Entitlement without Titles

The case of unregistered land owners in Kilifi, Kwale and Mombasa Counties

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A report by Haki Yetu Organization

February, 2013

What greater grief than the loss of one's native land - Euripides

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Foreword

Two years after the promulgation of a new Constitution, some Kenyans are yet to sample its fruits. For advocates of land reform the waiting is all the more painful due to the Executive's reluctance to swear into office the National Land Commission (NLC). The constitution has paved the way for new land legislation and the establishment of land and environmental courts. The nuts and bolts of a comprehensive land reform are in place, all that is missing are the technocrats from NLC to start the work.

Haki Yetu too has played its part in advocating for land reform to fully address the needs of the poor and dispossessed. This research was conducted with a view to giving a voice to the poor to express their anger and disappointment at being people of ***Entitlement without Title***. In the Coast Region there are far too many people living like squatters and foreigners in their own country. Thousands still lack security of tenure 50 years after independence.

In this research we have highlighted just 10 communities but there are dozens more facing a similar fate all over Pwani and Kenya. The research is intended to be submitted to the NLC as they commence their work. The research is complete, it is up to them to now take the necessary and immediate steps to redress these land matters.

Yet, the research and submission is just a beginning. The affected communities need to continue to lobby, protest and use every legal means possible to have their cries heard. Even in a new political and constitutional dispensation, advocacy and mobilization is still required. Jesus said blessed are the poor with spirit, and these communities have spirit and determination. There is hope but it requires both anger and courage to be realized – anger at the current situation and courage to take corrective measures. The NLC and the communities need both qualities.

This publication is the work of Lands Programme Officer Peter Kazungu and at Haki Yetu we are proud of his commitment, thoroughness and endurance. It has been a transforming project for him and for all of our staff, especially Sebastian Menza who assisted in the research. We feel that we have a document that does justice to the poor but also challenges us all to continue to struggle for land reform in Kenya. Read it, empathise with the victims of greed, corruption and neglect but commit yourself to make Kenya a better, fairer and more just society.

Fr Gabriel Dolan, Director Haki Yetu.

Acknowledgement

This report is the result of hard work, support and commitment of many individuals, communities and institutions. We are deeply indebted to all those who facilitated the successful compilation of this report and wish to acknowledge them.

We wish to appreciate the communities who willingly shared their experiences and predicaments with us, in particular: the Takaungu, Shariani, Kijipwa, Tudor, Kibarani, Maganda, Dunga unuse, Bangladesh, Kwa Punda, Kwale, Msambweni, Kinondo and Magaoni communities. May this publication ignite the drive that finally delivers you from your troubles.

We are grateful for the support we have received from members of the Coast Land Non State Actors especially Bernadette Muyomi then of Action Aid International (K), Grace Oloo of Ujamaa, Nelson Lugho then of Kenya Land Alliance, Nagib Shamsan of Kenya Land Alliance, Benjamin Maina of Kituo cha Sheria and Mrima Wanyepe of Ujumaa among others.

Special appreciation goes to Mr Odindo Opiata for his valuable contribution towards this publication as the legal consultant. We are grateful for your input.

Last but not the least, our appreciation goes to the staff of Haki Yetu Organization, led by Fr Gabriel Dolan. In particular, we wish to appreciate the efforts of John Paul, Triza Gacheru, Julius Wanyama and Sebastian Menza. The Land Rights Programme appreciates your support.

List of abbreviations

CLO	-	Crown Land Ordinance
COK	-	Constitution of Kenya 2010
FGD	-	Focus Group Discussion
KISCOL	-	Kwale International Sugar Company
LLC	-	Land Lobby Committee
LTA	-	Land Titles Act
LTO	-	Land Titles Ordinance
MoL	-	Ministry of Lands
MRC	-	Mombasa Republican Council
NLC	-	National Land Commission
NLP	-	National Land Policy

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Executive summary

Land at the coast of Kenya has been the subject of an intense scramble among the Coastal communities themselves as well as between the Coastal communities and perceived foreigners. This scramble has historical roots dating back to the pre-colonial period but has been exacerbated over the years mainly because of the region's strategic geographical location. There have been violent attempts at addressing this state of affairs but they have frequently ended in bloodshed and loss of life.[1] The adoption of the National Land Policy (NLP) in 2009 and the Constitution of Kenya (CoK) in 2010 and the subsequent enactment of enabling land legislations[2] have however ushered in a new land regime that presents a very opportune environment for the redress and resolution of the Coastal land conflicts.

Haki Yetu, the Human Rights Programme of the St Patrick's Catholic Parish, of Mombasa Catholic Archdiocese works with the poor, vulnerable and disadvantaged members of the Coastal community in Mombasa, Kilifi and Kwale Counties. It highlights the plight of some of these communities facing land problems with a view to using the opportunities afforded by the new land regime to resolve these problems.

This report is the culmination of a research into the land question at the Kenyan Coast with a special focus on ten distinct troubled communities in Kilifi, Kwale and Mombasa counties. The report is divided into five chapters.

Chapter one introduces the research. It gives the parameters for the research, its rationale and objectives. Furthermore, this part discusses the approach used by the research in collecting and synthesizing data to come up with the presented information. This chapter answers the critical question: why conduct this research?

Chapter two of this report looks at the historical perspective of the current Coastal land question. It examines the attempts by the successive governments to rectify the historical and present land issues. It also paints a picture of the current land situation at the coast.

Chapter three highlights land injustices suffered in the years past and present by ten communities. This chapter is supported by copies of titles to land and other documents. These documents have not been attached herein due to their sensitivity, but are available for perusal by interested parties.

Chapter four is a restatement of the present legal framework governing land in the country. This part gives a special emphasis to provisions of the National Land Policy, Constitution and legislations that address the Coast land issues.

1 The Kaya Bombo uprising in 1997 and most recently the Mombasa Republican Council are just a few examples of violent reactions to the land question at the Coast.

2 The Land Act no. 6 of 2012, the Environment and Land Court Act no. 19 of 2011, the National Land Commission Act no. 5 of 2012 and the Land Registration Act no. 3 of 2012

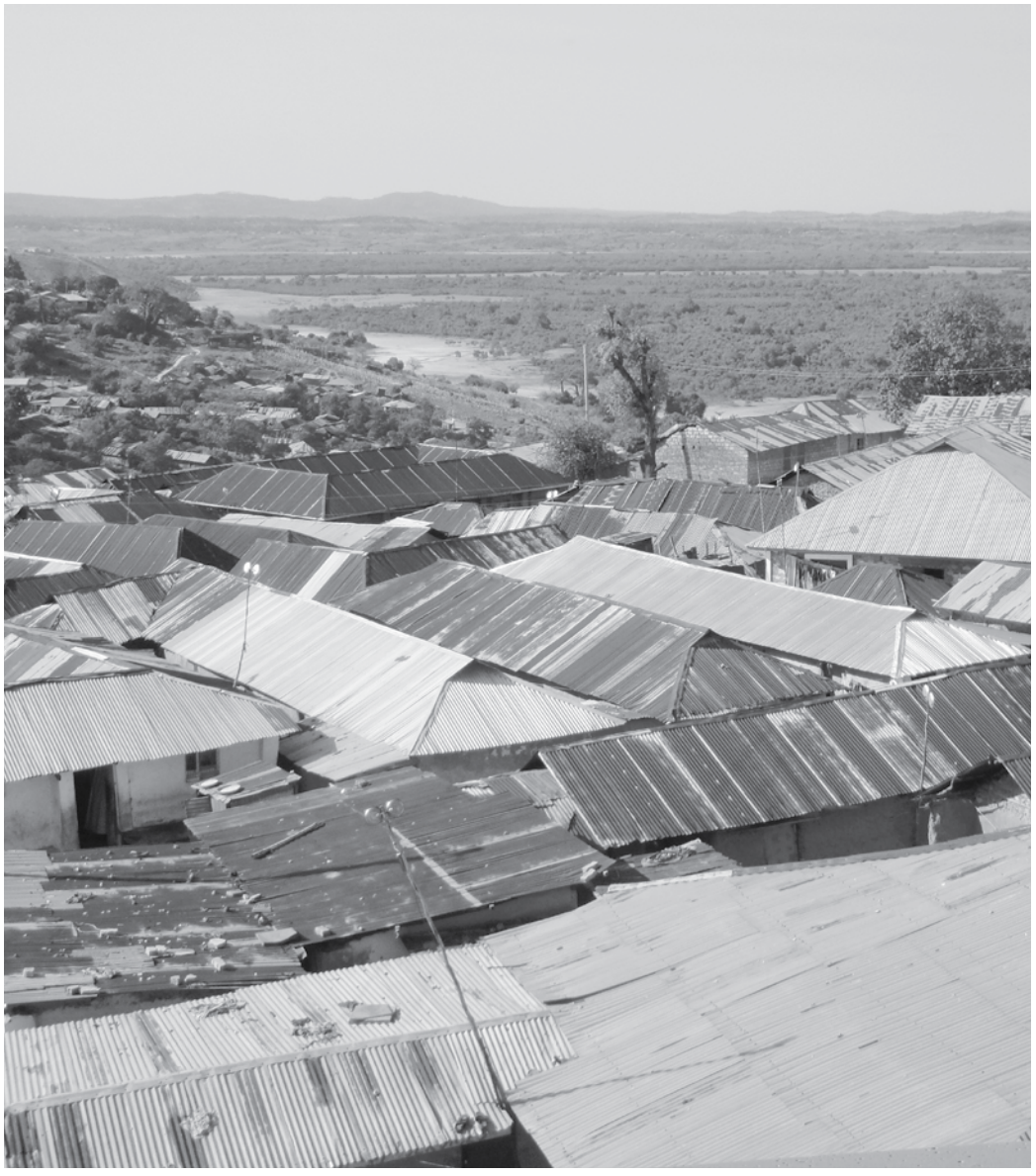
Chapter five of this report looks at the issues affecting the ten communities sampled for this study. It explores the opportunities available in the laws for exploitation. Recommendations are duly made for addressing the issues arising from the ten cases and to some extent several other issues ailing the land sector at the Coast. These recommendations include:

- State facilitated arbitration between title holders and unregistered land users (squatters), aimed at facilitating the protection of the rights of all parties involved;
- The immediate implementation of the new land laws especially provisions dealing with addressing historical injustices, squatters and settlement schemes;
- The hastening of the drafting and enactment of the Eviction and Resettlement law to ensure evictions are conducted according to internationally acceptable standards;
- The judiciary should encourage the application of appropriate means of alternative resolution including conciliation, mediation and traditional dispute resolution mechanisms as provided and recommended by the constitution;
- The courts must also allow both the values and spirit of the constitution and the recent land legislation to influence their rulings bearing in mind that they have a particular duty of social justice towards the poor and landless who have no other place to call their home.

The final part of the report includes conclusion and attachments.

1

Introduction to the study



1.1. Background

One of the major challenges that Kenya faces as it ushers in its jubilee year is addressing injustices in the land sector. Land and especially along the Kenyan Coast remains a complicated issue that is yet to be comprehensively addressed. Consequently, a substantial percentage of the Coastal community remain without title documents to the land they have occupied for ages, controversially deemed squatters. Statistics from the Ministry of Lands show that the number of registered 'squatters' along the ten mile Coastal strip stand at 128,900 persons (MoL, 2010). The ten mile Coastal strip figures however represent just a fraction of the situation when the region is viewed holistically. The region has the highest number of landless indigenous people living as squatters compared to all the other regions in Kenya.[3]

Some historical, socio-economic and legal factors have combined to give rise to the current land problem at the Coast. The onset of colonialism coupled with the enactment of laws that impacted tenural systems can be cited as the two main factors that facilitated the mass disinheritance of Coastal communities of their land. Post colonial land laws and policies have done little to correct the injustices occasioned by the colonial administration.

This is not the only category of landless people though. In fact the foregoing category is most prevalent in the rural parts of the region. In urban areas, the landless can be found in informal settlements, otherwise known as slums. These people have established settlements on idle land, belonging to the government or absentee landlords. While rural landlessness can be attributed to disinheritance made possible by colonial land laws, present urban landlessness is exacerbated by socio-economic factors, forcing people to move into vacant lands in search for settlement. Be that as it may, both categories have legitimate claims to these lands, what they lack are title documents to cement their claims on. Consequently, most of these communities have faced forced evictions from their settlements.[4]

Since independence, post-colonial governments have made attempts to resolve the endemic land question at the Coast. The first real attempt at resolving the Coast land question however was through a parliamentary select committee inquiry, the 1978 Parliamentary Select Committee on the Issue of Land Ownership along the Ten Mile Coastal Strip of Kenya. Subsequently, there have been concerted efforts to establish regional settlement schemes to offer tenure security to those occupying government lands. Unfortunately; greed, corruption, abuse of office, lack of a guiding land policy,

3 National Land Policy (sessional paper no. 3 of 2009), article 184

4 There have been several evictions at the Kenyan Coast with the most recent taking place at Kibarani, where the community was evicted on April 14th, 2012. The Dunga Unuse community was evicted on October 7th, while Makongeni community in Kwale has undergone eviction in phases July 2012 to December 2012 to name but a few recent cases.

a complex legal framework among other factors have rendered these attempts futile thus far. The land question at the Coast remains a controversial subject, often the source of unrest and sometimes violent outbreaks of conflicts.[5]

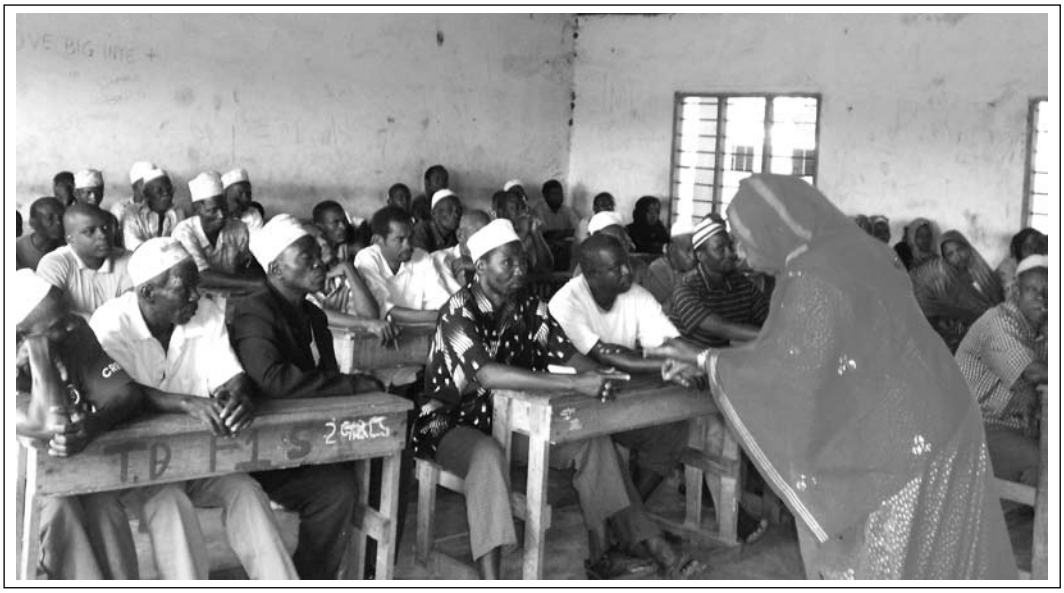
The adoption of Sessional Paper number 3 of 2009, otherwise known as the National Land Policy (NLP) was a huge step forward in addressing not just the Coastal land problem but the entire land sector in the country. The NLP sets out very progressive principles of land governance. These principles are anchored in chapter five of the Constitution of Kenya 2010, giving the policy constitutional protection and a platform for implementation. These two instruments expounded further in national legislations have substantively reformed the land sector, and present a real opportunity to comprehensively address the Coastal land issues.

This report is a culmination of a research into cases of legitimate land ownership claims without title documents. It documents legitimate claims to land of ten communities drawn from Kilifi, Kwale and Mombasa Counties. The objective of the research is to highlight the plight of these communities and to provide a sound platform for a fact based advocacy for the resolution of their cases. The ten cases are representative of some of the issues that have informed the Coast land question i.e. Historical injustices, absentee landlords, skewed settlement schemes and investor versus community interests conflicts. These issues are looked at from the communities' perspective, and recommendations based on existing legal framework have been customised to address the specific issues affecting the individual communities. This study is centred on addressing the Coastal issues using the legal and institutional frameworks already in place or expected to be put in place in accordance with the law.

1.2. Approach

Qualitative research methods were adopted in conducting this study. Focus was given to conducting interviews, observing, consulting stakeholders and land searches. The prevailing and past land laws were studied to give context to the origin of some of the land issues as well as explore opportunities available in the new laws. Given the number of studies previously done with regard to the Coast land problem, secondary data formed a good source of information for the study. In a nutshell, the research was conducted in the following key stages:

5 The Pokomo and Orma communities in Tana River for instance have been fighting over land rights. More than a hundred people and hundreds of livestock have been killed in the skirmishes in the last four months of 2012 and the first month of 2013.



1.1.1. Consultation of Stakeholders

A land stakeholders meeting was held at the Lotus Hotel on the 3rd of August, 2012 for consultation purposes. The meeting brought together stakeholders drawn from Civil Society Organizations working in the coast region including: Kituo cha Sheria, Minda Trust, Kenya Land Alliance, Action Aid International (K) and Ujamaa Centre. The stakeholders were engaged in critical deliberations on the objectives and relevance of the research.

Participants in the meeting made a variety of suggestions ranging from the potential areas of focus to potential communities to be engaged in the study for their land injustices experience. Some 20 odd communities were suggested as having suffered land injustices and who would be willing to participate in the study.

1.1.2. Sampling of Land Cases

Given there are several cases of land injustices at the Coast, it became necessary to sample a few. Cases sampled for this study were drawn from communities living in Kwale, Kilifi and Mombasa counties. With over 20 land injustice cases suggested by stakeholders, a criterion was developed to help cut down the number to a number that would be easy to work with. The criterion used to pick the cases was as listed below:

- The severity of land injustice suffered;
- The locality of the community;
- The willingness of the community to work with the researching organization;
- The willingness of the community to be part of the study;

- The interventions already made on the injustices suffered; and
- The stakeholders involved with the community;

After an initial vetting based on the criterion discussed above, some twelve communities were identified. These communities were drawn from the three counties as listed in the table below:

Table 1: *The 12 sampled communities grouped according to their County of origin.*

County	Kilifi	Mombasa	Kwale
Communities	1. Takaungu 2. Shariani 3. Kijipwa	1. Tudor 2. Kibarani 3. Dunga unuse (Chaani) 4. Kwa Punda 5. Maganda	1. Msambweni 2. Kinondo 3. Ramisi schemes (Magaoni) 4. Tsunza

1.1.3. Focus Group Discussions

Focus Group Discussions (FGD) were organized and held in the 12 locations. These discussions, targeting 30 participants per community were aimed at gauging each of the communities' perception of the land reform agenda (see annex 1). The FGDs formed the first part of larger forums that followed, where communities were given an opportunity to ventilate their land issues. Communities benefitted from brief empowerment on the new land laws that were discussed during the forums as well.

Table 2: *Schedule of FGD meetings / community forums*

No.	Date	Community	Venue of meeting	Number of participants
1	13/08/2012	Takaungu	Mkwajuni Polytechnic	34 (30 male and 4 female)
2	15/08/2012	Kwa Punda	St Patrick's Hall	29 (13 male and 16 female)
3	16/08/2012	Dunga Unuse	New Mombasa Miracle Church	31 (10 male and 21 female)
4	17/08/2012	Kibarani	St Patrick's Hall	17 (9 male and 8 female)
5	22/08/2012	Tudor	Tudor Pastoral Centre	25 (12 male and 13 female)
6	23/08/2012	Shariani	Shariani Pentecostal Church	39 (23 male and 16 female)
7	24/08/2012	Maganda	Local Church	38 (28 male and 10 female)
8	28/08/2012	Msambweni	Vingujini Primary Sch.	30 (15 male and 15 female)

9	29/08/2012	Magaoni (Ramisi Schemes)	Zigira Primary Sch.	30 (19 male and 11 female)
10	30/08/2012	Kinondo community	Kinondo Secondary Sch.	57 (42 male and 15 female)
11	12/09/2012	Kwale township	Kwale Cultural Centre	24 (14 male and 10 female)
12	19/09/2012	Kijipwa community	Ngoloko Primary Sch.	30 (24 male and 6 female)

Several cases were collected from the twelve community forums but were subsequently reduced to ten cases due to resource constraints. These cases are: Takaungu and Shariani communities in Kilifi County; Tudor, Maganda, Dunga unuse, Kibarani and Kwa Punda communities in Mombasa County; and Kinondo, Ramisi schemes and Msambweni communities in Kwale County.

Summary of the cases

i. Takaungu community

Takaungu is a settlement located about 35 kilometres north of Mombasa along the Mombasa-Malindi road. Administratively, it is a location in Kikambala division, Kilifi County. The settlement sits on land registered to the Mazrui Trust, in trust for the Mazrui family and its descendants. At the time of its registration in 1914, it was home to not just the Mazrui family but to hundreds of other indigenous communities mainly of the Mijikenda descent. This led to conflicts between members of the Mazrui family and the indigenous communities. This conflict remains unresolved to date.

ii. Shariani community

Shariani is yet another location in Kikambala division of Kilifi County. Within Shariani location is a 174 hectare plot that is home to hundreds of families. This piece of land located along the Mombasa-Malindi highway, about 25 kilometres north of Mombasa is registered in the name of The Kenya Ports Authority, a government parastatal. The community alleges that the piece of land is their ancestral land and was taken away from them under controversial circumstances via the infamous Land Titles Ordinance of 1908. It has been transferred to various entities over the years without the community's occupation on the land being affected. However, the current registered owner has issued an eviction notice to the community, after expressing its intention to build a hotel on the piece of land. The community faces a real threat of eviction from their ancestral land.

iii. Tudor kwa Makaa community

This is an informal settlement within the island of Mombasa at Tudor area. The Tudor kwa Makaa community with a population of over 200 people occupies two plots; MSA/Block IX/50 measuring 0.4 hectares and MSA/block IX/ 49 measuring 0.8 hectares, both registered to Chamdan Jethanand Gidoomal and Prem Jethanand Gidoomal as tenants in common in equal shares. They have lived on the two parcels of land without any harassment for over three decades. Recently though in 2009, a contractor has attempted to evict the community allegedly under orders of the owner. Court orders to stop attempts by the construction contractor to evict the community have systematically been ignored.

iv. Maganda settlement scheme

This settlement scheme was launched by the Minister of Lands sometime in 2009. The land was demarcated and plots allotted. The process of allotment was marred with massive irregularities. While priority was to be given to those already settled on the land, some of them were left out. The list of beneficiaries was inflated with the extra plots being allocated to public officers, politicians and their cronies. The sizes of plots have also been greatly reduced to make room for more plots to be dished out to these unintended beneficiaries. Some private companies have since surfaced with ownership documents to parts of the settlement scheme land. The fate of the scheme is currently blurred.

v. Dunga Unuse community

This community has been the subject of many ruthless evictions, the most recent being on the 7th of October 2012. It is settled on a three acre plot in Migadini, Mombasa; land registered to a private company (Westlands Properties Ltd). The community moved onto this piece of idle land several decades ago. The current registered owner has however in the past couple of years forcefully evicted the community without providing alternative land, but the community has been resilient in fighting for their right to a place to call home, and have refused to vacate the plot despite the constant destruction of their properties by the powers that be.

vi. Kibarani community

Kibarani is an informal settlement in Changamwe. The cosmopolitan community is settled on plots registered to various individuals and companies including Chesterton Company Ltd, Kenya Ports Authority (transferred from Sharif Nassir), Kalliste Company ltd and Rashid Sajad among others. The community settled on the piece of land prior to the first registration of the land and the government erred in overlooking them when

allocating the land. The registered owners have taken turns in attempts to remove the community from the settlement, in some cases, without following due process. The community's resilience has ensured they still occupy the plot, albeit under constant threat of eviction and harassment.

vii. Kwa Punda community

This community is settled adjacent to the Kibarani community discussed above. Their case is similar to the Kibarani case in that even though the community was already settled on the land, they were overlooked by the government during the registration of the land. The land was registered to Changamwe housing scheme when the community decided to enforce their right of ownership in 2010. A section of the community successfully petitioned the courts to acknowledge their legitimate claims to the land. The respondents to the petition (Trust Bank Ltd & Changamwe Housing Scheme) have since appealed the decision of the court, and are awaiting the court's decision.

viii. Msambweni community (KISCOL Case)

The Msambweni community is in a tussle for their ancestral land with a sugar company, Kwale International Sugar Company Limited (KISCOL). The company claims that the land the community occupies is part of the 15000 acres leased to it by the government for sugarcane farming, while the community is of the opinion that the company has exceeded its boundaries. The community argues that the land leased to KISCOL is that land that was originally used by the collapsed Ramisi sugar company for sugarcane plantation and their land while originally leased to the collapsed company, wasn't used for sugar plantation. Further, the community argues that those who were within the 15000 acres leased to the company were resettled in a settlement scheme, and since they were not part of the resettled community, their land is definitely outside the 15000 acres. There have been numerous evictions and destruction of crops as well as harassment and intimidation of the community by both the company and government officers.

ix. Ramisi settlement schemes

The Ramisi settlement schemes (Phase I and II) in Kinondo location of Msambweni district have been marked with irregularities. These schemes are situated in the former Ramisi Sugar Company land. Land officers have been accused of colluding with land agents to sell off land meant to settle squatters. Furthermore there have been attempts to allocate part of the settlement scheme land to corporations (e.g. KISCOL) without consulting the communities who believe this to be their ancestral land. This has occasioned great distress on the part of the community, with delays being witnessed in the completion of the registration of interests to the land.

x. Kinondo community (emfil land)

The community living in Kinondo area of Msambweni District of Kwale County lost their land initially to Ramisi Sugar Company. When the company collapsed in the 1980s, the land was transferred to Emfil Company Ltd. A tussle between the government and the private company over the ownership of the Kinondo land has left the community vulnerable.

1.2.4. Data Collection

This study required the collection of information from members of these communities especially with regard to the history of the disputed plots of land. The accounts by the affected communities and land stakeholders were counterchecked against Ministry of Lands records. In summary, the collection of data involved the following processes:

1.2.4.1. Key Informant Interviews

Once the cases had been identified, Land Lobby Committees (LLCs) were elected by the communities during the community forums alluded to earlier, to lead the community in land rights protection advocacy (see annex 2). These committees worked closely with the organization in documenting their plight. They participated in interviews and further forums to discuss land issues affecting their communities. It is these initial interviews with the members of the communities that informed further research on the cases.

Informal interviews were also conducted with government officers including the land officers at the Kwale, Kilifi and Mombasa land registries. They gave their input and by extension the government position on some of the cases in their jurisdictions.

Civil Society Organizations working with these communities were consulted in the course of the research to gather more information on the cases than they had shared in the stakeholders consultative meeting organized earlier. Among those interviewed included representatives of Msambweni Human Rights Watch, Ujamaa Centre, Action Aid International (K), Kituo cha Sheria and Kenya Land Alliance.

1.2.4.2. Land Searches

The ownership of any piece of land and any prior transaction on a piece of land is usually confirmed by a process known as 'search' in the relevant land registry. The seeker of the information makes an application for information regarding the ownership history and registration status of the identified piece of land and that information is availed to them after payment of the appropriate statutory fees.

Searches were conducted for the various pieces of land at the centre of the disputes to establish not only the ownership but also their recorded history. Where the plots were

registered in the names of a company, or a non-human entity, appropriate research was conducted for such entities to unveil the ownership of the said entities.

1.2.4.3. Secondary data

The land question at the Coast has been the subject of a number of government commissions and taskforces. It has also informed local and global scholarly discourses. It is well documented. This research involved broad and wide reading and comparing of accounts and perspectives of the various authors of the Coastal land question. While a comprehensive list of all the materials consulted is given at the end of the report, it is worth noting the following public documents that provided very useful insight into the land question not just at the Coast but in the entire country:

i. The Parliamentary Select Committee on the Issue of Land Ownership along the Ten-Mile Coastal Strip of Kenya, 1978;

ii. The Commission of Inquiry into Land Law System of Kenya, 1999 (The Njonjo Commission);

iii. The Judicial Commission into Tribal Clashes (The Akiwumi Commission);

iv. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, 2004 (The Ndung'u Commission);

v. The Commission of Inquiry into the Post-Election Violence (CIPEV), 2008 (The Waki Commission); and

vi. Sessional Paper No. 3 of 2009, otherwise known as the National Land Commission.

1.2.5. Data Analysis

Data collected was analysed against existing land legislations, the Constitution of Kenya as well as the National Land policy. This was pursued with the aim of unearthing available opportunities for the correction of the injustices that have burdened the ten and numerous other communities at the Coast.

1.2.6. Validation of Report

Upon completion of the collection and analysis of the data, the stakeholders involved in the research were converged again to validate the information gathered before publication of the final report. The one day forum bringing together all the ten LLCs was held on the 5th of December, 2012 at the Cool Breeze Hotel Mombasa.

1.2.7. Challenges

Numerous challenges were encountered during the research, especially during the data collection stages. These challenges can be summarised as follows:

i. The communities involved in the research have suffered for far too long and any form of intervention and assistance is greeted with very high expectations. Managing the communities' expectations was quite a challenge.

ii. Bureaucratic procedures in public offices posed another challenge. There were unnecessary scrutiny of applications for information at the land and even the company registries. In some instances, land files and company files disappeared at crucial stages of the research, thus frustrating and delaying the research a great deal.

iii. Far too many cases were forwarded by the communities for consideration to be part of the study. Convincing communities that the findings and subsequent recommendations can and should be used to solve similar cases in the region proved difficult as they felt a case had to be part of the research to stand a chance of being resolved.

iv. The emergency of perceived radical groups like the Mombasa Republican Council (MRC) posed a serious challenge as some communities chose against sharing their anger and frustration on their land predicaments for fear of being branded MRC sympathisers.

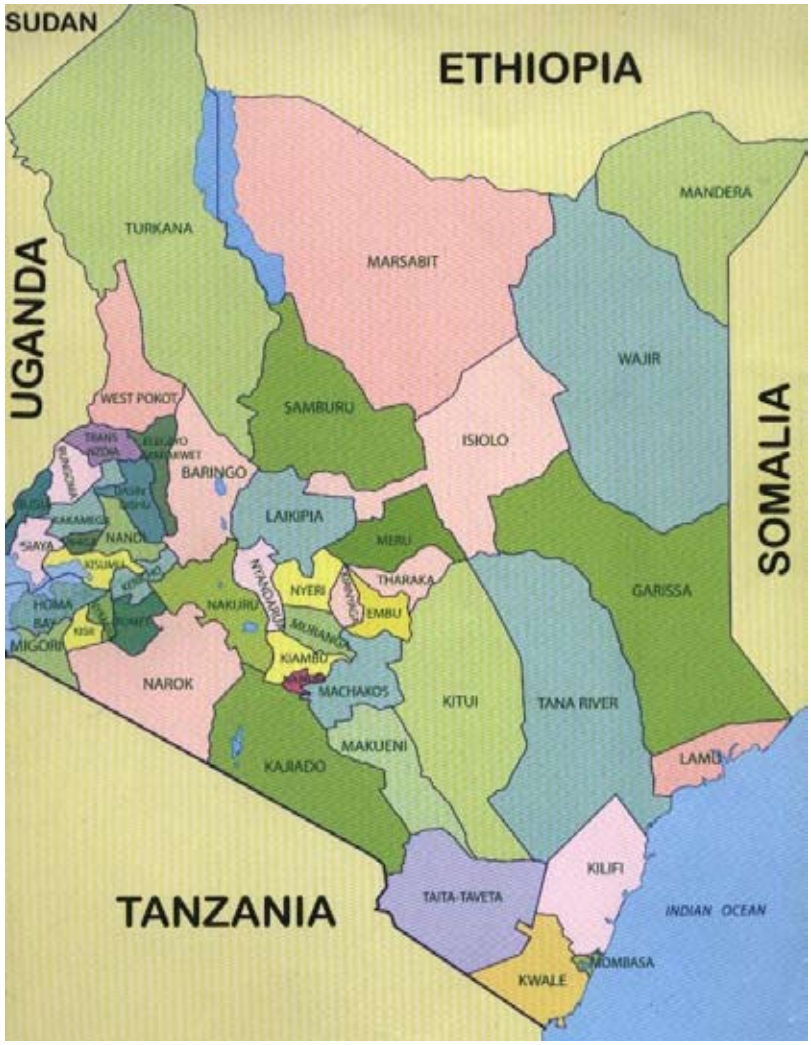
v. The delay in gazetting the National Land Commission (NLC), a constitutional commission, by the president has led many to consider this an executive plan to frustrate all land reforms[6]. As a result, many are pessimistic about the political willingness to address land problems at the Coast.

6 The NLC chair and commissioners were selected in June 2012. Thereafter objections to the composition of the commission led to court cases. These were concluded on October 12th when Justice Majanja dismissed all three petitions. The high court on February 4th ordered the president to gazette the commission in constitutional petition no. 6 of 2013 but contemptuously failed to do as ordered.

2

The Land Question at the Coast of Kenya

Map 1: map of Kenya showing counties



2.1. Introduction

The land question at the Coast is as complex as it has been perceived. Its complexity is moulded by its numerous dimensions as well as the region's strategic position and role in the socio-economic development of the entire East African region. The land issues affecting the Coast region can thus be summarised as follows;

a. High number of unregistered indigenous land owners, christened squatters - there is a general lack of tenure security especially among the indigenous Coastal communities;
b. The irregular/illegal allocation of public plots especially along the beach to private individuals including non-citizens to the exclusion of the public;
c. Conflicting interests in land and land use between local communities and corporations seeking to invest in the land;
d. The issue of houses without land otherwise known as tenants at will, a phenomenon only practised at the Coast of Kenya;
e. The rise in informal settlements in major urban centres at the Coast;
f. Slow and irregular adjudication process and delay in finalization of settlement programmes; and
g. Large tracts of land belonging to absentee landlords.

The failure by the government to address these issues has in the recent past given rise to radical groups calling for the secession of the Coast region from the rest of Kenya.[7] The gist of their argument is that the Kenyan government has deliberately failed to resolve the Coastal land question.[8]

To fully appreciate the extent and dynamics of the Coast land question, one has to revisit historical events that shaped the current situation.

2.2. Historical perspective

The Coastal land question has its roots in history, dating as far back as the 1800s. It was less pronounced at the beginning, but exacerbated in the early 1900s, with the onset of colonialism. The post colonial period has been characterised by attempts by successive governments to rectify the ills perpetrated by the colonial laws and practices, but has ended up achieving the opposite, carrying on the policies and practices of the colonial government. Summarised below is a brief historical perspectives of the Coast land problems.

7 The MRC and most recently the Nyuki groups have called for the secession of the Coast region from the rest of the country. The MRC have taken a step further to file petitions in court to seek leave to secede.

8 The delay experienced in enacting the land legislations (parliament had to extend the constitutional timeline for enacting land legislations by two months) and the inexplicable refusal by the president to gazette the National Land Commission lends credence to this school of thought.

2.2.1. Colonial land tenure

The colonial land tenure was founded on the legal principle of 'terra nullius' (the land of no-one). It was based on a misconceived notion that African land was vacant, and needed to be subdivided and allocated. The Land tenure in the colonial period was thus marked with the adoption of land legislations geared towards legalising these perceptions. The Crown Land Ordinance of 1902 (revised in 1915) for instance declared the entire Kenyan territory crown land under the control of His Majesty. The lack of ownership titles by the indigenous communities provided a lame justification for the colonial government's actions to possess presumed vacant land.[9]

The Ordinance provided for sale and leases to settlers. Indigenous communities were considered incapable of holding land. Consequently, ethnic enclaves known as 'native reserve areas' were established in which indigenous people were confined. Prime native land was set aside for the arriving white settlers through conquest or questionable agreements. Communities were arbitrarily evicted from their land and resettled in these enclaves to pave way for white settler occupation and use of their land. One such example was the 1939 eviction of the local Kikuyu population from their fertile ancestral land in Central Kenya resettling in the Rift Valley (O'Brien, 2011).

The Coastal region was under the dominion of the Sultan of Zanzibar prior to the coming of the British. The British authorities assumed jurisdiction through an Administrative Agreement in 1895 by which the Imperial British East African Company (IBEAC) transferred all that land that had been ceded to it by the Sultanate of Zanzibar by virtue of the 1888 concession agreement. The agreement had transferred all indigenous rights to the Company which subsequently was replaced by the Colonial government.

To put to rest any claims and conflicts arising from land ownership and titles at the Coast, the colonial government passed the Land Titles Ordinance 1908.[10] The Ordinance required all persons within the ten mile strip who had any claims to land to make such claims within six months.[11] Land that was not claimed within that period was declared Crown land to be governed by the Crown Lands Ordinance 1902.[12]

The six month notice did not reach most indigenous communities mainly due to high illiteracy levels and ignorance of the law. The region's elites, mainly Arabs, Indians and White settlers lodged claims to the recorder of titles as was required by the law. These claims were adjudicated and with minimal objection coming from indigenous communities in occupation of the lands, certificates of ownership were issued in favour

9 In 1915, the High Court in the famous case of *Wanaina wa Gathomo &others Vs Mumo wa Indagara and 2 others* gave judicial stamp to this position when it effectively declared all natives as mere 'tenants at the will of the Crown'.

10 Later known as Land Titles Act, Chapter 282 of the Las of Kenya

11 Section 15 of the LTA, Cap 282

12 Section 17 of the LTA

of the claimants. Claims were made by the elites even for land owned and occupied by indigenous communities. Unclaimed land was declared crown land. This is perhaps the origin of the Coast land problems; communities that had owned land lost it to the crown government and individuals who successfully claimed it under the LTO.

The colonial land system created serious resentment among the native population particularly in those areas where large settler farms were carved out. The intensification of the struggle by Africans to regain their lost land finally forced the colonial government in 1954, to come up with a new policy that was captured in a white paper called the 'Intensification of African Agriculture' through individualization of land tenure commonly known as the 'Swynnerton Plan'. The Plan was based on the belief that African land tenure systems were inherently inferior and incapable of facilitating development of modern agriculture. The solution, it was argued, was to give Africans land titles. However, communal ownership continued to exist especially among the pastoralist and nomadic communities. This led to complex land tenure systems that have made governance of land issues in the country extremely difficult.

2.2.3. Post colonial land tenure

The post colonial land tenure in Kenya was shaped by the need to resettle displaced Africans and secure the tenure of those disinherited of their land via the application of the colonial policies. At the height of colonialism in Kenya, 7.5 million acres of Kenyan land were in the hands of 3,600 European farmers. This comprised of the most fertile land in the country, mainly in Central Kenya and the Rift Valley. About 6.35 million acres of these were under 999 year and 99 year leases. Around 560,000 acres were under freehold tenure and 120 million acres remained unalienated and occupied mostly by Africans. Of the 120 million acres, only 11.65 million acres could support crop farming. The rest was arid and semi arid land. Thus, the 8.6 million Africans scrambled for 11.65 million acres while the 3,600 European farmers had 7.5 million acres for themselves (Alila, Kinyanjui, Wanjohi, 1986).

The post colonial government picked up the individualization of land tenure agenda already put in place by the colonial government. The settlement programme was the main tool for this exercise. Settlement schemes were funded by the British government and World Bank. The government established the Settlement Fund Trustee (SFT) under the Ministry of Agriculture to manage the revolving settlement fund. This arrangement had its hurdles though as money was not always sufficient, slowing the resettlement process. Further, African elites and political bureaucrats scrambled for the same limited funds to purchase farms left behind by white settlers. They took big chunks of the land available for the programme at the expense of the landless frustrating the resettlement (O'Brien, 2011).

Besides settlement schemes, the government pursued the individualization of land rights in communally owned areas. Lands originally set aside as native reserves for communities, and administered by the native land boards were converted into trust lands and placed under the county councils. They were systematically adjudicated to recognize and register individual interests. The statutory tenure borrowed from the English system slowly but effectively replaced the African customary tenure. Pastoral communities that could not do with individual tenure were forced to register ranches, while hunter and gatherer communities were totally ignored and thrown out of forests demarcated as government land.[13]

A different scenario took shape at the Coast. The implementation of the LTO of 1908 rendered most of the land along the Kenyan Coast as government land. Post colonial attempts by the government to regularise settlements on public land have lacked conviction. Despite a 1978 presidential directive to the effect, there still remains high numbers of unregistered indigenous communities on public land. Moreover, public land at the Coast has been used as a tool for rewarding political stooges (Ndungú, 2004). Land along the Kenyan Coast line (beach plots) has particularly been very attractive to these elites and has been used almost exclusively for rewarding political friendships, and allocated to close associates of the elites in the country.[14] In other instances, the government has been known to lease these lands to private investors without consulting the communities or providing them with alternative land.[15]

Meanwhile, those settled on private land have been forced to pay what has come to be known as ground rent to continue occupying these lands. They have been tenants at the will of the landlords, some of whom have been absent, collecting rent through agents. A growing trend adopted by the absentee landlords and/or their agents in the recent past has been to dispose of the lands to third parties and subsequently evict the tenants.

Where settlement schemes have been established, there has been some bias towards upcountry communities to the detriment of Coastal communities. It is reported that 57% of allocations in the Kwale settlement scheme went to WaKambas from Machakos and Kitui. The Lake Kenyatta scheme in Mpeketoni (Lamu) was established to resettle landless households from Kiambu while the Gikuyu expelled from Tanzania in 1978 were settled on the Diani scheme (Goldsmith Paul, 2011). In cases where these

13 The Endrois community for instance were evicted from their ancestral lands in 1973, and their land gazetted as government land. It took the intervention of the African court in 2010 to cure the injustice occasioned to the community.

14 President Kenyatta at some point in the 1970s issued a directive that only the Coast PC then, Eliud Mahihu could approve the allocation of beach plots at the Coast, effectively limiting the allocations to those in his inner circle. The courts have in Mombasa High Court Constitutional Petition No. 41 of 2011 (Mohamed Balala and 11 others vs. Attorney General and 7 others) have ruled that the directive lacked basis in law and therefore illegal.

15 This practice is very common in several parts of the Coastal region e.g. in Kibarani, Changamwe; the government granted the land to private entities at the expense of the community that lived on the plot, and no alternative land was offered to the community. The same can be said of the Chaani/Dunga unuse community.

schemes have been created for the settlement of Coastal communities, they have been marred by political interferences, fraud and inefficiency as the cases of Maganda and Ramisi will illustrate in this report.

2.3. Current situation of the Coast land question

The Coast land question is currently manifested by the following attributes:

MRC graffiti, Mombasa

- Large numbers of unregistered land owners dubbed squatters;
- Growth of informal settlements in urban areas;
- Evictions due to tenure insecurity;
- Inaccessible beaches and fish landing sites;
- Poverty;
- Ethnic clashes and the rise of radical groups;

According to a 2010 ministry of lands status report on the Coast of Kenya, the number of squatters along the ten mile strip is 128,900. This is the number of registered squatters; who are spread along the Coastal strip as follows:

Table 3: *Table showing the number of registered squatters along the ten mile coastal strip in 2009*

District	No. of registered squatters
Mombasa	51,621
Lamu	3,160
Kwale	24,551
Kilifi	26,124
Tana river	1,427
Malindi	22,017
Total	128,900

However, these figures can be misleading as they are limited to registered squatters along the ten mile Coastal strip, and excludes those living beyond the ten mile strip. Current estimates place the number of untitled land owners at the Coast region at 2 million people. A more recent survey by Development Policy Management Forum paints a grimmer picture.[16]

2.4. Efforts to solve the Coast land question

There have been numerous attempts to provide a lasting solution to the Coastal land issues over the years since independence. These attempts have had varying successes as elaborated below:

a. *A Parliamentary Select Committee on the issue of Land Ownership along the Ten mile Coastal Strip of Kenya* was established in November 1976. In its 1978 report, the parliamentary committee made the following recommendations:

- The reconstitution of the office of the commissioner of squatters;
- The initiation of Coast specific settlement schemes;
- The control of agricultural land prices; and
- The prioritization of the landless whenever land they were occupying was up for allocation.

These recommendations were neglected and only implemented haphazardly if at all.

b. With the legal framework condemned as being the main facilitator of land injustices, a special commission of inquiry was set up to investigate the same. *The Commission of Inquiry into Land Law System of Kenya 1999* otherwise known as the Njonjo commission, made some very progressive policy and law reform recommendations. The commission outlined some land policy principles that would make a huge impact if adopted. These principles were to later inform the country's first national land policy.

16 The 2011 report established that only 38% of members of indigenous Coastal communities had titles as opposed to 82.5% of 'upcountry' people living at the Coast.

c. *The Judicial Commission into Tribal Clashes*, otherwise known as the Akiwumi Commission, was established to investigate tribal clashes between 1991 and 1998 that coincided with multi-party politics and the balkanization of the country into ethnic enclaves. The report like that of *The Commission of Inquiry into the Post Election Violence 2008* (Waki commission) cited land as central to the clashes and suggested reforms in the land sector, including the addressing of historical land injustices.

d. The Ndungú commission (*The Commission of Inquiry into the Irregular/Illegal allocation of Public Land, 2004*) attributed irregular/illegal land allocations to abuse of office, fraud, greed enhanced by an effective legal framework.

e. The *Constitution of Kenya Review Commission* attempted to address the land question in what was famously referred to as Bomas draft before the same was mutilated leading to its resounding defeat at a national referendum in 2005.

f. The adoption of the *National Land Policy* in 2009 followed by the promulgation of a new land chapter and consciousness in the *Constitution* of 2010 set the platform for major reforms in the land sector.

g. The *Truth Justice and Reconciliation Commission* is investigating gross human rights violations including but not limited to injustices in the land sector. Further, the Prime Minister of the Republic of Kenya recently (October 2012) formed a task force to investigate and make recommendations on the issues affecting the Coast region. It is expected land injustices will be central to those issues.

These attempts have rarely been followed through. The findings of some of these reports have in most cases been unpublicized and recommendations mostly ignored. Consequently, the Coastal land situation has continued to escalate unabated. Recent calls for secession of the region from the rest of the country are centred on land, and are a manifestation of the levels of hopelessness that the indigenous Coastal communities find themselves in.

3

Land Injustice Cases

3.1. Kilifi County

County Profile

Kilifi is one of the six counties in the Coast region formerly Coast province. It is used to be Kilifi district prior to 1996 when it was split to Kilifi, Magarini and Malindi districts. The county now has six districts namely: Magarini, Malindi, Bahari, Ganze, Kaloleni and Kilifi South. It borders Tana River and Lamu counties to the north, Mombasa and Kwale to the south and Taita Taveta to the west.

Map 2: *Map of Kilifi county showing population distribution*

It is the 13th biggest county in the country with a surface area of 12,610 km², with 109 km² being water mass. It has a population of 1,109,735 people. The indigenous communities of Kilifi County are the Giriama, Chonyi, Kauma, Kambe, Jibana, Ribe, Rabai, Swahili and Bajun. There are other communities that have settled and hosted by the locals in the County who mainly include the Kikuyu, Meru, Kamba and the ever increasing white people led by the Italian community commonly found in Malindi and Kilifi.

Land Tenure

The county is home to thousands of squatters as most land is either registered as public land or to private individuals

other than the local communities. This stems from the application of the Land Titles Ordinance of 1908. The central and local governments complicate matters further by their constant leasing of public as well as community land occupied by local communities to investors without offering alternative settlements to the displaced communities. These investors have brought about untold suffering to communities in Magarini, Takaungu, Malindi and Kikambala among other areas of the county. This study highlights the experiences of two such communities, i.e. Takaungu and Shariani communities. Both communities are located in Kikambala division of Kilifi County, and along the Mombasa-Malindi road.

3.1.1. Takaungu community

Part of Takaungu community

Takaungu is situated about 35 kilometres to the north of Mombasa along the Mombasa-Malindi high way. It is inhabited mainly by the Mijikendas.[17] In 1908 when the LTO came into force, the Mazrui family claimed the Takaungu land even though it was mainly inhabited by the Mijikendas, who had settled there, hundreds of years before them. They subsequently registered a wakf[18] prior to the determination of their claim, in favour of the Shakhs followers of Salim bin Khamis and the descendants of the Mazrui tribe in 1913. In 1914, their claim to the Takaungu land was heard and

17 There are also some descendants of the Oman Arabs of the Mazrui lineage.

18 A perpetual trust that permanently dedicates any movable or immovable property for any purposes recognized by Muslim law as pious, religious or charitable. It is usually registered by persons professing Islam.

determined in their favour. A certificate of ownership no. 409 was issued for the land measuring 3172 acres on 1st April, 1914.

In 1931 parliament enacted the Mazrui Land Trust Act, chapter 286 of the laws of Kenya that established a board of trustees to manage the land, including making decisions and dispositions of the land.[19] The Takaungu community was thus rendered landless, as their land effectively became Mazrui land, a position upheld by Justice Muli (as he then was) in Ahmed Abdallah Mazrui & 5 others vs. Mazrui Lands Board of Trustee and Another.[20]

There have been different attempts to secure the land rights of the Takaungu community since then, the most elaborate being the 1989 repeal of the Mazrui Land Trust Act. The Mazrui Land Trust (Repeal) Act 1989, converted the Mazrui land into trust land vesting it in the County Council of Kilifi. The process of adjudicating the land started in earnest, but was halted a couple of years later via court injunctions as the Mazrui family challenged the decision to convert the land into trust land and subsequent adjudication in favour of the Takaungu community.[21]

Two decades after the cases were filed in court, a determination was made for HCC No. 185 of 1991, *The Mazrui vs. The Attorney General*. In the judgement delivered at Mombasa on 12th July 2012 by Justice Francis Tuiyott, the court ruled that the land was a wakf and thus private land; and that the government ought to follow the right procedure for acquisition of private land including the payment of compensation if it is still intent on adjudicating the land. This determination has essentially ended any hopes of the completion of the 1989 adjudication process. With the government showing little intention of appealing the decision, the over 10000 residents of Takaungu face a real threat of eviction from what used to be their ancestral land is quite real.

3.1.2. Shariani community

About 10 kilometres to the south of Takaungu is another community that has suffered a similar predicament. Shariani like Takaungu is a location in Kikambala division of Kilifi County. It is located south of Takaungu, about 25 kilometres from Kilifi town along the Mombasa - Malindi highway. It is similarly inhabited mainly by Mijikendas. The area is well developed especially along the beach front that is known to host a number of prominent personalities' holiday homes.

Members of the Shariani community claim their forefathers settled in the area in the 19th century. The area according to the community narratives used to be a thick

19 The board is chaired by the Coast Provincial Commissioner (see annex 3).

20 In High Court Case No. 230 of 1981 at Mombasa, the judge observed thus '*the vesting of the Mazrui land including that which was contained in the original wakf in the Board of Trustees diverted from the whole world any interest that anyone may have or may have thought he had.*'

21 Two cases were filed in court; HCC no. 134/1991 and HCC no. 185/1991 both at the Mombasa High Court

forest and they had to clear it to make it conducive for human habitation as well as farming. Land was owned individually with each of the first families to settle on the land claiming ownership of the land they had cleared for their own use. The family of Mataza is believed to be one of the very first families to settle on the Shariani land.[22]

Community narratives reveal that the land was initially registered to a man of Arab origin by the names Sheikh Rashid bin Soud under the controversial LTO in 1908. The Sheikh did not evict the families that were settled on the land, but rather levied a periodical fee known as '*mkate*' on the community. He appointed Mzee Mataza, one of the first settlers on the land to be the caretaker of the land. The payment of these periodical fees was abandoned several years after independence upon protest by the community.

The land known as MN/III/528, measuring an approximated 400 acres is currently registered to Kenya Ports Authority. According to the Ndung'u Commission report, KPA was coerced into buying this land from Winworld Company Ltd for Kshs. 150 million.23 This plot is home to over 1900 people according to estimates based on the 2009 population census. The parastatal has recently (June 2011) issued a vacation notice, expressing an intention to build a beach resort, drawing protests from the community. A section of the community has obtained temporary injunction orders, to stop the parastatal from evicting the community from their ancestral land.24

3.2. Mombasa County

County Profile

Mombasa County is the smallest county in the country, covering an area of 219 Km^2. It borders Kilifi County to the North, Kwale County to the South West and the Indian Ocean to the East.

Administratively, the county is divided into seven divisions, eighteen locations and thirty sub-location and hosts six constituencies namely Mvita, Changamwe, Jomvu Kuu, Likoni, Kisauni and Nyali.

22 Information gathered during an FGD with some community members in the area.

23 Ndung'u Commission Report on Illegal/Irregular Allocation of Public Land, page 95

24 Malindi High Court Constitutional Petition No 9 of 2011

Map 3: *map of Mombasa county showing population distribution.*

The county hosts the city of Mombasa, the gateway to East Africa and the Great Lakes region. It is home to most ethnic communities. Population distribution and settlement patterns in the county are influenced by proximity to roads, water and electricity facilities. The population is also concentrated in areas where there is availability and accessibility to employment opportunities, affordable housing, and security. Some of the highly populated areas are Mvita, Likoni, Bamburi, Bangladesh, Mikindani, Jomvu, Miritini, Migadini, Port Reitz, Mtwapa, Mishomoroni and Bombolulu.

Residents watch helplessly as bulldozer brings down their structures

Land tenure

The county's land tenure is informed by the large numbers of landless persons. The county has 55 informal settlements.[25] This has been precipitated by harsh economic times as well as the government's failure to regularize these settlements. The issue of absentee land lords is also most common in Mombasa County than in any other county in the country. This has given rise to the phenomenon of houses without land, whereby residents own the houses but not the land where their houses are located, and have to pay periodical ground rent.

Despite attempts to reduce landlessness through the establishment of settlement schemes, there has been little success. Most of the schemes established in Mombasa have been marred by numerous issues rendering them ineffective in reducing landlessness.

The cases narrated below are of experiences some communities have undergone over the years; and a desperate call for help.

3.2.1. Tudor kwa Makaa

Tudor Kwa Makaa is one of the many informal settlements in Mombasa County. It is located within the island, in Mvita constituency, and is cosmopolitan in nature, hosting a myriad of tribes. Like the rest of similar settlements in Mombasa and indeed the country, the Tudor settlement lacks basic amenities like clean water, security, drainage systems, and sewerage systems among other essential amenities. Lack of tenure security and planning is what defines informal settlements.

The community living within the informal settlement at Tudor Kwa Makaa trace their settlement to a couple of years after independence (Patrick, 2012). The community lived for several years oblivious of ownership issues until the early 1980s when a man only described as of Asian origin visited the area and had elders summoned to the area chief. He informed the elders that part of the land they occupied was his. He however did not issue them with an eviction notice and disappeared soon after without indicating his intention.

Records at the ministry of lands indicate that the contentious land is actually two plots; MSA/BLOCK IX/50 measuring 0.4003 acres and MSA/BLOCK IX/49 measuring 0.811 acres. They are both registered to Chamdan Jethanand Gidoomal and Prem Jethanand Gidoomal as tenants in common in equal shares. They are leases from the Trustees of the Wakf of Khamis Bin Mohamed Bekeshy for a period of 99 years from 1st June, 1981. This land is currently home to hundreds of families, some as tenants and about 44 as structure owners.

25 Kibarani, Kwa Punda and Bangladesh Enumeration Report, Pamoja Trust 2012

In 2009, the registered proprietors surfaced through agents after decades of absence. The agents have been harassing the community, intimidating them using the Provincial Administration, the Police and the Municipal Council with the hope that the community will vacate the land. This harassment has continued despite the existence of a court injunction stopping the proprietor from evicting the community from the two plots.[26] One contractor in particular, Mr Kigo Ng'ang'a,[27] has been very persistent in his attempts to put a perimeter wall around the two plots. He has been able to do so with the assistance of the provincial administration (area chief) and the police from Makupa police station in contempt of the court order.[28]

3.2.2. Kibarani

The situation is not so different in Kibarani settlement, situated in Birikani sub-location, in Changamwe district. It is located along the railway line, adjacent to the Changamwe roundabout on the Nairobi highway. It was first established as a settlement in the early 1930s. The colonial government evicted its residents in 1939 to use the land as a shooting range.[29] The settlement has a population estimate of over 1290 households (Pamoja Trust) and sits on five plots whose details are as follows:

- Plot MN/V/7 is registered to Chesterton Company Limited. Chesterton acquired the 16 acre land from Vashdev Hiranard Gidoomal (as trustee) on November 11th, 2010 for Kshs. 50 million;
- Plot MN/V/1614 registered to Kenya Ports Authority; bought from Sharif Nassir for Kshs 6 million;[30]
- Plot MN/V/1074 is registered to Sajad Mohamedali Rashid, measuring 0.3996 hectares. It was granted to him by then President Moi, for 99 years from 1990;
- Plot MN/V/724 is also registered to Sajad Mohamedali Rashid. It measures 1.011 hectares, and was granted to him by then President Moi for 99 years from 1990;
- Plot MN/V/1984 is registered to Kalliste Ltd, a company associated with the Doshi family. It measures 1.572 hectares and was granted to him by the president for 99 years in 1990;

26 The community extracted these orders through Miscellaneous Civil Application no. 332 of 2009, Patrick Muriuki and 43 others vs. Chamdan Jethanand Gidoomal and 2 others, at the High Court in Mombasa. The aim of the case is to seek adverse possession.

27 The Director of Bekins Investment Ltd according to records at the Company Registry

28 A claim raised by participants to the FGD. They claim the police have on several occasions guarded the constructor's operations despite court orders barring the same.

29 Kibarani, Kwa Punda and Bangladesh enumeration report, pamoja trust 2012

30 This has been sighted as one of the irregular deals involving public land by the Ndungú Commission

Apart from plot 7 registered to Chesterton Company Ltd, the rest are public plots granted to private individuals by President Moi in 1990 for 99 years.[31] Plot 7 meanwhile is a freehold property. Be that as it may, these plots were idle at some point before they were granted to the current registered owners. The registered owners have in the recent past made vigorous attempts to displace the occupants. These attempts have visited upon the community untold harassment, humiliation and violation of their rights, as they have involved the use of force and intimidation. Most recently, Chesterton Company limited demolished 200 households in a bid to force their vacation from the plot.[32] The community claim that there was no court order and the police transported 200 hired and armed militia to oversee the demolition. The community have returned to court to challenge this illegality.

3.2.3. Dunga unuse

This is yet another community with land tenural issues in Mombasa. It is situated in Migadini area of Changamwe. Within this community are over 100 families settled on a 3 acre plot no. 1212R/V/MN, believed to be registered to a private company called Westlands Properties Ltd. The company is associated with a powerful political family, but whose records cannot be traced at the company's registry. It claims ownership of adjacent plots no: 1229/V/MN, 1230/V/MN, 1228/V/MN and 1227R/V/MN. Records of these plots cannot be traced at the land registry either so information about them is hard to verify.

It is alleged the company issued money for the resettlement of this community to pave way for the company to take possession of the land but the money was misappropriated by the public officers tasked with resettling the community.[33] This left the community exposed to eviction.

The community faced two evictions in 12 months, December 2011 and October 2012. These evictions were carried out using suspicious orders from a lower court despite the existence of a case in the high court.[34] There is some form of tranquillity at the moment following interventions by the courts, civil society organizations and the media, even though the community is still living in temporary shelters on the land, awaiting the determination of their case by the high court.

31 These individuals were close confidantes of the former president. The Ndungú commission gives lots of options on how irregularly and illegally allocated plots can be repossessed.

32 Saturday the 14th of April, 2012

33 Mwamlai settlement scheme that had been identified as the destination of the landless from Dunga unuse, was allocated to other beneficiaries.

34 High Court Civil suit no. 401 of 2010 at Mombasa, Mary Thaura & 2 others –vs.- Westlands properties Limited.

3.2.4. Kwa Punda

The Kwa Punda settlement differs from the foregoing cases slightly because they have not been the subject of evictions. This settlement is adjacent to the Kibarani settlement. Unlike the Kibarani settlement though, it has a rural setup and is sparsely populated. It sits on a 70 acre plot that is the subject of an ownership row. It was established around 1970 and it since has four clusters namely Central, Majengo Mapya, Mlangoni and Mnazi Mmoja (Pamoja Trust 2012).

The plot of land they have settled on was transferred to Changamwe Housing Scheme Limited in 1997. The company used the land as collateral for a loan of Kshs 110 million from Trust Bank, almost as soon as it had acquired the land. The land was put up for auction after the company failed to service its loan in 2010.

The community had been oblivious of these transactions and deals involving the land and got to know of the whole process when the land was put up for auction in the printed press by Trust Bank. A section of the community, 158 (out of an estimated 442 households - Pamoja Trust 2012) to be exact, rushed to court not just to halt the auction but to seek adverse possession of the land.35 The community was successful in its application but has had to defend an appeal by the bank. Meanwhile, in the pendency of the suit, Trust Bank went into receivership, prompting the Central Bank of Kenya to take charge. CBK cleared the rates and has been leading the appeal in court.

A row is brewing in the community though, pitying those who went to court on behalf of the community and the rest of the community, with the latter feeling they deserve the plot more than the rest as they rescued it from being taken away from them.

3.2.5. Maganda community

Maganda is a settlement in Miritini area of Changamwe. It is home to over 900 households. The 172 acre land was declared a settlement scheme in 2009 by the Lands Minister when he visited the area. There was great excitement as the community felt they would finally get to possess title documents for the land they had occupied for years. The fact that the land borders the proposed Dongo Kundu highway raised the profile of the area even further.

A total of 918 people were identified from the area as beneficiaries of the scheme. However, when the allotment letters were issued a year later in 2010, a total of 1706 letters had been prepared. This number of allotment letters rose to over 2000 with time. With the rising number of allottees, the size of plots has been greatly reduced, to sizes barely capable of accommodating a standard room. Further, of all the 2000 plots demarcated, not all the 918 originally intended beneficiaries of the plot were

35 High Court Civil Case no. 57 of 2010,

accommodated as over 300 of them were left out[36]. A host of new beneficiaries was included. This did not go down well with the community and they made their protests known to the ministry and eventual in court.[37] The ministry is yet to respond to these complaints.

Some title deeds have since surfaced for plots within the land set aside for the settlement of this community. These titles, for about 22 plots averaging 2 hectares were apparently issued in 1996 for 99 year leases. One such company is Regional Container Freight Station Ltd. This company ownership documents for 13 plots within the scheme as tabulated below:

Table 4: *Table showing some of the titles to land in Maganda registered Regional Containers Freight Station Company Limited.*

No.	Plot no.	Size (ha)
1	MN/VI/4756	1.900
2	MN/VI/4757	1.993
3	MN/VI/4758	2.000
4	MN/VI/4759	2.000
5	MN/VI/4760	2.000
6	MN/VI/4761	2.000
7	MN/VI/4762	2.000
8	MN/VI/4763	1.939
9	MN/VI/4764	1.370
10	MN/VI/4765	2.000
11	MN/VI/4766	2.000
12	MN/VI/4767	2.000
13	MN/VI/4768	1.970

The Regional Container Freight Station Company Ltd is not the only entity to possess title to the land the subject of the Maganda settlement scheme. There are several other entities, human and otherwise that possess titles to land that independent surveyors have confirmed are within the settlement scheme. The Lands office has since dismissed these titles claiming they are in adjacent land even though independent surveyors have confirmed these plots are within the settlement scheme land. What worries the community is whether there is any land left for the scheme and if indeed it is there how large is it and how small are the plots going to be.

36 Estimates given by the community's Land Lobby Committee.

37 High Court Civil Suit 623 of 2011, Hamisi Mohamed Bakari & 152 others –vs.- The Land Adjudication and Settlement Officer & 4 others. This case is on-going and is yet to be determined.

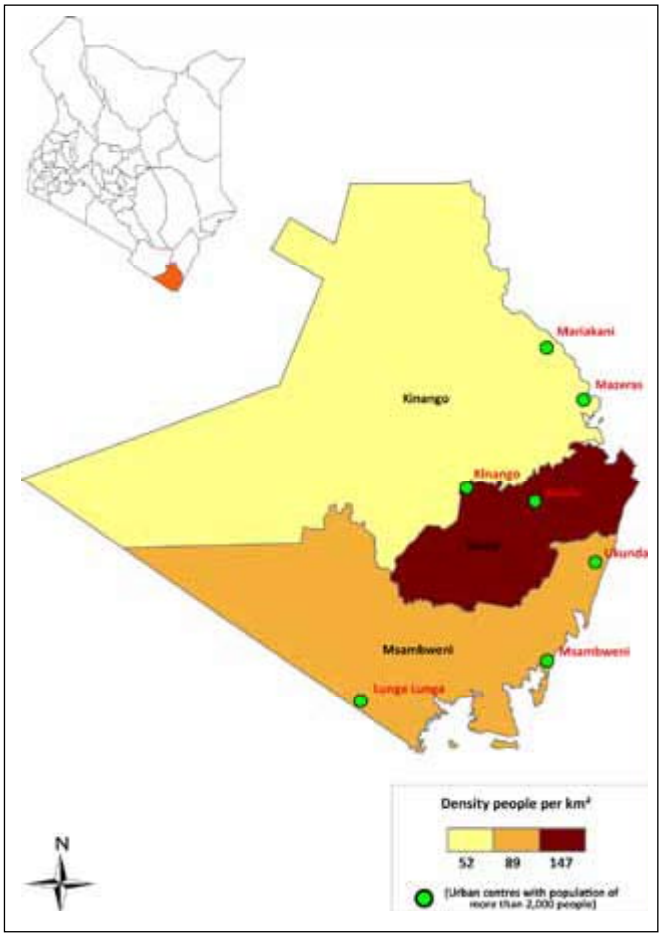
Public officers have also been allocated plots in this scheme undeservingly. It is alleged that some members of the Provincial Administration as well as local politicians and their associates have been issued with plots on the land.

3.3. Kwale County

County Profile

Kwale County with a population of 649, 931 (2009 population census) is one of the six counties of the former Coast province. It borders Taita-Taveta to the West, Kilifi to the North, Indian Ocean to the East and the Republic of Tanzania to the South. The county has a surface area of 8270 km^2, and is the 17th biggest county in the country.

Map 4: *Map of Kwale county showing population distribution*



The county is segregated into 3 districts namely: Matuga, Kinango and Msambweni. The population density is high in the urban centres i.e. Kwale, Kinango, Lungalunga, Msambweni, Diani and Ukunda.

The county is home to the Digo and Duruma sub-tribes of the Mijikenda. There is also a heavy presence of the Kamba and Gikuyu in the county as well especially around Shimba hills and Diani.

Land tenure

Kwale County is bridled with land issues as is the case with most of the other coastal counties. The land issues in the county are around skewed settlement schemes, mining/ quarrying, corporate versus community interests, fish landing sites etc. These issues have contributed to high levels of landlessness in the county.

The three communities sampled in Kwale County are all from Msambweni district. Msambweni is one of the three districts of Kwale County. It is the most populous of the three districts with a population of around 288,000 people.[38] It borders Kwale and Kinango districts, and of course the Indian Ocean. It is home to the Digo sub-tribe of the Mijikenda. The communities are based at Msambweni, Ramisi and Kinondo areas and their cases revolve around the collapsed Ramisi sugar plantation.

The Ramisi sugar plantation belonged to Ramisi Associated Sugar Limited. The company acquired 45,000 acres of land in Msambweni district, which was community land held in trust by Kwale county council on behalf of the Msambweni community during the colonial period. The company did not utilise the entire acreage, but rather just a fraction of the land that was vacant. Parts of the land were continuously occupied by the local community as their ancestral land.

The sugar company collapsed in 1987. It had taken a loan of Kshs. 66 million that had accumulated to Kshs. 0.8 billion from the Bank of India, using the land as collateral (Tsutsue, 2011). The bank assumed possession upon the collapsing of the sugar company, without interfering with the communities that were within the land.

The community moved into those areas that had earlier been used for sugarcane plantation oblivious of the charge on the land. In fact, the community believed the land was about to revert back to the community after the expiry of the lease believed to be due in 2013. A section of the community petitioned the Ministry of Lands in 1995 to be settled on the land as it was idle. Their petition went answered.

In 2006, the government paid the debt that had accumulated with the Bank of India and reclaimed the land. It should be noted that this land was not originally government land but rather trust land. The government identified an investor to revive the sugar plantation and leased 15000 acres of the 45000 acres to the Kwale International Sugar Company.[39] The company was leased land described as 'situated at south of Kwale Township in Kwale County measuring 6082.6 hectares on the 20th of August, 2011 for a period of 99 years.[40] The rest of the land was set aside to be used for the settlement of the indigenous community.

Around 30,000 acres of the land was set aside for the settlement of the community living around that area. Two settlement schemes were established: Ramisi Phase I and Ramisi Phase II. Ramisi Phase I was set aside for the community that was settled within the 15,000 acres set aside for the sugar company. They were to be resettled in Phase I. Meanwhile, Phase II was set aside for the other communities that were settled in the other parts of the 30,000 acres.

38 Kenya County Fact sheets, Kwale County, 2011

39 Statehouse.go.ke/news, 30th august 2007

40 Details seen in the lease agreement between the Permanent secretary treasury and KISCOL for the land

3.3.1. Ramisi phase I (Msambweni community)

Phase I was split into 5.5 acre plots: 0.5 acre was to be used for residential purposes, 2 acres for subsistence farming and the 3 acres for sugar out grower programme (Tsutsue, 2011). This scheme was originally in Kanana and Shimoni in Msambweni. About 980 squatters were identified from Ganjora, Dzibwage, Kibwaga, Fingirika, Nguluku, Maumba, Vumbu and Mwakoyo.[41] Unfortunately, during the identification of the beneficiaries, some legitimate claimants were totally left out and others not within the land considered instead. Those left out numbering over 600 residents were mainly those who farmed in the subject land but had residencies in Msambweni town.[42]

This neglected community moved to court in 2008 vide Mombasa High Court Civil Suit no. 198 of 2008 to seek protection of their rights. Two other cases have since been filed, namely High Court Civil Suit no 165 of 2011 and Constitutional Petition no 65 of 2011 both at the Mombasa High Court. These suits have not stopped the company with the support of the Provincial Administration and the police from harassing, intimidating, destroying crops and houses etc. This has frequently occurred despite the existence of court orders demanding the cessation of any operations on the land pending the determination of the suit in court.

3.3.2. Ramisi Phase II (Magaoni/ Makongeni community)

Phase II was split into two: Phase IIA and Phase IIB to facilitate ease of administration. Phase IIA comprises of the area around Makongeni and Phase IIB comprises of the area around Magaoni and Zigira. In October 2009, Ramisi phase IIA submitted a list of 1628 beneficiaries to the District Land Adjudication and Settlement Officer. Demarcation of phase IIB is ongoing.[43]

Issues arising from this settlement scheme have their origin in a failure to understand local settlement patterns and greediness of a few individuals. Communities in this part of the County live in villages, away from their farms. The settlement office had indicated to the community that they would be allocated plots where their homes are situated and have their farms secured as well. The unutilised spaces were to be set aside for adults living in their parents' homes and for communal amenities. However, this arrangement was not upheld and most families ended up losing their farms. Further, open and unutilised spaces were targeted for sale by the powers that be.

There is also the issue of the KISCOL Company. The company is said to have been allocated about 7000 acres in this scheme to compensate it for the land that is occupied by squatters and some 2000 acres hived off its land and allocated to Tiomin mining company by the government (Tsutsue 2011). There has been no clear communication

41 Ministry of lands status report, 2010

42 Mombasa High Court Constitutional Petition no. 65 of 2011

43 Lands office, Kwale

about this to the community. The company has just been seen clearing part of Phase IIB, encroaching on people's farms. In phase IIA, the company has in fact ruthlessly evicted people from their land.[44]

3.3.3. Kinondo community

During the establishment of the Ramisi schemes, it was revealed that part of the 45,000 acres had been sold to a third party prior to the collapse of sugar plantation. The company that claimed ownership of the land is Emfil Co. Ltd, a company associated with the directors of the collapsed Ramisi Associated Sugar Ltd, the Madhvan. Equally astonishing is that the land subdivision no. LR 12335/1 measuring 2824.9 hectares was transferred to Emfil, the same year the sugar company collapsed, 1987.[45]

The land had been further subdivided and disposed of prior to the establishment of the settlement scheme, prompting the Registrar of Titles Mombasa to revoke 119 titles to over 600 acres held by the company via gazette notice no. 6652 of 2011. He proceeded to subdivide the land in a bid to settle the 180 families in what became known as the Kinondo- Ramisi squatter settlement scheme (HCCA case 84 of 2011). This was challenged in court but the court in its wisdom found the need to settle squatters to be paramount and refused to issue judicial review orders in favour the company. Unfortunately, the community alleges that only about 30% of this land has been allocated to locals, the rest, mostly along the coastal line ended up in the hands of the politically correct and rich in local society.

44 These evictions have been on-going for a while now, the community has gone to court to get albeit temporary reprieve.

45 High Court at Mombasa, Misc. Civil Application no. 84 of 2011, R V registrar of titles Mombasa and 2 others exparte Emfil co. Ltd

Legislation on land

4.1 Introduction

Kenya plunged into its darkest moment in history after the 2007 elections. Violence, of a magnitude never before experienced in its short history erupted in many parts of the country. The country was shaken to its core and required foreign intervention to get the country back to its feet. A team of eminent personalities led by former United Nations Secretary General Dr Kofi Anan led peace talks between the warring parties and settling on a four point action plan to resolve the crisis. These agenda items were:

- Stop violence and restore fundamental rights and liberties;
- Address the humanitarian crisis that involved resettlement of internally displaced people;
- Resolve the political crisis; and
- Examine and address constitutional, legal and institutional reforms, poverty and inequality, youth unemployment and land reforms.

Agenda item four was long term and aimed at preventing future crises by reforming the all the main sectors of the country.

The signing of the peace agreement (National Accord) hastened what had been touted for years in the land sector – land reforms. The land sector has since the adoption of the national accord undergone major transformation. A National Land Policy has been adopted and constitutionalized. Four land legislations have also been adopted, with two more being crafted. The new pieces of legislation are: The Environment and Land Court Act (19 of 2011), the National Land Commission Act (5 of 2012), the Land Act (6 of 2012) and the Land Registration Act (3 of 2012). The Evictions and Resettlement guidelines law and the Community Land law are currently being prepared. The most significant change however has been the establishment of the National Land Commission. This chapter explores the main provisions of the new land

legal framework with special emphasis on the opportunities available for the resolution of the land question at the Coast.

4.2. The legal framework governing land in Kenya

Land is defined as the soil and whatever is below it and above it (Ndungú report).[46] The legal framework governing land in Kenya can be divided into four strata: The National Land Policy, the Constitution, the national legislations, and some subsidiary legislation. Each of the tiers plays a significant role in the administration and management of the land sector as explained below.

4.2.1. The National Land Policy

The National Land Policy is contained in Sessional Paper no. 3 of 2009. It is the blue print that guides the administration, management and governance of land in Kenya. It was adopted in 2009, to provide guidance to the land sector in a bid to address the challenges that the sector had faced over the years. It further sought to pre-empt future challenges expected as a result of the growing population and consequently growing demand for land. Its overall objective is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the government's overall development objectives. To achieve this objective, the policy outlined principles to be observed when using, holding or managing land in Kenya. These principles include:

a) Equitable access to land;

b) Security of land rights;

c) Sustainable and productive management of land resources;

d) Transparent and cost effective administration of land;

e) Sound conservation and protection of ecologically sensitive areas;

f) Elimination of gender discrimination in laws, customs and practices related to land; and

g) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.

The Policy devotes a whole section to land issues peculiar to the Coast region (Para. 184). It acknowledges that 'the land question within the Coast region is complex due to its peculiar historical and legal origins'. It gives a succinct historical and contemporary context of the problem and proceeds to make specific recommendations on how to

46 Article 260 of COK 2010 elaborates on this definition to include: the surface of the earth and the subsurface rock; anybody of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained or under the surface; and the air space above the surface.

comprehensively address the problem. The recommendations are that the government shall:

- Establish suitable legal and administrative mechanisms to address historical claims arising from the application of the land Titles Act (Cap 282) of 1908;
- Take an inventory of all Government land along the '10 mile Coastal strip' and other parts of the province where the problem of squatters is prevalent and come up with a framework for conversion to community land for eventual adjudication and resettlement;
- Provide a legal framework to protect tenants at will;
- Establish convenient public utility plots along the Coastline to serve as landing sites and for public recreation, and open all public access roads to the beach;
- Regulate the construction of walls along the high seas;
- Provide a framework for beach management and the protection, conservation, and management of land that has been created through natural recession of the sea or through reclamation from the sea;
- Establish a framework for consulting indigenous occupants of land before establishing settlement and other land use projects;
- Protect and conserve the Tana and Sabaki delta ecosystems in collaboration with contiguous communities;
- Sensitize and educate people on their land rights and land administration and management procedures;
- Provide a framework for sharing benefits from land and land based resources with communities;
- Initiate and support the preparation of an integrated Coast resource management plan;
- Regulate ownership of and use of islands by foreigners taking into account public policy considerations such as national security;
- Rationalize salt mining with other land users
- Establish mechanisms to regulate all forms of disposal of strategic public institutional land to take into account the future development plans and needs of these institutions.

The above recommendations, if faithfully implemented, would go a long way in solving the Coastal land problem once and for all.

4.2.2. The Constitution of Kenya 2010

The Constitution of Kenya is the supreme law of Kenya. It captures albeit broadly the relations between the government and the governed. The constitution of Kenya was promulgated in August 2010 after a national referendum. It has been lauded as one of the most progressive constitutions in Africa and indeed the world. With regard to land, the COK 2010 captures the core tenets of the NLP in chapter five. It declares that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. In doing so, it dispels the notion that land belongs to any particular individual or department. Whoever is authorized by law to administer or manage land does so with the authority of the people and for the benefit of the people.

The COK classifies land into three categories. What used to be government land is now known as public land. The government can no longer use land as it pleases; it has to do so for the benefit of the public. Trust land is now called community land. The name captures the essence of this category of land; that it is for communities and not for local authorities to dispose off as they please. The third category is private land. Kenyans have a right to own land in any part of the country as private individuals.[47] The categorization of land and especially the creation of the public and community land categories destroyed the myth that the national or local governments can own land. These governments were mere custodians of land on behalf of the people of Kenya, and the constitution has ensured they will no longer have the opportunity to abuse the powers that had been given to them under the old constitution.

The most significant development in the land sector however is the establishment of the National Land Commission. The Commission takes over the management and administration of land from the land commissioner and the President. The land grabbing culture and conflicts over land matters are substantially attributed to the massive powers enjoyed by the President and the Commissioner of Lands. The National Land Commission is intended to bring more accountability and transparency in land administration and management in the country.

In a nutshell, the commission is mandated to perform several functions including:

a) To manage public land on behalf of the national and county governments;

b) To recommend a national land policy to the national government;

c) To advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

d) To conduct research related to land and the use of natural resources, and make recommendations to the appropriate authorities;

47 Article 40 of the COK; the constitution protects property that has been acquired legally and regularly

e) To investigate present or historical land injustices, and recommend appropriate redress;

f) To encourage the application of traditional dispute resolution mechanisms in land and conflicts;

g) To assess tax on land and premiums on immovable property in any area designated by law;

h) To monitor and have oversight responsibilities over land use planning throughout Kenya;

i) To review grants and dispositions of public land; and other functions as may be assigned by legislations

4.2.3. Land legislations

National legislations form the third tier in the land legal framework. They operationalize the provisions relating to land in the constitution and the land policy. The constitution requires all laws relating to land to be revised, consolidated and rationalized within certain timelines to be in conformity with the constitution. All sectoral laws too are to be harmonized to be in line with the principles of the land policy. Parliament is further directed to enact legislations to make provisions for the following;

a) Sharing of benefits derived from natural resources;

b) The minimum and maximum land holding acreages in respect of private land;

c) To regulate the manner in which any land may be converted from one category to another; legislation;

d) To regulate the recognition and protection of matrimonial property;

e) To protect, conserve and provide access to all public land;

f) To protect the dependants of deceased persons holding interests in any land; and

g) To create a special court to hear and determine disputes related to land and environment.

Parliament has since passed four bills related to land in a bid to meet the above requirements.

4.2.3.1. The Environment and Land Court Act, (Act no. 19 of 2011)

This is the law that establishes the Environment and Land Court in accordance with article 162(2) (b) of the Constitution. The court is mandated to hear and determine disputes relating to the environment and the use and occupation of and title to land.

It has both original and appellate jurisdiction. In order to minimize delays always associated with land cases the law requires the Court to deliver justice expeditiously without undue regard to technicalities of procedure and technical rules of evidence. It shall be guided by the principles of natural justice. The law also provides for the court to apply alternative dispute mechanisms to speed up cases.

4.2.3.2. The National Land Commission Act, (Act no. 5 of 2012)

The Act operationalizes the National Land Commission by among others providing how the commissioners are to be appointed and outlining additional powers and functions to the Commission. It allows the Commission to establish county land management boards for purposes of managing public land. The Boards are mandated to process applications for allocation of land, change and extension of user, sub division of public land and renewal of lease in their respective areas.

Relevant to the Coastal region is the power given to the Commission to initiate investigations into present or historical land injustices, alienate public land, review all grants or disposition of public land to establish their propriety or legality. The Act also gives the Commission further power to recommend, within two years of its appointment, appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices. These provisions are very relevant particularly for the Coast region where cases of irregular allocations and historical land injustices are very well documented.

4.2.3.3. The Land Registration Act, (Act no. 3 of 2012)

This law revises, consolidates and rationalizes the registration of titles to land. It applies to the registration of public and private lands. It provides for the right to access information in the register, the protection of customary trusts, rights of way, water, natural light, air, compulsory acquisition, electric supply lines. It also allows citizens to challenge title deeds that may have been obtained illegally, unprocedurally or through corrupt schemes.

4.2.3.4. The Land Act, (Act no. 6 of 2012)

The Land Act is the core land law in Kenya. It consolidates, revises, and rationalizes all land laws that were in operation at the time of adopting the new constitution. Section 4 of the Act makes provision for the guiding values and principles of land management and administration. These principles and values are general statements of what should guide administration and management in the country. Further, the Act recognizes four forms of land tenure namely freehold, leasehold, such other forms of partial interest including but not limited to easements and customary land rights. All of them have equal recognition on the basis of non-discrimination. With regard to land management

and administration two key institutions namely the National Land Commission and the Cabinet Secretary are the ones mandated to deal with land matters.

For the Coast region the Act is significant in that it introduces new ways and procedures particularly in the administration and management of public land. For instance it is instructive that for the first time administration and management of public land has been specifically removed from the Executive and placed on the NLC. The Act requires the NLC to identify public land, prepare and keep a database of all such land, evaluate all parcels of public land and share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act. The Commission is also empowered to require the land to be used for specified purposes. The Act empowers the NLC to convert land status and this can be effectively used by the Commission to convert a lot of public land in the Coast to community land so that the same can be allocated to the local communities currently staying as squatters on such land. In allocating public land the Act allows the NLC to give land to a targeted group of persons or groups in order to ameliorate their disadvantaged position. This can be quite useful in addressing the issue of squatters.

All settlement programs shall now be implemented by the NLC. Those to be considered for settlement include squatters, persons displaced by natural causes, development projects, conservation and internal conflicts. A Land Settlement Fund is established to be administered by the NLC and used to provide land for the aforementioned groups. The identification of beneficiaries will be done by sub-county administrators, representatives of the county government, representative of the Commission, national government, of persons with special needs, women's representatives and youth representatives.

Further to the foregoing summaries, the laws repealed the following laws:

- The Indian Transfer of Property Act;
- The Government Lands Act;
- The Registration of Titles Act;
- The Land Titles Act;
- The Registered Land Act;
- The Wayleaves Act; and
- The Land Acquisition Act.

The new laws also require all existing laws relating to land that have not been repealed, to be applied with the necessary alterations and adaptations to give effect to the new laws. There is however a number of land bills that are yet to be enacted into law:

- The Community Land Law;
- Matrimonial Land Law; and
- Evictions and Resettlement Law.

The foregoing demonstrates that the new laws if diligently implemented can go a long way in addressing a number of land issues in the Coast region.

4.2.4. Subsidiary legislations

In the same way some constitutional provisions on land require legislation to be implemented; some provisions of the land legislations require subsidiary legislations to be implemented as well. Most of these subsidiary legislations are yet to be adopted. They will provide guidance as to how the reforms are to be fully realised. A taskforce has since been formed by the Ministry of Lands to draft these regulations.

Opportunities and Recommendations

As earlier noted, a majority of the coast population suffer land injustices in one way or another. The region has the highest concentration of landless indigenous communities in the country.[48] This has been attributed to the process of land adjudication under the Land Titles Ordinance, 1908. Post independence governments have propagated the problem by their failure to take decisive action to rectify the injustices occasioned by the colonial government.

The Constitution of Kenya 2010 has however made provision for the resolution of these injustices at chapter five, which basically summarises the National Land Policy. It also establishes the NLC to tackle these injustices. The judiciary also offers yet another opportunity for the resolution of these cases. It is highly reformed under the new constitution making it very efficient, independent and reliable to deliver justice.

While we acknowledge that most communities are affected by these injustices, this study focussed on ten distinct communities drawn from Kilifi, Mombasa and Kwale counties, as tabulated below:

Table 5: *Sampled cases according to the county of origin*

County	Communities
Kilifi	Takaungu, Shariani
Mombasa	Tudor, Kibarani, Dunga unuse, Kwa Punda, Maganda
Kwale	Msambweni, Kinondo,

These communities represent a sample of most of the coastal communities burdened by land injustices. During the study, the ten communities were categorised into three classes according to the common issues they faced. This section of the report will highlight the plight of these communities and the opportunities available in the laws and policies for their resolution.

48 Article 184 of the National Land Commission

The cases are classified as follows:

Table 6: *Categorisation of the cases*

Common issues	Communities/case
Historical injustices	Takaungu, Shariani
Informal settlements	Kibarani, Tudor, Kwa Punda, Dunga unuse
Settlement schemes	Maganda, Ramisi I (Msambweni/KISCOL), Ramisi II (Magaoni), Kinondo (Emfil land)

5.1. Historical injustices

5.1.1. Introduction

These are land injustices dating back to 1895.[49] They can be associated with the application of the colonial land laws and policies which were premised on the doctrine of terra nullis.[50] These laws and policies were put in place basically to facilitate the disinheritance of Africans of their land. The Crown Land Ordinance enacted in 1902 for instance declared all land in Kenya as crown land. It also implied that Africans were incapable of owning land and therefore setup enclaves known as native reserves for the settlement of natives.[51]

At the Coast, the law accredited with facilitating land injustices is the Land Titles Ordinance of 1908. The ordinance was passed to settle land claims along the ten mile Coastal strip. It required residents of the Coastal strip to register their claims with the Recorder of Titles for adjudication and issuance of Certificate of Title. All unclaimed land was declared crown land.

As with most communities, the Coastal communities were illiterate. This requirement did not reach them on time to make claims or contest claims made by others. Further, they believed, and rightly so that they did not have land issues requiring settlement at the Recorder of Titles as they already had their own frameworks of addressing these matters and therefore did not require the certification of a foreigner to legitimize the ownership of their lands. Consequently, very few Africans signed up for the exercise by submitting their claims within the six months period after the coming into force of the LTO. Most Coastal communities then had their land converted to crown land, or private land (some individuals took advantage of the naivety of these communities and claimed albeit without contestations, land that did not belong to them but rather to these communities).

49 This is the year when formal colonization began in Kenya. It has been generally accepted as the year when injustices in the land sector began.

50 This doctrine was presumptuous of African land being vacant.

51 These enclaves were managed by Native Land Boards till independence when native reserves were renamed trust lands and subsequently placed under the County Councils.

5.1.2. Opportunities for Redress

These two communities' experiences are shared by many a community in Coast of Kenya. Communities who find themselves landless as a result of the application of a law that failed to acknowledge the existence of traditional land tenures. Recent reforms in the land sector present a real opportunity for the resolution of these injustices.

- The NLP lays down the foundation for addressing historical injustices. Article 184 traces the origin of historical land injustices to the application of the Land Titles Act Cap 282, (previously known as LTO). The policy directs the government to take measures to address historical claims arising from the application of this law.[52] These measures are shaped in the CoK 2010 at chapter five with the establishment of the National Land Commission. Article 67 (2) (e) of the constitution lists one of the functions of the commission as including;

  '…to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress'

  This provision is of particular importance as it places central to the functions of the NLC the resolution of historical land injustices. This provision is detailed at section 15 of the NLC Act, where the commission is given 2 years of its appointment to put together a framework for the adjudication and resolution of historical land injustices.

- Another opportunity is provided by the Truth Justice and Reconciliation Commission (TJRC). This commission as established in 2008 as part of the Agenda 4 reforms[53] by the TJRC Act, to among other things investigate gross human rights violations and abuses and economic rights inflicted on persons by the state, public institutions and holders of public office, between December 1963 and 28th February 2008. Historical land injustices arising after independence fall under these parameters. The failure by the government to address land injustices propagated by colonial laws amounted to gross violation of the rights of these communities by the state.

  The Commission has gone around the country hearing accounts by individuals and communities of their perceived historical injustices. The Commission is expected to publish its report and recommendations in the course of 2013, though it has had its fair share of challenges.[54] Be that as it may, the commission offers another opportunity for the resolution of the historical injustices.

52 Article 193 of the NLP.

53 Agenda 4 are the long term reforms agreed in the national accord to be undertaken as part of the long term measures to prevent future incidences of conflicts and violence as experienced after the 2007 elections.

54 The public has lost confidence in the Commission because of the widely publicized wrangles involving the Chair of the Commission and its slow work rate. It has sought extension of its term on three different occasions.

- On October 8th of 2012, the Prime Minister of the Republic of Kenya gazetted a taskforce to address grievances of the people of the Coastal region, central to them being the land question.55 This taskforce was premised on the grievances raised by the secessionist group, the MRC. The task force has since started its sittings at the Mombasa County Hall. It is expected that the issue of land historical injustices will dominate submissions by the Coastal communities.

  Scepticism is high among a majority of the coastal residents over the role of this taskforce. There is a general feeling that there have been too many taskforces and commissions set up to address coastal issues without their recommendations being implemented. The shared opinion is that the coastal issues are already well documented and what remains is implementation.

5.2.3. Recommendations

The government should use the opportunities availed by the new laws and institutions to protect the rights of not just the two communities discussed above but also the several other historical injustices cases at the coast and the country at large. In this regard, the following recommendations are made:

1. The NLC should move with speed and develop the framework for the resolution of historical injustices. While at it, it should put in place interim measures to protect victims of land historical injustices from evictions and/or further harassment by those with ownership documents to these pieces of land;
2. The communities have a duty to take an active role in the formulation of the framework for the adjudication of historical injustices; and
3. Communities and stakeholders should embrace other opportunities that have been presented to them for instance the TJRC and the Prime Minister's taskforce.

5.2. Informal settlements

2.2.1. Introduction

Informal settlements or squatters settlements are residential areas which have developed without legal claim to the land and/or permission to occupy. Informal settlements basically denote the absence of tenure security and planning. Informal settlements manifest the following characteristics:

- There is a general lack of basic social amenities and infrastructural services; and where they are available they are usually below minimum standards. Services like security, education, clean water, electricity, education, drainage and sanitation are usually lacking in these settlements.

55 Gazette notice no. 17438

- Socially, most residents of these settlements belong to the lower income group, either working as wage labour or in various informal sectors. On average most earn wages at or below the minimum wage level.[56]
- The key characteristic however is the lack of ownership of the land parcel on which they have built their homes. These could be vacant/idle land, unproductive land e.g. marshy plots and could be either public or private.

Informal settlements arise as a result of either internal or external factors. The internal factors that influence the growing of informal settlements include: lack of collateral assets; low income; lack of savings or other financial assets. The external factors are high cost of land and housing services, lack of government support, high 'acceptable' building standards, rules and regulations and lopsided planning. These reasons leave no other option for the low-income householder but to squat on a vacant piece of land. There are 5 million slum dwellers or 13% of the population in Kenya, and 1 billion slum dwellers worldwide.

In Mombasa, the rapid growth in population and urbanization has exerted relentless pressure on resources and services such as, housing, water supply and sanitation, education and health facilities. The increased demand in housing has resulted in the mushrooming of unplanned settlements and slums most often in marginal areas of the County. According to a Pamoja Trust report, Mombasa has over 55 informal settlements spread as below was: 20 settlements in South of Mombasa, 5 settlements within the Island, 14 in Mombasa North and 12 in Mombasa West.

This study has highlighted the plight of four of these settlements namely Tudor, Kibarani, Dunga unuse and Kwa Punda settlements. They have faced harassment, intimidation, demolition of their property and forceful evictions from their settlements because of lack of ownership documents.

5.2.2. Opportunities for Redress

A number of opportunities have been presented by the new constitution and the land legislations as guided by the land policy.

- Article 211 of the policy outlines the following measures to be taken by the government address the issue of squatters and informal settlements:
    - o Take an inventory of genuine squatters and people who live in informal settlements;
    - o Determine whether land occupied by squatters is suitable for human settlement;

56 Incomes can be higher sometimes due to many income earners and part-time jobs.

- Establish appropriate mechanisms for the removal of squatters from unsuitable land and their resettlement;
- Facilitate planning of land found to be suitable for human settlement;
- Ensure the land subject to informal settlement is developed in an ordered and sustainable manner;
- Facilitate negotiations between private owners and squatters in cases of squatter settlements found on private land;
- Facilitate the regularization of existing squatter settlements found on public and community land for purposes of upgrading or development;
- Establish a legal framework and procedures for transferring unutilized land and land belonging to absentee land owners to squatters and people living in informal settlements;
- Develop in consultation with affected communities, a slum upgrading and resettlement programme under the specified flexible tenure systems;
- Put in place measures to prevent further slum development;
- Facilitate the carrying out of informal commercial activities in a planned manner;
- Regularize the disposal of land allocated to squatters and informal settlers; and
- Establish an appropriate legal framework for eviction based on internationally acceptable guidelines.

These measures have been incorporated in the new land legislation, in particular, section 160(2) (e) of the Land Act, which mandates the commission to make regulations with regard to squatters.

- Further, an eviction and resettlement guidelines law is being crafted to provide for acceptable guidelines to be adhered to in evictions.[57]
- The constitution at article 43(1) (b) has also recognized the right to decent housing which translates to a duty to the state to ensure that Kenyans have decent homes. While this article does not suggest that the government has a duty to provide everyone with free housing jurisprudence would surely declare that it is illegal to carry out evictions unless alternatives are put in place.
- The Limitation of Actions Act, chapter 22 of the Laws of Kenya provides yet another opportunity that a majority of communities discussed above have exploited. This act makes provision to the effect that one loses their right to claim

57 A task force by the lands minister is currently collecting views on this law from the public.

if they do not do so within 12 years of the land being adversely occupied by another party otherwise known as adverse possession.58 A person may under Section 38 approach the courts to seek orders of registration as owner of the land they have adversely occupied for an interrupted period of 12 years. The Land Act alludes to the doctrine of adverse possession at section 7(d) when it identifies prescription as one of the methods of acquiring land.

5.2.3. Recommendations

1. The taskforce and the relevant institutions involved in the preparation of the evictions and resettlement law should move with speed in drafting and enacting the evictions and resettlement law to protect and reduce instances of arbitrary forced evictions. Communities should play an active role in the formulation of the law;
2. Communities should consider out of court settlement of disputes, including initiating negotiations with the registered proprietors with a view to buying the proprietors off the land;
3. Communities should take advantage of the reformed judiciary by seeking the enforcement and protection of their rights. Civil Society organisations should support public/community interest litigation;
4. The courts must also allow both the values and spirit of the constitution and the recent land legislation to influence their rulings bearing in mind that they have a particular duty of social justice towards the poor and landless who have no other place to call their home; and
5. Land stakeholders involved in the development of community land law should consider the possibility of converting and registering informal settlement scheme land to community land for the benefit of the communities living in informal settlements.

5.4. Settlement schemes

5.3.1. Introduction

The Settlement programme is the government tool for the resettlement of squatters. The implementation of this programme has been done through the establishment of settlement schemes. Settlement schemes have in the past been implemented through the Settlement Trust Fund, under the Ministry of Agriculture, in conjunction with the Ministry of Lands and the Provincial Administration. However, the lack of

58 Section 7 as read with section 17 of the Limitation of Actions Act.

clearly defined procedures for the allocation of land in settlement schemes has led to the manipulation of lists of allottees and the exclusion of the majority poor and the landless. Further, there is lack of clearly defined procedures for identifying, and keeping records of genuine squatters and landless people. Cases of double allocation of plots are common. Consequently, settlement schemes have in most cases failed to meet their objectives, often benefitting the wrong people.

The Kwale county communities involved in this study had their issues revolving around settlement schemes. The Maganda community is a settlement scheme case as well. Below are summaries of the experiences of these communities.

5.3.2. Opportunities for Redress

The NLP acknowledges that settlement schemes have in the past been problematic mainly as a result of undefined procedures under the Agriculture Act (Cap 318). Article 152 of the policy directs the streamlining of settlement schemes procedures and process. This is picked up by the Land Act at section 134 and 135. The act outlines the people to be considered to benefit from settlement schemes and the procedures to be used. The act establishes a sub-county committee to identify and verify settlement scheme beneficiaries. Land acquired by virtue of settlement schemes is not transferable except through a process of succession. In general, the process of setting up settlement schemes shall be consultative.

5.3.3. Recommendations

1. It is recommended that an audit of the settlement schemes is carried out to establish who exactly has been benefitting and who has missed out. Most beneficiaries of schemes are usually not the intended or deserving beneficiaries;
2. There should be a consultation mechanism especially with regard to conventional settlement schemes (common in the rural areas where beneficiaries are the people settled on the land and are allocated plots as they are already settled). The communities involved should at all times be kept abreast of whatever is going on to avoid unnecessary tension;
3. With regard to the squabble involving the sugar company in Msambweni, the ministry of lands should engage the community in consultations, especially the group that was overlooked in land allocation with a view to finding alternative land for either the community or for the company. Further, consultations should consider compensation for the losses incurred when their crops and property were destroyed;

4. Communities should be responsible and avoid selling off plots allocated to them. The selling of allotment letters is rampant even though an allotment letter cannot legally transfer land. This should be discouraged and outlawed;

5. The issue of existing titles in Maganda settlement scheme needs to be sorted. They should be revoked if found to be irregularly acquired, or owners compensated if they are legal. The land should then be subdivided and allocated to genuine squatters, with the current occupiers of the land given priority. Further, the list of allottees should be regularized and made public to ensure the current occupiers of the land (some of whom have been there for several decades) can be certain of their allotments.

6. Settlement scheme plots should be economically viable in size.

7. MoL should hasten the development of community land law and use the same to secure community lands converted to public/private lands by previous regimes to the detriment of communities. Most communities in Kwale live in villages separate from their farms. These farms should be secured for these communities by converting them to community land so that the settlement patterns and customs are not greatly altered by the adjudication processes.

6. Conclusion

This research has disclosed the extent of the land troubles that have bedevilled the Coast region for several decades. It has at the same time attempted to raise the hope of victims of land injustices by alluding to the opportunities available for the comprehensive resolution of these issues.

This report is by no means an end in itself; there is still a lot to be done. The government and the powers that be are challenged to put in place the mechanisms necessary for the realisation of land reforms. The community too has a role to play. The Executive and political class has displayed laxity to implement reforms without that extra push from the public. The public is encouraged to be vigilant and push for the implementation of the new land laws and be part of that process. They should participate in the making of laws, regulations and rules governing the land sector, as the famed land reforms will be shaped and realised via these legislations and subsidiary legislations.

May this publication give all the parties concerned that extra impetus needed to deliver justice to these communities.

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Annex 1

Land Reform Agenda FGD guide.

To be administered during the 12 rural communities in Kwale and Kilifi counties as well as Mombasa counties.

Duration: 20 minutes

Questions

1. What is land
2. Categories of land
3. Management and Administration of land in the country
4. Laws governing land and land tenure systems in the country
5. Land dispute resolution mechanisms

Annex 2

Land Lobby Committees

Takaungu

1. Mwavita Eliud
2. Charles Janji
3. Awadh Mohamed
4. Florence Gambo
5. Mohamed Sharrif
6. Kaingu Ushuru
7. Alice Ruwa

Shariani

1. Augustus Kazungu
2. Mselem Hassan
3. Dzengo Chai
4. Pst. Donald Mzungu
5. Asiya Kingi
6. Fatuma Yusuf
7. Kibibi Abdallah

Tudor

1. Mathew Kisau
2. Fadzi Karema
3. Beatrice Paul
4. Patrick Muriuki
5. James brown

Kibarani

1. Justus Muchiri
2. David Juma
3. Anastancia Musili
4. Mercy Mkauma
5. Maurice Wekesa
6. Juma Mwanongo Mrisa
7. Irene Wekesa

Dunga unuse

1. Emily Mweke Nzao
2. Suleiman Adam
3. Maureen Wangare
4. Mary Taura

Maganda

1. Kalume Kitsao
2. Hamisi Badi
3. Josphat Malase
4. Mwinyi Salim
5. Swabrini Washe
6. Lydia Kabila
7. Bernadette simiyu

Kwa Punda

1. John Calvin Omondi
2. Omar Shaaban
3. Margaret Wakio
4. Mercy Masambaga
5. Jerusa Muthoni

Msambweni

1. Masud Abdalla Dzinao
2. Juma hassan Kirozo
3. Suleiman Bakari Shauri

4. Rama Mwinyi Madzumba
5. Bakari Ali Nguvu
6. Hamisi Athman Mwachangani
7. Salim Mwanangura
8. Asha Bakari Chimweri

Kinondo

1. Ali Zuberi Chombola
2. Shaban Salim Nyere
3. Ali Zuberi Mwanyumba
4. Swaleh Helefu
5. Abdhallah Bakari
6. Bibi Mwachoyo

Ramisi (Magaoni)

1. Rumani Ahmed Sego
2. Mohamed Abdallah Budzo
3. Ali Bakari Mwaweko
4. Mwanamisi Said Chibwebwe
5. Rashid Suleiman Tuku
6. Mwanamisi Suleiman Maluki
7. Zainab Ahmed Salim

Annex 3

(Repealed by Mazrui Lands Trust (Repeal) Act)

LAWS OF KENYA

THE MAZRUI LANDS TRUST ACT

CAP. 286

Published by the National Council for Law Reporting
With the Authority of the Attorney-General

THE MAZRUI LANDS TRUST ACT

CAP 289

Commencement Date: 1931-10-07

An Act of Parliament to establish a Mazrui Lands Board of Trustees, to provide for the powers and control which such Board may exercise over the Mazrui Land, and to validate titles granted by a certain arbitration board

Short title.

1. This Act may be cited as the Mazrui Lands Trust Act.

Interpretation.

2. In this Act, "the Mazrui" means the Mazrui and Shakh'si followers of Salim bin Khamis.

Establishment of Board

3. (1) There shall be established a Mazrui Lands Board of Trustees (hereinafter called "the Board") for the purpose of holding and administering all the lands of the Mazrui.

(2) The Board shall consist of the Provincial Commissioner of the Coast Province as chairman and such other persons not exceeding six in number as the Minister may by notice in the Gazette appoint.

Incorporation of Board.

4. The Board shall be a body corporate and shall have perpetual succession and a common seal, and may sue and be sued in its corporate name and, subject to the provisions of this Act, may hold, and by instrument under their common seal may convey, mortgage, assign and demise, any land or any interest therein now or hereafter belonging to, or held for the benefit of, the Mazrui in the same manner, and subject to such restrictions and provisions, as the Board might without incorporation hold, convey, mortgage, assign or demise for the benefit of the Mazrui as hereinafter provided.

Vesting of land in Board.

Cap.167.

5. (1) All lands held by or on behalf of the Mazrui at the commencement of this Act, which lands are described in the Schedule and more particularly delineated on a set of plans entitled "Mazrui land, mainland north", which plans have been deposited in the Survey Records Office, Survey of Kenya, Nairobi, are declared to be vested in the Board for such estate and interest and subject to such leases, mortgages, charges or other encumbrances, rusts, rights of way, easements, conditions and restrictions as existed immediately before the commencement of this Act.

(2) Any areas of land which may hereafter be granted or conveyed or which may in any way devolve upon or be held for the benefit of the Mazrui shall, subject to the provisions of the Trustee Act, vest in the Board.

Powers of Board over trust property.

6. (1) The Board shall hold all land as trustees in trust for the Mazrui.

(2) The Board may convey, mortgage, assign or demise any of the land for the benefit of the tribe on such terms and conditions as they may think fit, and shall distribute any profits which may arise out of the land among the members of the tribe in such manner as may seem to them just.

(3) The Board may at the request of the majority of the tribe subdivide any land vested in them and grant any such land so subdivided to such member or members of the tribe as they may think just.

Validity of acts of Arbitration Board.

7. (1) Any land the property of the tribe in any way alienated in good faith by the Arbitration Board appointed by notice appearing on page 178 of the Gazette, 1912, or as constituted from time to time, shall be deemed to have been lawfully alienated, and the Arbitration Board shall be deemed for all purposes to have acted legally, and any person in whose favour any grant, lease or conveyance has been made or given shall be deemed to have the same estate or interest which purported to be given by that grant, lease or conveyance.

(2) No suit, prosecution or legal proceeding whatsoever whether civil or criminal shall be instituted against the Arbitration Board, or any member thereof, in respect of any act, matter or thing directed or done in good faith in exercise or purported exercise of their or his appointment, or in relation to the alienation

in good faith of any land of the Mazrui, and the validity of any act, matter or thing as directed or done shall not be liable to be contested by suit or otherwise.

Power to make rules.

8. The Minister may make rules prescribing -

(a) the tenure and avoidance of office of trustees appointed under this Act;

(b) the number of trustees who may act on behalf of the Board;

(c) the opening of a banking account and generally the transaction of the business of the Board;

(d) the conduct of meetings of the Board and the powers of the chairman;

(e) the majority of trustees necessary to authorize the doing of any act as to which the Board is not unanimous;

(f) the device of the common seal;

(g) the custody and use of the common seal;

(h) generally for the purpose of administering the land vested in the Board.