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## PUBLIC REGULATION OF THE USE OF PRIVATE LAND: OPPORTUNITIES AND CHALLENGES IN KENYA

Nixon Sifuna

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## ARTICLE

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# 1

## INTRODUCTION

Land tenure in Kenya can be classified into three broad categories, namely, public ownership, customary (communal) ownership and private ownership.<sup>1</sup> Land that is under public tenure either as state or trust land may be described as public land. That which is collectively owned by the community under customary tenure is communal land while that which is privately owned may be described as 'private land'. In this paper the phrases 'private land' and 'privately owned land' are used interchangeably to refer to land owned by an individual or entity other than the state. In Kenya, private tenure is predominant and is even protected by the Constitution<sup>2</sup> Despite its sanctity, private ownership of land is an obstacle to the power of public authorities to control its use of land, irrespective of the tenure regime, in the public interest.

This is the paradox that characterises Kenya's land use regime. On the one hand there is the sacrosanct nature of private tenure arising from the legal protection of private property. On the other hand is the need for regulation of the use of private land as a way of balancing the public good of society collectively and the proprietary interests of the individual landowners as well as ensuring the efficient use of land and appropriate distribution of its benefits in the country. Besides, this public intervention in the use of private land will ensure that its use does not result in environmental pollution or land degradation, jeopardise the interests of future generations in such land or negatively impact on other land uses. Despite the need for public regulation, however, the exercise of this function faces numerous challenges in Kenya. The author has identified seven challenges, namely; constitutional entrenchment of private property rights in land, potential for abuse and misuse of the power, fragmented legal frameworks, failure of the laws to set standards for action, ignorance, institutional problems, and relegation of the traditional local control systems by modern formal systems.

1 See P. Ondiege, 'Land Tenure and Soil Conservation', in C. Juma and J.B. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Development* 111, 122 (Nairobi and London: Initiative Publishers and Zed Books, 1996).  
2 Kenya, Constitution of the Republic, Section 75.

This paper in essence makes a case for public regulation of the use of private land; in effect, justifying public intervention in the regime of private property. It also discusses the above obstacles and makes suggestions on how they can be attenuated in order that regulation may meet its intended goals. The paper is divided into six parts. This part one is an introductory section that generally introduces the theme and structure of the paper. Part two discusses the importance of land. Part three examines the implications of private ownership rights in land and proceeds to make a justification for public regulation of the use of privately owned land. Part four discusses the various forms of public regulation of land use in Kenya, while Part five examines the challenges existing in the country to the exercise of this function. Part six summarises the key findings of this study and makes recommendations on how the above challenges can be attenuated. It also makes suggestions on the safeguards that may be adopted to ensure the regulation is more democratic, fair and beneficial so as to ensure efficient use of land and the equitable distribution of its benefits to the present and future generations.<sup>3</sup>

# 2

## THE IMPORTANCE OF LAND

Land is not just a commodity. It is perhaps the most fundamental natural resource and the resource base that supports most life forms and provides the physical stratum that sustains political, socio-cultural, economic as well as natural systems.<sup>4</sup> Besides being the basis of all livelihoods, many traditional African customs regard it as a gift from God that passes on from generation to generation by inheritance.<sup>5</sup> Despite its numerous uses, land is a rather sensitive and emotive issue in the country, and therefore a major source of controversy and conflict. In sum, land is of great significance and

3 N. Sifuna, 'Using Eminent Domain Powers to Acquire Private Lands for Protected Area Wildlife Conservation: A Survey Under Kenya Law', *2/1 Law, Environment and Development Journal* 86, 90 (2006).

4 *Id.*

5 P. Mbithi, *Rural Sociology and Rural Development* 90 (Nairobi: Kenya Literature Bureau, 1982).

numerous benefits to humankind, whose value may be classified into five broad categories, namely: Value as a source of food, economic value, ecological value, socio-cultural value, and political value.

## 2.1 Value as a Source of Food

Cutter et al have observed that 'land has always provided nearly all the food used in the world and will continue to be the ultimate source of most food'.<sup>6</sup> Land comprises the medium that supports crop farming and pasture for livestock and is essential for food production. Crops such as corn provide starch that is an important source of carbohydrates while livestock supplies meat and milk that provide the much needed proteins, minerals and vitamins. The United Nations Environment Programme (UNEP) in one of its reports states that before the 1960s Africa was a net food exporter, but that the region has become more dependent on food imports and food aid; and further that by the year 2025 the region will be able to feed only about 40 per cent of its population.<sup>7</sup> This is a serious threat and there is need therefore to ensure that Kenya's land produces more food as a strategy towards attaining food security.

## 2.2 Economic Value

Undeniably, land is considered to be one of the most valuable properties, with an ever-appreciating monetary worth and one described as 'real property'. Despite being a property itself in its own right, it is also the base on which virtually all other properties stand, such that without it, most other properties would not exist. Indeed land is a principal source of livelihood and material wealth to humans by providing them with the means with which to meet their needs and wants. Besides, it is one of the factors of production alongside labour and capital hence being so crucial to the production process that without it production and development are almost unthinkable. This is partly because like other resources land has to be utilised in order to provide the goods of

existence for the sustenance of life, such as food and shelter. In any case 'resources are by their very nature human-centered'.<sup>8</sup>

## 2.3 Ecological Value

Land is the medium that supports most life forms, hence, 'the way in which land is used affects the integrity of biological systems upon which human life depends'.<sup>9</sup> Indeed, whatever affects land is likely to have impact on the entire spectrum of life, as it provides the habitat within which living and non-living organisms exist and interact in the ecosystem. The UNEP has noted that land degradation threatens the life-supporting system of the entire earth.<sup>10</sup> As Rachel Carson rightly notes it is the soil that controls all forms of life on earth and without soil, terrestrial plants could not grow, and without plants no animals could survive.<sup>11</sup>

## 2.4 Socio-cultural Value

Mbithi, a Kenyan authority, describes land as 'a cultural artifact that holds a very significant position for one's orientation towards his or her social and economic well-being'.<sup>12</sup> Indeed land provides space in which society exists, by providing the space on which humans live.<sup>13</sup> Population density is, for instance, computed as the number of people per square unit of land. Moreover, it is on land that housing and infrastructure such as hospitals, schools and roads are built. In Kenya, it is also of remarkable and diverse cultural significance since a number of cultures are land-based and because it is a cultural heritage that is passed on from one generation to the subsequent one through inheritance. This is especially because most communities in the region have strong inclinations to traditional cultures. Kimaiyo another Kenyan authority notes that in indigenous communities, land is not only part of people's culture as the locus where those activities that characterise people's culture take place but is also a means through

6 S. Cutter, H. Renwick and W. Renwick, *Exploitation, Conservation and Preservation: A Geographic Perspective on Natural Resource Use* 96 (New York: John Wiley & Sons Inc, 1985).

7 UNEP, 1991 Annual Report of the Executive Director 23 (Nairobi: UNEP, 1992).

8 See Cutter et al., note 6 above at 1.

9 P. Kimeri-Mbote, *Property Rights and Biodiversity Management in Kenya* 72 (Nairobi: Acts Press, 2002).

10 See UNEP, note 7 above at 33.

11 R. Carson, *Silent Spring* 53 (Boston: Houghton Mifflin Company, 1962).

12 See Mbithi, note 5 above at 29.

13 See Cutter et al., note 6 above.

which a community preserves its cultural heritage to pass it on to future generations.<sup>14</sup> In many traditional societies in the country, land was communally owned by clans and kinship groups.<sup>15</sup>

Moreover, some communities in the country have sacred and cultural sites used for rituals and worship.<sup>16</sup> Besides its cultural and religious significance, land is also of spiritual significance since it is also on land that people bury their dead, hence being the medium where lies the spirits of ancestors and the ones we loved. As such it means a lot for those whose people lie beneath. Mbithi argues that land is associated with continuity between generations and that an individual's ancestral spirit haunts regions where his or her ancestors are buried, hence establishing continuity in one's destiny.<sup>17</sup> Apart from that, land is, in most local communities, a symbol of status in that the more land one owns, the more respect that person elicits from society.<sup>18</sup> Such communities consider landlessness to be an anathema and regard the landless as 'lesser beings'.<sup>19</sup> Notably, parents in many traditional communities were reluctant to allow their daughters to marry men who were landless. As such persons were considered vagabonds having nowhere to take wives or raise families.<sup>20</sup> In sedentary communities especially, land was perhaps the most treasured property and symbol of communion for families, clans and villages throughout the country.

## 2.5 Political Value

Land is also of considerable political significance. Firstly, it is the base on which national territories sit. Secondly, at international law all states have permanent sovereignty over all natural resources within their territories such as minerals, forests, wildlife, water and land. Thirdly, land is an aspect of nationality in that the place where one lives determines that person's nationality. Fourthly, at international level, just like at the national level, land has continued to be one of the most guarded

possessions and object of sovereignty. Indeed many wars have been fought between states to protect land they consider to form part of their territories. In Kenya, land was a central issue in the struggle for independence.<sup>21</sup> Despite the advent of political liberation from colonialism, land has remained an important historical focal point that continues to inform major political agenda in the post-colonial period and has even been a subject of violent tribal wars.<sup>22</sup> Even presently, there are a number of land-related disagreements between communities on land issues. Apparently, land and land issues will continue to occupy a center stage in the peace, security and development agendas not only in Kenya but throughout the sub-Saharan African region. In essence land has over the years continued to be a rather emotive and sensitive issue politically in this part of the world that needs to be approached rather delicately especially with regard to ownership and use.

# 3

## PUBLIC REGULATION OF PRIVATE LAND

### 3.1 Private Ownership Rights in Land in Kenya

There are three major land tenure systems in Kenya, namely: public ownership, communal (customary) ownership and private ownership. While a substantial portion of land in the country is either under communal tenure or under public ownership, most of the land in the country is under private tenure on freehold or leasehold terms. Private ownership was introduced in the country by colonialists. Before then, there existed no formal regulation of land use and the only forms of regulation were taboos and practices. Land in the country was held under communal tenure by family lineages, kinship groups and clans under the overall administration

14 T.J. Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004* 17, 105 (Nairobi: Ogiek Welfare Society, 2004).

15 F. Plog and D.G. Bates, *Cultural Anthropology* 313 (New York: Alfred A. Knopf, 1980).

16 See, e.g., Mbithi, note 5 above at 94.

17 *Id.*

18 See Sifuna, note 3 above at 90.

19 See Mbithi, note 5 above at 101.

20 *Id.* at 89.

21 See J. Kenyatta, *Facing Mount Kenya* (Vintage: Vintage Books, 1962); F.D. Corfield, *The Origins and Growth of MAU MAU: An Historical Survey* (Nairobi: Govt. Printers, 1960).

22 See C. Leo, 'Land and Lies: Ethnic Clashes in Kenya', in C.H. Kahl, *States, Scarcity and Civil Strife in the Developing World* (Princeton: Princeton University Press, 2006).

of local chiefs or kings.<sup>23</sup> People in virtually all indigenous communities held land along the lines of family lineages and land passed from one generation to another by inheritance according to customary law.<sup>24</sup> In these communal tenure systems that dominated the country in the early years, individuals did not acquire ownership to the land.<sup>25</sup> All they acquired was the right to use it according to their needs and one could neither pledge nor sell any part of it since the title to the land belonged to the clan or community.

In this traditional tenure system, no individual could be permitted to own land and land belonged not to individual members but to the particular clan or community to which that individual belonged. Individuals were only entitled to use the land for permitted purposes, in line with the rules and ethos of the particular clan or community and under supervision of a consortium of elders. The permitted purposes for which land could be used included cultivation, pasturing livestock, as well as collecting firewood, fruits, honey and other benefits within the limits allowed by their respective traditional customary norms.<sup>26</sup> The advent of colonialism witnessed the introduction, by the colonialists, of western laws and ideology in the country's land tenure regime; thereby dramatically and radically changing the entire then existing traditional land tenure systems.

Realising that there were no well defined land ownership and land tenure systems, the colonial government alienated to the state all the land that was hitherto 'unoccupied' (land not physically occupied).<sup>27</sup> Such land was converted to state ownership as belonging to the crown. While the tenure of the crown land, also known as state land, became governed by western concepts of property, those lands comprising African reserves were generally left to be governed by African customary law, except for the police powers of the state and governmental authorities to regulate land use.<sup>28</sup> Later, part of these state lands was allotted to individuals, beginning with white settler farmers and later others including Africans.<sup>29</sup> This marked the beginning of

private ownership rights in land by individuals as opposed to clans, kinship groups or communes.

Presently, land in Kenya, unlike most natural resources such as air and water, is generally under private ownership. This private tenure status raises a number of social, moral and ethical as well as legal questions regarding land use and control. In an agrarian society such as Kenya's, conferring private property rights over land poses a problem with regard to land use, especially of two typical competing interests, namely, the exploitation of the available land versus regulation imperatives. Admittedly, private property in land has had far reaching implications for society in terms of productive use and sustainability as well as environmental management. This is because private ownership elevates ownership rights to a constitutional plane where the individual owner has sweeping powers of use. Kenya recognises private property rights generally and protects them from violation.<sup>30</sup>

### 3.2 Justification for Public Regulation of the Use of Private Land

While individual owners have sweeping user rights over the land they own, the unique characteristics of land as well as its crucial place in the life of humankind and other factors discussed above, make a compelling case for public intervention into the regime of private land. This necessitates the regulation of the use of such land in the public interest. It is undesirable to permit absolute rights of use in land, whether it be under public, communal or private ownership. This responsibility is *inter alia* exercised through the taking of measures to ensure that landowners use their land in a manner that is not injurious to public interest concerns such as transportation, recreation, water resources, security, sanitation, health, and similar common needs.<sup>31</sup> In Kenya, these have been entrenched in the limitations to the enjoyment of constitutional rights listed in the preambular article of the bill of rights chapter of the Constitution.<sup>32</sup> In effect therefore, constitutional property rights in the country like other rights are not absolute but subject to public interest concerns.

23 H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law Institutions in Kenya* 6 (Nairobi: Acts Press, 1991).

24 See Kimaiyo, note 14 above.

25 See Plog and Bates, note 15 above at 313-314.

26 *Id.* at 313.

27 See Okoth-Ogendo, note 23 above at 12.

28 *Id.*

29 *Id.*

30 See the Constitution of the Republic of Kenya, note 2 above.

31 See Cutter et al., note 6 above at 105-106.

32 See the Constitution of the Republic of Kenya, note 2 above, Section 70.

The constitutional entrenchment of these limitations is plausible because since private ownership rights enjoy constitutional protection, it was necessary to secure any legitimate legal interference with them to ensure coexistence. Similarly, securing the regulatory power on land use by way of constitutional provisioning is better than leaving it to political expedience, whims, practices or ordinary legislative provisions. This is because constitutional provisioning elevates it to plane where it has primacy over all other laws such that any law or conduct abrogating from constitutional provisions is null and void. However, while it is necessary to control the use of private land, there is need to put in place safeguards that would ensure, that any regulation does not amount to 'constructive taking', for example where it extinguishes the economic value of the land or its economic benefits, such that the land becomes of no economic value to the owner.<sup>33</sup> Incidentally, while physical taking is through constitutional provisioning made illegal, economic taking is not envisaged by the constitution.

Indeed privately owned land is the private property of the respective individual owner(s), with the latter, as already discussed above, theoretically, having the right of disposal, use, 'abuse', and of excluding all others including public authorities from it. Being private property it is sacrosanct and protected by the law hence the rights of the owners with regard to their land should be upheld at all times. This private interest is, however, subject to the public interest; such that the use of privately owned land may be regulated in the promotion of public interest and welfare. This author has identified five specific grounds that justify intervention in the use of land despite its system of ownership. These are: the scarce nature of land; ethical considerations; environmental considerations; land planning needs; and public responsibility for promotion of the public good.

### 3.2.1 Scarce Nature of Land

This is perhaps the most fundamental justification for land use control. Whereas land is important for life and livelihood, it is also a scarce and finite resource.<sup>34</sup> Scarce because under normal circumstances it is limited in supply and can not regenerate itself, hence a non-renewable resource. While the world's land area is

virtually fixed, not all the available land is utilised, leave alone being devoted to proper use. With the ever increasing human population there can never be enough land for everybody; besides there are many competing demands for land. The uses for which there is demand for land include settlement, industrial activity, infrastructure, agriculture, urbanisation, forestry, wildlife and recreation.<sup>35</sup> Indeed the available land cannot be enough to be distributed between these multiple yet ever increasing uses, and people. There is need therefore for intervention in the allocation of land to the various competing uses in terms of priority and the regulation of the application of land to any of these uses. The power to intervene is the proper province of public law and the legitimate concern of governmental and public authorities by virtue of their public mandate to provide for the collective welfare of the citizens. Besides, this power, although *stricto sensu* inconsistent with the concept of private property, is one way in which the private interest of a landowner is reconciled with the wider public interest of society; lest land use becomes a curse upon society.<sup>36</sup>

In terms of priority, agricultural use for food security will, for instance, be preferred to recreational uses such as development of sports facilities.<sup>37</sup> Admittedly, not all the land suitable for arable farming is applied to such use hence arable farming has to compete for this land against other uses, such as industry, forestry, mining, settlement or wildlife. Besides, each form of land use has implications on the other forms.<sup>38</sup> Notably, land use decisions are a process of allocating land to the diverse competing interests, and public regulation of land use is a process of balancing these interests and reconciling the attendant use-related conflicts.<sup>39</sup>

### 3.2.2 Ethical Considerations

Property in land comprises the total bundle of rights that a person enjoys over the land he or she owns.<sup>40</sup> It

33 This is 'constructive taking' as opposed to outright physical invasion or occupation of land.

34 See Sifuna, note 3 above at 90.

35 See Cutter et al., note 6 above at 96.

36 See Sifuna, note 3 above at 90.

37 Agriculture supplies the population with food which is the driving force of life and raw materials needed for industries, for example cotton, sugarcane, sunflower, tea, pyrethrum and coffee.

38 See Cutter et al., note 6 above at 105.

39 *Id.*

40 T.O. Ojienda and A.D.O. Rachier, *Conveyancing: Theory and Practice* 6 (Eldoret: Moi University Press, 2001).

has been argued that ownership carries with it four basic rights reserved to the owner, namely, use, 'abuse', disposal, and the right to exclude others from the land.<sup>41</sup> The most contentious of these rights is the right of 'abuse'. It is the author's view that the unique characteristics of land make it a special category of property in which a right of abuse or misuse cannot be permitted. Indeed the very essence of land use control is largely intended to guard against this, such that a private landowner has an obligation to consider the public good when making land use decisions. To view land as merely a private commodity belonging to the owner to use as he or she wishes, is to ignore its intrinsic and ecological values and the external impacts of abusive land use practices. There is need therefore for landowners to view land as an object to which they belong rather than an object belonging to them. It is only then that they will begin to use it with love and respect, and responsibly.

Aldo Leopold a leading environmental ethicist rightly faulted the tendency to see man's relation to land as a strictly economic one entailing privileges without obligations.<sup>42</sup> He called for a new land ethic that would recognise that human beings are members of a community of interdependent parts and that this community includes soils, water, plants and animals, or collectively the land.<sup>43</sup> To ensure responsible ownership, it is necessary to revise the fundamental concepts of private property rights. Land and other natural resources are a heritage of humankind that should be available for the present and future generations. Land is not just a 'hotel' whose benefits are to be exploited without care about the future but our only 'home' where we live and where we spent the rest of our lives on earth, hence the need to take care of it in order that it can be fit for our habitation.

There is need therefore for land use to be regulated to ensure that land is utilised in a sustainable manner that

ensures it is available to the present generation as well as the future generations and to the various competing and sometimes protagonist and incompatible uses enumerated above. There is a Chinese saying that land is given to us by our ancestors for our grandchildren. This saying holds true in virtually all communities in Asia and sub-Saharan Africa, in that the present generation is said to be holding the land in trust for posterity. This in essence requires that the present generation should utilise land while taking into consideration the interests of future generations. This reasoning accords well with the concept of sustainable development as well as the public trust doctrine and intergenerational equity where the present generation should use land in a manner that ensures that the same land is available to future generations and in a state that is beneficial to the latter. The public trust doctrine establishes a trust relation between the government and the people, in which the government has the responsibility of regulating certain natural resources such as land, forests and wildlife on behalf and for the benefit of the people collectively.<sup>44</sup> On the application of this doctrine, this author in a related paper has observed as follows:

Firstly, land and other natural resources are a heritage of mankind that should be available for present and future generations. In fact, it is argued that such resources are only held by the State in trust for future generations and that citizens should- while utilizing them- take into consideration the interest of future generations. Therefore, since land is entrusted in the hands of the State on behalf of all future generations, it is held by the present generation under the same constraints, and the State is entitled to administer this trust by enacting laws and regulations. This trust also puts on the individual landowner an obligation to preserve the land for future generations. Secondly, its importance and scarcity dictates that its tenure and distribution be controlled for the benefit of society.<sup>45</sup>

One way in which the government can exercise this public trust is through land use regulation. Another foundation for the need for regulation of land use is

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41 J.M. Migai-Akech, *Land, the Environment and the Courts in Kenya 5* (A Paper for the Environment and Land Law Reports (Kenya), DFID/Kenya Law Reports Partnership, 2006), available at [http://www.kenyalaw.org/environment/content/download.php?File=../downloads/Land\\_Env\\_Background%20paper.pdf&content=3](http://www.kenyalaw.org/environment/content/download.php?File=../downloads/Land_Env_Background%20paper.pdf&content=3).

42 A. Leopold, *A Sand County Almanac* 5 (New York: Oxford University Press, 1949).

43 *Id.*

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44 N. Sifuna, 'Damage Caused by Wildlife: Legal and Institutional Arrangements in Botswana', 39/2 *Environmental Policy and Law* 105, 110 (2005).

45 See Sifuna, note 3 above at 90.

the concept of 'sustainable development' referred to above. This concept is related to and incorporates the principle of intergenerational equity discussed above. The World Commission on Environment and Development (WCED) has defined 'sustainable development' as 'development that meets the needs of the present generation without comprising the ability of future generations to meet their own needs'.<sup>46</sup> Indeed sustainability entails providing for the present needs while at the same time preserving the long-term productive capability of the resource base. This requires, among other things, that the present generation should in pursuing their development needs and in exploiting the available natural resources such as land ensure that it does not jeopardise the availability of these resources to future generations or the ability of the generations to meet their needs. In fact it is this regard for the welfare of future generations that has come to be known as intergenerational equity. There is justification for this and it is therefore acceptable for the government to regulate the way land is used, in order to ensure that this land is to be passed on to future generations in a state that is not prejudicial to their needs.

### 3.2.3 Environmental Considerations

Unbridled land use may lead to undesirable environmental consequences such as land degradation, soil erosion, sedimentation of water bodies, pollution of environmental media, and depletion of biological resources. Improper land use practices that have such environmental costs are undesirable and should be discouraged. It is therefore proper that land use be regulated to minimise such costs and promote uses that are environmentally sound, ecologically and economically sustainable as well as those that do not unduly undermine other beneficial uses. This resonates well with the age-long common law principle *sic utere tuo ut alienum non laedas* (so use your own as not to cause harm to others) according to which people are supposed to ensure that their activities do no result into harm to others or the environment.<sup>47</sup> Linked to the *sic utere tuo*

principle is 'the preventive principle'.<sup>48</sup> Under this principle, steps should always be taken to prevent harm from occurring rather than waiting to address harm after it has already occurred. One way of preventing harm from occurring from land use practices is through formal regulations on land use. The need to regulate the manner in which land is used is partly due to the imperative to control the undesirable consequences of certain land use forms.

### 3.2.4 Land Planning Needs

Planning has traditionally been one of the major responsibilities of state, governmental and other public authorities all over the world. While it is necessary for these authorities to provide stimulus for land-based economic activity for development, it is also necessary to ensure that such development activities are done in an orderly way and not a haphazard manner that can undermine further development. This will ensure sustainable land development. Whereas development activities are desirable and should be undertaken, while growth is underway, measures should be undertaken to ensure that growth does not take place in a manner that is haphazard or injurious. Notably, planning requirements do actually limit the use of any land, including land that is privately owned. Land planning entails not only deciding where to put what development but also the preparation and implementation of physical development plans for orderly management of human activities.<sup>49</sup> This is to ensure efficient and sustainable management that mitigates the adverse effects of unplanned development activity as well as unsustainable land use forms and practices.

### 3.2.5 Public Responsibility for the Promotion of the Public Good

Land being a resource is necessary for human beings to use to provide for their needs and development, and in a manner that does not undermine public interest concerns. This calls for public intervention to embrace these concerns. Besides, some land use activities and practices have undesirable consequences such as famine,

<sup>46</sup> See WCED, *Our Common Future* 356 (New York: Oxford University Press, 1987).

<sup>47</sup> The *sic utere tuo* principle applies to environmental management and in this case land use management. See N. Sifuna, 'The Role of Courts in the Implementation of Environmental Law in Kenya', 1/2 *The Law Society of Kenya Journal* 75, 78 (2005).

<sup>48</sup> Also called 'the principle of preventive action' or the 'prevention principle'. On this principle, see P. Sands, *Principles of International Environmental Law* 246 (Cambridge: Cambridge University Press, 2003).

<sup>49</sup> FAO, *Guidelines for Land Use Planning* 5 (Rome: FAO, 1993).

land degradation and environmental pollution. Land degradation, for instance, may result in serious deterioration of life-support systems as well as social and economic disruptions. There is need therefore for land use activities to be regulated even if they are on privately owned land in such a manner that the rights of use of such land are not absolute, but subject to the public interest. This in a way introduces public rights in the regime of private property. Youdeowei a Nigerian authority notes that while the use of land is an economic activity its control is political.<sup>50</sup> Supporting land use regulation, Ogolla and Mugabe rightly observe as that 'land is not just another form of property that can be appropriated and used at the absolute discretion of individuals or groups without regard to wider social and ecological interests'.<sup>51</sup> Even in capitalist economies, usually known to be rather liberal, the concept of private property has its limits and the state is in most jurisdictions empowered to regulate the use of privately owned land.

The need for the public regulation of the use of privately owned land also springs from the public responsibility of society to promote the public interest. These public interest concerns include issues of public health, transportation, security, recreation, and similar public needs. While regulation in respect of public land is not a big problem, regulation of private land raises several legal, economic and ethical questions. Indeed public regulation in respect of land under private tenure represents a delicate balance between private property rights of the individual owner(s) and the public interest. Regulation by the state, for instance, represents a balance between the state's responsibility to protect individual rights and its duty to promote and protect the public good.<sup>52</sup> It is a balance between private property rights of the individual landowner and the police power of state and governmental authorities in protecting the public interest; and between the notion of land being a private commodity and that of it being a natural heritage of humankind.

Admittedly, however, for public regulation of privately owned land to be supportable, it must advance a

legitimate public interest. Justification for public regulation may also be based on the public trust doctrine. Under this doctrine, governmental and other public authorities have a responsibility to ensure proper management of natural endowments such as land for the common benefit of their subjects collectively and for the future generations as well.<sup>53</sup> While in theory, land belongs to its individual landowner(s), under the public trust doctrine, the radical title to this land is vested in public authority on behalf of and for the benefit of the people generally.<sup>54</sup> The ultimate tenurial rights in land therefore essentially belong to the people collectively in such a way that no one of them can claim exclusive rights of ownership. This position is basically contrary to the usual capitalist notion that the benefits from land belong exclusively to the landowner, who has exclusive rights to hold the land as well as the right to use the land as he or she pleases.

Even in the colonial period, and before the introduction of individual title to land, the colonial government in Kenya regulated the use of non-public land.<sup>55</sup> While it controlled the use of state lands, it also promulgated laws to enable the exercise of some control over land within the African reserves (native land), and especially in regard to the use of such land.<sup>56</sup> This as Okoth-Ogendo has observed made the natives mere 'tenants of the crown'.<sup>57</sup> The imperative for the colonial government to regulate land use within the native reserves was mainly intended to check rampant land degradation resulting from increasing populations of humans and livestock as well as improper land use practices that were causing soil erosion.<sup>58</sup>

During this period, however, the natives had their own traditional local systems for the regulation of land use. These systems comprised informal local management institutions and norms, and were based on kinship and community ties. Regulation was exercised according to traditional customary norms, practices and taboos.

50 A. Youdeowei, F.O.C. Ezedinma and O.O. Onazi, *Introduction to Tropical Agriculture* 15 (London: Longman, 1986).

51 B.D. Ogolla and J. Mugabe, 'Land Tenure Systems and Natural Resource Management', in C. Juma and J.B. Ojwang, *In Land We Trust: Environment, Private Property and Constitutional Development* 85, 94 (Nairobi and London: Initiative Publishers and Zed Books, 1996).

52 See Sifuna, note 3 above at 90.

53 See generally P. Kameri-Mbote, 'The Use of the Public Trust Doctrine in Environmental Law', 3/2 *Law, Environment and Development Journal* 197-200 (2007), available at <http://www.lead-journal.org/content/06084.pdf>.

54 See Sifuna, note 3 above at 90.

55 See Okoth-Ogendo, note 23 above at 32.

56 *Id.*

57 *Id.*

58 *Id.*

The introduction, by the colonial and post-colonial government, of private ownership of land in the country had a profound impact both on the traditional local management institutions and regulatory functions generally. With regard to the first, the new land tenure regime made regulation of privately owned land problematic and raised critical legal and constitutional concerns. To this date, private ownership of land is a major obstacle to public regulation of land use due to the concept of private property and the inviolability of private property rights. Regarding the second, this new regime eclipsed traditional institutions that hitherto played a crucial regulatory role in the society not just in matters of land use but the entire spectrum of life. The part below examines the current regulatory institutions in the present day Kenya with respect to public regulation of land use.

### 3.3 The Existing Regulatory Institutions in Kenya

In Kenya, the public regulation of land use is exercised by three institutions, namely: the government, local authorities and local management institutions.

#### 3.3.1 The Government

Government is the most common and predominant regulatory institution not only in Kenya but in many parts of the world. Besides, its regulatory power seems to cut across the entire spectrum of the country's sectors and day to day life. Public regulation of land use is a public law function, which like other such functions is usually exercised by state and governmental authorities under the 'police power'. The term refers to the power of the state and governmental authorities to regulate land use in the public interest.<sup>59</sup> In Kenya this function is derived from the government's constitutional mandate to provide for the welfare of its people and from its responsibility as the custodian of the public interest. Both this mandate and responsibility are exercised through the adoption of appropriate policies, laws and regulations such as those relating to land use control, the subject of this paper. Okoth-Ogendo has observed that regulation is one of the pillars of land administration.<sup>60</sup> Since the institution of government

does not have the human attributes, it carries out its functions through its officials.

#### 3.3.2 Local Authorities

While the government is the predominant institution of public regulation of land use in the country, there are instances where certain laws have vested this function in local authorities. Whereas there are others, the principal legislation in this regard is the Local Government Act which establishes local authorities and spells out their functions.<sup>61</sup> Others include the Water Act of 2002,<sup>62</sup> Malaria Prevention Act,<sup>63</sup> Physical Planning Act,<sup>64</sup> Crop Production and Livestock Act,<sup>65</sup> Public Health Act,<sup>66</sup> Plant Protection Act,<sup>67</sup> Trust Land Act<sup>68</sup> and the Forests Act of 2005.<sup>69</sup> This legislative fabric empowers local authorities to exercise some land use control functions within areas of their jurisdiction.

#### 3.3.3 Local Management Institutions

Apart from regulation by the government and the local authorities, public regulation is also exercised by local management institutions, although to a small extent. While regulation by government and local authorities is more formal, regulation by traditional local institutions in Kenya is still informal. There is, however, room for the latter to grow into a formalised system as is the case in jurisdictions such as South Asia. Local control in the country is largely by family, clan, ethnic, tribal and community organisation. While these are largely based on family and kinship ties, there also exist in the country less informal institutions such as the *Wazee wa Kaya* (Kaya Elders) at the Coast and *Njuri Ncheke* in eastern Kenya.<sup>70</sup> There is a possibility of them growing into more formal

61 Cap 265 Laws of Kenya.

62 Act No. 8 of 2002.

63 Cap 246 Laws of Kenya.

64 Act No. 6 of 1996.

65 Cap 321 Laws of Kenya.

66 Cap 242 Laws of Kenya.

67 Cap 324 Laws of Kenya.

68 Cap 288 Laws of Kenya.

69 Act No. 9 of 2005.

70 See M.M. Kioga, 'Administration of Justice in the Rural Areas', in International Commission of Jurists (ICJ), *Law and Society* 74, 75 (Nairobi: ICJ, 1989). See also V.G. Simiyu, *Ethics and Ideology in a Constitution*, (Paper for the Constitutional Review of Kenya Review Commission, 2001), available at <http://www.commonlii.org/ke/other/KECKRC/2001/15.html>.

59 See Kameri-Mbote, note 53 above at 200.

60 *Id.*

local management institutions such as: the Village Assemblies (*Dagashida*) and *Baraza la Wazee la Ardhi* (Elders Land Council) of Tanzania;<sup>71</sup> and the famous *Panchayat* (assembly of wise men) of South Asia.<sup>72</sup> The *Panchayat*, for instance, exist in India, Pakistan and Nepal; where they are entrenched in national laws and constitutions. The Indian Constitution for its part has provision for devolution of powers and responsibilities to them.<sup>73</sup> Besides their incorporation into laws, they have more formal structures than their Kenyan counterparts which are ambiguous rudimentary informal institutions that exercise land use control only through social pressure and informal regulations that are not codified. Their operation is guided exclusively by traditional customary land use norms.<sup>74</sup>

## 4 FORMS OF PUBLIC REGULATION OF LAND USE IN KENYA

Public regulation of the use of privately owned land in Kenya is exercised in three major ways, namely: land planning and zoning; outright prohibition of harmful activities; and licensing processes.

### 4.1 Land Planning and Zoning

This is the traditional form of land use regulation. Land use planning is a process by which a public authority prepares and implements spatial frameworks for orderly management of human activities. Its major goal is to ensure that such activities are undertaken in a manner

that guarantees utmost attainment of economy, safety, aesthetics, harmony in land use and environmental sustenance. Kameri-Mbote has noted that land-use planning provides a guide for integrating different land uses.<sup>75</sup> Zoning for its part is the creation of zones for the respective land uses. It is a system of designating permitted uses of land, based on mapped zones which separate one set of land from another as a way of regulating the use to which land may be put. The purpose of zoning is to separate uses perceived to be incompatible, for instance, having a factory in a settlement area or setting up a bird sanctuary in an area dominated by farming activity.<sup>76</sup> The zoning system may either be activity-based or area-based; the former is where it is determined by a catalogue of activities while the latter is where land is divided into various categories and each category designated for certain uses.

Land planning and zoning are necessary to ensure efficient and sustainable utilisation and management of land and land-based resources.<sup>77</sup> They aim at avoiding haphazard land development and promoting desirable land development by ensuring efficient and sustainable management that mitigates the adverse effects of unplanned development activity.<sup>78</sup> Planning and zoning is the predominant form of land use regulation in Kenya and has even been incorporated in the country's laws. The bulk of Kenya's land use regulation and zoning law is found in the Physical Planning Act of 1996.<sup>79</sup> Others are the Environmental Management and Coordination Act,<sup>80</sup> and the Local Government Act. The Physical Planning Act makes provision for the preparation and implementation of physical development plans for urban areas, rural areas and even regions in order to regulate development and other land use activities in the country. This Act repealed the Town Planning Act<sup>81</sup> and Land Planning Act;<sup>82</sup> therefore replacing the regime set in place by these two pieces of legislation.<sup>83</sup>

Before the coming into existence of public control over the use and development of land, landowners were free

71 *Id.* at 97. See also I.G. Shivji, *Not Yet Democracy: Reforming Land Tenure in Tanzania* 65 (Dar es Salaam: HED/HAKIARDHI, 1998). The *Baraza la Wazee la Ardhi* and Village Assemblies are quasi-judicial bodies for settling land disputes at and directing land matters at village level.

72 See Encyclopedia Britannica, available at <http://www.britannica.com>. These exist in India, Pakistan and Nepal, and are entrenched in national laws and constitutions. The Indian Constitution, for instance, the Constitution of India Amendment Act of 1992 has provision for devolution of powers and responsibilities to the *Panchayat*.

73 See (India) Constitution of India Amendment Act of 1992.  
74 *Id.*

75 See Kameri-Mbote, note 9 above at 72.

76 *Id.*

77 *Id.*

78 *Id.*

79 See Physical Planning Act, note 64 above.

80 Act No. 8 of 1999.

81 Cap 134 Laws of Kenya.

82 Cap 303 Laws of Kenya.

83 See Physical Planning Act, note 64 above, Section 53.

to use their land as they wished, subject only to any limitations in the grant under which they held it and to obligations placed upon them at common law. Provided an owner acted within the confines of his or her estate and interest and committed no nuisance or trespass against a neighbouring property, he or she was free to use the land for the purpose for which it was economically best suited. However, with regulation, the situation changed and any development activities have to be in accordance with the land planning laws, which provide for the granting of permits and prescribe land zoning regulations. Notably, the function of land planning and zoning is exercised through legislation and is vested in the formal regulatory institutional framework of governmental power; central government and local government. It is exercised by governmental functionaries as well as local authorities.

## 4.2 Outright Prohibition of Certain Activities

Apart from planning and zoning, land use in Kenya is also controlled through a mechanism of outrightly prohibiting certain land use activities or practices which are considered harmful or undesirable. Notably, this form of regulation defies the 'formal-informal' dichotomy in that it is widely applied by both formal as well as informal systems and regulatory institutions. In Kenya, it is exercised by all the three regulatory institutions of land use control, namely, Government, local authorities and local management institutions. This regulatory regime is supported by an extensive array of legislation. This legislative fabric includes: the Agriculture Act,<sup>84</sup> Land Control Act,<sup>85</sup> the Forests Act of 2005,<sup>86</sup> Public Health Act,<sup>87</sup> Local Government Act,<sup>88</sup> Malaria Prevention Act,<sup>89</sup> Crop Production and Livestock Act,<sup>90</sup> Plant Protection Act,<sup>91</sup> Grass Fires Act,<sup>92</sup> Environmental Management and Co-ordination Act,<sup>93</sup> and the Chiefs'

Authority Act.<sup>94</sup> While a detailed discussion of all the legislative provisions in this framework is undesirable, certain provisions of some of these laws are examined below to provide a general overview of the prohibitory approach of land use control in the country.

Under the Agriculture Act the minister may for the purpose of soil conservation and ensuring good land husbandry prohibit landowners from undertaking certain activities or land use practices.<sup>95</sup> These activities include cultivating on steep slopes; ploughing along the contours of slopes; clearing of vegetation; planting certain vegetation; as well as grazing and watering of livestock. The Local Government Act empowers local authorities to prohibit owners as well as occupiers of land from carrying on certain activities. Under the Act a local authority may prohibit such persons from fencing their land parcels in a particular manner or using certain fencing materials or erecting structures on the land.<sup>96</sup> The Crop Production and Livestock Act empowers local authorities to make by-laws for purposes of prohibiting the keeping and grazing of cattle.<sup>97</sup>

The Environmental Management and Co-ordination Act prohibits the undertaking of certain activities and projects without first conducting an environmental impact assessment.<sup>98</sup> The Malaria Prevention Act for its part prohibits owners and occupiers of land from planting trees, vegetation or otherwise cultivating their land in a manner that may obstruct the flow of water into or out of or in a drain or culvert.<sup>99</sup> This prohibition is meant to avoid accumulation of breeding places for mosquitoes such as bushes and stagnant water and is important because malaria is one of the major public health problems in Kenya.<sup>100</sup> Another example of proscriptive directions is the public nuisance regulation under the Public Health Act where certain activities are considered as nuisances and are prohibited.<sup>101</sup> Under

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84 Cap 318 Laws of Kenya.

85 Cap 302 Laws of Kenya.

86 *See* Forests Act, 2005, note 69 above.

87 *See* Public Health Act, note 66 above.

88 *See* Local Government Act, note 61 above.

89 *See* Malaria Prevention Act, note 63 above.

90 *See* Crop Production and Livestock Act, note 65 above.

91 *See* Plant Protection Act, note 67 above.

92 Cap 327 Laws of Kenya.

93 *See* Environmental Management and Co-ordination Act, note 80 above.

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94 Cap 128 Laws of Kenya.

95 *See, e.g.,* the Agriculture Act, note 84 above, Sections 48 and 64.

96 *See* Local Government Act, note 61 above, Sections 145 and 166.

97 *See* Crop Production and Livestock Act, note 65 above, Section 4A.

98 *See* Environmental Management and Co-ordination Act, note 80 above, Sections 58 and 138.

99 *See* Malaria Prevention Act, note 63 above, Section 6.

100 *See* N. Sifuna and S. Mogere, 'Enforcing Public Health Law in Africa', 34 *Zambia Law Journal* 148, 153 (2002).

101 *See* Public Health Act, note 66 above, Sections 115 and 118.

the Act, it is unlawful, for instance, for any owner or occupier of any land or premises to allow or cause to exist on such land or premises any nuisance that is injurious to human health, for instance filth, garbage, smoke, foul smell or other noxious matter.<sup>102</sup> The Chiefs' Authority Act for its part also plays a role in this regulatory regime. Under it, local administrators called chiefs (not traditional chiefs) may issue orders prohibiting or restricting owners or occupiers of land situated within their locations from undertaking certain activities. The activities for which chiefs are empowered under the Act to prohibit or restrict include: cultivation of poisonous and noxious plants; destruction of trees; cutting of timber; grass fires; and the grazing of livestock.<sup>103</sup>

Prohibition, as already noted above, is a tool not only employed in the formal systems of land use control but in the informal systems as well. While it is used by Government and local authorities it has for a long time been a regulatory tool in society. This is evident from the fact that it was the predominant if not the only regulatory approach used by the rudimentary informal local management institutions such as family, clan, ethnic, tribal and community organisation; as well as the more corporate institutions such as the *Wazee wa Kaya* (Kaya Elders) at the Coast and *Njuri Ncheke* of eastern Kenya. Their operation is guided exclusively by traditional customary land use norms as well as customary practices and taboos.

### 4.3 Licensing Processes

Another way in which public regulation of land use is exercised in Kenya is through licensing processes, by subjecting certain activities to a licence. This is where the undertaking of certain activities requires prior licensing from a designated licensing authority. In Kenya, this form of regulation is provided for in legislation and is exclusively by governmental authorities, namely, the central government and local government authorities. It is not employed by informal local management institutions. While licensing is a way of sourcing government revenue as well as funds to meet the running costs of administrative agencies, it is also widely used as a way of regulating land use. This is because in order to be licensed the proponent is not only required to pay the

licence application fees but also to fulfill or comply with certain conditions spelt out as part of the licensing requirements. These conditions may include soil preservation or pollution control measures. Licensing is therefore not only a means of sourcing government revenue but can be an important tool in land use management.

There are several pieces of legislation that subject certain activities to licence and set out licensing procedures and institutional mechanisms with regard to land use. These include: the Environmental and Co-ordination Act,<sup>104</sup> Local Government Act,<sup>105</sup> the Water Act of 2002,<sup>106</sup> the Physical Planning Act of 1996,<sup>107</sup> Wildlife Conservation and Management Act,<sup>108</sup> Trust Land Act<sup>109</sup> and the Mining Act.<sup>110</sup> While again a detailed discussion of all the licensing legislative provisions is undesirable, it is nevertheless desirable to highlight some important provisions so as to provide a general overview of the licence approach of land use control in the country. The Environmental Management and Co-ordination Act identifies the activities and projects known to have significant effects on the environment and subjects them to an environmental impact assessment licence.<sup>111</sup> Accordingly such activities and projects may not be undertaken without a prior licence from the National Environment Management Authority (NEMA).

The Local Government Act requires that in order for some activities to be conducted they require a licence from the local authority in whose jurisdiction they are to be undertaken. Such activities include trade, livestock keeping and construction works. As per the Water Act of 2002, no owners and occupiers of land shall undertake any water works on their land without a licence from the ministry in charge of water.<sup>112</sup> The Wildlife (Conservation and Management) Act for its part requires landowners intending to keep wildlife on their land or to engage in hunting on it to obtain a licence from the ministry in charge of wildlife.<sup>113</sup> The Trust Land Act

<sup>102</sup> *Id.* Section 118.

<sup>103</sup> *See* Chiefs' Authority Act, Cap 128 Laws of Kenya, Sections 10 and 11.

<sup>104</sup> *See* Environmental and Co-ordination Act, note 80 above.

<sup>105</sup> *See* Local Government Act, note 61 above.

<sup>106</sup> *See* Water Act, note 62 above.

<sup>107</sup> *See* Physical Planning Act, note 64 above.

<sup>108</sup> Cap 376 Laws of Kenya.

<sup>109</sup> *See* Trust Land Act, note 68 above.

<sup>110</sup> Cap 306 Laws of Kenya.

<sup>111</sup> *See* Environmental Management and Co-ordination Act, note 80 above, Sections 58 and 138.

<sup>112</sup> *See* Water Act, note 62 above, Section 27.

<sup>113</sup> *See* Wildlife (Conservation and Management) Act, Cap 376 Laws of Kenya, Sections 29 and 48.

provides for the setting apart of trust lands and empowers the local authorities under whose jurisdiction these lands fall to control through licensing processes, land use activities on them. Among the activities for which a licence is required are: grazing of livestock; removal of timber and other forest produce; the taking of common minerals; wayleaves; and establishment of temporary labour accommodation.<sup>114</sup> Under the Mining Act, ownership of all minerals in Kenya is vested in the government and no one may prospect for or mine any mineral except with a licence from the Commissioner of Mines.<sup>115</sup> These are only examples to illustrate public regulation through licensing processes.

## 5 CHALLENGES TO PUBLIC REGULATION OF PRIVATE LAND IN KENYA

While public control of land use has numerous benefits, in Kenya the exercise of this function faces several challenges. These significantly undermine the role of the function in land administration and management in the country. The author has identified seven major challenges facing the smooth exercise of public regulation of the use of private land in Kenya. These are: the constitutional entrenchment of private property rights; potential for abuse of the power; the fragmented character of the applicable legal framework; failure of the laws to set standards for action; ignorance; institutional problems; and the relegation of traditional local control systems by modern formal systems.

### 5.1 Constitutional Entrenchment of Private Property Rights

Kenya has entrenched the sanctity of private property in the bill of rights in its Constitution.<sup>116</sup> Constitutional entrenchment accords such rights considerable sanctity

and inviolability and places them beyond the reach of any offices, persons, laws, policies and practice. Besides, Kenya, legislation confers upon landowners sweeping proprietary and usufruct rights. Kenya's Registered Land Act, for instance, grants owners of private land absolute and indefeasible proprietorship rights with regard to ownership and use.<sup>117</sup> Ideally this legislative provisioning allows landowners to use their land as they wish. These rights of use are, however, subjected to the police powers of the state and governmental authorities to control the use of land whatever the regime of ownership.

Notably, while the Kenya constitution has express provision on compulsory acquisition of private land for public purposes (eminent domain), it has no express provision on the power to control land use (police power). In essence therefore the only form of public intervention in the regime of private property rights in land expressly provided for in the Constitution is eminent domain. Any attempts to read into the Constitution the police power can only arise by implication as a matter of interpretation of the general proviso for the enjoyment of individual rights which is enshrined in section 70 of the Constitution. This is a grave omission because implication alone is insufficient to justify interference with a sacrosanct constitutionally entrenched right such as private property. Given the importance of public regulation of the use of private land as demonstrated in this paper, one would have expected an equivalent provision entrenching the police power. Notably, the Constitution has extensive and elaborate provisions on eminent domain, stating the circumstances under which private land may be acquired and the procedures for such acquisition as well as prescribing safeguards against abuse or misuse of this power.<sup>118</sup> In Kenya, therefore, the function of public regulation of the use of private land is exercised mainly through land use legislation. Supporting this fact, Migai-Akech observes that in Kenya it is legislation which 'determines the uses to which land may be put, seeks to reconcile competing demands on land and land-based resources, and seeks to ensure that established resource use and conservation standards and objectives are adhered to by holders of land rights'.<sup>119</sup>

114. See Trust Land Act, note 68 above, Sections 37 and 38.

115. See Mining Act, note 110 above, Sections 4 and 6.

116. See Section 75, Constitution of the Republic of Kenya, note 2 above.

117. See Registered Land Act, Cap 300 Laws of Kenya, Section 27 and 28.

118. See the Constitution of Kenya, note 2 above, Section 75. See also Sifuna, note 3 above at 94-95.

119. See Migai-Akech, note 41 above at 10.

## 5.2 Potential for Abuse and Misuse of the Power

Where an agency has been given the power to act in a particular way, the possibility of such power being abused or misused for a different purpose cannot be ruled out. An unconscionable exercise of this power by an overzealous or even malicious functionary may put undue hardship on landowners. This may happen where the functionary exercising this power, for instance, considers irrelevant matters, fails to consider relevant matters, is biased, acts on vendetta, or acts *ultra vires*. Besides, while appropriate public regulation of land use is proper and can help achieve the desired goals, over-regulation is not good as it may subject landowners to undue hardship or render their proprietary rights nugatory. Moreover, regulation that considerably diminishes the economic value of the land to a point of having insignificant or no economic value at all to the owner amounts to 'constructive taking' of the land and should be avoided. In order to avoid such situations there is need for safeguards to ensure that the exercise of the power does not result in mischief.

## 5.3 Fragmented Legal Frameworks

In Kenya, the legislative approach to public regulation of land use is largely fragmented. Although it is enshrined in land statutes, public regulation of the use of land is spelt out in several pieces of legislation rather than in the land statutes. It is in legislation on physical planning, agriculture, water, environmental protection, and forests. This fragmented approach is inappropriate and undermines the efficacious exercise of this function because of overlapping responsibilities and confusion that may lead to conflict, duplicity and even inaction. In situations where a responsibility is vested in various agencies, there is need for having inter-agency co-ordination efforts. Besides, there are many other sectoral pieces of legislation which though not directly intended for land use control, their enforcement and implementation is likely to affect certain aspects of land use. The problem is compounded by the fact that Kenya lacks adequate mechanisms for co-ordination of implementation and enforcement of the existing land use control policy and laws. One would have expected there to be an inter-agency outfit, for example an inter-ministerial committee on land matters. Related to this are weaknesses in the institutional arrangements.

## 5.4 Failure of the Laws to Set Standards

Notably, most of the legislative provisions on the public regulation of land use in Kenya do not themselves set standards within which human activity must be conducted. They merely identify areas of concern and confer on individual government functionaries the power to make rules. This is evidenced by the persistent use of the words 'The Minister may ....' Leaving fundamental regulatory tasks to the discretion of individuals is undesirable. First, due to inertia known of all bureaucracies the functionary of the power may fail to act. Secondly, the functionary may make rules, decisions or take actions that go against the principles of proper land and environmental management. This will in effect defeat the very essence of those regulatory functions.

## 5.5 Ignorance

Even though ignorance of the law is not an excuse, ignorance of facts and even laws is alive in Kenya and is one of the factors that undermine the smooth operation of the regulatory regime of land use. The low levels of literacy in the country especially among the rural folks could be a major reason for the widespread lack of awareness of the existence of land use laws. This problem may be compounded by a lack of proper communication on the part of the government with land users about these laws. With an appreciable portion of owners and occupiers of land unaware of their public obligations in the use of that land, this is a real problem that needs to be addressed urgently. Such people lack information on the regulatory regime on land use in terms of the policies and laws as well as the mandate of existing institutions and agencies.

The Kenya government publishes its laws through the government printer as well as through notices in its official publication- the Kenya Gazette. Currently, the circulation of the gazette is limited to certain public institutions such as government offices, law courts, and libraries run by the Kenya National Library Services (KNLSS). To the general public it is by subscription and the publications are in the English language with no effort at translation. Under these circumstances the lack of adequate access to these laws by the Kenyan public is a reality especially with widespread illiteracy in

the country and over 50 percent of Kenyans living under the poverty line. Penalties for breach alone are not enough to secure compliance because there is no justification to taking an entire village to jail for failure to comply with a land use directive or law. This is a fact that law enforcement and implementation agencies ought to be alive to. For policies there has been ample publicity to the grassroots through the provincial administration through *barazas* (meetings) of chiefs, divisional officers and district commissioners. There is no equivalent publicity on the laws by any government or non-governmental agency.<sup>120</sup>

## 5.6 Institutional Problems

Another challenge to public regulation of land use in Kenya is the weaknesses in the existing institutional arrangements. These hamper the effective exercise of the function by the respective institutions. While this regulatory function is generally vested in three broad institutional arrangements (government, local authorities and local management institutions), the actual exercise of the function is carried out by several agencies even within the same institution. In most cases each of these agencies exercises different functions and have different mandates. This has resulted in fragmentation in the institutional arrangements for land use control. The existence of a mammoth bureaucracy created by the multiplicity of regulatory agencies may undermine their efficacy as well as that of their parent institutions. It has also resulted in overlapping responsibilities among such agencies and institutions, in turn fostering conflict, duplicity and even inaction.

Overlapping responsibilities among agencies is likely to lead to inter-agency conflicts where the respective agencies take different positions on a particular issue or where the officials argue on which agency is the most-suited to act in a particular situation. It may also lead to non-action where one agency expects the other to act in a given situation. Besides, where there is duplicity of roles among various agencies, there is need for effective co-ordination so as to harmonise and synchronise the respective efforts of these institutions. The situation is compounded by the fact that public regulation of land use in the country is also exercised by traditional local management institutions. These institutions are

predominantly informal and therefore play an informal role that lacks the legal backing enjoyed by formal institutions within the central and local government structures.

As a result, the leaders of these local outfits have continued to lose influence in the national regulatory structure and their decisions and directions may be and are often ignored without any tangible punitive legal consequences. Admittedly, compliance with their decisions and directions is largely secured through taboos and social morality. Nevertheless, as Evers reports 'these institutions continue to play important roles in pastoralist and cultivator communities, often complementing or accompanying private management systems'.<sup>121</sup> Notably, even if these local management institutions finally become incorporated into formal law systems, it is unlikely that they will be more effective than those institutions within the formal state and governmental structures such as government departments and agencies. Unlike contemporary formal institutions which are backed by the coercive power of the state, the local management institutions depend on the perceptions of the individual members of society for legitimacy and authority.

## 5.7 Relegation of the Traditional Local Control Systems by Modern Formal Systems

The adoption and expansion of modern systems in Kenya has weakened and disrupted the traditional local management systems of land use control.<sup>122</sup> Indeed these systems have been eclipsed and effectively replaced by modern control systems.<sup>123</sup> Despite their importance in the rural setting as demonstrated above, these largely indigenous local management systems have one major inherent limitation. They are not incorporated in the country's legal framework. The lack of legal backing has left them to rely on fossil institutions and amorphous norms that are not codified. For this reason their decisions and directions lack the force of law and can

<sup>120</sup> Findings by this author during research for this paper.

<sup>121</sup> Y.D. Evers, 'Supporting Local Natural Resource Management Institutions: Experience Gained and Guiding Principles', in D. Stiles ed., *Social Aspects of Sustainable Dryland Management* 93 (New York: John Wiley & Sons, 1995).

<sup>122</sup> *Id.* at 96.

<sup>123</sup> *Id.* at 95.

be ignored without any legal penalties. This has also led to a situation where these local control systems are often misunderstood and their potential contribution neglected. Barrow reports that the role of these systems has been eroded and ignored by government planners and legislators.<sup>124</sup> Despite these setbacks these systems have remained resilient and are still influential in many rural areas, although on an informal basis. Barraclough et al, for instance, reported that 'rural areas in much of sub-Saharan Africa are still largely managed through customary land systems under which each clan claims inalienable rights to the lands it occupies'.<sup>125</sup>

## 6 CONCLUSION AND WAY FORWARD

This paper has demonstrated the significance as well as unique character of land and the necessity of the public regulation of its use even when it is under private ownership. The various forms that this regulation may take as well as its benefits have been extensively examined and strongly supported. Kenya's legal and institutional frameworks on public regulation of land use have also been discussed as well as their effectiveness in enabling the exercise of this function to meet its intended goals. The author, however, established that despite the need for regulation and the array of supportive legal and institutional frameworks for this regulation in the country, the exercise of this function in the country faces serious challenges that undermine its effectiveness in achieving its intended goals. Five such challenges were identified and the author in the part that follows below makes suggestions on how these factors can be surmounted.

### 6.1 Way Forward

For public regulation of the use of private land in Kenya to be meaningful and achieve its intended goals, there is need for the following reforms:

124 E.G.C. Barrow, *The Drylands of Africa: Local Participation in Tree Management* 5 (Nairobi: Initiatives Publishers, 1996).

125 S. Barraclough, K. Ghimire and H. Maliczek, *Rural Development and the Environment: Towards Ecologically and Socially Sustainable Development in Rural Areas* 68 (Geneva: UNRISD, 1997).

#### 6.1.1 Need for Safeguards

There is a need for adequate safeguards to guard against abuse and even misuse of this function. This can be done by crafting into the law certain checks and balances to strike a balance between the imperative to regulate the use of any land despite its regime of ownership on the one hand and the imperative to protect the proprietary and usufruct rights of the landowners. Three steps are required in this regard. First, the Kenya Constitution should be amended to have express provisions on the power of the government to regulate the use of privately owned land. Such provisions should expressly spell out the circumstances under which state and governmental or other public authorities may regulate the use of such land as well as the procedures to be followed.

The second step is to democratise the process of regulation to adopt fundamental principles of democracy such as consultation, negotiation and consent of landowners. Disregard for objections and views of individual landowners can only promote antagonism and is likely to open floodgates of litigation in courts. Since the right to private property is a constitutional right, courts are most likely to rule in favour of the objecting landowners. This is likely to render the power nonfunctional unless accompanied with adequate safeguards against abuse and misuse. Another problem that this paper identified with regard to land use control laws is their failure to set standards of action and hence leaving fundamental tasks to the absolute discretion of individual functionaries who may take wrong actions or fail to take any action at all. The third step in these reforms therefore is for the laws to be amended to clearly spell out unambiguous standards of action for officials, by prescribing thresholds and clear guidelines that should direct action.

#### 6.1.2 Need for Effective Co-ordination

One of the challenges facing the exercise of public regulation of land use in Kenya is the fragmented approach of the existing legal arrangements and particularly the legislative framework as well as the attendant institutional arrangements. Currently the power is contained in various pieces of legislation which vest power in various different agencies. This disjointed approach invariably results in confusion, conflict, duplicity, overlapping responsibility; hence undermining

the effective operation of power. There is need for the Kenya government to maintain effective co-ordination to harmonise the applicable laws and synchronise the respective efforts of these institutions in carrying out their functions as well as the implementation of those laws. This can be done by setting up inter-agency as well as inter-sectoral mechanisms, for instance an oversight co-ordination committee or agency comprising of members drawn from the respective agencies to address cognate matters relating to land use control. Such a committee or agency should be created through legal provisions and be located preferably in the land ministry to benefit from its centrality and expertise in land related matters.

#### *6.1.3 Incorporate in the Laws the Significance of Land to the People of Kenya*

The importance of land in the lives of the Kenyan people should be expressly incorporated in the country's law. Given the primacy of the Constitution among other laws as the law from which all other laws derive their legitimacy and the charter of government, it should incorporate and entrench this philosophy. This will form the basis for a national land ethic that will rally governmental as well as individual action with regard to land tenure. One way in which the incorporation may be crafted is by expressly recognising the importance, scarcity, fragility and sensitive character of land issues and set out the factors that should guide government and private actions in matters relating to land. These factors could include, for instance: the principle of inter-generational equity; its cultural as well as historical significance to the African people; its scarcity; its sensitive character as well as its fragile nature; the numerous competing and sometimes incompatible uses; principles of democracy such as consultation, public participation and negotiation; need for civility; rule of law and principles of fair play such as due process; and need for peaceful resolution of disputes.

#### *6.1.4 Raise Public Awareness*

It was noted above that in Kenya, there are low levels of literacy especially among the rural folks, resulting in ignorance among the subjects. This, it was further noted contributes to lack of information on the existing regulatory regime. There is need to reduce the level of ignorance among the public while also mitigating the undesirable effects of it by maintaining mechanisms for

proper communication of the laws to the people to whom they should apply, in this case owners and occupiers of land as well as their agents. This will enhance compliance with the prescriptions of the regulatory regime. Public authorities, non-governmental organizations (NGOs) as well as private sector agencies should in partnership initiate civic education programmes to educate the general public on the country's land use regime. Such programmes should specifically focus on the significance of land; the need to use it in a manner that does not degrade it; regard by land owners for other land owners and future generations; the rights and obligations of owners and occupiers of land under existing laws with regard to its use. While this awareness will help develop a land ethic in the country, it will also bolster public knowledge among the citizenry on the country's policies, laws and institutions on land use.

#### *6.1.5 Formal Recognition of Local Management Institutions and Systems*

While land use control in Kenya has for a long time been exercised by both governmental authorities as well as local management institutions, the latter are increasingly losing their place in the mainstream regulatory processes. There is a need to incorporate these local management systems and institutions into Kenya's laws and policies as has been done in jurisdictions such as South Asia. This will not only transform them into formal outfits and accord their functions formal recognition and legal backing but will also ensure that their decisions and directions are respected. This will make them more effective in the public regulation of land use in the country. After all traditional African customary law from which they draw their power and norms is one of the stipulated sources of law in Kenya.<sup>126</sup> Since they are based on traditional values and practices, these local control systems are likely to enjoy more acceptance among the people than the superimposed government-backed systems that are fashioned largely along American and European concepts that are alien to the local circumstances of Kenya. This is also because rural areas in the country are still dominated by customary land concepts. Aspects of this can be discerned from the Land Disputes

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<sup>126</sup> (Kenya) The Judicature Act, Cap 8 Laws of Kenya, Section 3 (2).

Tribunals Act of 1990 which establishes land disputes tribunals in all administrative areas in the country whose membership comprises government administrators and elders from local communities.<sup>127</sup> The Act limits the jurisdiction of Magistrates' Courts in certain matters relating to land and requires the Tribunals to apply recognised customary laws of the respective communities.<sup>128</sup>

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<sup>127</sup> (Kenya) The Land Disputes Tribunals Act, Act No. 18 of 1990.

<sup>128</sup> *Id.* Section 3 (7).

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