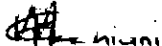


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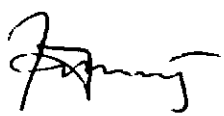
I, the undersigned, declare that this long essay is my original work achieved through my personal reading, scientific research method and critical reflections. It is submitted in partial fulfilment of the requirement for the Ecclesiastical Degree of Baccalaureate in theology. It has never been submitted to any other college or university for academic credit. All sources have been cited in full and acknowledged.

Signed: 

Name of student: PETER GACHIANI MUGO

Date: 10th FEBRUARY 2004

This long essay has been submitted for examination with my approval as the college supervisor.

Signed: 

Name of the supervisor: Fr. Joachim Omolo Ouko, A.J.

Date: Feb 10, 2004

Dedication

To all the victims of the land clashes in Kenya and to the Church ministers working towards ensuring a just distribution of land in Kenya. May they not despair even when the wicked appear strong and well established.

ACKNOWLEDGEMENT

Sincere thanks to Fr. Joachim Omollo, A.J.

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The issue of land ownership occupies the minds of almost every Kenyan

GENERAL INTRODUCTION

... Here we are shown a hierarchy of values in the framework of the right to property between 'having and being' especially when the 'having' of a few can be to the detriment of the 'being' of many others.¹

Since time immemorial, land and its fertility has been a controversial issue in human history. We may pose a question on the reason of the conflict between Israel and Palestine or Aboriginals and Australians. No matter what arguments can be raised, all the conflicts rotate around the land and its fertility, as it is the case of the Promise Land in the Bible.

King Ahab wanted a piece of Naboth's land for a garden. Pure greed! He must have had lots of land; what marks the will of the big owners in the abuse of power. (Cf. 1 Kings 21). Greed is more perfected now. Here in Kenya they want land to construct big houses, to plant grass for livestock or just to keep it. Nothing to produce food, something good, for the people! and the people without land, without the power to plant, who are hungry? The way Ahab and his wife Jezebel got Naboth out of their path is the same today. They use lies and false documents to "prove" that they are the owners. They get false testimonies, they buy witnesses. Sometimes they even order the murder of the rightful owners who happen to be small farmers. That's what prophet Elijah says here: they are thieves and murderers. Naboth's reply to the king is marvellous and to be imitated: "The Lord forbids that I should give you the inheritance of my fathers." Small farmers honour their little pieces of land. It has a history. Generally it is a history of sweat and suffering.

¹ J.A. KAISER, *If I Die*, 74.

For Kenyans the story of Naboth and his vineyard is a powerful representation of their own reality. Many landless Kenyans see themselves as Naboth and his experience as their own. Ahab and Jezebel are no different from contemporary large landowners and agricultural enterprises. Kenyans understand that land is inheritance, but that for the powerful, it is only a commodity to be bought and sold for personal gain. The story of Naboth is their story.

Naboth's story is found in 1 Kings 21, and is a good place to begin a study of the biblical tradition of land. It not only lifts out the principal feature of that tradition which is inheritance but also makes clear that biblical land is soil to be tilled, and as such, is of central concern. The biblical tradition of land as inherited soil that signifies God's presence—and, therefore, hope and future—is what makes that tradition meaningful to Kenyans. Seen from their context of marginalisation and struggle, they discover in the bible a historic dimension of the land. At the same time, the biblical history of struggle for land becomes their struggle for land even today. The theme of land is fundamental in the biblical tradition. Land, besides being an object of study, is also the angle, the prism, the theological place to view faith and life.

Land is a central, if not the central theme of biblical faith. When the Hebrew bible speaks about Promised Land, it is talking about the earth and its resources, not a spiritual home. Anticipating modern economists who understand land not only as soil, but also as minerals, water, forest resources, even the air the Deuteronomist spoke of:

A good land, a land of brooks of water, of fountains and springs, flowing forth in valleys and hills, a land of wheat and barley, of vines and fig trees and pomegranates, a land of olive trees and honey, a land in which you will eat bread

without scarcity, in which you will lack nothing a land whose sores are iron, and out of whose hills you can dig copper. (Deut. 8:7-9)

This material reality on what all human wealth depends is evident in the words used for land and on what God has blessed us with in the immeasurable riches on the earth's crust.² The anticipation of the Promised Land in Deuteronomy, is but the culmination of a major theme running through the whole Pentateuch. The promise of land is a constituent part of God's covenant with Abraham; the Exodus is presented as God's first act in preparing to fulfill that promise; the law and covenant are given with a view to life in the land.³ Beyond the Pentateuch, the land remains a primary theme; its capture and division in Joshua; the struggle to survive unity in judges; the eventual complete control of the whole territory under David and Solomon; the prophetic protest of injustices perpetrated on the land; the exile as divine judgment and the people's eventual restoration of the land as a token of a renewed relationship with God.⁴

The essential affirmation that Yahweh promises land to the patriarchs as the foundation of the future is sealed in the exodus from Egyptian slavery. This promise has fundamental importance. This is the core of covenant Yahweh makes with his people. He gives them land and the very same time gives them identity and shows his presence among them. Thus, he proves himself faithful by liberating and giving them a land to live in. Covenant-Exodus-Giving-of-the-Land form a single theological unit (Deut 26:5-9).

This is clear in Deuteronomy. The land has especially significance. There, promise and gift are related integrally, and together signify past, present, and future.

² C.J.H. WRIGHT, *God's People in God's Land Family, Land and Property in the Old Testament*, 3.

³ W. BRUEGGEMANN, *The Land*, 10-11.

⁴ W. BRUEGGEMANN, *The Land*, 10-11.

In other works, the promise given to the patriarchs in the past is actualised in the present, and corresponds to the salvific activity of Yahweh.⁵ "The promise of land was proclaimed every a new even after its fulfilment, as a future benefit of God's redemptive activity."⁶ The Promised Land is the moving force of their history (Gen. 12:1-2), and is the frame of reference for their present and their future. The promise always is before the people, and its possession is the gift of salvation.⁷ With the promise, Israel knows that. It has a future, in spite of being "the fewest of all peoples" (Deut.7:7). The promise is a gift. It is Yahweh himself who gives them the land (Deut. 6:10-11). The only requirement is to possess it (Deut. 11:10-12).

Land is a gift from God. It is necessary only to take ownership of it. Human action is required to own the gift and to fulfil the promise. It is because Yahweh has given the land that it is possible to take it. The power of Yahweh assures the ownership of the land (Deut. 3:21-22; 7:1-9), but people have to take it through their own struggle. To take the land, then, is to fulfil Yahweh's command (Jos. 1:11)⁸

In need of land, they took it in various ways and proclaimed it as Yahweh's gift in fulfilment of his promises. They see all their military operations as guided by Yahweh who leads them out, sends fear upon the enemy, and gives Israel victory even against heavier odds. To take possession of the land is therefore for Israel an act of faith and obedience⁹

This struggle for land is the foundation for the formation of Israel. Taking the land always has theological significance and always is always justified as the promise of Yahweh. Taking the land is not to covet land. To covet it would be to seek one's own personal, selfish interests. Rather, it is to take in the sense of

⁵ P.D.MILLER, "The Gift of God". *Interpretation* 23 (1969) 454.

⁶ G. Von RAD, *The Problem of the Hexateuch*, 93.

⁷ P.D. MILLER, *The Gift of God*, 543.

⁸ MILLER, *The Gift of God*, 455.

⁹ MILLER, *The Gift of God*, 456.

receiving what is necessary for life's well-being. Without land there is no life, and that Israel sharply felt.

Promised Land is the promise of life. "Life"¹⁰ as von Rad demonstrates was an essential theological concept for Israel. "Choose life, that you and your descendants may live." (Deut. 30:19). Life is what land means. It is above all, sustenance. Throughout the Hebrew Bible land tradition, one finds a symbiotic relationship between human life and the soil. Humanity is to manage, care for, and use the land and its creatures to assure a full and plentiful life, thus, secondly, making soil truly soil. Land and human kind depend upon each other for each other's fulfilment.

Nor is anyone to be excluded from the land. This is glimpsed in the Cain and Abel story, and seen more fully in the Abraham and Lot account. For the writers of the account of the killing of Abel, Cain is as a sedentary farmer representing landowners, while Abel, the shepherd represented the landless nomad. The socio-historical situation of the writers was one of conflict between these two groups, a serious problem for early Israel (Num. 21:21-23). When the gift of the landless was received by God but that of the land rejected, Cain rose up against Abel. Cain sought to exclude Abel from access to land and was punished by Yahweh for doing so.¹¹

There was a similar situation with Abraham and Lot (Gen 13:1-18). The two were in conflict over access to pasture. Abraham solved the problem offering Lot the land of his choice. That is the way. The problem is solved by finding ways to include each other, not exclude each other from the land. By sharing land Abraham becomes a source of life for Lot and lets Yahweh's blessings to come upon both of

¹⁰ G. Von RAD, *The Problem of the Hexateuch*, 253.

¹¹ G. Von RAD, *The Problem of the Hexateuch*, 253.

them. Abraham “gives” land to Lot, just as Yahweh ‘gives’ land to Abraham (and Israel)¹² Exclusion means murder, death while inclusion means blessing, life. Land is to be shared. Therefore, living in the land has to be in order “to escape self interests like imperialism and feudalism imposed by outside powers and to prevent the rise of feuded domination within their won society.”¹³

The unjust distribution of land and the greed and individualism by the powerful on the lands of the poor are fundamental causes of understanding the present Kenya, because it is such a central political economic theme. Apparently, in one way or another, nearly all social injustice like; land clashes tribal discrimination can be traced to land.

The title of this paper, *Land reform in Kenya: Challenges in Theological reflection and Pastoral practice*, points to the landless, exploited and the marginalized who serve powerful economic interests but are being pushed aside as the country strives for modernization and development.

The title also recalls an important but often overlooked biblical image that points to the same people. When Israel was sent into exile, the poorest were purposefully left behind. They were the ‘poor of the land’ (Amos 8:4) those forced off their properties, whose livestock was stolen by powerful economic interests (Job 24:2-4), those “trampled upon” (Amos 8:4), and “thrust off the road” (Job:24:2-4) by powerful people in the society as it was in Kenya during the land clashes whereby thousands of people were displaced by a far rich minority. The rich minority have caused people to hate and kill one another just because of their interests.

¹² W. BRUEGGEMANN, *Genesis*, 130-132.

¹³ GOTTWALD, *The Tribes of Yahweh*, 389.

It is the same old story. Everywhere Mombasa, Nakuru, Kisumu, Eldoret. The same old story, our people... leaves one another... and all because of the crumbs thrown at them by the exploiting foreigners. Our own food eaten and leftovers thrown to us in our own land where we should have the whole share. We buy wood from our own forest; sweat on our own soil for the profit of our oppressors. Kimathi's teaching is to unite, drive out the enemy and control your own riches, enjoy the fruit of your sweat.¹⁴

As such Kenyans must all strive for unity and drive away any enemy that intends to divide us. We should all conform to what the constitution says:

Land, being Kenya's primary resource and the basis of livelihood for the people shall be held, used and managed in a manner which is equitable, efficient, productive and sustainable.¹⁵

The essay is divided into four chapters. Chapter one deals more the history of the land in Kenya.

The essay is divided into four chapters. Chapter one deals with the historical part of the land in Kenya. This part intends to show how land was shared before, during and after colonisation, i.e., to show how some problems on land face today were woven by colonialism and its foundation.

Chapter two and three aim at bringing out why many people are interested in land. Though everyone is interested in land, there are laws regarding land that give equal opportunities to everyone. These laws are well consistent with the current Constitution of Kenya and the one being discussed. However, due to personal interests, some few individuals have ignored these laws and violated the rights of others. Thus, many Kenyans are left homeless and displaced. The basic question addressed is for the measures the government is planning to take to reinforce the law and the way to compensate the displaced people.

¹⁴ N. wa ITHIONG'O – M.G. MUGO, *The Trial of Dedan Kimathi*, 18.

¹⁵ The Constitution of Kenya Review Commission, "Draft the Constitution of the Republic of Kenya", *Nation* (2 October 2002), 28. Section 232, 1.

Chapter four shows how the Church has been answering the challenge of the land in Kenya. To this end, we start presenting how it is that the issue of the land is a challenge to the Church. We have gone along history to check how the Church has been behaving as a landlord in this country and then how has change his approach to it defending the right of the landless and making it a central issue in her today's pastoral activity. The latter was stated in the letters of the Kenyan Episcopal Conference that proposed a way forward.

CHAPTER 1

IMPLICATIONS FOR THE DEFINITIONS OF THE LAND QUESTION IN KENYA

1.0 A Historical Overview

Kenya today is undergoing tremendous changes in the wake of the emerging new world order.¹⁶ To be open to the signs of the times is to experience these changes. These occur in different spheres such as scientific, socio-political, economic and religious sphere. They call us to respond in faith, hope and love to generate and sustain life.¹⁷ Faith is not an intellectual concept or just an acceptance of the message of the gospel, but an encounter with the Lord¹⁸ that implies commitment for the betterment of the society.

African theologians have for the past few decades been trying to present an answer to the commitment that this faith demands. Thus, different theologies have emerged in response to a particular African context and time.¹⁹ One of them, in the 1990s, is a new trend of thought that Mugambi called Theology of Reconstruction. Theology of Reconstruction strives for a transformation of the African landscape.²⁰

¹⁶ New World Order refers to Globalisation.

¹⁷ J.N.K. MUGAMBI, *From Liberation to Reconstruction African Christian theology after the cold war*, 161.

¹⁸ J.B. CHIPENDA, "Theological Options in Africa Today," in K. APPAH-KUBI *African Theology in route* 66ff.

¹⁹ For example, Theology of inculturation, African Theology, Black Theology.

²⁰ Several books and articles have been written and published on this topic. For instance, M.N. GLTUI E. A. OBENG, ed., *Theology of Reconstruction Exploratory Essays*, 16.

1.1.1 A Quest for Identity

The land issues above-mentioned provoked the think-tanks to search for a Kenyan identity to build up our society. This society would respect our own cultural values and ethnic differences. Kenyan leaders have talked much about transforming our society. Thus, the land issue has over the years become a very big topic of discussion in our society. For instance, in the recent past, this has grown even bigger because of the involvement of public personalities and length of land involved. However, this issue is present since independence. The Kenyan public has been flooded with press reports of sensational, almost unbelievable, land scandals. They were brought to the fore by the debates in the Parliament because, sadly to say, the civil servants were corrupt and their corruption ended in the grabbing of public and private lands.

The problem of land in Kenya has become so enormous that every sector of the society – governmental agencies, civil servants, officials in semi-private and private organizations and even individuals is involved in the scandal. Thus, we are not surprised to hear about bribery, nepotism, outright theft and misapplication of land from the top political levels to the individual citizens. Therefore, its impact on the social-economic and political development cannot be overestimated. The issue at stake is that perhaps the real damage done to present and future generations may not be known until it is too late to successfully address the problem.

1.1.2 Human Settlement and Population

The territory of the Republic of Kenya covers roughly an area of 581,751 square kilometres of which 97.8% is land and 2.2% is water surface. About 20% of the classified area is claimed to be high potential land, the rest being arid or semi-

arid. Woodlands and forests occupy about 7% or 37,000 square kilometres. National Parks and Nation Reserves together occupy about 10% of the country's area.²¹ The country can be divided into four distinct geographical regions: the Coastal Plain, the Arid Low Plateau, the Highlands, and the Lake Victoria basin. The amount of rainfall varies from one geographical region to another.

The country's population according to the final result of the 1999 census stands at approximately 29 million at an overall growth rate of 1.9%.²² Increase in mortality and a steady decline in total fertility levels have contributed to the decline in population growth. Moreover the rapid spread of HIV/AIDS has also increased mortality levels in both urban and rural areas. Approximately 75% of the country's population live in arid and semi arid lands. Size distribution of land varies quite widely. Some areas are over populated whereas others are not.

1.1.3 Essential Characteristics of the Land Question

For long land has been the decisive factor in Kenya's political economy, because its ownership and control has meant power and domination over the principal means of production. The long term fundamental character of the Kenyan agrarian structure is the concentration of huge extension of land, providing for a very small minority of the local population. The majority is landless or reduced to extremely small holdings.²³ In the colonial era, those with a big land, developed on the basis of a monopoly of land and the domination of the peasant population. The system was closed, based on the exploitation of not only cheap, but free labour.

²¹ *Report of the Commission of Inquiry into the Land law system of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration*, 15.

²² *Report of the National Population Census 1999*, 8.

²³ *Report of the Commission of Inquiry*, 29.

Land over time is seen as an important political issue throughout Kenya's history as the land tenure is based on principles of English law, which neglected the customary property law that existed before.

1.1.4 Land, the Central Focus in Economy and Society

Since time immemorial, Kenya's economy remains primarily dependent on agricultural and pastoral land uses. Crops that dominate the agricultural economy include; tea, coffee, pyrethrum, cashew nuts, rice and fruits among others. These are either grown for both cash and subsistence purposes by large and small-scale farmers. Livestock farming for both dairy and beef production is also a significant undertaking especially in arid and semi-arid lands. Major land uses outside agriculture and pasture includes harvesting of forest production such as timber and fuel woods, tourism, mining, fisheries and infrastructure. These together define the environment in which Kenya's land economy functions.²⁴ Apart from the economic factors, it is to be noted that land issues in Kenya are, in addition, deeply rooted due to political and socio-cultural reasons. The political factors that have shaped the nature and characteristics of issues surrounding Kenya are intricately connected with the country's history. This being the case throughout the country, the land issue was, not surprisingly, the drive in the country's independence struggle. After independence, however, the land question quickly asserted itself as the fundamental factor in the dynamics of power and wealth among the learned that were now in control of the instruments of state power. As such the question of land therefore remains high on the country's political and development plan.²⁵ In Kenya, land is

²⁴ *Report of the Commission of Inquiry into the Land*. 17.

²⁵ *Nation Building in Kenya: the role of Land Reform*. 76.

first and foremost the medium which defines and binds together social and spiritual relations within and across generations.

1.1.5 Implications for the Definition of the Land Question

If essential characteristics of the land question in Kenya are to be identified, the geographical, economic, political and socio-cultural factors ought to be constantly kept in mind. These factors, to a large extent, point to the major concerns which policy development must address.

i. Historical: Before the colonial era land was the key cornerstone of Kenyan human life for it joined all communities. During this era land was communally owned and the question of individual tenure was never heard of. The most common form of tenure during this period was what can be termed as communal tenure. This is, whereby, land belonged to no one individual in particular but to the whole community. Each person had rights of access and usage.²⁶ The rights of access to the land were ensured by the political authority in a given land.

ii. Political: This authority whatsoever did not own land but rather carried out political control over land. This was necessary so as to ensure the structural framework within which the rights of access were to be enjoyed and maintain an equitable share between the availability of land and the needs of individual members of the community.

iii. Cultural: Apparently, this characteristic of ownership varied from one ethnic community to another. The social formations of a certain ethnic group and their philosophy as determined by the dictates of historical stage of development were important influences on the land tenure system of pre-traditional community.

²⁶ S.C. WANJALA, *Essays on Land Law*, 26.

Given these differences, land tenure in pre-colonial Kenya was fairly dynamic and flexible. Colonialism was an agent of disruption of the “communal tenure” as this system was forced to respond to the needs of the colonizing power.²⁷

1.1.6 Land in the Colonial Era

Kenya as it was with any other country elsewhere in colonial Africa, was characterised by earliest acts of impartial control carried out by the colonialists in Kenya in the form of assertion of authority over land occupied by indigenous people. After the Berlin Conference of 1888, the territory that now covers present day Kenya was declared a British Protectorate.²⁸ In 1899, it was decided that the British Foreign Jurisdiction Act of 1890 gave the British government power of control and disposition over what was termed ‘waste and unoccupied land’ in the protectorate where there was no settled form of government and where land had not been appropriated either to the land sovereign or to individuals. The British sovereign could then declare such lands to be crown lands or sell them to individuals at a fee and for any term.²⁹ As a result of this decision, the East African (lands) Order Council, 1901 was passed, the effect of which was to make the British Crown the owner of all land that was not actually occupied by Africans.³⁰ This was done without considering or in ignorance of the African tenure system, under which all land belonged to the community and there was no need of declarations of ownership as communal ownership was understood by all.

²⁷ S.C. WANJALA, *Essays on Land Law*, 26.

²⁸ *Ours by Right, Theirs by Might: A study on Land Classics of Kenya Human Rights Commission Report 1996*, 8.

²⁹ S.C. WANJALA, *Essays on Land Law*, 5.

³⁰ S.C. WANJALA, *Essays on Land Law*, 4-6.

In 1902 the Crown Lands ordinance gave His Majesty the power to sell land in lots not exceeding 1000 acres and to grant leases not exceeding 99 years for town plots and 999 years for agricultural land.³¹ Lands ordinance was passed, declaring all waste and unoccupied land crown land and giving the government powers of alteration over it. This led to the alienation of over 167,000 square miles of prime land in what came to be known as the white highlands.³² Africans particularly the pastoral communities were thus deprived of their land and their means of livelihood.

The total disinheritance of the indigenous population was thus secured. The effect of the crown lands ordinance was to take away all native rights in land reserved for their occupation, and leave natives as tenants at the will of the crown in the land occupied.³³ The effect of the crown lands ordinance was the increase of the settler population in Kenya as it not only offered security of tenure but also attractive property interests. However, the creation of a capitalist system of agricultural development required not only land as the means of production but also labours. The native population was self sufficient within its units because the pre-capitalist subsistence economy did not know the value of money and the settler economy could not sustain high wages. Thus, this led to the need for compulsion to avail cheap labour. Compulsion was through taxation, official conscription, the 'kipande' system and direct recruitment by the colonial administration which resulted in coercion of natives into working as wage labourers in settler farms and colonial establishments.³⁴

³¹ P.L. ONALO, *Land Law and Conveyancing in Kenya*, 19.

³² P.L. ONALO, *Land Law and Conveyancing in Kenya*, 20.

³³ H.W.O. OKOTH OGENDO, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, 26.

³⁴ A. KIRIRO - C. JUMA, *Gaining Ground: Institutional Innovations in Land use Management in Kenya*, 22-23.

1.1.7 The collapse of the African economy

To ensure that the indigenous majority was controlled the colonial ruling class ensured the establishment of ethnic enslavery variously known as “native reserves.” The ruling class had in mind that by doing so they could be able to prevent acquisition of prime native lands through fake forms of treaties with chiefs and traditional elders. This also was to facilitate simpler and more efficient control as the natives were now divided according to tribes. Apparently this ensured that their labour was indeed available. The effects of this was that they led to several destabilization of social and production relations in the African areas these being founded as they were on community access to and control of land.³⁵

The destabilization was the fact that the settler economy survived essentially by depriving its indigenous counterpart of its most valuable human capital that is its able bodied men and women,³⁶ that, in its turn, substantially weakened overall social and political authority in those areas. Moreover the natives were denied all opportunities for technological adaptation of market. With an increased population the production of food was very low hence hostility to indigenous agriculture as a viable economic enterprise. Apparently this also intensified ethnicity and disputes among the natives.

³⁵ J.W. ARNEZEN -- L.D. NGONGCO. *Land Policy and Agriculture in Eastern and Southern Africa*, 79.

³⁶ R.M. Van ZWANENBERG. *Colonial capitalism and Labour in Kenya, 1919-1939*, 46-47.

CHAPTER 2

AN INTEREST IN LAND

Many people deal with land without knowing what legal consequences may follow from such activity. If people know the various interests over land that the law recognizes, if they also know how and when and in whose favour these interests can be created, they will then be aware of what the law requires of them in view of their conduct concerning land.

2.1.0 What is 'Land' in Law

Under the English system, land is defined so as to include not only the soil or ground as we see it, but also everything under it and above it. Land therefore includes the soil, and anything below it to the centre of gravity and anything above it. It also includes anything which is permanently fixed to the soil.³⁷ Under customary law, land means the soil.³⁸ There was no individual ownership on customary law and it was not regarded as property to be sold but regarded as a gift from God and therefore communally owned and could not be sold. In Kenya customary law there were no such acts. The main theme of this right is that the citizen becomes the user of the land but not its absolute owner. Ownership connotes

³⁷ S.C. WANJALA, *Land Law and Disputes in Kenya*, 11.

³⁸ A. KIRIRO & C. JUMA, *Gaining Ground: Institutional Innovations in Land use Management in Kenya*, 21.

or refers to certain bundles of right over a certain piece of land.³⁹ To land, it refers to the most extensive rights to attain maximum enjoyment and use of land. Those who had land in their possession held in trust and not absolute ownership.

2.1.1 Why an 'Interest' in Land?

i. Tenure

It means holding of land on certain terms and conditions. Tenure concerns with the condition or term under which land is held, it measures the extent of rights implied in an estate. It is more concerned with the quality of rights.⁴⁰ By tenure it is implied that all land in England is owned by the crown only and his successors on the throne; the people could not own the land but would be allowed to use it since they are the Kings' subjects.

ii. Estate

It refers to the size in the sense of duration of the land owner's interests. They can either be freehold or leasehold. 'Estates of freehold' means that land is owned until it remains ownerless. In that event the land reverts back to the government.⁴¹

'Estates of leasehold' are those lands that an individual/or group of persons holds for a specific period of time.⁴²

iii. Servitude

These are merely changes or burdens resting upon one's estate for the benefit or an advantage of another, rights over or tenancies in common.⁴³ Joint tenancy

³⁹ A. KIRO – C. JUMA, *Gaining Ground*, 21.23.

⁴⁰ S.C. WANJALA, *Land Law: The reform Debate in Kenya*, 137.

⁴¹ S.C. WANJALA, *Land Law: The reform Debate in Kenya*, 138.

⁴² S.C. WANJALA, *Land Law: The reform Debate in Kenya*, 138.

refers to situation where two or more persons enjoy interest in land as if they were one single owner. Tenancies in common implies that tenants have separate interests and co-ownership exists; the land is not been divided among them. There is no right of all and the owner is not affected by the death of one of his companions.⁴⁴

iv. Encumbrances

Is a conveyance of land for the purposes of securing a loan of money under which the lender obtains the power to sell the land or take other steps if interests upon the debt are not duly paid.⁴⁵

2.1.2 Land Tenure Systems in Kenya

The current land tenure policy in Kenya is a creation of a process that started way back in the middle and late 19th century when the country was under colonial rule. During that era, prior to the independence, an exclusive use by European settlers was reinforced for a dual reason to prevent land invasion and a also tp prevent abandonment of land by settlers.⁴⁶ The policy to reform tenure in the reserves was based on the belief that rapid progress in agriculture could only be possible if the structure of land holdings was changed from customary to individual ownership. The change extinguished customary tenure systems since they were considered a major impediment to productive decision making in agriculture.

The dual policy was inherited at independence and still is in operation today with some alterations. Settlement schemes have been organized, modernization of

⁴³ S.C. WANJALA, *Land Law and Disputes in Kenya*, 32.

⁴⁴ S.C. WANJALA, *Land Law and Disputes in Kenya*, 32.

⁴⁵ S.C. WANJALA, *Land Law and Disputes in Kenya*, 21.

⁴⁶ *Ours by right, theirs by Might*, 11.

tenure in the country led to massive appropriation of land by the rich hence the change in policy in 1968 to the concept of group capacity.⁴⁷

However, land tenure today must address issues of unequal access to land due to chaotic tenure requirement and social and cultural factors. Apparently, it must rectify the phenomenon of skewed distribution of land across and within large and small scale farming communities. Land tenure must also seek to correct land market distortions and must deal with the fact of substantial landlessness arising from historical and contemporary causes. Moreover the state shall review a national land policy that will ensure security of land rights, sustainable and productive land resources open and affordable administration of land and protection of sensitive areas like water catchments areas.⁴⁸

2.1.3 Process of Land Policy Development

Process of land policy development involves a number of steps. The government through the Ministry of Lands ought first to establish the National Land Commission guided by clear terms and functions. This can administer public land on behalf of the government, constantly review the national land policy and from time to time review all laws relating to land.⁴⁹ Apparently the National Land commission can ensure that there is public debate carried out through public enquiry. By so doing the people of Kenya will feel more involved in matters of allocation, distribution and management of land.

⁴⁷ *Ours by right, theirs by Might*, 11.

⁴⁸ The Constitution of Kenya Review Commission, "Draft the Constitution of the Republic of Kenya", 28. Section 235.

⁴⁹ The Constitution of Kenya Review Commission, "Draft the Constitution of the Republic of Kenya", 29. Section 237, 2 a-f.

The designation of an adequate land policy through the National Land commission must, in the first instance, identify the specific issues which the land sector is expected to address. Process of land policy development would ensure that land and resources are held, used and managed efficiently, productively and sustainably.”⁵⁰ Efficiency, transparency and participatory land administration and management system to ensure that property rights in land are lawfully acquired should be emphasized so as to avoid discrimination on the basis of gender or any other cause.⁵¹ The sound conservation management and protection of protected areas such as wildlife, forests marine zones, wetlands, water catchments and any other ecologically sensitive areas should be given priority to prevent them from any damage and degradation.⁵²

2.1.4 The Constitutional Approach

It is universally recognized that a constitution is the supreme law of any country. Expression of environmental rights and duties constitutionally provided national priorities and hence executive actions. Thus, the elevation of environmental concerns to constitutional status no doubt enhances the priority likely to be conferred by governments on sound national and commission and sustainable development. Some of the provisions are general declarations of public policy to protect the Kenyan’s land. It is the focus of category of property in the lives of Kenyans. A significant number of issues regarding land calls for the entrenchment in the constitution.

⁵⁰ *Report of the Commission of Inquiry*, 37.

⁵¹ *Report of the Commission of Inquiry*, 37.

⁵² The Constitution of Kenya Review Commission, “Draft the Constitution of the Republic of Kenya,” 29. Section 239,21.

i. Ownership of land: The land in Kenya should be categorized into three categories, public, private and commons. In order to avoid unnecessary confrontation regarding the above mentioned categories of land, the District Land Authority should be consulted before taking any measure⁵³

ii. Protection of title: It should be implemented to property legally and procedurally acquired. To address the problems of land tenure and use, policies need to ensure that authority for resources are provided for, or shared with those best placed to enforce them. Experience shows that responsibility for land and resources ultimately lies at the local level and it is at this level that enforcement can be undertaken most efficiently. This transfer of authority to appropriate levels can be achieved through decentralization of function to local government structures.

Given the importance of land in the lives of Kenyans, they must be allowed to contribute through appropriate institutions at all levels to decision making on matters related to land. These institutions must be genuine representative, transparent and accountable to the constituencies that they represent. Land and land based resources being finite, proper care ought to be taken to prevent abuse and redress or correct past degradation on land and other natural resources.

⁵³ *Report of the Commission of Inquiry*, 93-96.

CHAPTER 3

LAND DISPUTES IN KENYA

Since colonial days land has been the basis for greed and power, giving rise to the tragic disjuncture of power, of rich and poor throughout Latin America. Ownership and control of land determines who lives and who dies. The process, spurred by “development and modernization,” has increased significantly in the last decades. The result has been the genocide of whole Peoples, the expulsion of landless people from their lands, forcing them to become part of Kenya’s massive urbanization, and the subjection and exploitation of those who remain on the land as a cheap source of labour for the powerful.

3.1.0 Land Politics

Land has long been the decisive factor and was seen by settler European Liberals both as an annoying diversion from their strategy of realigning the political structure and as a problem best solved by retaining their African allies in power. Its ownership and control has meant power and domination over the principle means of production. Apparently, this has made land disputes in Kenya to revolve around

- i) registration
- ii) transfer

- iii) succession or transfer.

Categories of Disputes

a) Registered owners and other claimant

This emanates from the areas that were mainly trust lands and where adjudication, consolidation and deregistration has taken place. The disputes symbolize the clashes between individual ownership and communal ownership (customary law). Registration introduces land ownership as absolute owners.⁵⁴ However, due to conflicting judgments passed by ordinary courts of law, in 1981 parliament passed what is known as Magistrates Indirection (Amendment) Act which established what is termed as 'Elders Court' or 'Panel of Elders' and vested to them the authority to hear and decide some land cases.⁵⁵ The Elders Court has authority on the land situated by District Commissioner. This court usually consists on two or four elders. Their appointment rests in an agreement upon by the parties. This court is required to file a record of its findings in the Resident Magistrate Court.⁵⁶

The record contains:

- a) Names of the members
- b) Land concerning which the issue was raised
- c) Issues raised
- d) Decision arrived at by the panel

⁵⁴ S.C. WANJALA, *Land Law and Disputes in Kenya*, 40.

⁵⁵ S.C. WANJALA, *Land Law and Disputes in Kenya*, 41.

⁵⁶ S.C. WANJALA, *Land Law and Disputes in Kenya*, 45.

Once the decision is accepted by the Resident Magistrate Court and a decision has been issued no appeal can be accepted except in cases where the decision is in excess or not in accordance with the decision of the elders.

An elder is a person in the community to which the parties by whom the issues is raised belongs and who are recognized by custom in the community as being, by virtue of age, experience or other wise, competent to resolve issues between parties. The elder's courts procedure was expected to be simple, cheap, fair and democratic. However, the Elders' Court has been found wanting due to limited jurisdiction of Elder's Panels, corruption by the panel of the elder, on clear provisions of the law and peoples lack of knowledge about the workings of the panel.⁵⁷

b) Disputes related to transfer of lands

These categories of disputes arise because the registered owner denies that he even transferred his land to the claimant. These disputes are resolved under the land Control Act (Cap 302 of the Laws of Kenya).⁵⁸ It provides that before any transfer of land is effected by way of either sale or gift to another person consent from the relevant and control board must be obtained. Without the consent the transfer is null and void in law. The land affected by the card control act is referred to as Agricultural land, defined land that is not within a municipality, a township or a market centre.

c) Disputes arising from adverse possession

⁵⁷ S.C. WANJALA, *Land Law and Disputes in Kenya*, 46.

⁵⁸ S.C. WANJALA, *Land Law and Disputes in Kenya*, 47-48.

This is a situation where a person takes possession of another person's land without legal title and is referred to as adverse possession.⁵⁹ This arises from the main principle of law that anyone who has a reasonable claim in law against another person and takes too long to make it will be barred by the law from making it. This is generally so where the adverse possession uses the land for twelve or more years continuously. The principle is clearly defined in the Limitations of Act (Cap 22 of the Laws of Kenya).⁶⁰ The land owner needs to ensure that the other person entered the land through some legal means, otherwise the land owner should take action before the expiry of 12 years by seeking to evict the possessor through a court action.

c) Disputes as to succession

These arise where the land owner dies in testate (without having written a will) and the family starts making conflicting claims about how much land they are entitled to.⁶¹ The law governing this category of disputes is the Law of Succession Act (Cap 160 of laws of Kenya). The Law of Succession Act provides that sometimes the inheritance of agricultural land in some areas set aside by the Minister will be governed by the customary law of the particular area.

3.1.1 Why Disputes if the Law is Well Stipulated?

If the above procedure was to be effected fully then there would have been very few disputes concerning land. Ignorance of the law or either violating it intentionally thinking that following the stipulated laws is time wasting and without foreseeing any problem in the future then leads to all these disputes. It is no wonder

⁵⁹ S.C. WANJALA, *Land Law and Disputes in Kenya*, 54.

⁶⁰ S.C. WANJALA, *Land Law and Disputes in Kenya*, 54-55.

⁶¹ S.C. WANJALA, *Land Law and Disputes in Kenya*, 55.

therefore that the people who sell their pieces of land without consulting the proper channel (Land Control Board) later turn around and deny that they ever sold their land and keep on claiming that the land is still theirs.

A dispute revolving around the issue of transfer is usually handled by ordinary courts of law. In cases of this nature, the courts have ruled in favour of the people who had earlier sold the land. This is because the alleged transfer was made without the permission of the Land Control Board hence any agreement had no effect in the eyes of the law.

Ministers, security chiefs are named throughout the *Akiwumi Report on Land Clashes*. Apparently, the purpose of this report was to clean members who can vote against the ruling party. "A group of politicians warned their people that political pluralism would give way to bloodshed or political dominance by other tribes. The Kalejin, in particular, were made to understand they risked losing their wealth and stranglehold power."⁶² Many Kenyans who were victims of land clashes in Trans more region believed that their area MP Mr. William Ole Ntimama and also a cabinet Minister was the mastermind of all the disputes in the area.⁶³ Also mentioned are the security personnel who are believed to have been silent even after being warn beforehand about the clashes.⁶⁴ Those who carry out the fighting seem to "have undergone semi-military training including the use of sophisticated weapons." Senior members of the Police Force and the Provincial Administration aided and abetted the clashes."

⁶² A.M. AKIWUMI, "Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya" *Nation* (19 October 2002) 3.

⁶³ J.A. KAISER, *If I Die*, 31.

⁶⁴ A.M. AKIWUMI, "Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya", 5.

This was supposed to discourage Kikuyos, Kambas, Luos, Luhyas and Kisiis who were living in parts of the Rift Valley and were considered a threat to the ruling party (Kenya African National Union, KANU) Along the Coastal Region, this was to discourage people, from up country and different political parties, from voting.

3.1.2 Land Clashes

Woe to those who devise wickedness and work evil upon their beds! When the morning dawns, thy perform it, because it is in the power of their hand. They covet fields, and seize them; and houses, and take them away; they oppress a man and his house, a man and his inheritance. (Micah 2:1-2)

Because human nature is what it is one cannot expect a perfect world. But with time and more education, things are bound to change. In this regard, incitement and a betterment of tribal or inter-clan clashes, by social and political leaders as well as by members of the security, police and administrative services should no longer be tolerated. "The causes of the clashes have been given as conflict over land, cattle rustling, and political differences and ecological reasons..."⁶⁵ but are these the real reasons or they were proffered to conceal the real motive or reason for the clashes?

Why did the attackers target particular ethnic groups for instance the Kikuyu, Kisii, Luhya, Luo or non-Kalenjin and non-Masaai communities? Were the attackers barbaric, callous aiming at crippling others economically and to psychologically traumatize them? Another question that one may ask is why did the clashes start suddenly and end suddenly?

Apparently politicians and provincial administration are also to be held responsible for their unsavoury and inflammatory statements. The re-introduction of multi-party regime, tended to magnify and fuel tribal loyalties and to complicate the

⁶⁵ A.M. AKIWUMI, "Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya", 12.

resolution of inter-tribal border conflicts. The violence was not purely “ethnic” or “land” clashes for they were largely conflicts brought about as a result of incitement of the poor by greedy politicians who misunderstood the re-introduction of multiparty democracy.⁶⁶ On 5th April, 1967 the Assistant minister in the office of the Vice President Mr. Matano, made these remarks regarding incitement:

“...There have been a few incidents here and there and, I regret to say that with regard to a lot of those instigations and some of the things that have been happening on the boundaries, the blame really lies on some leaders of this country. I would not like to say which leaders because I feel it is irrelevant, but I feel that if we restrain ourselves and try to help our own people to try to understand one another more and more, I am sure, Mr. Speaker, we shall have less of these incidents.”⁶⁷

The reason for all these clashes must go back to the colonial government that had created this problem by keeping such areas like “Maasai territory” thinly populated, hence possible for white settlement and exploitation. These areas are of great value in terms of tourist hunting grounds.⁶⁸ On the contrary it may be logical to say some prominent people in government circles really wanted to evict people from these areas for their own personal interest like constructing more lodges in the game parks and reserves. The average man does not benefit from these ventures, just a few individuals. Leaders have failed to feel with their constituents and instead they are ready to do anything to see themselves getting rich. The words of the late J.M Kariuki are best fulfilled in Kenya when we see land clashes taking place.

A small but powerful group of greedy, self-seeking elite in the form of politicians, civil servants and business people, has steadily but surely monopolized the fruits of independence to the exclusion of the majority of people we do not want a Kenya of ten millionaires and ten million beggars⁶⁹

⁶⁶ *Ours by right, theirs by Might*, 43.

⁶⁷ A.M. AKIWUMI, “Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya” 12.

⁶⁸ J.A. KAISER, *If I Die*, 31.

⁶⁹ J.A. KAISER, *If I Die*, 32.

As both Mr. Matano and Kariuki stated, it is clearly shown that both political leaders and civil servants have betrayed their own people. They simply took advantage of them, exploit them for their own benefit and then to cover-up everything they instigate them and encourage them to fight one another due to reasons well known to them alone. The Abagusii farmers have co-existed peacefully with the Maasai's. The Abagusii rented shambas from the Maasai and even bought farm. Hence it was unthinkable for people who had co-existed peacefully for years to fight one another. Apparently the Maasai warriors were transported from other areas in a few truckloads to come and conduct the evictions.⁷⁰

The following are some of the perennial common place distrusts and disputes which should be properly tackled and a lasting solution should be found"

- a) Disputed transfers of land sold through individual agreements by not dealing with the law as is required.
- b) Disputed sub-divisions in land buying co-operative societies, companies and partnerships
- c) Instant stock theft
- d) Lack of civic education and the quest of ethnic superiority
- e) Rivalry due to political and administrative positions."⁷¹

Apparently all the reasons behind the ethnic or land clashes whether to allow the big men in the government to grab the resources of a thinly populated area at the expense of others or should be clearly addressed. As Mr. John Kaiser says, "Res clamat domino or res clamat Dominum,"⁷² (A thing, having been stolen, cries out

⁷⁰ J.A. KAISER, *If I Die*, 36.

⁷¹ *Ours by Right theirs by Might*, 43.

⁷² J.A. KAISER, *If I Die*, 90.

until it is returned to its rightful owner). Hence, the fertile highlands on the Maasai reserve will one day come back to its rightful owners. May the cry of the people left landless reach the ears of our father.

3.1.3 Settlement of Land Disputes


In the context of customary land tenure, disputes are often part and parcel of the continuous process of constitution and reconstitution of social and cultural relations in a given territorial system. Dispute can be short or protracted depending on their history, subject matter or political or economic ramifications. The present land dispute settlement mechanisms and institutions should be revised as they appear to be delaying, incompetent, corrupt, and have political interference lead to confusion and cause chaos. Hence, the ministry of land should come up with resolution to deal with disputes arising from customary land disputes, and disputers over registered land. The policies will make disputes be handled effectively, fast and in a transparent manner. Politicians too should keep away from this policies to avoid and incitement and malice.

Proper land policies protected by the Constitution will make it possible to put to an end the process of a new class of modern capitalist landlords that is being created. The small holders cannot compete; they have no resources; they cannot absorb the risks. Little by little they die on their tiny plots or leave by the thousands for the city like Nairobi.

This chapter largely has been dealing with the dispute of land in Kenya and the situation of landlessness. In the next chapter I will show how the church has a challenge ahead of herself in terms of land.



Too much to bear: The tears and pain on this woman's face tell the story of the plight of Maela victims after being dumped at Kiambu's Kirigiti Stadium.



Desperate and weary: As millions of Kenyans celebrate Christmas in 1994, these displaced persons spend nights out in the cold in Kiambu's Kirigiti Stadium.



Misery: This old couple flee from the clashes with the only belongings they could salvage carried on the woman's back.

CHAPTER 4

THE CHURCH AND THE CHALLENGE OF LAND

4.1.0 The challenge of land

All Kenyans have a right to live in any part of the country. We do not have communal lands or ethnic lands.⁷³

Of late, land has emerged as a central pastoral and theological concern for the Church in Kenya. As never before, Church leaders spoke out against the injustices suffered by the poor of the land, for instance, land grabbing, land clashes, and land disputes. Priests, religious and other ministers have made the cause of rural poor their own. Catholic Bishops of Kenya published pastoral letters on the problem of land in the last two decades to the present.

By the end of the last two decades pastoral workers involved in the issue of land and the poor were organized into networks across the country to share their ministries with each other, analyse together their situations, and offer mutual support.

The progressive development of people is an object of deep interest and concern to the Church. This is particularly true in the case of those people who are trying to escape the ravages of hunger, poverty, epidemic, diseases and ignorance... since the second Vatican council, of the demands imposed by Christ's gospel in these areas, the church judges it her duty to help all men explore this serious problem in all its dimensions and to impress upon them the need for concerted action at this critical juncture⁷⁴

The Church remains committed to its mission of ensuring that justice and peace is realised by all by preaching the Good News of our reconciliation with God

⁷³ R. MEJIA, ed., *The Social Teaching of the Catholic Bishops of Kenya 1960-1995. The Conscience of society*, 214.

⁷⁴ R. MEJIA, ed., *The Social Teaching*, 71.

hence strive to bring all people to God's kingdom. The Church has tried to seek ways and form a network with other professionals who work with the marginalized. This has enabled the Church to reach the marginalized in their own settings through group processes. Fr. John A. Kaiser after being appointed the Catholic chaplain to the Maela Camp worked hand in hand with other Non-Governmental Organisations and the United Nations Development Program⁷⁵ to ensure that the displaced in Maela Camp had somebody to talk for them and help them materially. This has led to prioritise our vision to serve the less privileged and the marginalized by conscientizing our own communities about marginalization among us brought about by the problem of land. This conscientization has, to a great deal, helped the Church to shift its focus from doing to "being with", to evolve solutions to the problems of the marginalized. Apparently, the Church and its ministers have come to see what she ought to do is to understand better the reasons causing marginalization and condemn them identifying themselves with the poor. The Church through the constitution of the second Vatican council on the Church in the modern world states;

Peace is not merely the absence of war. Nor can it be reduced solely to the maintenance of a balance of power between opposing forces. Nor can it arise out of government by tyranny. Instead it is rightly and properly called "the effect of justice."... A peace of this kind cannot be obtained on each unless the welfare of individual persons is carefully protected and unless men are prepared freely and trustingly to share with each other the riches of their own minds as well as their talents. A firm determination to respect the dignity of other men and other peoples, as well as a deliberate practice of fraternal love, are absolutely essential if peace is ever to be achieved. Hence peace is also the fruit of love, because love goes beyond what justice can provide.⁷⁶

Hence the approach of the Church to the problem of land can be seen in the light of peace that proceeds from the Father through the Son in the Holy Spirit. The three are always present in the mission of the Church and it is through the Trinity

⁷⁵ J.A. KAISER, *If I Die*, 43-44.

⁷⁶ ICEL, *Liturgy of the Hours III*, 711.

that the whole mission of the church stands. Hence all religions and cultures are something positive because they all advocate peace equality and justice. God, as the “fountain of love”, is a missionary God. The Church's mission is a participation in God's mission to the world. This makes the church missionary by its very nature. Its missionary nature has become more radical on the one hand, and more precarious on the other.

4.1.1 The Church as Landlord in the History of Kenya

The Kenyan Church has not always been so concerned with land as a central justice issue. Indeed, British (colonial) acquisition, agri-businessmen, and transactional have not been the only landlords in Kenya. The Church has been a landlord too. During the colonial and post colonial periods, the Church acquired vast tracts of land, not only for evangelistic and educational purposes, but especially for commercial interests.

In spite of reforms that were introduced following independence the Church continued to amass land well into the twentieth century. The Church was and still is among the largest landowner in Kenya. These lands are no different from any other. Like the other landlords, the church's interests seem to be like those of the landed aristocrats. However, the Church has developed a new response to land. If historically the Church has sided with the powerful landlords, there are important signs that the church is changing. The Church has increasingly been identifying with the poor of the land, not the comfortable landowners as in the past. Land is no longer understood as real estate to be acquired for power and wealth. Rather, important sectors of the Roman Catholic Church and occasionally Protestants, more and more are involved in the struggle for land reform and rural justice.

Moved by compassion for the parishioners who were evicted, traumatized, hungry, suffering, reduced to dressing in rags and housed in plastic makeshift shelters under the burning African sun, this simple priest challenged individuals, governments and nations at whose door he laid the blame. Neither did he fail to point a finger at himself or his Church for failing to do more.⁷⁷

Fr. John Kaiser was a free voice calling for justice and for respect for those who were oppressed, exploited and persecuted for others' personal material interests, for greed of wealth and power and even for tribal hatred. In Kenya priests have been actively involved in organizing groups (unions) of landless farmers to struggle for land. The Catholic Justice and Peace Commission has not relented in its crusade for social justice. Fr. Dolan from Kitale while fighting against land grabbing of Kitale prison said, "Land should go to the poor for whom it is intended. It doesn't matter how long it takes. They will eventually get what they are entitled to."⁷⁸ Throughout the Kenyan Church, 'land' is emerging as a central justice issue intimately related to the rights of rural peoples.

This same thesis has been urged by the World Council of Churches (WCC). In a special declaration on "Land Rights for Indigenous People," the central committee called on member churches to:

1. Listen to and learn from indigenous people in order to deepen Christian understanding of (and solidarity with) their legal rights, their political situation, their cultural achievements and aspirations, and their spiritual convictions;
2. Commit significant financial and human resources to the struggle of indigenous people for land rights;

⁷⁷The Coadjutor Archbishop of Nyeri, John Njue, is commenting on the life and death of Fr Kaiser in the opening page of the quoted book. Cf. J.A. KAISER, *If I Die*, 1.

⁷⁸The Wednesday Family Magazine, "The turbulent Priest: Father Dolan's latest crusade is targeting land grabbers" *Nation* (10 December 2003) 2.

3. Become politically involved on the side of indigenous peoples and join the struggle against those powers and principalities that seek to deny the land rights and human rights of indigenous people;
4. Support indigenous people struggling for land rights in their efforts to build linkage with other indigenous people around the world;
5. As a sign to the wider community of the churches' commitment to justice for indigenous people;
 - a) to recognize the rightful claims of indigenous people and take steps to transfer land and property to them to set up procedures to deal with the claims or demands of the indigenous people made upon the churches;
 - b) to support the struggle of the people in their land claims through national and international courts of law;
6. Examine their investments in national and transnational corporations with a view to taking action to combat corporate policies affecting the lands of indigenous people;
7. Urge their governments to ratify and implement all relevant United Nations and other inter-governmental instruments for the protection of the rights of indigenous people;
8. Urge their governments to enact adequate and effective national legislation recognizing the collective property of indigenous people.⁷⁹

The Bishops of Kenya, following the World Council of Churches example, has reminded its members:

⁷⁹ Central Committee World Council of Churches – Program to combat Racism, “Land rights for Indigenous People,” in *Land Rights for Indigenous people* 16 (March 1983) 10-11.

To work for the eradication of injustice wherever it is seen to exist for instance the question of land distribution, violation of human rights, unfair practices in agriculture, education, health, media, tourism, housing and habitat etc. here it should be noted that complex situations of injustice can have not only religious and spiritual implications, but also anthropological cultural, legal, economic or political dimension⁸⁰

Hence the local Church is day by day challenged by the struggle of the many landless indigenous people to fight for their land rights and be faithful to the mission of Jesus, the mission of reconciliation and the biblical affirmation that all human beings are created in the image of God (Gen 1:26)

4.1.2 Land as the Church's Apostolate

As seen in the previous chapter land is not only a biblical theme, but it is the basis for injustice and exploitation committed against the poor. The thesis on land must be fully understood and grasped⁸¹ in order to grasp the present social-historic reality and for founding a ministry that will make "promised land" with its understanding for social transformation, a reality. Hence to grasp this promise fully implies to engage in land as our apostolic and intervene in the struggle for and defence of their lands.

When the freedom fighters fought in the forest, they believed that 'land' means future and, hence salvation."⁸² The identification of oneself with land is so important as many believe that it is a blessing that one passes to his children when one dies. When the freedom fighters fought in the forest they used to clutch at the soil and pray that it would never benefit a foreigner.⁸³ They died holding on to the soil and this shows how they identified themselves with the land. For many land for

⁸⁰ R. MEJIA, ed., *The Social Teaching*, 74.

⁸¹ W. BRUEGGEMANN, *The Land*, 3.

⁸² The Wednesday Family Magazine, "The turbulent Priest", 3.

⁸³ The Wednesday Family Magazine, "The turbulent Priest", 3.

cultivation and territory for living is promise and salvation, identity and divine presence, sustenance and power over their own lives. Land means security hence a future. When they have land then we preach that the poor shall inherit the earth (Gen 5:5), it makes sense to them because they can comprehend these only in this socio-historic context.

Self interest, greed and selfishness may lead us into racism which is a “prejudice domination over others, and urge to regulate affairs to one's advantages and privileges.”⁸⁴ Hence everybody in the society will be busy pretending to work for the other but only superficially. As a result oppression, exploitation and suffering thorough misuse of power will creep in our society.⁸⁵ Apparently, on the part of those who are marginalized will react in predicament, resignation, submission, and rebellion especially when they come to realize that their case is heading nowhere. They may become rebellious as they will refuse to accept the evil that is oppressing them. Hence, our apostolate must deal with issues of ministry ethics and civil education. The church apostolate towards land must seek socio-economic arrangements that will ensure just and secure access to land. It must be political pastoral action because fundamentally it will be about rectifying the structure of power that is based on land ownership.

4.1.3 The Cost of Defending the Poor of the land

A U.S. farm activist has observed regarding the church and the family farm crisis in North America:

The church is called to overcome decades of neglect to bring to the struggle a number of it's a renewed and renewing the understanding of the covenantal community of the people of God on the God-given land, a prophetic voice raising

⁸⁴ P. KANYANDAGO, *Marginalized Africa An International Perspective*, 93.

⁸⁵ P. FRYER, *Staying Power: The History of Black People in Britain*, 40.

the challenge of distributive justice on the land. An activist stance with those who organize and empower rural people; a clear presence in the public policy arena to develop and secure just farm, food, and land policies; and its full prophetic, economic and political strength to challenge and transform the corporate and financial powers that would continue to dominate life on the land.⁸⁶

His observation is equally appropriate as the church seeks to be in mission to the poor of the land in Kenya. Land is a gift to sustain life: nevertheless, human action is required to secure it and to establish justice. Apostolate in land must be oriented toward securing and defending land, and establishing just ownership and labour patterns. The church must also strengthen the organizations of peasant farmers and indigenous people only through strong union like organizations will they be able to instigate actions for obtaining land or defining the land they already have. Pastoral work must stimulate the poor of the land to organize and must be involved in such integrally related activities as leadership training and conscientization.

This also implies orienting the poor of the land to their rights before existing laws are stipulated in the constitution as well as the theological significance of "promised land" as it is elaborated in Mathew 5:5, in their actual socio-political context. Of special importance is facilitating legal counsel to peasants especially when their land is forcefully grabbed by the rich or politicians.

The prophetic voice that denounces every injustice and violence against the poor of the land is an essential part of ministry related to land and must be raised not only in Kenya but in any other area where there is exploitation. Its aim is to secure justice and promote lasting and fundamental solutions. All development programs for instance water resource development, types of agricultural production, economic

⁸⁶ D.L. OSTENDORF, "Who will control rural America? Food, land, people and power", *Christianity and Crisis* (2 May 1988) 159.

scale (prices), technology to be applied and agricultural policies must be directed in terms of social benefit to all and not to a few. Through its apostolate the church must try to work hand in hand in educating the poor of the land in achieving this goals.

Since land pertains to all, it is to be distributed in the context of the jubilee-reign of God; the organizing principle is *Koinonia*. We must always remember that God is interested in society and that God does not deliver individuals but a people. Hence through the obedience to God's will we are to become God's own possession, or kingdom of priests and a holy nation. We must be a nation that keeps not only the Ten Commandments but also the laws regarding social justice as is stipulated in Leviticus:

When you reap the harvest of our land, you shall not reap your field to its very border; neither shall you gather the gleanings after your harvest. And you shall not strip your vineyard bare, neither shall you gather the fallen grapes of your vineyard; you shall leave them for the poor and for the strangers I am the LORD your God. Lev. 19:9-10

When you reap your harvest in your field, and have forgotten a sheaf in the field, you shall not go back to get it: it shall be for the sojourner, the fatherless, and the widow; that the LORD your God may bless you in all the work of your hands. When you beat your olive trees you shall not go over the boughs again; it shall be for the sojourner, the fatherless, and the widows. When you gather the grapes of vineyard, you shall not lean it afterward; it shall be for the sojourner the fatherless, and the widow. You shall remember that you were a slave in the land of Egypt therefore I command you to do this. Deut. 24:19-22

The law provides support especially for those groups which for very different reasons, are not in a position to live at their own land. If the system worked, these groups could no longer be considered poor. It will never be possible to eliminate the existence of strangers, orphans and widows. But it is possible, according to the law, to create a world in which one can be a stranger, an orphan, or a widow without being poor (marginalized and exploited)

Sharing and solidarity are fundamental to the Christian faith, so much so that early Christians sought to organize their lives, including property relations, around them. Basically *koinonia* means to share something with someone in a deep sense of solidarity. It contains both spiritual and historical dimension related dialectically (Romans 15:26 and Acts 2:24, 42-47; 4:32-51)

Analyzing the passage in Acts of the Apostles four points of that community can be traced:

1. profound spiritual communion
2. a classless society
3. renunciation of private property
4. a community of economic goods

However, *koinonia* makes sense only if it assumes historical shape information a new socio-economic model, again as a sign of God's reign. Hence the church in its apostolate towards land has to emphasis on God's love that is expressed in the law and in trying to form a community based on *koinonia*.

Priests, pastoral agents and other church-related workers must be ready to face the wrath of the rich and ill minded people in our society. Many have been harassed, accused, tortured and even killed for the defence of the poor and their land. The word of Henry II King of England 1133-1189 must ring in our minds to show that in most cases our apostolate will not be popular to a few rich people. However these words should not scare us but instead strengthen us.

“Will no one rid me of this turbulent priest?”⁸⁷ Of Archbishop Thomas Becket who was later murdered by four knights at the Canterbury Cathedral. Father

⁸⁷ The Wednesday Family Magazine, “The turbulent Priest”, 1.

Gabriel Dolan, a Kitale based priest human rights activist and civic education facilitator was humiliated by the dreaded riot squad as he tried to bring the issues of land grabbing to the Vice President, Mr. Moody Awori who was visiting Kitale prison.⁸⁸

Fr. John A. Kaiser, an American missionary, had been ministering in Kenya (Trans-Mara Enosupukia areas) for years. During that time, he became known for his commitment to the area of the exploited poor people of that region. Many especially the politicians who didn't like him threatened his life, but he still continued to support the weak and the exploited. On the 24th August 2000, his body was found on a lonely country road in the Rift Valley, the top of his head blown off, yet his face serene even in death.⁸⁹ Reflecting on Fr. Kaiser's murder, the Apostolic Nuncio to Kenya, Giovanni Tonucci said:

The episodes of the tribal clashes in Kenya, in the period from 1990 to 1997 marked profoundly Fr. Kaiser's perception of the Kenyan society and his understanding of the responsibilities of the political class. Trying to be close to those persecuted, for whom he had a deep, concrete love, he found many hostilities and little support, giving the impression for many seemed to be not-so-important. Fr. Kaiser is still alive, and his battle for justice and for the dignity of every human person is still going on. Perhaps now in a stronger way, more than ever before.⁹⁰

His death is a challenge to those who still believe in justice. And other courageous people will surely take up that challenge keeping in mind that already too many killings have occurred in Kenya, and none have a reasonable explanation offered.

Violence and repression against the Church, however, are not limited to Roman Catholics but also to Anglicans, Protestants and to those in the Human

⁸⁸ The Wednesday Family Magazine, "The turbulent Priest", 1.

⁸⁹ The Coadjutor Archbishop of Nyeri, John Njue, is commenting on the life and death of Fr Kaiser in the opening page of the quoted book. Cf. J.A. KAISER, *If I Die*, 1.

⁹⁰ From the Foreword of the quoted book by Giovanni Tonucci, Apostolic Nuncio to Kenya. Cf. J.A. KAISER, *If I Die*, 12-13.

Rights Activists who have had their lives threatened for defending the poor of the land and many Kenyans have been arrested for participating in demonstrations. "Fight to the death for truth, and the Lord will be on your side" (Ecclesiastes 4:28-29).

4.2.0 A way forward from the Pastoral Letters of the Bishops

Your protests against violence, your defence of human rights, your proof of those who seek personal advantage by exploiting their neighbours, your calls to the civil authorities to renew their honest dedication to ensuring the common good, and your summons to national reconciliation - all of these are signs of your ideality to the demands of your apostolic ministry. They mark you out as authentic heirs of those who said; "we cannot do anything but speak" (Acts 4:20) "we cannot do anything against the truth, but only for the truth" (2 Cor 13:8)

The Church is the conscience of society, and today a society needs a conscience. Do not be afraid to speak. If we go wrong and you keep quiet, one day you may have to answer for our mistakes.⁹¹

When Fr. Dolan was recently harassed by the police the Kenya Episcopal Conference (KEC) came to his defence, arguing that he should have been allowed to see the Vice President and present his case. In a statement, the church said it was appalled by the conduct of the police officers, "Kenya is now a free society. It is clear to the KEC that Fr. Dolan had every right to meet the Vice President, whose ministerial docket includes prisons,"⁹² the KEC chairman, the Rt. Rev. Cornelius Korir said. The Bishops through their Pastoral Letters have always come to the defence of the poor and the exploited. The Church strongly condemns any sort of evil especially killing, oppression and exploitation in our society.

The concern for social justice is at the core of the Bishops message and the social teaching of the Church:

⁹¹ R. MUIA, ed., *The Social Teaching*, 50. The bishops quote in their letter the words of Mzee Jomo Kenyatta to the AMECEA Bishops at their plenary assembly in July 1976.

⁹² The Wednesday Family Magazine, "The turbulent priest", 1.

The Catholic Church has no other power than the moral power of the truth entrusted to it by the word of God. In an effort to read the signs of the times and to enlighten the social situations with the light of the unalterable word, the Church proposes not only to Catholics but to all people of good will its social teaching. This teaching, either at the universal level or at a Bishops conferences and Diocesan levels, can contribute to the promotion of justice and peace in Africa. It should be taught in the seminaries, higher institutes and in Catholic universities. The laity should also be trained in the knowledge and practice of the social teaching of the Church. We desire that this social teaching should be presented in a simple and popular format and reach wider audience so that Christians may also take inspiration from it at the local level.⁹³

The Bishops also accept and foresee the challenges that lie in the future. Like Elijah, our Church hears the voice of the 'signs of the times'. Some of these challenges are how to narrow the gap between the rich and the poor and how to implement justice and peace in our land today. The bishops unanimously agree that the Church has always been aware of what God wants. Hence the Church ensures that 'where people were deprived of education she opened up schools. She brought health and medical care where needed most, and was always ready to help in times of hunger, hardship, and to work towards the relief of those who were suffering and deprived,⁹⁴ as it was in the case of Maela Camp.⁹⁵

The purpose of the letters is to commit the Church to solidarity with the poor of the land and to defend their interests as pastoral priorities of the Church. It is a commitment to renewing its "pastoral service by assuming the struggle for land as the struggle of the God who defends the life of the humble. The Bishops in the pastoral letter issued on 2nd April, 1995, "a call to a change of Heart," have clearly and spoken out in one voice condemning the increase of lawlessness and violence corruption⁹⁶ and have also not spared the international monetary fund and world bank for their praise to Kenya. They have openly stated that "money does not solve the moral crisis of Kenya. Nothing has improved for the majority citizens."⁹⁷ "All Kenyans have a right to live in any part of the country. We do not have communal lands or ethnic lands"⁹⁸

⁹³ R. MEJIA, ed., *The Social Teaching*, 9.

⁹⁴ R. MEJIA, ed., *The Social Teaching*, 71.

⁹⁵ J.A. KAISER, *If I Die*, 41.

⁹⁶ R. MEJIA, ed., *The Social Teaching*, 204.

⁹⁷ R. MEJIA, ed., *The Social Teaching*, 205.

⁹⁸ R. MEJIA, ed., *The Social Teaching*, 1.

4.2.1 Recommended Policy Options for Redressing Historical Wronging in Kenya

- Establishment of land transaction units in which the dispossessed are given priority to buy shares where land restitution is not possible.
- Expropriation of land illegally acquired.
- A land restitution programme for areas affected by the ethnic clashes.

4.2.2 Policy Implications

These options for redressing historical wrongs have, as may be expected, important economic, political and legal implications.

- a) **Economic:** Redressing historical wrongs would, to a large extent, necessitate the redistribution of land from large to small farmers.
- b) **Political:** There may be a need to repossess land acquired fraudulently or irregularly and for such land to be redistributed equitably among the landless. This has obvious political implications, for those who are thus deprived of this land are unlikely to take it well and it may, in some cases, because some measure of social unrest.
- c) **Legal:** The option expert to Kenya implies fundamental changes not only in the laws governing the use and ownership of land, but also in the constitutional provisions relation to land. Hence, need to be:
 - a redefinition of the ownership of public land.
 - Clear constitutional guidelines as to how and in what circumstances and for what purposes public land can be alienate.

- Legislative policies that balance the conflicting claims of the dispossessed and those who have acquired constitutionally protected rights over the land in question.
- Strengthening of governance structures that would check abuse of powers. Even where there has been legislation, dispossession has taken place in different regions because the governance structures have not been strong enough to check the misuse of power by the commissioner of lands and others in the office.

GENERAL CONCLUSION

The land is a very important issue in Kenya and it is still a pendent task not only for the government but for all of us, including the Church. This essay has offered an organised presentation of the land issue in Kenya with a special reference to the aspects the Catholic Church has been involved in.

The first chapter we have dealt with the implications for the definition of the land question in Kenya. To this end, we have had an overview of the history of land in Kenya. In this effort we have discovered the different stages in the approach to the land in the various different moments of Kenya's life. First, we have seen the pacific sharing of the land in a pre-colonial Kenya. The land was the common good and people were working for the good not only of themselves as individuals but also for the good of the community as a whole.

The colonial era changed this approach to one more individualistic. Now there were owners and people without land. The latter were to work in the lands of the former and get a living out of their work with little or none opportunities to acquired land. The independent Kenya did not resolve the problems created in the colonial era; however, they became worst. Before the colonialists were keeping the land, but now it is some individuals in power who overlooking the law distribute the land to their advantage and among their acquaintances or simply for cash.

The analysis of this essay led us to review the importance of land. This made us realise the growing interest in land reflected in the laws and even in the Constitution. We started by defining land and asserting land as a privilege instrument for development. This clear idea is safeguard in the Constitution of Kenya and the corps of laws that deal with the land. Both stated the equal opportunities for everybody to acquire land and make the best use of it.

The history of Kenya is revisited in chapter three to verify the implementation of the Constitution and laws abovementioned. It was sadly surprising to realise that the history is marked by an unequal distribution of the land. Some individuals have for self-interest appropriated and given out public land as it was its own. On top of that, we have stated that to cover up this shameless act of theft they have provoked clashes urging tribal feelings in the people.

The Church has not been exempted of this malign problem. However, we have found out that she has done a great change of approach in the issue of the land. Today the Church is seen as the institution conscience of the society that is not afraid to tell people involved to respect the right of the whole nation. She has passed from being a landlord to being a land owner that puts its property at the service of the less privilege people of the society, among them the landless. Another shift is her being at the vanguard in fighting for the rights of the landless. This stands show how the Church has understood that an important part of her mission and service to the people in Kenya - and not only in Kenya but in many African nations- is the pastoral to and for the landless of the land.

The land issue is really a challenge to every minister of the Church. Though joy and optimism is her hallmark, the Church and her minister can not but be

involved in this that is so actual and real in the life of the people. However, solving this issue would only be possible through forgiveness of the past and looking for better way how to reinforce the power of the law to share the richness of our nation.

The author of this essay is very aware that the issue dealt here is very delicate and vast in its scope; thus, I realise the need to further investigation on the so interesting issue that took my sight for quite long and deepen its not only investigation but commitment for a better society where the Kingdom of God in its earthly dimension is being brought about in fidelity to Jesus' mission.

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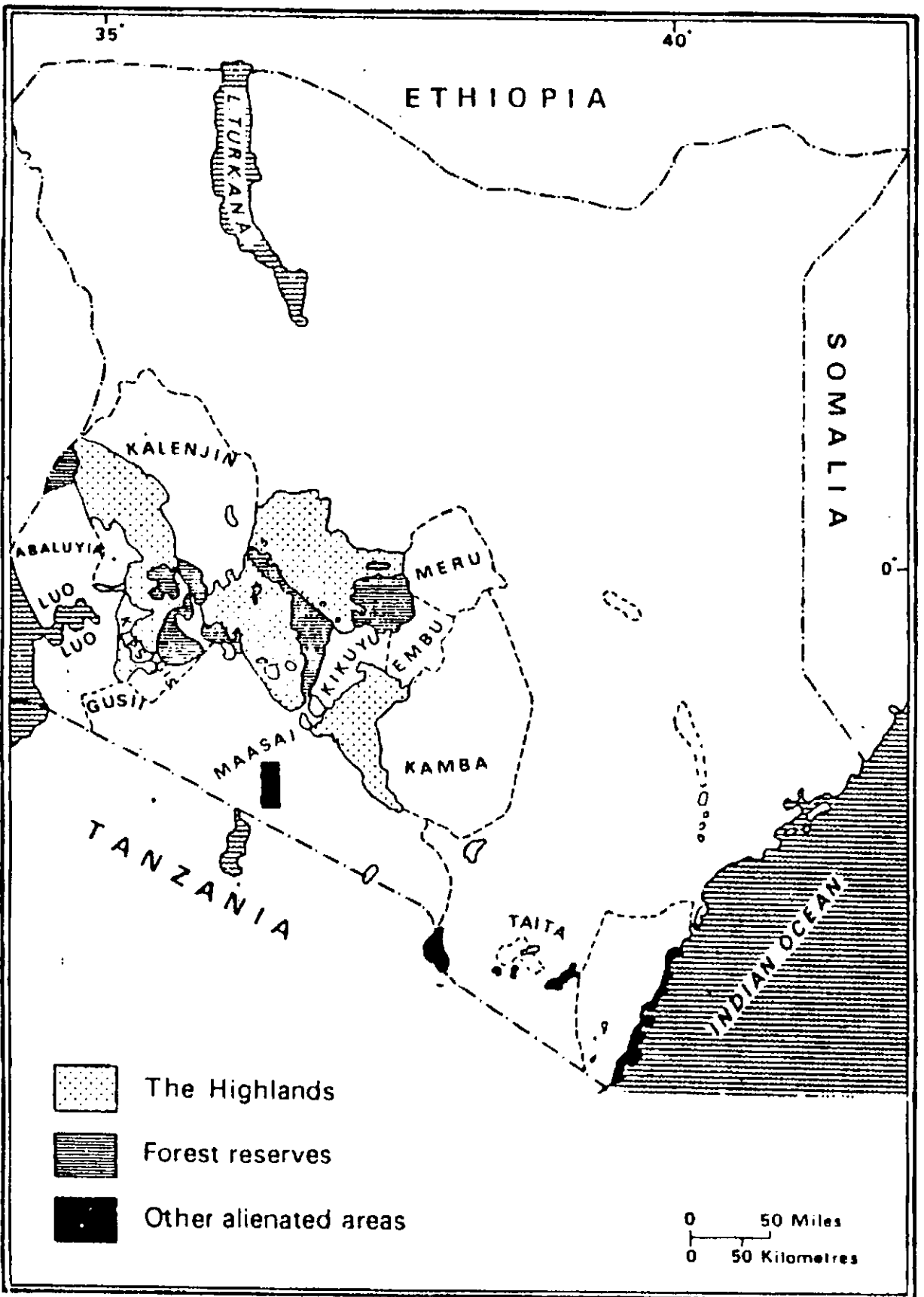
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APPENDIX 1

Map 1 – Showing the Provinces, Districts and Ethnic groups in Kenya as at 1961

Map 2 – Location of the White Highlands (fertile regions in Kenya)

Map 3 Agricultural Districts of the white Highlands



MAP 2 *Location of the White Highlands*



MAP 3 *Agricultural Districts of the White Highlands*

APPENDIX 2

Fig 2 - Land classification in Kenya

Fig 3 - Vegetation of Kenya (Determines crop and population distribution)

Fig 4 - Agro - climatic zones of Kenya

Fig 5 - Crop distribution in Kenya

Fig 8 - Forest reserves in Kenya

Figure 2 Land classification in Kenya

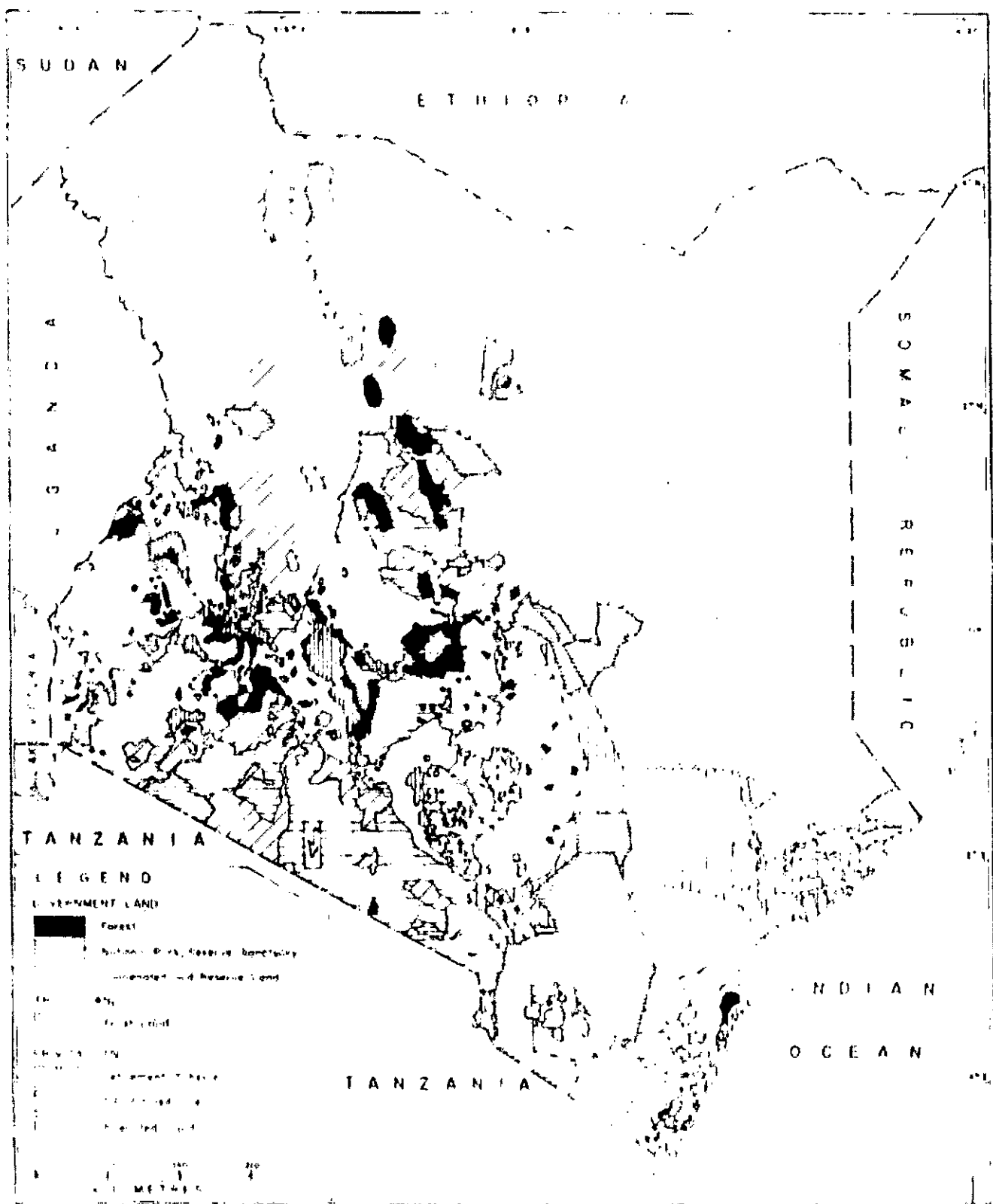


Figure 3 Vegetation of Kenya

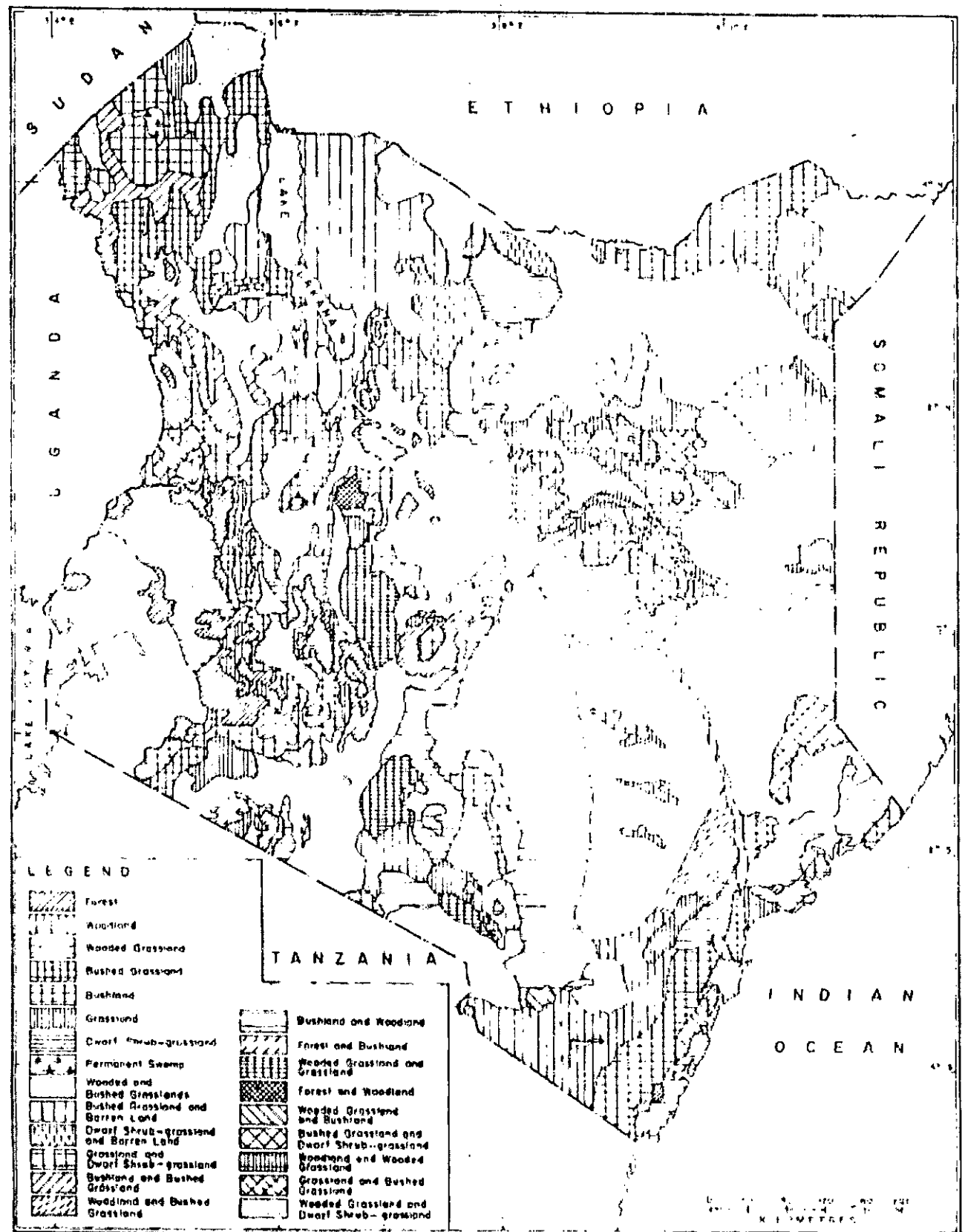


Figure 4 Agro-climatic zones of Kenya

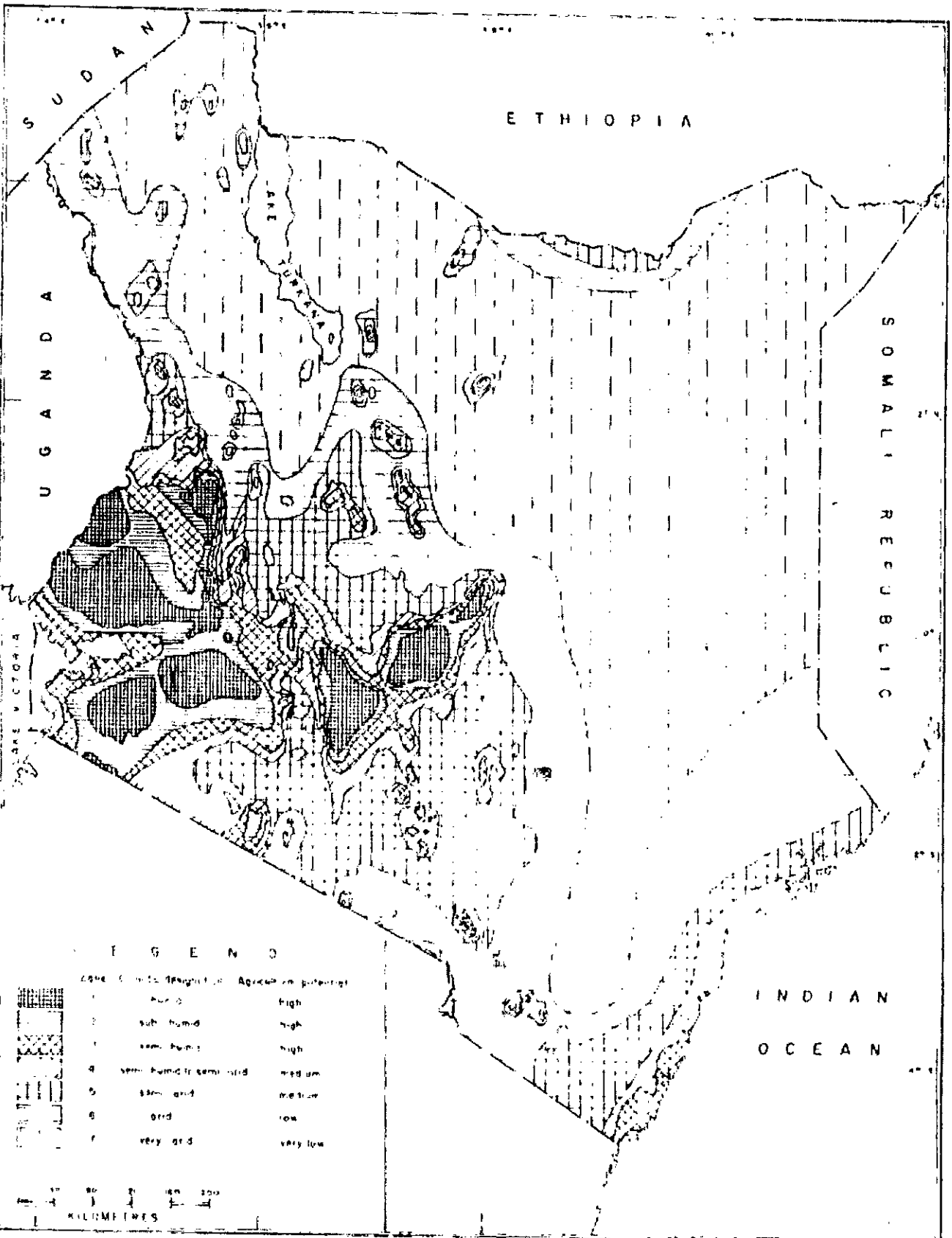


Figure 5 Crop distribution in Kenya

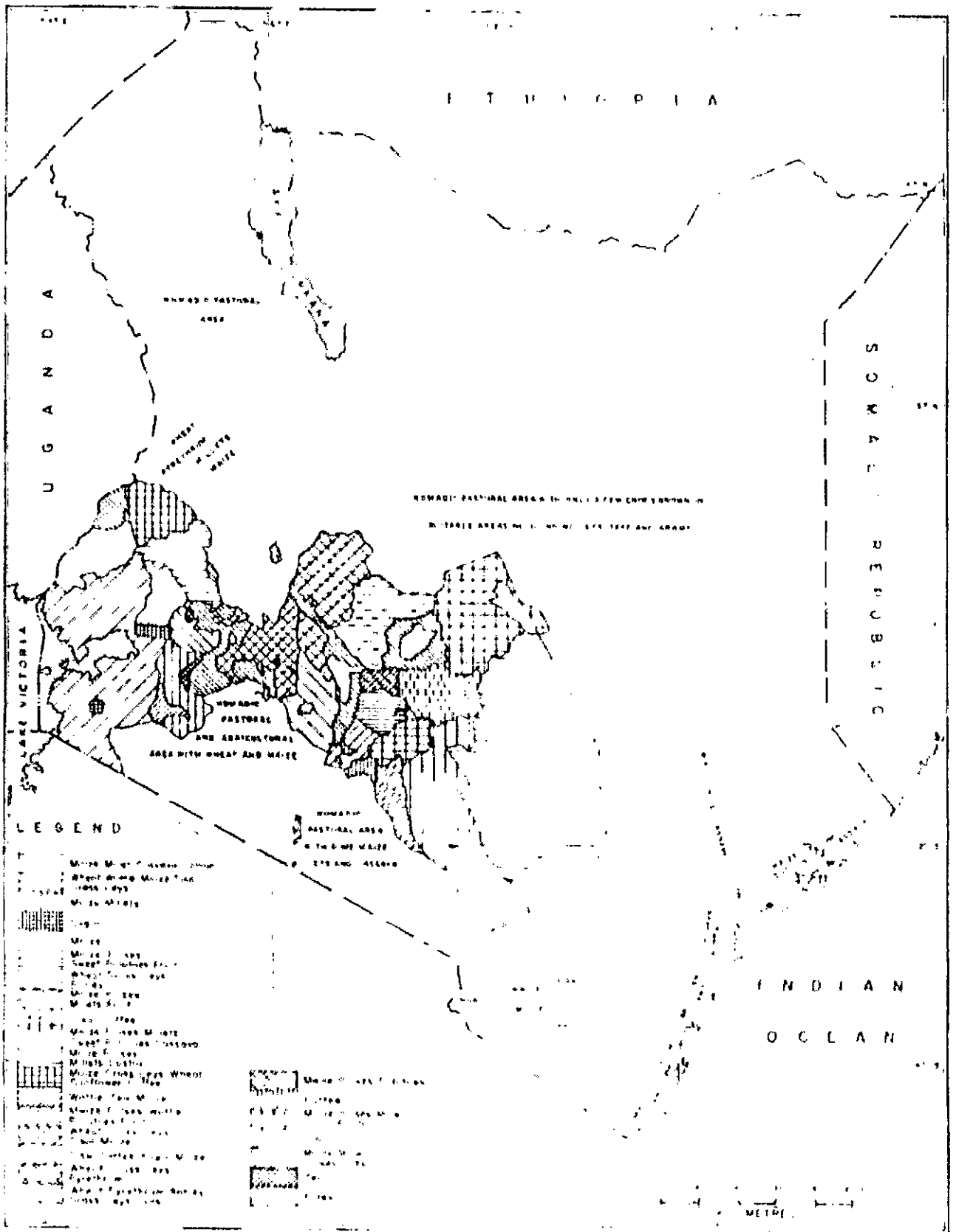


Figure 8 Forest reserves in Kenya

