

Kenyan Land Disputes in the Context of Social Conflict Theories

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Summary

In a number of Kenyan regions, land ownership and land use rights are often in dispute resulting into land disputes. These land disputes have far reaching negative effects on the certainty of land markets, tenure and food security, economic production and reduction of poverty. Often, the land disputes lead to; civil strife, loss of lives, population displacement, destruction of property and international humanitarian crisis. A trace of the tenure-political evolution reveals failure of land order which was occasioned by colonialists and later the successive Kenyan governments. To consolidate power; the colonialist took proprietary powers over land. Among others this led to suppression and subversion of indigenous land governance structures, institutions and laws and the emergence of the state and its agents as the dominant factor in land relations. This was bitterly contested by the natives leading to Kenya's independence. However, at independence the Kenyan elites confirmed and safeguarded the unpopular property rights, laws and administrative structures acquired during the colonial period thus prolonging the existing and breeding new land disputes. Land disputes are purely a type of social conflict given their causes, form and their net effects. Though the general theories of social conflicts are known, comprehensive and systematic knowledge of the theories behind land disputes is still limited and inconclusive. This discussion paper looks into the nature of causes of Kenyan land disputes and tenure-political evolution to discuss the Kenyan land disputes in the context of the known general theories of social conflict. Kenyan land disputes are discussed in the context of theory of Materialist Interpretation of History, Dialectical Method of Analysis and Political Program of evolution.

1. Introduction

The term 'land' lends itself to a variety of meanings. The meaning of land is not constant. The actual institution and the very way people see it, change over time. The changes are related to the changes in the purpose which society or dominant class in society expect land to serve, (Macpherson 1978). This gives land various proprietary attitudes and user interests (John 1976:13) defined by the three fundamentals of tenure i.e. land ownership systems, land administration and land laws and legal systems. An outgrowth of diversity in the interpretation of these fundamentals of tenure whether in the past, the present or the future lead to land disputes.

Like any other resultant effect of diversity of interpretation, land disputes are highly social. Land dispute is constituted by assertion of conflicting claims on land ownership, land use rights, land laws or a combination of them.

Land disputes are a long standing issue in Kenya. They are not only the platform on which the Kenyan independence was fought and won (Nyadimo 2005) but also the strain that has in the recent past threatened the Kenyan cultural and ethnic harmony and often brought the Kenyan economy to its knees.

Today the issue of land is often treated with fervent sentimentality and sensitivity and in many ways, considered explosive. Whereas the constitution guarantees the right of ownership of property anywhere in the country, the peaceful coexistence of the numerous Kenyan tribes appears to have been profoundly undermined by both new and long standing land disputes (Government of Kenya, 1999). Kenyan land disputes have been continuous, seasonally heightening into land conflicts. Land conflicts have been bloody and often characterised by massive population displacements and extensive destruction of property to levels that culminate into international humanitarian crises.

The solution to Kenya's present problem will include: nullification of titles, resettlement of communities and land redistribution. These are complex issues and their successful resolution requires the understanding of the basic reasons and theories behind the Kenyan land disputes through a thorough look at the Kenya's land tenure evolution.

2. Evolution of the Kenyan Land Tenure

The Kenya Land Tenure has transited from pre-colonialism, to colonialism to post colonialism. Before colonisation, Kenya practised customary land tenure where land was owned by different clans based on a socially and culturally known and accepted arrangement among the community members. Resolution of all land disputes were subject to customary law that was constituted of spontaneously evolved rules emerging through past dispute adjudication (Ojienda 2008: 13)

The colonisation of Kenya in 1889 completely altered these arrangements. According to the Government of Kenya Government of (2002:21), to ensure state, political and economic power, one of the earliest imperial acts was the assertion of sovereignty over land occupied by indigenous Kenyans and legislation of laws to protect their expropriated interests whereas destroying the customary arrangements. This came in three phases; first the imperial government acting on the advice of the law officers of the crown on December 13, 1899 expropriated all productive land not formerly held by the Sultan Arabs. This was followed by the colonial government promulgating an ordinance in 1908 in the ten mile coastal strip formerly held by the Sultan Arabs requiring individuals with interests in this land to make a claim thereof. Lastly the colonial government created native reserves to facilitate simpler and more efficient control and administration of 'natives'.

Successive post independence governments have come to power mostly by promising to reverse these historical land injustices. However, commitment aimed towards reversing the land injustices only last as long as the elected government are still new in office. See excerpt from Kenyan local dailies by officials of newly elected governments since independence (table 1). What eventually follows is the use of government land and abuse of land laws to ensure political patronage (Government of Kenya 1999: 62-63 and Lamba 2003). This fuels up resentment in sections of the citizenry leading to land disputes.



<p><i>Promise made by Current coalition Government June 2008</i> <i>Source- (The Standard 2008)</i></p>	
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Table 1- Excerpts of Successive Post Colonial Governments shortly after they assume office

3. Theories of Social Conflict

Social theory is an essential tool used by scholars in the analysis of society; through the use of theoretical frameworks social structures and phenomena are analyzed and placed in context within a particular school of thought. The field is interdisciplinary, drawing ideas from and contributing to such disciplines as anthropology, economics, history, human geography, literary theory, mass communications, philosophy, sociology, and theology. (Berberlogu 2005, p. xi). This paper adopts a "Critical" social theory; a neo-Marxist theory.

Social conflict theory is a Marxist-based social theory which argues that individuals and groups (social classes) within society have differing amounts of material and non-material resources (the wealthy vs. the poor) and that the more powerful groups use their power in order to exploit groups with less power. The two methods by which this exploitation is done are through brute force and economics (Marx and Engels 1848). This theory was founded by Karl Marx and later developed by theorists including Max Weber. The Marxist, conflict approach emphasizes a materialist interpretation of history, a dialectical method of analysis, a critical stance toward existing social arrangements, and a political program of revolution or, at least, reform (Marx and Engels 1848, Kent 2000).

i. Theory of Materialist Interpretation of History

In the key elements of material view, in social production of their existence, men inevitably enter into definite relations. These relations are independent of their will. The totality of these relationships constitutes the economic structure of society, the real foundation on which arises a legal and political superstructure and which correspond to definite forms of social consciousness. In this case, it is not consciousness that determine existence but social existence that determines consciousness (Marx 1971:20).

ii. Theory of Dialectical Method of Analysis

Dialectical method is based on Hegel's earlier idealistic dialectic. It focuses on how existing social arrangements or thesis generate its social opposite or antithesis and how

qualitative different social form or synthesis emerges from resulting struggles (Kent 2000). Any stages of history based on exploitative economic arrangements generate within itself the seeds of dispute.

iii. Theory of Political Program of Revolution

Social criticism and political reform which based on common property not expected to involve many conflicts as capitalist criticism and political reform based on private property (Kent, 2000). Conditions change and classes in society are altered. Amid turmoil and anguish, the division of wealth is altered. Thus, history is a pageant of ceaseless struggles between classes to partition social wealth. Capitalism must consist of a technical base of economic reality and a superstructure of social class system (Heilbroner 1967).

4. Discussion

In common usage, social conflicts are struggles over values or claims to status and resources in which the parties are an aggregate of individuals, such as groups, communities and crowds rather than single individuals (Oberschall 1978). Given the land tenure evolution in Kenya, contestation for land takes quite a similar form. Land and land relationships in traditional and modern Kenya are highly social and intimately related to kinship and identity. Assertion of conflicting landownership claims and land use rights are therefore commonly advanced along lineage, clan and ethnic fronts. Thus Kenyan land disputes can be looked at in the context of theories of Social conflict.

i. Kenyan Land Disputes in the Context of the Theory of Materialist Interpretation of History

Under the theory of materialist interpretation of history, Heilbroner, (1967) and Kent, (2000) argue that it is not consciousness that determine existence but social existence that determines consciousness. This is because whereas existence is universal, consciousness is a creation of a localised group for their own good and identity. Creation being an entity under existence (note; that God exists but was not created), creation is much lesser as compared to existence. Thus, whereas existence is always beyond human manipulation, conscience is more often a process of inclusion or exclusion for convenience. In Kenya, the following can be singled out as the effects of materialist interpretation of history;

- a. In Kenya, existence is defined by kinships' political power which is determined by a kinship's economic strength. There is no political power without an economic base. Political power essentially is an expression of economic strength. This can be in terms of rewarding or punishing. In rewarding, successive governments have given any kind of support that eventually translates into economic value, likewise in punishing, successive governments endeavoured to weather down rivals and competitors

economic strength. Kenya being agriculturally dependent, economic strength squarely lies in land, for land is the main means of generating income, accumulating wealth and transferring the wealth between successive political units. Thus, land has been the means of rewarding loyalists and punishing opponents (Government of Kenya 1999:62, 2004:9). For instance, successive Kenyan government leaders set up resettlement schemes for their loyalists (members of their communities) in foreign ancestries and public and trust land regardless for what purpose these lands were set aside for. Thus the native land owners (now squatters) have always attempted to evict the foreign occupants before and after every electioneering year as was the case in 1992, 1997, 2002 and 2008 (Republic of Kenya 1992 and Government of Kenya 1999).

- b. The substantial and procedural abuse of land laws and legal systems (See Table 2).

Table 2- Kenyan Land Laws commonly abused leading to land disputes

<i>Law</i>	<i>Common Abuses</i>	<i>Effects leading to land dispute</i>
Registered Land Act- CAP 300	Laxity by registrars issuing titles on the basis of failed mutations	-Creation of multiple void titles
	Section 143 (1)-Incapability of 1 st title not being defeated by any other claim	-Registration of some family members as trustees to disinherit other family members -Irregular allocation and registration of public land to individuals enjoy sanctity of title
Land Control Act-CAP 302	Section 2-Special Board meetings	Exemption of stakeholders /family members leading to selling of family land secretly
	Appointment of Committee Members	Long Service-accumulation of unabated powers and subsequent abuse of the same
Land Dispute Tribunal	Section 3-Exercise outside the jurisdiction	Entertainment and biased determination of disputes involving beneficial ownership to land, doctrines of title and rectification of registration
Land (Group Representative Act) CAP 287	Disregard of principles and procedures in the Act	Dispossession of other real members of group land through illegal allocation
Trust Land Act CAP 288	Section 53,117 and 118-Doctrines of public interest	Defilement of the public interest doctrines thus neglecting reference to the frequency of imperatives and dishing out land at the whim and caprice of the President and Commissioner
Government Land Act- CAP 280	Section 12- Adjudication and Registration of Public Land to be done after a public auction	-Secret and Corrupt Illegal and Irregular allocation -Creation of multiple void titles
	Section 3 and Section 7-Delegation of allocation powers	-District and Provincial allocation committees the supposed agents of the commissioners only after advertisement in accordance with the provisions began to irregularly and illegally allocate land

Government Land Act- CAP 280	Section 12- Adjudication and Registration of Public Land to be done after a public auction	-Secret and Corrupt Illegal and Irregular allocation -Creation of multiple void titles
	Section 3 and Section 7-Delegation of allocation powers	-District and Provincial allocation committees the supposed agents of the commissioners only after advertisement in accordance with the provisions began to irregularly and illegally allocate land
	Section 18 –Sale, exchange, lease, subdivision to be done after completion of the development conditions in the grant	-Land hoarding for non public interests. -Emergence of land buying and selling syndicates and cartels
	Institutionalisation of letter of allotment as representing an interest in land	Easened the accusation of illegal titles
	Abuse of doctrine of public interest	Defilement of the public interest doctrines thus neglecting reference to the frequency of imperatives and dishing out land at the whim and caprice of the President and Commissioner

Source; Own analysis

Most of the land disputes in Kenya arise mainly from the failure of the authorities concerned to enforce and to comply with the law as it exists. This is encouraged by the belief and interpretation of title in absolutists' terms i.e. that all that matters is to get registered as a proprietor to land and to be issued with title. The manner which title is acquired is irrelevant (Government of Kenya 2002, 2004: 15-17). The title is an end in itself. Thus Authorities have over time overseen the abuse of Land laws, land transfer and conveyance procedures. Alternatively these same authorities create new procedures which are inappropriate or inconsistent with existing laws. In both cases, the results are confusion and creation of title that are disputable and or wholly void.

ii. *The Kenyan Land Disputes in The Context of the Theory of Dialectical Method of Analysis*

In view of the theory of dialectical method of analysis, any stages of history based on exploitative economic and political arrangements generate within itself the seeds of dispute. In Kenya the following instances can be singled out from the tenure-political evolution;

- a. Land expropriation from the indigenous land owners by colonialists and the subsequent transfer of the same to Kenyan, elites gave forth a class of squatters and the slum's urban poor.

Thus the squatter problem at Kenyan Coast, the Pastoralist versus Ranch owner's problem in Laikipia and the large Kenyan Slums.

- b. The colonial government declared Mau East part of the Mau forest the home of the Ogiek (community of traditional honey gatherers, who survive mainly on wild fruits and roots, wild game hunting and traditional bee keeping) as a natural reserve. This was meant to create a buffer zone between the Maasai cattle and their residence to avoid their cattle getting into contact with the Maasai cattle. Later it was gazetted as a forest reserve. The forest policy, progressively and immensely displaced the Ogiek, further it replaced the natural forest with conifers that are to the Ogiek totally sterile and unproductive and useless for either bees or wild animals (Sang 2002). Today, a whole community is landless and their livelihood completely undermined resulting into long standing land disputes around the Mau forest.
- c. Kenya's struggle for independence was a fight for the land expropriated by the colonialists all over Kenya (Nyadimo 2005:3). However, at independence the Central Kenyan elites never redistributed land to the central Kenyan natives. Instead, they resettled the natives in a foreign ancestry-the Rift Valley. Note that the Rift Valley natives had fought the colonialists alongside the Central Kenyan natives in an effort to get their ancestral land as well. The question is; why should the land in the Rift Valley be shared with the Central Kenyan natives whereas the Central Kenyan colonial land arrangement remains unaltered? In attempting to protest; the Rift Valley natives have always displaced the non natives whenever an opportunity arises (Republic of Kenya 1992 and Government of Kenya 1999). On the other hand, a third force has emerged in Central Kenya pressing for the urgent land redistribution in the name of addressing the past land related injustices.
- d. Most Trust and Public Lands were for certain purposes given their ecological integrity, cultural relevance or strategic location and cannot be allocated to private use unless public interest dictates that they should (Government of Kenya 2004:15). However, a combination of legal and political factors over years contributed to facilitate irregular allocations of public land and trust land in what is termed as land grabbing. As communities and neighbourhoods lost land meant for their cultural heritage, play grounds, recreational areas and other social amenities, public resentment set in, leading to land disputes

iii. *Kenyan Land Disputes in the Context of Theory of Political Program of Revolution.*

In the context of the theory of political program of revolution, political reform must be oriented towards socialism and not capitalism to avoid conflict in society. Thus, if Sociologists recognise that political reform must be socialist and not capitalist oriented then tenure-political evolution must ensure;

1. The sanctity of the doctrine of public interest with respect to the traditional practices and legal systems.
2. Ancestral sovereignty in rural settings and complete cultural integration in urban settings
3. Restrictions on the marketability of land rights i.e. broadening land access or forestalling reductions in access through restrictions of purchase by foreigners, ceilings on land ownership, preferential lease/buy rights etc
4. Tax regimes that ensure betterment for communal biased land holding and worsenment for individual biased land holding, i.e. Taxation regimes that impose a wider array of cost and benefits upon society at large than those borne by the individual land owners.

The Kenya's tenure-political evolution did not take these tenets into account. It fell short setting a firm platform for contestation for land ownership and land use rights. From the tenure-political evolution the following pitfalls within the tenets are identified. The ulceration of these tenets has been continuous and seriously intertwined. Hence, it is difficult to discuss each tenet in isolation of the other. The following order has been adopted in this paper;

1. Doctrine of public interest tenet

- a. December 13 1899-seizure of sections of land owned by indigenous Kenyan. This was done based on Britain's Jurisdiction Act in whose view there was no settled government and the land had not been appropriated to the local sovereign (Government of Kenya 2002:23). *(effect-expropriation of the white high lands-this led to the emergence of Mau Mau (the movement that earned independence) and its remnants the today's third force Mungiki seeking to address the historical injustices)*
- b. Enactment of Crown Lands Ordinances in 1902 to ensure the enforcement of the Britain's Land Acquisition Act of 1894 (Ibid)*(effect-De-legitimisation of the customary land law, legal systems and structures)*
- c. 1908 promulgation of the 1902 Ordinance to cover the entire country in that all Kenyans claiming interest to declare before the expiration of 6 months failure to which such land shall be deemed crown land (Ojienda 2008: 15) *(effect-Forced displacements causing landlessness and emergence of squatters).*

- d. 1915 a mere opinion delivered by the then Chief Justice that whatever rights indigenous inhabitants may have had to the land had been extinguished rendered every Kenyan a tenant to the will of the Crown (Ibid) (*Effect-Disorientation of the formal practices and disruption of respects to the existing land rights*)

2. Ancestral sovereignty and complete cultural integration tenet

- e. 1926, pockets of land deliberately delineated from the expropriated un arable farms were set out as ‘native reserves’ (Government of Kenya 2002) (*Effect-Disruption of ancestral sovereignties and Ethnicisation of land ownership*)
- f. New Legislations passed in 1938 extinguished any other rights that ‘natives’ in Kenya as a whole might have had outside their respective reserves (Ibid) (*Effect- Institutionalisation of Ethnicised and regionalised land ownership*)
- g. 1940s Reconditioning of Land through a Development and Reconstruction Authority (DARA) by decongestion of African Native reserves in spite their societal arrangements in the congested reserves (*Effect- Ulceration of social cohesion and the eventual breakdown of national tranquillity*)

Doctrine of public interest tenet (re-emergence)

- h. 1954 saw the ‘Swynnerton Plan’ to ensure ‘Intensification of Agriculture’ to destroy African land tenure systems and ensure conversion to systems of individualised tenure arrangements, (Swynnerton, 1955) (*effect-Delegitimisation of the customary land order, legal systems and structures*)

3. Restrictions on the marketability of land rights + Doctrine of public interest tenets

- i. Mid 1950s to early 1960s the incorporation of emerging politically active African elites currently the ruling class into principles of colonial land practices (*effect-Politicisation of land ownership*)
- j. Mid 1960s, 1970s and 1980s re-entrenchment of colonial land policies, laws and administrative structures by the current leading class and their cronies (*Effect-Emergence of corruption in land ownership*).

4. All tenets

- k. 1970s, 1980s, 1990s through to the millennium saw the substantive and procedural abuse of customary and formal land laws (*Effect-All already mentioned effects plus emergence of slums in urban centres plus emergence of the most unequal society in the world*)

5. Conclusion

The Kenyan land tenure-political evolution reveals that the origin of Kenyan land disputes is historically traceable. The Kenyan tenure- political evolution gave rise to the following strains;

1. Massive displacements and Landlessness
2. Systematic discrediting of customary law and enactment of formal law
Leading to conflicting customary and formal land laws,
3. Ethnicisation, politicisation and regionalisation of land ownership,
4. Unacceptable disparities in land ownership,
5. Procedural and Substantial abuse of land laws and
6. Corruption in Land administration and Management.

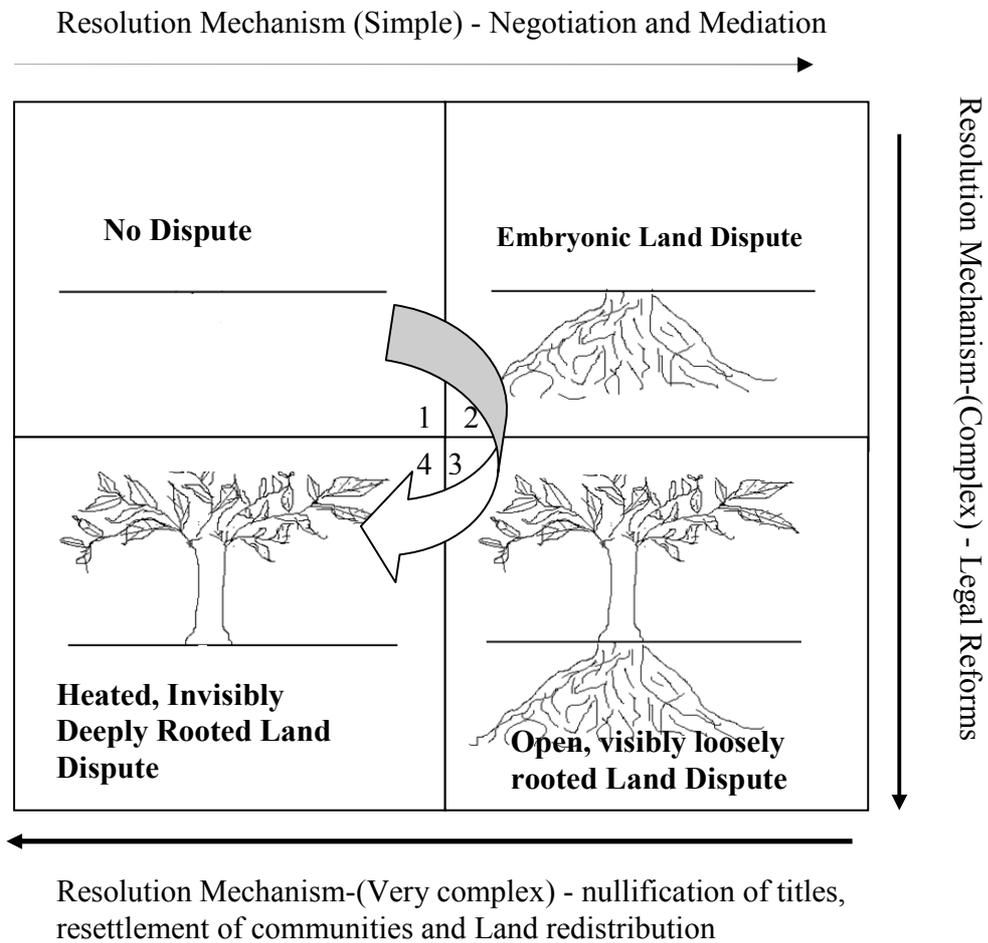
These strains are deep rooted and are the platform on which Kenyan land disputes are founded. This paper reveals that the genesis of these strains is either *the legacy of colonial and successive government policies* or *the late transformation of land into a marketable commodity or the intimate relationship between land and kinship* or *selfish individual interests* (Wehrmann 2006; 2008) or a combination of these factors.

The social conflict theories emphasize;

- i. *Theory of Materialist Interpretation of History* in which existence determines social consciousness and not vice versa. This explains the unacceptable disparities in land ownership and procedural and substantial abuse of land laws in Kenya. It also explains the growth of multiple legal systems and thus the assertion of legal systems that advantages one contending faction while disadvantaging the opposing party.
- ii. *Theory of Dialectical Method of Analysis* in which existing social arrangements or thesis generate its social opposite or antithesis. Thus any stages of history based on exploitative economic arrangements generate within itself the seeds of dispute. This explains the reasons behind the protracted land disputes in former native reserves where sovereignty of ancestries was upset for political power and patronage giving forth ethnicisation, politicisation and regionalisation of land ownership. It also explains the origin of landlessness and thus the bitter and protracted land disputes between landowners and squatters in some Kenyan districts.
- iii. *Theory of Political Program of Revolution* in which Social criticism and political reform based on common property is not expected to involve many conflicts as capitalist criticism and political reform based on private property currently in use in Kenya. The Kenyan tenure political program of revolution is responsible for abuse of adjudication and registration procedures, massive displacement and landlessness, ethnicisation, politicisation and regionalisation of land ownership and unacceptable disparities in land ownership.

Kenyan land disputes are numerous and scattered within the conflict cycle. Potential resolution mechanisms' complexities vary with the stage of the dispute cycle (figure1).

Figure 1; Land Disputes and Resolution Complexity Cycle



Source; Fisher et al. 2000 (modified)

The situation is bound to get even more complicated with time because the social nature of the Kenyan society is that property is equated to status, egoism, political and economic power of an individual and/or kinship lineage. The expected legal reforms otherwise expected to resolve the current situation are threatening to be democratic. This will definitely not resolve the problem as there will be definite attempts to manipulate the legal system to protect the interests of the dominant class (In this case the elites and the beneficiary of the flawed tenure political evolution).

Given the complexity of causes leading to land disputes, as well as their diversity and the large number of different actors involved, requires an integrated, system-oriented approach for solving land conflicts and for preventing additional ones (Wehrman 2008)

p;102). For those disputes at the embryonic stage e.g boundary disputes and family disputes; negotiation and mediation will have to be applied. Disputes that may be open, visibly and loosely rooted like disputes resulting from abuse of existing laws or conflicting formal and informal laws will best be resolved by focussed legal reforms that will emphasize among others ceilings on land ownership. For disputes that are heated, invisibly and deeply rooted like the disputes resulting from land grabbing by politically correct individuals and irregular allocations of land by past governments -nullification of title, resettlement of communities and land redistribution is the best way out.

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BIOGRAPHICAL NOTES

William KALANDE qualified with a Bsc in Surveying and Photogrammetry (Hons) from the University of Nairobi. He is currently pursuing an Msc in Surveying-Land Information Management in the Department of Geospatial and Space Technology in the University of Nairobi. He worked as a land Surveyor carrying out Cadastral Surveys around the Republic of Kenya with Ramani Communications and the Ministry of Lands and Settlement for Three years. He later joined the Somaliland Cadastral Survey as a Land Surveyor where he resettled refugees, solved land disputes and carried out cadastral surveys for issuance of titles before joining Mumias Sugar Company in December 2006 to take up his current position as the Land Information Manager. He is currently charged with surveying and managing the Agricultural Management System (AMS); a land based information system of 70,000 contracted farmers and the 6000Ha company's nucleus estate. He is also frequently involved in solving land disputes amongst farmers and carrying out Cadastral and farm boundary surveys for the company. His research interests include land tenure evolution, land administration and mitigation of property based conflicts in the horn of Africa.

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