

CLASS NOTES

1. INTRODUCTION TO LAW.

- i. Jurisprudence/philosophy of the law.
- ii. Constitutionalism
- iii. Definitions in Agricultural and Environmental Law
- iv. Agrarian Law.
- v. Pre colonial and colonial land tenure system.

Colonial Land Policy Before Kenya became a British Protectorate in 1895, land tenure was governed through the African customary laws, which embodied usufructuary and communal ownership. As a protectorate, the British had no legal power to alienate land unless such power was granted through agreements. Thus, they could not claim title on land occupied by Africans. To circumvent this constitutional impasse, the British invoked the Foreign Jurisdiction Act of 1890, which gave jurisdictional power over unoccupied land. They enacted new laws to acquire land occupied by the Africans. These laws denied Africans' occupancy rights by segregating them to the so-called Natives' Reserves. Africans, for the first time, became tenants at the will of the Crown. With legal power to alienate land in native reserves, the Kenya colonial government adopted a policy that encouraged European settlement through freehold and leasehold estate, at the expense of African settlement.

African land tenure system was seen as an impediment to proper land use practices. Consequently, the colonial government modified the policy and allowed replacement of customary system with English-style based on individual property rights. However, replacement of Africa land tenure with private ownership stalled until the Mau Mau revolt demonstrated the urgency of land reform. In the wake of the revolt, the British government established the Royal Commission to produce a blueprint of subsequent land reform policy (East African Royal Commission 1953-55).

At the same time, Kenya's colonial government produced the so called Swynnerton Plan (Swynnerton, 1955). Both reports called for land reform based on formalization of property rights held under the customary law. The reform process entailed three steps: adjudication, consolidation and registration. Although the proposed land reform was mainly driven by economic factors, it had political overtones aimed at disinheritng Kenyans who had left their communities to join the Mau Mau revolt.

2. SOURCES OF AGRICULTURAL AND ENVIRONMENTAL LAW IN KENYA

1. Constitution

2. Statutes – Laws of Kenya

- i. Land Act No. 6 of 2012 (LA)
- ii. Land Registration Act No. 3 of 2012 (LRA)
- iii. National Land Commission Act No. 5 of 2012 (NLCA)

- iv. Land (Group) Representatives Act
 - v. Repealed land laws (quoted for discussion and guidance purposes only; Registered Land Act, Registration of Titles Act, Government Lands Act)
 - vi. Agriculture Act Cap. 318
 - vii. Agricultural Finance Corporation Act (Chapter 323)
 - viii. Environment and Land Court Act. No 19 of 2011
 - ix. Environmental Management and Coordination Act (EMCA), 1999
3. Government policies.
- A, Sessional Paper No. 3 of 2009, Kenya Land Policy
 - B, Sessional Paper No. 10 of 2014, The National Environment Policy

The Constitution

Supremacy of this Constitution.

2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

National values and principles of governance.

10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

42. Environmental (rights)

Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations

Chapter Five—Land and Environment

PART 1—LAND

60— Principles of land policy.

60. (1) Land in Kenya shall be held, used and managed in a manner that is

equitable, efficient, productive and sustainable, and in accordance with the following principles—

- (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 law, customs and practices related to land and property in land; and
- (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

(2) These principles shall be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.

61— Classification of land.

61. (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

(2) Land in Kenya is classified as public, community or private.

62 Public land.

62. (1) Public land is—

(2) Public land shall vest in and be held by national government or a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission

63. Community land.

(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

Land (Group) Representatives Act

64. Private land.

Private land consists of registered land held by any person (or company) under any freehold tenure and land held by any person under leasehold tenure;

65. Landholding by non-citizens.

66. Regulation of land use and property.

National Land Commission.

67. (1) There is established the National Land Commission.

(2) The functions of the National Land Commission are—

- (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 appropriate authorities;
- (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- (g) to assess tax on land and premiums on immovable property in any area designated by law; and
- (h) to monitor and have oversight responsibilities over land use planning throughout the country.

68. Legislation on land.

PART 2—ENVIRONMENT AND NATURAL RESOURCES

69. Obligations in respect of the environment.

- (1) The State shall—
 - (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
 - (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
 - (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
 - (d) encourage public participation in the management, protection and conservation of the environment;
 - (e) protect genetic resources and biological diversity;
 - (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
 - (g) eliminate processes and activities that are likely to endanger the environment; and
 - (h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural

resources.

70. Enforcement of environmental rights.

(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress and seek legal remedies

71. Agreements relating to natural resource.

The transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya; and

72. Legislation relating to the environment. Parliament shall enact legislation to give full effect to the provisions of this Part.

162. System of courts: The Environment and Land Court

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. That is; Environment and Land Court Act. No 19 of 2011.

The Environment and Land Court as one of the Courts established by article 162(2) is a Superior Court just like its counterpart, it has the same status as the High Court.

The court is further provided for under section 4 of the Environment and Land Court Act No. 19 of 2011. It has jurisdiction to hear any other dispute relating to environment and land. The jurisdiction of the court is provided under section 13 of the Act. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of Act or any other written law relating to environment and land.

The court has powers to deal with disputes relating to land administration and management. The court is also empowered to hear cases relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

The court also exercises appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. The court further exercises supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution.

Environmental Management And Coordination Act (EMCA), 1999

This is the framework law on environmental management and conservation. EMCA establishes among others the following institutions; National Environment Management Authority, Public Complaints Committee, National Environment Tribunal, National Environment Action Plan Committees, and County Environment Committees. The National Environment Management Authority (NEMA) was established as the principal instrument of government charged with

the implementation of all policies relating to the environment, and to exercise general supervision and coordination over all matters relating to the environment. In consultation with the lead agencies, NEMA is empowered to develop regulations, prescribe measures and standards and, issue guidelines for the management and conservation of natural resources and the environment. The Act provides for environmental protection through;

- Environmental impact assessment
- Environmental audit and monitoring
- Environmental restoration orders, conservation orders, and easements.

NEMA is also the Designated National Authority for certain Multilateral Environmental Agreements and for Environmental Licensing

Issuing of Environmental licenses and Permits

NEMA issues a wide range of environmental licenses and permits under various environmental regulations.

These include licenses and **Permits for:**

- Environmental Impacts Assessment (EIA).
- Effluent discharge
- Waste Management, transporters, incinerators and recyclers
- Import Export for controlled substances

- Access genetic resources
- trans boundary movement of waste
- Sand Harvesting sale and transportation

Agricultural Finance Corporation (CAP 323)

Establishment of Corporation (1) There is hereby established a Corporation, to be known as the Agricultural Finance Corporation. (2) The functions of the Corporation shall be to assist in the development of agriculture and agricultural industries by making loans to farmers, co-operative societies, incorporated group representatives, private companies, public bodies, local authorities and other persons engaging in agriculture or agricultural industries. (3) The Corporation shall be a body corporate with perpetual succession and a common seal, and shall have power to acquire, own, possess and dispose of property, and to contract, and to sue and be sued in its own name. (4) The Corporation is not subject to the Companies Act (Cap. 486) or the Banking Act (Cap. 488). 4. Board of directors (1) There shall be a Board of Directors of the Corporation, which shall, subject to this Act, be responsible for determining the policy of the Corporation and for controlling its operations.

Agriculture Act (Cap. 318)

An Act of Parliament to promote and maintain a stable agriculture, to provide for the conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land management and good husbandry.

agriculture includes; cultivation of land and the use of land, horticulture, fruit growing and seed growing; dairy farming, bee keeping and breeding and keeping of livestock; conservation and keeping of game animals, game birds and protected animals the use of land as grazing, meadow land, market gardens or nursery grounds; and the use of land for woodlands and other forms of agroforestry,

(further) Land Law Statutes in Kenya

- i. Land Act No. 6 of 2012 (LA)
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- vi. Agriculture Act Cap. 318

Facilitator;

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