



THE IMPACT OF LEGISLATION ON CUSTOMARY LAND TENURE SYSTEM IN GHANA AND KENYA

By

Henry Acho Nnokam*

ABSTRACT

Although Land Tenure system is an English term, its significance is not completely alien to African communities that existed prior to the advent of colonial rule in Africa. The term simply answers the question; how is land being owned and used in any given society. That is to say, it describes the nature of land holding in the said society. This paper investigated how land was being held and used in Ghana and Kenya prior to the advent of colonial rule in these countries. The investigation was done in three phases; the nature of land holding in the pre-colonial era, the colonial era and the post-colonial era. The paper revealed that in Ghana land was and is still seen as a Deity and owned by ancestors. That is to say, no human person own land and it is not owned on absolute ownership basis. Though a freehold nature of land tenure, particularly special lands like Stool land. The paper also looked at the legal frameworks at the colonial era and the impact of same on the people. The research was taken to what the current land tenure systems are in those countries and how the Neo-colonialisation still holds sway. The Doctrinal research method was adopted in the work. Legislation on land which were brought about firstly by the Colonial Administration impacted so negatively on customary land holding, particularly in Kenya. The indigenous owners of the land became slaves to foreign settlers. The work concluded that the main agendum was to water down the efficacy of customary laws on land, which was achieved through the instrumentality of these Statutes. The paper therefore recommends the amendment of the Kenyan Land Act and the Constitution of Kenya. It also recommends the amendment of the Land Act of Ghana.

Keywords: *Land, Land Tenure System, Legislations, Pre-colonial, Colonial, Post-colonial*

INTRODUCTION

This paper critically examines the mode of ownership and use of land in the pre-colonial era in Ghana and Kenya. In other words, the work analyses the nature of the land tenure system by Ghanaian and Kenyan natives, prior to the advent of colonial rule, bearing in mind that land

* Henry Achor Nnokam, LLB(RSU), BL (ABUJA) PDCL (RSU) LLM (RSU).



existed before the advent of the colonial rule as land is as old as man and that land could not have been owned and used without order at the time.

The paper will showcase the way and manner land was held in the pre-colonial era as aforesaid, the jurisprudence behind such nature of land holding particularly in Ghana jurisdiction where individual ownership of land was not allowed and is still not allowed because land in Ghana is seen as a deity, so that individual ownership was and is still a threat to the sanctity and preciousness of land. Land in Ghana was and is still spiritualised and mystified, thereby vesting ownership of land on the ancestors solely for fear of what individual ownership of land will cause to the sanctity of land as aforesaid. Individual ownership of land was and is particularly prohibited for stool land.

In Ghana, community chiefs and village heads functioned as trustees and managers of lands on behalf of the ancestors.

In Kenya, the situation is not completely different. But in Kenya, land is not given the same spiritual status as land in Ghana. In Kenya, individual land ownership was not practiced in the pre-colonial era. Land was owned by communities and managed by community chiefs and village heads as trustees. There was no absolute ownership at the time, as land was held on life time basis which could be likened to life Estate in the English jurisdiction. The effect of the foregoing therefore is that land in Kenya was merely on occupation and possessory basis at that time.



This paper further shows how lands were held during the colonial era in the both jurisdictions. The era introduced legislation on land. The legislation were both locally enacted and by way of adoption of English laws on land. How these laws regulated use of land was not left out.

Also, the paper analysed the nature of land holding in the contemporary times beginning from the point of independence in both countries. In other words, the work will show how natives fare on land in both jurisdiction in the present day.

LAND TENURE SYSTEM IN THE PRE-COLONIAL GHANA

In the Pre-Colonial era in Ghana, individual acquired title to land by deforestation. Any portion so deforested by an individual, the community respected and honoured the person's title to such land for life.¹ It appears that land tenure system in Ghana during the Pre-Colonial Era was only for life which means lands were not held in Ghana in the Pre-Colonial era on absolute ownership. If land was held only for life in Ghana during the said era, it means that land at the time was not inheritable. It means at the time in Ghana, land was acquired upon deforestation for farm purposes only.² It is so reasoned because lands were held for life only and was not inheritable; no permanent act of ownership could have been done on the land since the holding was only for life. It goes further to reason that lands were not owned in Ghana at the time. The interest acquired in land in Ghana was merely possessory and occupatory.

¹ A E Selase, 'Land Tenure System in the Pre-Colonial Era, Ghana as Insight' (2015) *International Journal of African and Asian Studies* 14.

²*Ibid.*



The Land Tenure System in the pre-colonial Ghana is summarized thus;

It is important to stress that although the individual may acquire land and have right to its usage even for life, the truth is that the individual did not own the land as such but enjoy its usufruct. This is so because as noted earlier on, the real owners of the land in any traditional community in Ghana are the ancestors on whose stead the chief stands. That is, the chief has the custody of all land in his jurisdiction...³

The above fortifies the earlier position. The land belonged to the ancestors through the chiefs. The chiefs were also entitled to reversion. In fact, what is obtained in Ghana could be likened to a Licence granted to use land or a mere leasehold interest (as in the case of present day Nigeria), save that the major ingredient of a leasehold transaction i.e. (certainty of term) is missing as it is not to be more than 99 years in Nigeria. Whilst in Ghana, grace of holding the land for life is given. However, how old a man lives, he must surely die, no man lives forever.

Thus, by and large, the tenure is still mere possessory and “occupatory” only which cannot be inherited since it is only for life.

LAND TENURE SYSTEM IN THE COLONIAL ERA IN GHANA

In the course of colonialization in Ghana, the Colonial Administration delegated the administration of land to the Paramount and Divisional chiefs.⁴ This watered down the authority of the village chiefs over land. It is presumed that the Divisional Chiefs were what was later known as “Warrant Chiefs”. Subsequently, in 1927 the Land and Native Act Rights Ordinance of 1927 was made. The Act declared all lands public and vested same in the Colonial Governor.

³ (n2).

⁴(n2).



Management and control of land were no longer on the bases of the customs of the people in Ghana at the time.

It does appear that there were no much Legislation on land in Ghana by the Colonial Administration apart from the 1927 Act. It is reasoned that the absence of many Legislations on land in Ghana during the Colonial rule was because the Act of 1927 covered the field for them in the agendum of divesting the native owners of their entitlement to land. Land in Ghana during that era was put under the control of the Colonial Governor as in Nigeria. This is in fact the only agendum for the so-called land reformation by the colonial administration.

LAND TENURE SYSTEM IN POST-COLONIAL GHANA

After independence, Ghana concentrated on the Registration of Land Tiles⁵ pursuant to which some legislation was made to regulate and govern Land Title Registration. The latest of these legislations is Land Title Registration Law 1986.

There is still customary land tenure system as practiced in Pre-Colonial Ghana. In Ghana now the pre-colonial land tenure system which centred on spirituality and religion is more respected even more than the legislation made during the colonial era. Both the land tenure system in the pre-colonial Ghana and the legislations made during colonial rule still apply in Ghana.⁶ Customary laws on land in Ghana are more respected because of its spirituality than the

⁵*Ibid.*

⁶A E Selase, 'Land Tenure System in the Pre-Colonial Era, Ghana as Insight' (2015) *International Journal of African and Asian Studies* 14.



legislations.⁷To put it more succinctly, customary land laws are being honoured by the Government in Ghana. The pre-colonial land tenure system in Ghana is stronger in observance. The present Administration in Ghana recognizes the customary laws on land. The Ghanaian customary laws on land are most respected and honoured in the rural areas where over 60% of the population of Ghana reside.⁸ It is also within the rural area that major economic activities are carried out, especially agriculture and mining.⁹

The foregoing reveals there is dual land tenure system in Ghana as we speak. That is the customary land tenure system and the system pursuant to the legislations. It is however important to note that there is a new land act in Ghana¹⁰. The law forbids the creation of freehold interest in stool land particularly and all other lands in Ghana.¹¹ The new land law in Ghana provides for the creation of customary land secretary for the management of the land held by the native.¹² However, the new Land Act in Ghana merely made innovations to help the public on their right to possessing land.¹³ The new Act does not affect the dual land tenure system taken about earlier.¹⁴ That is, customary and land titles registered under the 1986 law.

LAND TENURE SYSTEM IN THE PRE-COLONIAL KENYA

⁷*Ibid.*

⁸*Ibid.*

⁹*Ibid.*

¹⁰Land Act 2020 (passed into law and accessed in Dec 2020).

¹¹*Ibid.*

¹²customservice@lexology.com accessed 15th August 2022.

¹³*Ibid* (the new act innovations only the administrative aspect of the old law).

¹⁴*Ibid.*



Land use and management was regulated by the customary laws of the people in Kenya in their Pre-Colonial era. During this time, land belonged ultimately to the communities, while individual only had user-rights. Rights of individuals were subject to the communal ownership of the lands. The individual land needs were determined by the community leaders who had the right to decide which individual should use land and for what nature of usage.¹⁵ However, this system existed as aforesaid, but it did not have a uniform application as it varied from locality to locality¹⁶ depending on the people's cultural, geographical, political and socio-economic circumstances. The variation in the application of the land tenure system aforesaid does not derogate from the fact of the ultimate communal ownership of land, what actually varied as aforesaid was the nature and mode of the user rights of individuals in such locality.

The land tenure system in the pre-colonial Kenya is almost uniform with the land tenure system in the pre-colonial Nigeria. In the both jurisdictions land at the time belonged ultimately to the communities which had the radical title in the form of reversionary interest upon the completion of the purpose for which the land was allotted e.g. (farming). The practice in pre-colonial Kenya as to the communities determining who is to be allowed land for use was not alien to Nigeria at the time. As discussed earlier, communities or families owning land determined what an individual allotted land will use it for (mostly for farming purpose). It would appear that it was only communities that owned land in Kenya at the time whilst in Nigeria at the time both communities and families owned land. Another distinction deducible in both jurisdictions is the absence of partitioning of community land in Kenya for the purpose of creating individual

¹⁵A Thuo, *Genealogy of Land Ownership, Use and Management Problems in Kenya During the Pre- August 2010*.

¹⁶W Odhiambo and H Nyangito, *Land Laws and Land Use in Kenya: Implications for Agricultural Development (2002) Kenya Institute for Public Policy Research and Analysis* .



ownership of land to divest the community of the title over land. As foreseen, in the pre-colonial Nigeria, individual acquired title to land by partitioning of community or family land. It would also seem that in the period in Kenya lands were not acquired through deforestation, conquest and first settlement as in the case of Nigeria.

LAND TENURE SYSTEM IN THE COLONIAL ERA IN KENYA

Land reforms in Kenya during the Colonial era took a rather punitive dimension. It adopted most English Common Laws into the Kenya legal framework in the colonial era notwithstanding the existence of tribal legal system¹⁷. Among the English common laws so adopted was the English Property Law.¹⁸ The law governed land ownership and use. The law affected ownership of land by the natives by vesting lands in the individuals thereby divesting communities of land ownership as it was in the pre-colonial era. The law also allowed for the bringing of foreign settlers into Kenya for grazing and cultivation of land formerly used by native tribes.

The Colonial Administration in Kenya also incorporated the Transfer of Property Act of India. This was further improved upon by enacting the Registration of Titles Ordinance of 1920¹⁹. This Ordinance was made to secure land tenure of the foreign settlers which enabled the issuance of title Deeds on lands to the foreign settlers used for agricultural purpose. The settlers connived with the Colonial Government to make regulations restricting the native farmers from growing

¹⁷D Nabudere, 'Beyond Modernization and Development of Why the Poor Reject Development' *Geograficka Annaler Series B Human Geography* (1997).

¹⁸K Kanyiga, 'Re-distribution From Above: The Politics of Land Rights and Squatting in Coastal Kenya' *Nordic African Institute* 2000.

¹⁹H Okoh-Ogendo, 'Formalising Informal Property System: The Problem of Land Rights Reform in Nigeria, Commission on Legal Empowerment of the Poor' (United Nations Development Programme) Nairobi, 2007.



cash crops such as tea and coffee.²⁰ This led to the seizure of the natives' highly productive land and the institutionalisation of the use of force on the natives as labourers on the foreign settlers' farm.²¹ Consequently, the natives protested to the Colonial Administration which led to the making of the Native Land Ordinance 1938. This law enabled the adding of more lands to the natives. This however never resolved the land conflict between the foreign settlers and the natives as natives were still made subject to the settlers.²²

The adoption of English Property Law into the Kenyan's *corpus juris* did not result to a different or better situation compared to Ghana. The law also divested the natives of title to their lands. The adopted English Property Law in Kenya even did more harm to the corporate existence and livelihood of the native people of Kenya. Like in Ghana, land never belonged to individuals, but to communities and families, except in cases of partitioned land under Nigerian Customary law. It was even more strict in Ghana where land was deemed to be owned by the spirits (Ancestors). But the English Property law vested land ownership in individuals in Kenya at that time. This was a surreptitious way of pooling the wool over the eyes of the natives because as seen earlier, the natives were subjected to various manner of degradation over their own land by the Colonial Government.

English Property Law vested land ownership in the English jurisdiction in individuals, yet all the laws made during this era in Kenya divested individuals of the ownership of their land and

²⁰C Ochieng, 'Making Capitalism: The Political Economy of Varieties of Capitalism in Kenya and the Smallholder Dimension' *Oxford University: Development of International Development*, 2007.

²¹*Ibid*; Government of Kenya, State of Environment Report Kenya. (National Environment Management Authority, 2004).

²²(n22).



vested same in the Colonial Governors? This is clearly Neo-Colonialism. During the Colonial Administration in Kenya, foreign settlers unsettled native owners from their land. To further unsettle the native owners, the Registration of Titles Ordinance of 1920 was made to fortify the settler more on the native lands to the extent of prohibiting the natives from growing cash crops like tea and coffee. Their highly productive lands were seized, thereby subjecting them to work as labourers for the settlers.

LAND TENURE SYSTEM IN POST-COLONIAL KENYA

Since after independence in Kenya, land tenure system had been addressed in piecemeal. Kenya lacks a comprehensive land policy. There are numerous laws that address land tenure system.²³ The colonial laws on land are still being applied, particularly the laws which divested communities of ownership of land and vested same on individuals, particularly the foreign settlers who occupied land in Kenya as discussed earlier. In other words, a dual system of land management evolved in Kenya. That is, the customary laws on land and the English Common law made and imported into Kenya by the Colonial Administration.²⁴ However, it is imperative to note that the English Laws made by the Colonial Administrations are still in force in the country and other legislations made are fashioned in the manner of the said colonial laws. This makes it plausible to argue that there are three land tenure systems in Kenya. That is, private, customary and public land tenure system. This is more so as the new Land Act in Kenya still upheld the Land tenure systems as discussed above. The constitution²⁵ of Kenya still recognize the three (3)

²³G Wamukoya and F Situma, Centre for Legal Research and Education on Environment 2000.

²⁴A Thuo, Genealogy of Land Ownership, Use and Management Problems in Kenya during the Pre- August 2010.

²⁵Kenya Land Act 2012.



land tenure systems alluded too. The new Constitution of Kenya²⁶ recognizes acquisition of title to land through prescription.

Under the private land tenures system, corporate entities, corporative societies and religious bodies are allowed to own land. Under this system a private entity can acquire public land. Albeit, the tenure of the holding is not absolute.²⁷The customary tenure system had been discussed earlier. For the public tenure system, the Government is deemed the private owner of such lands. The lands are administered under the Government Lands Act²⁸ pursuant to which certain parcels of land are reserved for public use.

By the foregoing, one can say that, Kenya has plural legislations on land tenure system, each addressing various aspects of their economic needs. However, one challenge hitherto is the application of the colonial made laws. Howbeit, in all the negative impact of legislations on customary land ownership the Constitution²⁹ guarantees the protection against dispossession of private property. More to the above are the provisions of sections 75, 117 and 118 of the Kenya's Constitution which make provisions for acquisition of land. It provides that such acquisition may take place if the purpose is justifiably for public purpose, and that the benefit of such purpose for acquisition far exceeds the hardship or inconveniences to be suffered by the land owners and that the owners are compensated promptly and in full.

CONCLUSION

²⁶S.6(12) of the 2010 Constitution of Kenya.

²⁷A Mumma, 'Kenya's New Water Law: An Analysis of Implication for the Rural Poor' *International Workshop on African Water Laws: Plural Legislative Framework for Plural Water Management in Africa* (Johannesburg) 2005.

²⁸W Odhiambo and H Nyangito, 'Land Laws and Land Use in Kenya: Implications for Agricultural Development' *Kenya Institute for Public Policy Research and Analysis* 2002.

²⁹Land Registration Law 1986, ss 75, 84.



As could be gathered from the antecedent of land holding in both jurisdictions, customary ownership of land was the only mode of land ownership (Land Tenure System) before the advent of the colonial rule. The natives enjoyed a less restrictive means of ownership of land as the families and communities (as the case may be) through the Chiefs and village heads, trustees for the benefit of the people. Land meant everything to the natives so much so that the management and control of it were not left in the hands of any individual but communities and families as aforesaid. It was so because there is no gainsaying the effect of leaving the control and management of lands in the hands of individual members of the communities or families. Howbeit, as seen in Ghana jurisdiction, individuals were not even seen as owners of land, but the ancestors. Land was and it is still accorded a spiritual status in Ghana so much so that for special land such as Stool land, individuals do not enjoy absolute ownership of same as the land belongs to the ancestors. Also in Kenya, individual ownership was not allowed, but communal ownership. This is the level of premium and value attached to land in the pre-colonial era. It is so because family and communal ownership of land engenders more security than individuals who will apply the lands in any manner desirable to them, which in most cases, desecrates and makes a mess of the precious nature of land.

During the colonial administration it is regrettable to note that terrible situations befell Kenyans. The foreign settlers became their overlord in terms of land ownership. As if that was not enough, their productive land for agriculture was taken away from them and they ended up becoming labourers for the foreign settlers. Individuals became owners of land in the colonial era rather than communities as it was originally.



After independence in Ghana, the paper showed Ghana is currently operating a land tenure system that could be said to have human face somewhat. Two land Tenure systems are operational in Ghana, viz; customary land tenure system and public land tenure system. Infact, in actual sense, the land tenure system in Ghana is dual. Thus, their land tenure system could be said to be operating on two pedestal as aforesaid. While Kenya operates three Land Tenure Systems as aforeseen. In the both jurisdictions the impact of legislation on customary land tenure cannot be overemphasized. It affected the flavor of absolute ownership in land. Even in the case of Ghana, title to lands, subject of customary tenure system, are still registrable. The law under which such titles are registered control and regulate the use and management of the lands, though the nature is freehold as distinct from the mere leasehold interest in Nigeria and Kenya. Howbeit, the holders of the freehold interest in Ghana cannot convey the land out-rightly. The nature of conveyance in Ghana is leasehold, but not by the government. The owners of the land are the ones conveying. Lands are not conveyed in Ghana out-rightly because of the spirituality attached to land.

Kenya has plural on land tenure system, each addressing various aspects of their economic needs. However, one challenge hitherto is the application of the colonial made laws. In Kenya, one can say that the people breathe fresh air when it comes to land holding. This is because ownership rights to properties are protected under the Kenya's Constitution.³⁰The Constitution guarantees the protection against dispossession of private property. More to the said fresh

³⁰Land Registration Law 1986, ss 75, 84.



airbeing enjoyed by Kenyans are as enshrined in section 75, 117 and 118 of the Kenya's Constitution which make provisions for acquisition of land by government. The Constitution went further to provide that the holders of the land must be compensated promptly and in full.

However, the above situation in Kenya appears the point still remains that land can be acquired even against the wish of the owner, thereby making the matter of compensation a mere window dressing and a façade. In all, it is beyond plausible argument to say that the sole agendum for the legislations over land is to water-down the effect of customary ownership of land. This indeed has been achieved as seen in the work.

RECOMMENDATIONS

1. It is recommended that the Kenya government should institute a legal action before the International Court of Justice against the British government for damages for the enslavement the Kenyan natives suffered in the hands of British settlers during colonial administration for restricting the native owners from growing cash crops such as tea and coffee, seizing their highly productive lands and compelling the natives to become labourers on their farm lands.
2. The Kenyan Land Act 2012 and the Kenyan Constitution 2010 should be amended to re-introduce family and community ownership of land in respect of land held under customary law in Kenya as against the individual ownership of land being practiced under the current Legal framework in Kenya. The reason is that during the pre-colonial era, land was not owned by individuals but families and communities. It was so because



land is precious, sacred and was well managed by chiefs and village heads during the pre-colonial era in Kenya. Hence, the absence of individual ownership at the time.

3. The spiritualization of land in Ghana particularly special land held under customary law such as Stool land should never be watered down by any enactment, lest the sacred and precious nature of land is eroded.
4. The Land Act 2020 of Ghana should be amended to introduce freehold interest in land, this is excepting Stool land which is a special land. The essence is for customary lands to become inheritable as against what is currently being practiced in Ghana.