in its historical perspective.

In introducing the subject of the study, I emphasised that what lies at the heart of the land question in Kenya, is the issue of unresolved grievances. These grievances can be traced back as far back as the colonial era. At the time the Imperial British Government took control of the territories, each community was autonomous and managed its own affairs. The pre-colonial Maasai and Boorana communities, in common with the other indigenous groups, formed interactive and dynamic configurations, with shared resource borders and settlements

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<sup>1</sup> Mutua, M (2008) Lesson from Kenya: Failures in lasting democratic reform led to this years devastating violence. Chronicle Review, Vol. 54, Issue 36. The Chronicle of Higher Education.

conditioned by adaptation to vagaries of weather and ecology. For millennia, they groups lived side by side, sometimes with overlapping orbits of clans and territories induced by cross-cultural exchange. The study has evidently demonstrated that the Maasai and Boorana communities had developed effective socio-political systems, accustomed to their systems of livelihoods where land and natural resources governance featured prominently.

The British colonial authorities ‘lumped’ those disparate peoples and regions into an entity that later became Kenya. From numerous historical data studied, there is no evidence of the indigenous peoples being consulted or having willingly consented to the formation of political entity based on colonial structure. Instead, the colonial government unilaterally established new institutions and legal frameworks, which were used as the basis for political jurisdiction and control of land resources. Declaration of radical title of the crown as a manifestation of sovereignty equated to ownership of land, which essentially nullified indigenous land rights. Land and land-based resources became the ‘property’ of the Imperial Crown for almost seventy years of colonial rule. Alien notions based on English property jurisprudence were introduced, changing indigenous peoples’ relationship to land. The Africans, as individuals and as members of communities became in effect tenants of the Crown.

Policy of land alienation, which constitutes taking charge of transfer of property, was the cornerstone of colonial rule. The governing authorities became the sole custodians of land and land resources, determining access by individuals and communities. As the Maasai case of the early 1900s has illustrated, the policy was based on unequal power relations. This is especially so when colonial authorities used their force majeure to seize land and expropriate it for the benefit of settler community. Even though in the early phase of the occupation, the British Government was cautious and avoided uncontrolled allocation of land to the European

settlers, it was just a matter of time before the policy alienation became the guiding principle of the colonial rule. This study demonstrates how legal and administrative instruments facilitated dispossession of the indigenous population.

Land was the prime target of the colonial authorities and as such became the main instrument of colonial establishment. The acquired territories were integrated to form a nascent political and territorial entity that later formed Kenya, extensively and radically transforming the pre-existing social and political order. Moreover, the indigenous communities' perception, of land which was shared, based on mutual respect, reciprocity, and inter-generational equity was challenged and distorted. In contrast the colonial authorities viewed land as a 'commoditised' asset to be dominated and exploited for material enrichment. The seventy years of colonial rule was mired in controversies surrounding conditions of land ownership, use and access to land. What began as an external (temporary) intrusion that would terminate with the departure of colonial government, has today become a permanent feature entrenched by laws and institutions.

The Africans though were not sophisticated in the way the western European powers, took advantage of military and industrial revolution of the nineteenth century, still managed to challenge occupation and usurpation of their territories. The Maasai quest for justice in respect of the historical loss of land was arguably unmatched in the British East Africa at the time. From 1912-13 the Maasai challenged colonial Government in the courts in a bid to restore their land rights. The seed sown by the British in taking over Maasai land in 1904 vibrated 100 years later as the Maasai resorted to public court in the streets of Kenya in 2004. The Maasai were convinced that the colonial land leases for Laikipia (the northern reserve to which they were moved after the 1904 Agreement), which was for 99 years had expired in 2004. The Government on the other hand was adamant that the leases were for 999 years.

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Some of the current owners of large-scale land and ranches who have been interviewed did not know the length of their leasehold or details of how their predecessors came into possession of sprawling property. The Maasai sense of loss and betrayal has not dissipated and their case was particularly controversial. The High Court dismissed the case on the ground that the Maasai were not subjects of the crown and therefore could not come before a municipal court. The Court of Appeal upheld that ruling. The attempt by the Maasai to seek restoration of their land rights failed as the courts decided the case on procedural technicalities rather than the substantive issues raised by the Maasai.

As this study has shown throughout the chapters, the weight of history was felt more in the overall land policy which had been brought about by that colonial government. The land policy left an indelible mark in the lives of the society, especially among the pastoralists. I have discussed extensively how laws and regulations were used as instruments of dispossession and alienation. The colonial legal framework radically transformed land tenure arrangements that different communities had always utilised. The dominant European view at the time was that the Africans neither owned land nor had the conceptual capacity to develop tenure regimes capable of defining tenure rights.

Understanding the root cause of contemporary land tenure relations is important in appreciating the challenges that society must address in the process of land tenure reforms. In Kenya these challenges, as we have demonstrated in this study revolved around colonial land tenure conversion of indigenous landholding systems, which has been consistently retained by successive postcolonial governments. I have also demonstrated that the pastoral communities, who were and continue to be on the periphery of colonial and post-independent political and economic order, face intractable dilemmas in view of insecure land resources. The policy of 'benign neglect', which was originally adopted by the colonial governments, has permeated

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contemporary land policy as evidently illustrated by statutory laws such as Trust Land Act, Land (Group Representatives) Act and Land Adjudication Act. Although customary laws have shown some measures of resilience in the face of disruptive formal legal mechanisms, they are becoming increasingly vulnerable.

This study has proved arguments that land tenure regimes have fundamentally remained as they were during colonial time. Many indigenous Africans have their land rights undermined because of the erosion of their pre-existing land rights. The prevailing conflicts among Kenyans, especially the pastoralists, show that government land policy has put enormous pressure on land and land-based resources. These challenges are deep and require a comprehensive review of the past land tenure policies and practices. The situation in pastoral areas in particular calls for urgent policy and legislative actions. This study has mainly focused principally on the diagnosis of these historical problems and how they have permeated the contemporary land tenure regimes. Land-based grievances have served as a rallying point for political agitation by various communities in demanding redress in new legal and constitutional dispensation. Unresolved land grievances remain as the 'sticking points' in the efforts of forging a tolerable society. The state holds enormous power over land resources, particularly in the so-called government (public) and trust lands. Not only was the architecture of the colonial political and economic structures left intact but the ruling elites nurtured and perpetrated the situation to suit their reconfigured interests based on regional, ethnic, class and other gradations.

In recent decades, there has been a universal clamour for land and land tenure reforms in many part of the world, targeting those policies and laws inherited from colonial powers. This was especially popular among developing countries, in Africa, Asia, South America and others. However, not every country has successfully reformed policies and legislation to bring

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about better governance of land resources. Kenya is a prime example of a country that is struggling with land reforms, and it will take a lengthy debates and persistence before reforms finally come to fruition. Long after colonisation was dismantled, the concept of land and land tenure reform continues to attract different meanings depending on where one stands from social, political, economic and cultural viewpoints. About three decades ago, Russell King, who written widely on land tenures in many societies, stated that land reform was the most important social change that was taking place in the world. According to King, land reforms fall under three headings.<sup>2</sup> Firstly, the social equity arguments based on the ethical-moral premise that inequality, and worse still, exploitation, is perverse in many countries. Secondly, and partly linked to the first argument, land reform has become closely involved with ideological positions, and, therefore, political dogmas. It is important to acknowledge the fact that historical development not only provides the basis for reforming contemporary land tenure regimes, but also establishes justification for such reforms to be informed by principles of justice and equity.

The issue of historical injustice in pastoral areas, which successive governments have evaded for so long, needs to be addressed in the light of positive debates that have evolved over the two decades of Kenya's 'endless reform journey.'. The starting point for understanding current tenure issues in Kenya requires taking stock of both colonial and postcolonial systems and how they have affected land tenure rights of the Kenyans, especially communities like pastoralists who still depend on land resources for their livelihoods. Since early 1960 successive governments have either rejected or ignored calls for land reforms because of heavily vested interests by political elites and economically dominant classes. The

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<sup>2</sup> King, R (1977) Land Reform: A World Survey, p. 3. G. Bell & Sons Ltd.



preference of these politically entrenched groups was to maintain the status quo of inherited land tenure arrangements. Besides, the post-independence governments' land tenure policy was in accord with the colonial strategy of private and individualised landholdings, which is perceived to be amenable to market economy.

Given that customary tenure systems have evolved over a long period, they are often adaptable to specific conditions and needs. Even in situations where such arrangements reach their limits, building on that which already exist in many cases is significantly easier and more appropriate than trying to 're-invent the wheel', which can end up creating parallel institutions with all their disadvantages. In the past, dominant multinational and donor institutions like World Bank have considered customary arrangements as conceptually and programmatically inferior. In their neoliberal market economy, they felt that customary systems were incapable of facilitating economic efficiency and dynamic growth. They therefore proposed establishing freehold title and subdividing the commons. The pre-existing land rights and tenurial dynamics that could respond and adapt to changing times were largely relegated to the periphery of dominant post-colonial discourses. The reform processes and narrative have been largely defined by powerful groups and institutions operating outside the control of the ordinary rural and peri-urban communities. It is important to make land reform processes more inclusive, especially for rural and pastoral communities who have been struggling with land issues for a long time.

Comprehensive land reform can still falter without a deliberate effort to consider customary land tenure of the various communities. The fact is that customary tenure practices have been the subject of many policy distortions, resulting from simplistic reliance on English concepts of land property in trying to understand the nature and institutions of African land relations. Three fundamental assumptions have arisen from over reliance on foreign notions of

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land ownership. One, land tenure security is guaranteed only by registration and titling. Two, that land belonged to the community and not individual ownership, existed; and three, that traditional land use systems were not efficient in an era of market economy. These misconceptions have continuously led to the relegation of customary land law to an inferior status in Kenya's legal and constitutional framework. This is clearly exemplified by Sessional Paper No: 10 of 1965-African Socialism and its Application to Planning in Kenya. This Paper is widely acknowledged as the blueprint of economic policy in Kenya. Its focus is on agrarian development of what it terms as 'high potential' areas, which historically (note the classification made by the Kenya Land Commission 1934) marginalises pastoral land systems in favour of individualised land tenure regime in agricultural areas.

Successive governments have consistently moved towards individualising land tenure in predominantly pastoral settings thus causing conflicts as multiple land users engage in competition. Land adjudication and subdivision as practised in Maasai and Boorana areas have aggravated the already simmering landlessness. The problem is further compounded by non-state actors, including multinational companies and other corporate groups, whose demand for land is increasing daily. These groups of 'global corporate' are currently prospecting pastoral rangelands for mining and ecotourism investments. What will happen to those who depend on land for their livelihoods as more rangelands are being 'set aside' for the other 'public' purposes that appear to mostly exclude pastoralism? While pastoralism can accommodate such sectors as ecotourism, the investors have been permitted to monopolise the benefits that accrue from range resources. Government and other key players in the sector certainly have to adopt more inclusive systems that allow local communities such as pastoralists to appropriately benefit from local resources. The government's deliberate exclusion of the local communities during negotiation for mining of natural resources such as

the case of Chinese exploration of oil and gas in the rangelands of Merti in Isiolo, is a breach of trust.

One of the key questions posed in the introductory part of this study, touches on the fact that land tenure reform issue in Kenya has become such a daunting and unpredictable subject for such a long time. For Kenya, the opening of political space was not all positive. The competitive multi-party politics concomitantly lifted the veil of dysfunctional state of Kenya. As experiences in various communities have shown, land has become the most explosive issue at the centre-stage of spiraling land clashes. In the build up to the first multiparty general elections of 1992, some parts of the country were gripped by violent clashes that witnessed claims and counter-claims over land rights. In 1999 and 2002 commissions of inquiries were appointed to evaluate land issues and since 2004, a national land policy reformulation process has been going on and a draft is already in parliament.

Why is the land question in Kenya worsening rather than improving? Although these conflagrations have proved momentous in the body politic of Kenya and have placed land at the centre of public debate, this has paradoxically not translated into successful policy transformation. Many have tried to blame institutional and legal weaknesses such as the inability to deal with corruption and mismanagement. Some scholars such as Professor Okoth-Ogendo have tried to explain this anomaly but have inordinately based their arguments on juristic and administrative shortcomings. The approach may unduly miss the important historical preponderance of the colonial involvement in land tenure transformation. In the government circle, the land question has not, until recently received the attention it requires, until recent times. The veil was partially lifted when, for the first time in 1999, the government commissioned an inquiry to officially investigate the vexed land question.

This study has demonstrated the interface between the colonial and contemporary land tenure issues, which have now become more imperative as land crises increasingly trigger conflicts among and between communities. Issues such as poverty, food insecurity, conflicts, and landlessness have dominated recent legal and constitutional reform debates. These concerns are deep-seated and have been consistently articulated by individuals and communities. Why are successive governments of Kenya unable or unwilling to facilitate land and land tenure reforms even in the face of enduring social conundrums that have often resulted in huge social, economic and political costs? What is it that makes Kenya's legal and institutional jurisprudence different from other colonial experiences, making it difficult to reform even when evidence is overwhelming? Although the clamour for change has been going on for two decades, no concrete achievements have come out as far as land reform is concerned. It is only recently in 2008 that a draft national land policy was formulated after many years of disillusioning lack of interest by both parliament and government. Competition and suspicions among leaders have masked any pretence of national or public good and have led to endless stalemate of legal and constitutional reforms.

The past and present governments have not committed themselves to land reform, even in the face of frequent land-related conflicts. Unfortunately, as Gary Wasserman observed in his study of the decolonisation process in Kenya, land reform prospects wilted away on the altar of independence 'bargaining'. The possibility or even inevitability of reforms was thus scuttled no sooner than Kenya achieved its political independence and since then every other transition has faced similar fate. Although attempts have been consistently made since the 1990s, the most conspicuous being the Constitution of Kenya Review Commission, Kenya has not managed to achieve concrete legal and institutional changes

The political environment prevailing in Kenya, at least since the coalition of parties' formed the government (since 2002), has been anything but conducive to change. Competition and suspicions among leaders representing ethnic blocs have masked any pretence of national interests and have led to endless stalemates of legal and constitutional reforms. Like the 'Bomas Draft Constitution', is the Draft National Land Policy is likely to face parliamentary guillotine once it is presented and proposed for adoption? The issue of land tenure reform has become one of the critical agendas in Kenya's quest for democratisation. Although it was among the first countries in Africa to embrace multi party politics and rule of law, Kenya has relatively lagged behind in addressing the vital issues of land tenure and land rights. There is a growing concern as to why Kenya has failed to make progress in land tenure reforms and while many countries that had shared similar colonial experience have achieved significant milestones. What is the underlying factors that made land and tenure problems seemingly insurmountable during this 'transition' period? Why has the government failed to recognise the unique set of circumstances, resulting therefore in jeopardizing of their land rights? An assessment of historical evolution of land tenure systems has shown how a deliberate government policy have entrenched colonial notion of land tenure with negative consequences on communities.

Land is and has been the most important asset of every human society since time immemorial. Pre-colonial societies in Africa had organised their social, political, cultural, economical and spiritual lives around land and natural resources for millennia until they were disrupted by the colonial wave of the nineteenth century. The most potent consequence of the European colonisation was the formation of state structures based on alien legal and institutional frameworks. Over the many decades of its rule, the colonial authorities

systematically established new institutions and administrative systems that led to the erosion of the indigenous land tenure organisations and land rights.

Although contact with the colonial rule may have differed amongst various communities, the impact on their land had continuously evolved over a long period. For example, among the pastoral people, the Maasai had a direct and most compellingly controversial relationship with the Europeans which led to intensive loss of land. The pastoral Boorana had only weak link with the colonial administration but today faces serious challenges to their traditional land due to increased alienation of land through policy of land adjudication and 'project-based' allocation. There is a clear convergence between the old direct alienation and those that emerged later because of the legacy inherited from the past colonial policy of expropriation. The consequence is the same for the communities who have depended on land resources from time immemorial. Both the Maasai and Boorana are struggling to hold onto the 'last frontier' as their rangeland resources have been exposed to unequal competitions and unfamiliar alienation processes facilitated by statutory laws. Today, new and extensive mega projects with global links involved in mining resources are emerging, threatening the already stressed pastoral communities. With mounting pressure on them, the survival of pastoralists, more than before is hanging in the balance. It is a fundamental task of any government to urgently and effectively address problem of land reforms in Kenya, with particular focus on the historical land question. It is only then that the current fixation with the colonial land tenure systems will be replaced by organically harnessed laws that improve and sustain community's livelihoods. Majority of Kenyans agree that a new roadmap for growth and development is required that is more inclusive and democratic.

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## **APPENDICES**

### **APPENDIX 1**

#### **Lists of Statutes and Subsidiary Legislation**

##### **Colonial Statutes, Rules, and Regulations**

Agricultural Advances Ordinance, No.34/1934

Agricultural Morgagors' Relief Ordinance, No.35/ 1934

Agriculture Produce Export Ordinance, No.44/1921

Application to Natives of Indian Ordinance, No.2/1903

Crown Lands Ordinance, No. 21/1902

Crown Lands Ordinance, No. 22/1915

Crown Lands (Amendment) Ordinance, No.27/1938

Crown Lands (Amendment) Ordinance, No. 27/1944

Crown Lands (Discharge Soldiers Settlement) Ordinance, No.1/1921

East African (Acquisition of Lands) Order-in-Council, 1898

East African (Lands) Order-in-Council, 1901

Foreign Jurisdiction Act, 1890

Kenya (Highlands) Order-in- Council, 1939

Kenya (Land) Order-in-Council, 1960

Kenya (Native Areas) Order-in-Council,1939

Land control Ordinance, No.22/1944

Land registration (Special Areas) Ordinance, No.27/1959

Native Land Trust Ordinance, No.9/1930

Native Land Trust Ordinance, No. 15/1915

Native Registration Ordinance, No.56/1921

Outlying Districts Ordinance, No. 25/1902

Land Regulations, No. 26/1897

Land Tenure Regulations, 1960

Land control Regulations, L.N.142/1961

Land Conservation Rules, GN 586/1945

Transfer of Property Act of India, 1882

## **Current Statutes, Rules, and Regulations**

Constitution of Kenya. 2001 (1998)

Government Land Act, Laws of Kenya, Cap 280

Registration of Titles Act, Laws of Kenya, Cap 281

Land Titles Act, Cap 282

Land Consolidation Act, Cap 283

Land Adjudication Act, Cap 284

Registration of Documents Act, Cap 285

Land (Group Representatives) Act, Cap 287

Trust Land Act, Cap 288

Mazrui Land Trust (repealed), Cap 289

Trusts of Land, Cap 290

Equitable Mortgages Act, Cap 291

Wayleaves Act, Cap 292

Distress for Rent Act, Cap 293

Trespass Act, Cap 294



Land Acquisition Act, Cap 295

Rent Restriction Act, Cap 296

Survey Act, Cap 299

Registered Land Act, Cap 300

Land Control Act, Cap 302

Physical Planning Act, No. 6 of 1996

## **APPENDIX 2**

### **1904 MAASAI AGREEMENT**

AGREEMENT, dated 10th August, 1904, between HIS MAJESTY'S COMMISSIONER for the

EAST AFRICA PROTECTORATE and the CHIEFS of the MASAI TRIBE.

We, the Undersigned, being the Lybons and Chiefs (representatives) of the existing clans and sections of the Masai tribes in East Africa Protectorate, having, this 9th day of August, 1904, met Sir Donald Stewart, His Majesty's Commissioner for the East Africa Protectorate and discussed fully the question of a land settlement scheme for the Masai, have, of our own free will, decided that it is for our best interests to remove our people, flocks, and herds into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.

We have, after having already discussed the matter with Mr. Hobley at Naivasha and Mr. Ainsworth at Nairobi, given this matter every consideration, and we recognize that the Government, in taking up this question, are taking into consideration our best interests.

Now we, being fully satisfied that the proposals for our removal to definite and final reserves are for the undoubted good of our race, have agreed as follows:-

That the Elburgu, Gekunuki, Loita, Damat, and Laitutok sections shall remove absolutely to Laikipia, and the boundaries of the Settlement shall be, approximately, as follows:-

On the north, by the Loroghi Mountains.

On the west, by the Laikipia (Ndoror) Escarpment.

On the south, by the Lesuswa or Nyam and Guaso Narok Rivers.

On the east, by Kisima (approximate).

And by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley, to be used by the Government for the purposes of European settlement. Further, that the Kaptei, Matapatu, Ndogalani, and Sigarari sections shall remove into the territory originally occupied by them to the south of Donyo Lamuyu (Ngongo), and the Kisearian stream, and to comprise within the area the Donyo Lamuyu, Ndogalani, and Matapatu Mountains, and the Donyo Narok, and to extend to Sosian on the west.

In addition to the foregoing, Lenana, as Chief Lybon, and his successors, to be allowed to occupy the land lying in between the Mbagathi and Kisearian streams from Donyo Lamuyu to the point where both streams meet, with the exception of land already occupied by Mr. Oulton, Mr. McQueen, and Mr. Paterson.

In addition to the foregoing, we asked that a right of road to include certain access to water be granted to us to allow of our keeping up communications between the two reserved areas, and further, that we be allowed to retain control of at least 5 square miles of land (at a point on the slopes of Kinangop to be pointed out by Legalishu and Masakondi), whereat we can carry out our circumcision rites and ceremonies, in accordance with the custom of our ancestors.

We ask, as a most important point in this arrangement, that the Government will establish and maintain a station on Laikipia, and that officers whom we know and trust may be appointed to look after us there.

Also that the Government will pay reasonable compensation for any Masai cultivation at present existing near Nairobi.

In conclusion, we wish to state that we are quite satisfied with the foregoing arrangement, and we bind ourselves and our successors, as well as our people, to observe them.

We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as a race shall exist, and that European or other settlers shall not be allowed to take up land in the Settlements.

In confirmation of this Agreement, which has been read and fully explained to us, we hereby set our marks against our names, as under:-

LANANA, Son of Mbatian, Lybon of all the Masai.

MASAKONDI, Son of Arariti, Lybon at Naivasha.

Signed at Nairobi, August 15, 1904:-

LEMANI, Elmura of Matapatu.

LETEREGI, ditto.

LELMURUA, Leganan of Kapte.

LAKOMBE, Elmura of Kapte.

LIMOISONG, Elmura of Ndogalani

LISIARI, Elmura of Ndogalani.

MEPAKU, Head Elmoran of Matapatu.

LAMBARI, Leganon of Ndogalani.

Naivasha, representing Elburgu, Gekunuku, Loita, Damat, and Laitutok:-

LEGALISHU, Leganon of Elburgu.

OLMUGEZA, ditto.

OLAINOMODO, ditto.

OLOTOGIA, ditto..

OLIETI, ditto.

LANAIRUGU, ditto.

LINGALDU, ditto.

GINOMUN, ditto.

LIWALA, Leganan of Gekunuki.

LEMBOGI, Leganan of Laitutok.

Signed at Nairobi, August 15, 1904:-.

SABORI, Elmura of Elburgu.

We, the undersigned, were interpreters in this Agreement:

C. W. HOBLEY, (Swahili).

MWE s/o LITHIGU (Masai).

LYBICH s/o KERETU (Masai).

WAZIRI-BIN-MWYNBEGO (Masai).

I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East Africa Protectorate, hereby agree to the foregoing, provided the Secretary of State approves of the Agreement, and in witness thereof I have this 10th day of August, 1904, set my hand and seal.

D. Stewart

We, the undersigned officers of the East Africa Protectorate Administration, hereby certify that we were present at the meeting between His Majesty's Commissioner and the Masai at Naivasha on the 9th August, 1904, and we further heard this document fully explained to them, and witnessed their marks affixed to same:

C. W. HOBLEY,

Acting Deputy Commissioner.

JOHN AINSWORTH,

His Majesty's Sub-Commissioner, Ukamba.

S. S. BAGGE,

His Majesty's Sub-Commissioner, Kisumu.

J. W. T. McCLELLAN,

Acting Sub-Commissioner, Naivasha.

W. J. MONSON,

Acting Secretary to the Administration.

I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East Africa Protectorate, hereby further agree to the foregoing parts of this Agreement concerning Kapte, Matapatu, Ndogalani, and Sigarari Masai, provided the Secretary of State approves of the Agreement, and in witness thereof I have this 15th. day of August, 1904, set my hand and seal.

D. Stewart

We, the undersigned officers of the East Africa Protectorate, hereby certify that we were present at the meeting between His Majesty's Commissioner and the Masai at Nairobi on the 15th August, 1904, and we further heard this document explained to them, and witnessed their marks affixed to same:

C. W. HOBLEY,  
Acting Deputy Commissioner.

JOHN AINSWORTH,  
His Majesty's Sub-Commissioner. Ukamba.

T. T. GILKISON,  
Acting Land Officer.

W. J. MONSON,  
Acting Secretary to the Administration.

I, the undersigned, hereby certify that I translated the contents of this document to the Masai Lybich, who, I believe, interpreted it correctly to the Masai assembled at both Naivasha and Nairobi.

JOHN AINSWORTH,  
His Majesty's Sub-Commissioner.

Reprinted from East Africa Protectorate, Correspondence Relating to the Masai, Command Paper No. 20360. Received 28 March 1910, House of Commons Parliamentary Papers, 1911 Volume LII pp., 730-731.

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## **APPENDIX 3**

### **1911 MAASAI AGREEMENT**

#### **AGREEMENT**

We, the undersigned, being the Paramount Chief of all the Masai and his regents and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve, as defined in the agreement entered into with the late Sir Donald William Stewart, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, His Majesty's Commissioner for the East Africa Protectorate, on the ninth day of August, one thousand and nine hundred and four, and more particularly set out in the Proclamation of May thirtieth one thousand nine hundred and six and published in the Official Gazette of June first one thousand nine hundred and six, do hereby on our own behalf and on behalf of our people, whose representatives we are, being satisfied that it is to the best interest of their tribe that the Masai people should inhabit one area and should not be divided into two sections as must arise under the agreement aforesaid whereby they were reserved to the Masai tribe two separate and distinct areas of land, enter of our own free will into the following agreement with Sir Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Member of the Distinguished Service Order, Governor and Commander in Chief of the East Africa Protectorate, hereinafter referred to as the Governor.

We agree to vacate at such time as the Governor may direct the Northern Masai Reserve which we have hitherto inhabited and occupied and to remove by such routes as the Governor may notify to us our people, herds and flocks to such area on the south side of the Uganda Railway as the Governor may locate to us the said area being bounded approximately as follows and as shown on the attached map.

(Not reproduced)

On the south by the Anglo-German frontier:

On the west by the Ol-orukuti Range, by the Amala River, otherwise called Eng-are-dabash or Eng-are-e-'n-gipai, by the eastern and northern boundaries of the Sotik Native Reserve, and by a line drawn from the most northerly point of the northern boundary of the Sotik Native Reserve to the south-western boundary of the land set aside for Mr. E. Powys Cobb on Mau;

On the north by the southern and eastern boundaries of the said land set aside for Mr. E. Powys Cobb, and by a straight line drawn from the north-eastern boundary of the said land to the highest point of Mount Suswas otherwise called Ol-doinyo onyoke;

On the east by the southern Masai Native Reserve as defined in the Proclamation dated June eighteenth one thousand nine hundred and six, and published in the Official Gazette of July first one thousand nine hundred and six.

Providing that nothing in this agreement contained shall be deemed to deprive the Masai tribe of the rights reserved to it under the agreement of August ninth one thousand nine hundred and four aforesaid to the land on the slopes of Kinopop whereon the circumcision rights and ceremonies may be held.

In witness whereof and in confirmation of this agreement which has been fully explained to us we hereby set our marks (finger impressions) against our names as under:-

Mark of.SEGI, son of Ol-onana (Lenana), Paramount Chief of all the Masai.

Mark of.OL-LE-GELESHO (Legalishu), Regent during the minority of Segi, head of the Molelyan Clan, and chief spokesman (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.

Mark of.NGAROYA, Regent during the minority of Segi, of the Aiser Clan.

Mark of.OL-LE-YELI, head of the Mokosen Clan of the Purko Masai, and one of the spokesmen (Ol-sigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.



Mark of.OL-LE-TURERE, head of the Mokesen Clan of the Purko Masai.

Mark of.OLE-LE-MALIT, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of.OL-LE-MATIPE, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of.OL-LE-NAKOLA, head of the Tarosero Clan of the Purko Masai.

Mark of.OL-LE-NAIGISA, head of the Aiser Clan of the Purko Masai.

Mark of.MARMAROI, uncle and personal attendant of Segi.

Mark of.SABURI. The Prime Minister of the late Chief Ol-onana (Lenana) and principal elder of the Southern Masai Reserve.

Mark of.AGALI, uncle of Segi, representing the Loita Masai.

Mark of.OL-LE-TANYAI of the Tarosero Clan, chief spokesman (Ol-sigwenani) of the Lamek (Meitaroni) agegrade of the Purko Masai.

The above set their marks to this agreement at Nairobi on the fourth day of April nineteen hundred and seven.

A. C. HOLLIS,

Secretary, Native Affairs.

OL-LE-MASIKONDI, head of the Lughumas section of the Aiser Clan: chief elder of the Purko Masai, called in the former treaty of Ol Oiboni of the Purko Masai.

OL-LE-BATIET, head of the Aiser Clan of the Purko Masai on Laikipia, Ol aigwenani of the age known as Il Merisho.

The above set their marks to this agreement at Rumuruti on the 13th day of April nineteen hundred and eleven.

E. D. BROWN  
Assistant District

Commissioner,

Laikipia.

Witnesses:

J. M. COLLYER  
D/C. Laikipia.

His Mark:.OL-LE-LENGIRI, of the Aiser Clan Purko Masai.

His Mark:.OL-LE-GESHEEN, head of Tarosero Clan of Purko Masai.

His Mark:.OL-LE-SALON, brother of Ol-le-Kotikosh, as a deputy for Ol-le-Kotikosh.

The above set their marks to this agreement at Rumuruti on 19th. day of April 1911.

E. D. BROWNE,

A.D.C., i/c Laikipia.

We, the undersigned, certify that we correctly interpreted this document to the Chief, Regents, and Representatives of the Masai who were present at the meeting at Nairobi.

A. C. HOLLIS,

OL-LE-TINKA, of the Il-Aiser Clan.

We the undersigned certify that we have correctly interpreted this document to the Representatives of the Masai at Rumuruti.

A. J. M. COLLYER,  
District Commissioner.

OL LE TINKA. His mark.

In consideration of the above, I, Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Member of the Distinguished Service Order, Governor and Commander in Chief of the East Africa Protectorate, agree on behalf of His Majesty's Government but subject to the approval of His Majesty's Principal Secretary of State for the Colonies to reserve for the exclusive use of the Masai tribe the area on the south side of the Uganda Railway as defined above and as shown on the attached map, which area is coadunate with the Southern Masai Native Reserve and to further extend the existing Southern Masai Native Reserve by an addition of an area of approximately three thousand and one hundred square miles, such area as shown on the accompanying map the approximate boundaries being on the south the Anglo-German Frontier, on the west the eastern boundary of the aforesaid Southern Masai Reserve, on the north and east by the Uganda Railway zone from the Athi River to Sultan Hamud Railway Station thence in a line drawn from the said station to the north-west point of the Chiulu Range thence along the Chiulu Range to the south-eastern extremity thereof thence by a straight line to the meeting point of the Eng-are-Rongai River and the Tsavo Rivers thence by the Eng-are Rongai River to the Anglo-German frontier and to undertake on behalf of His Majesty's Government to endeavour to remove all European settlers from the said areas and not to lease or grant any land within the said areas (except such land as may be required for mining purposes or for any public purpose) without the sanction of the Paramount Chief and the representatives of the Masai tribe.

In witness whereof I have hereunto set my hand and official seal this twenty-sixth day of April one thousand nine hundred and eleven.

Signed sealed and delivered by the within named Sir Edouard Percy Cranwill Girouard in the presence of

C. HOLLIS

E. P. C. GIROUARD

We, the undersigned were present at a meeting between His Excellency the Governor and the Masai at Nairobi on the fourth day of April one thousand nine hundred and eleven, and we

heard this document explained to the Chief and the representatives of the Masai who entered into this agreement of their own free will and with full knowledge of the contents thereof.

R. M. COMBE

Crown Advocate.

C. W. HOBLEY,

Provincial Commissioner, Ukamba.

JOHN AINSWORTH,

Provincial Commissioner, Nyanza.

C. R. W. LANE,

Provincial Commissioner, Naivasha.

S. L. HINDE,

Provincial Commissioner, Naivasha.

J. W. T. McLELLAN,

Provincial Commissioner, Kenya.

A. C. HOLLIS,

Secretary for Native Affairs.

C. C. BOWRING,

Treasurer and M.L.C.

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