Impacts of Different Land Registration Systems on Communal Tenure in Kenya

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Dedication

I dedicate this thesis to my wife, Sandra Cherotich, for her constant love and support, and to my son, Elijah Baraka, for the joy he brings into my life.
Acknowledgements

I would like to thank Almighty God for giving me strengthen and provision to finish this thesis. Thank you God for teaching me to trust in you with my whole heart and not to lean on my own understanding, for your grace is sufficient for us and your power is made perfect in our weakness.

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Abstract

The main aim of this research is to investigate whether communal tenure changes differently when impacted by different land registration systems. The output of this research may help to develop more appropriate land registration systems for communal tenure. In most developing countries, implementation of formal land registration systems is struggling and most people continue to gain access to resources through communal tenure. According to current statistics, only about thirty percent of land in developing countries has been formally registered. Hence, a majority of the people cannot gain from the possible benefits of land registration.

The Republic of Kenya was selected as the main study area for this thesis, within which three case studies were chosen. Kenya was selected because it is a developing country in which colonial and post-independence governments extensively introduced three different land registration systems as a means of supplanting communal tenure. The three are: the individual, group ranch and Trust Land systems, within which the Luo, Maasai and Pokot people were selected, respectively, as a means of investigating changes in communal tenure.

Case study methodology was selected as the main form of inquiry within which a framework was developed for data collection and analysis. Among various reasons, case study methodology was selected because it is a form of inquiry that can be used to investigate a phenomenon that is not easy to separate from its surrounding, as is the case with communal tenure which is not easy to distinguish from aspects of formal land registration. In case study methodology, a framework was developed in which aspects of communal tenure were limited to factors that are contrary to exclusivity and the ability to sell land as prescribed by introduced land registration systems. Based on the framework, semi-structured interviews were conducted among the three selected tribes. Further, literature and evidence from court proceedings were collected as data for each of the case studies. Within-case and cross-case analysis was conducted to find out whether communal tenure has changed differently among the three tribes after being impacted by the different land registration systems.

The results show that from a general perspective, communal tenure has not changed differently towards the different land registration systems in Kenya. At a detailed level, there are differences across the three systems. However, the differences can be attributed more to the tribes being different as opposed to the systems. Thus, if the minor differences are ignored, a conclusion can be made that communal tenure has not changed differently towards the varied land registration systems. In essence, in each of the systems, some people have retained aspects of communal tenure while others have accepted exclusivity and, or, the ability to sell land.
In chapter seven, a paradigm shift is proposed as a means of developing more appropriate land registration systems for developing countries. The shift in thinking is that the concept of registering land owners over communal tenure should be abolished and replaced with registration of stewards or custodians. The concept of stewardship comes from an understanding that in communal tenure, individual rights are embedded within wider social obligations.
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<tbody>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>ALDEV</td>
<td>African Land Development Organization</td>
</tr>
<tr>
<td>AusAID</td>
<td>Australian Agency for International Development</td>
</tr>
<tr>
<td>CIDA</td>
<td>Canadian International Development Agency</td>
</tr>
<tr>
<td>CLBs</td>
<td>Community Land Boards</td>
</tr>
<tr>
<td>DC</td>
<td>District Commissioner</td>
</tr>
<tr>
<td>DLBs</td>
<td>District Land Boards</td>
</tr>
<tr>
<td>DO</td>
<td>District Officer</td>
</tr>
<tr>
<td>ESDI</td>
<td>European Spatial Information Infrastructure</td>
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<tr>
<td>FIG</td>
<td>International Federation of Surveyors</td>
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<td>GLTN</td>
<td>Global Land Tool Network</td>
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<tr>
<td>IAD</td>
<td>Institutional Analysis and Development framework</td>
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<td>IBEAC</td>
<td>Imperial British East Africa Company</td>
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<tr>
<td>INSPIRE</td>
<td>Infrastructure for Spatial Information in Europe</td>
</tr>
<tr>
<td>KAU</td>
<td>Kenya African Union</td>
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<td>KANU</td>
<td>Kenya Africa National Union</td>
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<td>Kikuyu Central Association</td>
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<td>Kavirondo Taxpayers Welfare Association</td>
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<td>Land Information Systems</td>
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<td>LRA</td>
<td>Land Titles Act</td>
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<td>Acronym</td>
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<tr>
<td>MOLA</td>
<td>Meeting of Officials in Land Administration</td>
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<td>NLC</td>
<td>National Land Commission</td>
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<td>NLP</td>
<td>National Land Policy</td>
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<td>Provincial Commissioner</td>
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<td>UNECE</td>
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<td>YKA</td>
<td>Young Kikuyu Association</td>
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1 Introduction

1.1 Research background

The main objective of this thesis is to investigate whether communal tenure changes differently when impacted by different land registration systems. The changes in communal tenure can assist in development of more appropriate land registration systems for developing countries. In many countries, colonial and post-independence governments introduced land registration as a means of increasing land tenure security, increasing access to credit and developing land markets, among other possible benefits (Deininger, 2003; Swynnerton, 1955). Despite the perceived benefits, only about thirty percent of land in developing countries has been registered (Augustinus, 2010, p. 1; Zevenbergen et al., 2013, p. 595). In Sub-Saharan Africa, the numbers are substantially lower, in which only about ten percent of the land has been formally registered (Chauveau et al., 2007, p. 6; Deininger, 2003, p. 62). Hence, a majority of people in Sub-Saharan Africa are limited in their ability to gain from the possible benefits of land registration (Zevenbergen et al., 2013).

There are many different types of land registration that have been introduced over communal tenure arrangements. According to Fitzpatrick (2005), some countries have used a minimalist approach, in which certain areas are described as communal on registry maps, with little interference in internal land matters. In other areas, the State has appointed agents to act on behalf of people living within certain jurisdictions. In other cases, the State has introduced land boards to manage transactions on behalf of the people. Finally, in some cases, the State has registered the land to individuals or to groups of people (Fitzpatrick, 2005).

Various studies have been conducted on the performance of land registration systems, as will be elaborated in chapter two (Sjaastad and Cousins, 2009). In summary, research has been conducted on how and why administrative aspects of land registration are working (Steudler et al., 2004; Williamson et al., 2010). Studies have also been conducted on how land registration systems have succeeded, or failed, at achieving proposed economic benefits such as increasing access to credit, developing land markets and improving agricultural productivity (Atwood, 1990; Feder and Onchan, 1987; Migot-Adholla et al., 1991). Proposals have also been made on how to improve land registration systems, some of which include: Cadastre 2014, the Bogor Declaration and the Bathurst Declaration (Wiliamson, 2001). Despite the various studies, there is a gap in the literature on whether communal tenure changes differently when impacted by different land registration systems.
The changes in communal tenure would show whether there is one system of registration that is more appropriate for registering communal tenure. If none of the systems are appropriate, the changes would show the current nature of tenure, which is a mix of formal and communal aspects, which can be used to develop more appropriate registration systems. Thus, the main research question for this thesis is as follows:

**Does communal tenure change differently when impacted by different land registration systems?**

In order to answer the main research question, the following scope and limitations were imposed on this research.

### 1.2 Scope and limitations

#### 1.2.1 Choice of study area and case studies

In this research, the Republic of Kenya was selected as the study area because it is a developing country in which colonial and post-independence governments introduced land registration covering great extents of areas in which communal tenure existed (Atwood, 1990; Green, 1987; Knox, 1998; Larsson, 2000). In Kenya, three land registration systems were selected for investigation, namely, individual, group ranch and Trust Land systems. In the individual system, land is usually registered to a person (Republic of Kenya, 1963). In the group ranch system, land may be registered to families, clans or part of a tribe (Mwangi, 2007; Rutten, 1992; Wayumba and Mwenda, 2006). In the Trust Land system a County Council is appointed to administer land on behalf of the people living within its boundary (Republic of Kenya, 1970).

In order to investigate changes in communal tenure, a tribe was selected within each of the land registration systems in Kenya. The Luo people were selected within areas in which individual land registration has been introduced because they are a tribe in which land issues can be investigated without looking at aspects of restitution. The Maasai people were selected within group ranches because they are a tribe in which the ranches have been most extensively implemented (Coldham, 1982; Mwangi, 2007). The Pokot people were selected within the Trust Land areas because they can represent both nomadic and pastoral communities. The three tribes were also selected because the researcher had entry points with which to conduct interviews and collect data.
1.2.2 Description of communal tenure

Communal land tenure can be described in various ways. Communal tenure can comprise usually unwritten rules which have legitimacy because they have been applied for a long time (Chauveau et al., 2007, p. 10; Simpson, 1984, p. 220). Communal tenure can also be described as an arrangement in which individual rights to land are embedded within wider kinship networks (Cousins, 2007, p. 293; Cousins et al., 1992, p. 17; Goodwin, 2011, p. 5). Communal tenure may also consist of overlapping rights to land in which various users can access the same piece of land at the same time or in different seasons (Chauveau et al., 2007, p. 11; FAO, 2002, pp. 7–8; Meinzen-Dick and Mwangi, 2009, p. 37).

In this research communal tenure is restricted to aspects that are contrary to exclusivity and ability to sell land as will be discussed in more detail in chapter three. Aspects that are contrary to exclusivity and the ability to sell land were selected because registration systems are often based on “Western” concepts of ownership which normally include exclusivity and the ability to sell land (Bromley, 2009, 1991; Honoré, 1961).

1.2.3 Description of land registration

In this research land registration is described as “the process of recording legally recognized interests (ownership and/or use) in land” (McLaughlin and Nichols, 1989, p. 81; Zevenbergen, 2002, p. 2). This description has been chosen because it can include different types of registration without looking at whether a system is a deeds or title system. In this regard, in terms of deeds and titles, a registration system can be described as follows.

Land registration is a process of official recording of rights in land through deeds or as title on properties. It means that there is an official record (land register) of rights on land or of deeds concerning changes in the legal situation of defined units of land (Henssen, 1995, p. 5).

In the description above, it is stated that land rights can be recorded as deeds or titles, which can be defined as follows.

A deed registration system means that the deed itself, being a document which describes an isolated transaction, is registered. This deed is evidence that a particular transaction took place, but it is in principle not in itself proof of the legal rights of the involved parties and, consequently, it is not evidence of its legality. Thus before any dealing can be safely effectuated, the ostensible owner must trace his ownership back to a good root of title (Henssen, 1995, pp. 7–8).
A register of title is an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body, and of the limitations, if any, to which these rights are subject. With certain unavoidable exceptions known in the English system as ‘overriding interests’…, all the material particulars affecting the title to the land are fully revealed merely by a perusal of the register which is maintained and warranted by the State (Simpson, 1984, p. 16).

1.2.4 Choice of methodology
Case study methodology was selected as the main form of inquiry for this thesis as will be described in detail in chapter three. The method was selected because it is a form of inquiry in which investigations can be carried out on phenomena that are not easily distinguished from their context (Yin, 2009), the way communal aspects are not easy to separate from formal aspects of registration (Chauveau et al., 2007; Griffiths, 1986; Meinzen-Dick and Pradhan, 2002; Merry, 1988). Case study methodology was also selected because it has been used in previous research on aspects of land registration (Barry and Roux, 2013; Çağdaş and Stubkjær, 2011; Silva and Stubkjær, 2002).

Based on case study methodology, data and information was collected using semi-structured interview questions, from books, Acts of Parliament, Court hearings and observations among many other sources. The data was then synthesised using qualitative analysis techniques within case study methodology.

1.3 Specific objectives
Based on the above scope and limitations, the following specific objectives were set for this research.

1) To ascertain how the individual, group ranch and Trust Land registration systems were introduced among the Luo, Maasai and Pokot people respectively.

2) To ascertain how the three land registration systems have impacted on aspects of communal tenure that are contrary to exclusivity and the ability to sell land among the Luo, Maasai and Pokot people.

3) To compare and contrast the impacts of land registration on communal tenure across the three case studies.
1.4 Thesis structure

This thesis is divided into seven chapters. As already seen, chapter one provides an introduction. The remaining chapters can be described as follows.

Chapter two will provide a literature review on evaluation of land registration systems. The first part of the literature review will cover various approaches that have been proposed as a means of improving land registration systems, such as: Cadastre 2014, Statement on the Cadastre, Bogor declaration, Bathurst declaration and “pro-poor land administration systems”. The second part will cover methods that have been used to evaluate land registration systems, some of which include: the Logical Framework Approach (LFA), the Steudler Framework for evaluation, Systems approach and investigations based on economic aspects of registration. The last part of chapter two will contain a synthesis of the literature and show that there is a need to compare/evaluate land registration systems based on changes in communal tenure.

Chapter three will provide a methodology that was used to answer the specific objectives and the main research question. The first part will describe why case study methodology was selected as the main form of inquiry for this research. The second part will describe how a framework for analysing changes in communal tenure was developed, including limitations of the framework. The third part will provide detail on why Kenya was selected as the study area for this research, and why the Luo, Maasai and Pokot people were selected within the individual, group ranch and Trust Land systems respectively. The fourth part will show how the case study methodology was applied in the selected study areas, for example, how data collection was conducted, how within-case and cross-case analysis was conducted, ethical considerations that were made, and how validity and reliability was maintained.

Chapter four will answer the first specific objective by providing a historical background of the three land registration systems in Kenya. The first part of the chapter will show how the history of land registration in Kenya is intertwined with European settlement and subsequent colonisation. Details are provided on how individual land registration was introduced among the Luo people, how group ranches were introduced among the Maasai people, and how the Trust Land system was introduced among the Pokot people. At the end of chapter four, the contemporary extent of the three land registration systems is provided, including amendments that have been made through an introduced National Land Policy.
Chapter five will answer part of the second specific objective by looking at the impacts of exclusivity in the land registration systems on communal access to land within the three tribes. The chapter will start by describing how exclusivity in the individual system has impacted communal access to land among the Luo people. Subsequent parts of the chapter will show impacts among the Maasai and Pokot people, after which a cross-case comparison will be provided. In order to show impacts, the focus was on how and why people have either retained aspects of communal tenure that are contrary to exclusivity or accepted the formal ability to exclude.

Chapter six answers the second part of the second specific objective by looking at how the ability to sell land as introduced by the three formal systems has impacted on communal restrictions against sales. The first part of this chapter will provide information on how and why some of the Luo people have retained communal aspects that are against selling land and how some of the members of the tribe have left custom and accepted the ability to sell land. The second part will show why the ability to sell land has been accepted or rejected in group ranches and the third part will be on acceptance of sales in the Trust Land areas. Apart from showing the reasons why sales are accepted or rejected, in each case study, the main challenges facing sales will also be provided, for example, how people transact land using informal channels instead of laid down formal procedures and why some people depend on custom to secure purchased land instead of relying on the formal register. The last part of the chapter provides a cross-case comparison of the impacts of the ability to sell land in the three case studies, as a means of contributing towards the main research question.

Chapter seven provides a conclusion for this thesis. The chapter will provide various factors that are related to the main research question, which can be broken down into: knowledge claims, theoretical implications of this research, namely, indications on what should be optimised in an appropriate land registration system, policy recommendations arising from the implications, and finally, recommendations for further research that can conducted to improve the findings of this thesis and to test proposed theories.
2 Evaluation of land registration systems

2.1 Introduction
This chapter will provide a literature review on evaluation of land registration systems and show that there is a need for further comparison of the systems based on impacts on communal tenure. In this research, impact refers to the way land registration has succeeded or failed at changing communal tenure into aspects of “Western” property rights. As described in the previous chapter, the rate of land registration is low in most developing countries, in which only about thirty percent of land has been formally registered. Thus, evaluation can assist in asking questions such as, “are we doing the right thing, are we doing things right, and what lessons can we learn from the experiences?” (Steudler et al., 2004, p. 372). Evaluations can also assist in measuring performance of systems as a means of enabling improvement (Steudler, 2004; Steudler et al., 2004).

This chapter will be divided into the following main sections. The first section will cover various approaches that have been proposed for improving land registration systems. The second section will be on methods that have been used to evaluate land registration systems. The third section will show the need for further comparison of land registration systems based on impacts on communal tenure.

2.2 Various approaches for improving land registration systems
There are various approaches that have been proposed by different agencies that work on land issues as a means of improving land registration systems. In this section, a few of the approaches are considered, namely, Cadastre 2014, the Statement on the Cadastre, Bogor declaration, Bathurst declaration, Development of Spatial Data Infrastructure (SDI), and “pro-poor land administration”/“fit-for-purpose administration” systems. In exploring the various approaches, an assumption was made in this research that land registration is part of land administration which can be described as follows:

Land administration is the processes of determining, recording and disseminating information about the tenure, value and use of land when implementing land management policies. It is considered to include land registration, cadastral surveying and mapping, fiscal, legal and multi-purpose cadastres and land information systems (Steudler, 2004, p. 15; Steudler et al., 2004, p. 372; UNECE, 1996).

The description above has been echoed by many other authors in slightly different ways (Dale and McLaughlin, 2000; Enemark, 2001; Williamson et al., 2010). In general, land
administration consists of juridical, fiscal, regulatory, and information management functions (Steudler et al., 2004; Williamson et al., 2010). The juridical component covers land ownership, the fiscal covers land values, the regulatory covers land use, and information management includes collection, management and dissemination of material regarding the other three components (Enemark, 2001; Steudler et al., 2004, p. 372; Williamson et al., 2010).

An assumption was also made in this research that land registration can be used synonymously with the word cadastre, which has been defined as follows:

Cadastre is a methodically arranged public inventory of data concerning properties within a certain country or district, based on a survey of their boundaries. Such properties are systematically identified by means of some separate designation. The outlines of the property and the parcel identifier normally are shown on large-scale maps which, together with registers, may show for each separate property the nature, size, value and legal rights associated with the parcel. It gives an answer to the question where and how much (Henssen, 1995, p. 5; Larsson, 2000, p. 16).

2.2.1 Cadastre 2014

“Cadastre 2014” is an approach that was developed by the International Federation of Surveyors (FIG) in 1994 as a means of providing a vision of how registration systems should look like after twenty years (Kaufmann and Steudler, 1998). The vision was developed because of a view that land registration systems as they were structured at that time were unable to adequately provide land tenure security (Kaufmann and Steudler, 1998, p. 36). The vision was developed by looking at reforms on registration systems that were being carried out in developed countries, with a focus on automation of systems and the role of cadastres in the larger Land Information Systems (LIS) (Kaufmann and Steudler, 1998). The vision in “Cadastre 2014” provided six main statements on the possible characteristics of cadastral systems by the year 2014.

Statement 1: Cadastre 2014 will show the complete legal situation of land, including public rights and restrictions!

Statement 2: The separation between ‘maps’ and ‘registers’ will be abolished!

Statement 3: The Cadastral mapping will be dead! Long live modelling!

Statement 4: ‘Paper and pencil – cadastre’ will have gone!

Statement 5: Cadastre 2014 will be highly privatized! Public and private sector are working closely together!

Statement 6: Cadastre 2014 will be cost recovering!
Today, in the year 2014, the statements have not been fully achieved, especially in developing countries. In terms of the first statement, in most countries, cadastres do not fully show the “complete legal situation of land” especially as regards informal and communal land rights (Augustinus et al., 2006; Lemmen et al., 2007). In terms of statement four, in most developing countries, especially in Africa, land registration systems are still based on “paper and pencil” and are yet to be computerised (Makanga and Smit, 2010). Thus, contemporary registration systems may not adequately guarantee land tenure security for all as was envisioned in “Cadastre 2014”.

2.2.2 Statement on the Cadastre

The International Federation of Surveyors (FIG) also released a “Statement on the Cadastre” as a means of elaborating the role of the Cadastre in development of Land Information Systems (LIS) and socio-economic development (FIG, 1995). The Statement focused on technical, legal and organizational aspects of registration systems that should be developed in order to have cadastres that can contribute towards economic growth. The Statement also described functions of surveyors in maintaining the Cadastre (FIG, 1995; Williamson, 2001).

The Statement described how various issues of registration might be tackled and conceded that tackling communal aspects is challenging. Descriptions were provided in the Statement on how registration systems can form that foundation on which LIS are developed. FIG also highlighted the main functions of a registration system, such as enabling taxation, improving land sales, and facilitating land management among others. However, FIG concluded by stating that “establishment of a cost-effective Cadastre for customary rights … is a significant challenge for cadastral organisations in many developing countries” (FIG, 1995). Hence, if aspects of communal tenure are not investigated, the proposed benefits and methods of developing Cadastres may not be beneficial to most developing countries.

2.2.3 Bogor Declaration

The Bogor declaration was issued in Bogor, Indonesia in 1996, through a meeting of Experts on land registration systems (FIG, 1996; Williamson and Grant, 2002). The main objective of the declaration was to outline options that would be used to improve registration systems, particularly in the Asia and Pacific region (FIG, 1996). The Experts in the meeting agreed that for a registration system to be successful, adjudication, land transfer and mutation surveys should be carried out in an efficient, secure and cost effective manner, in support of formal land markets (FIG, 1996; Williamson, 2001). However, the Bogor declaration recognized that even after registration systems have been introduced, transactions can be insecure if rights to land
are not captured adequately (FIG, 1996). Hence, a possible need to bridge the gap of rights as captured by “Western” based registration systems in developing countries and rights as held and operated by people in communal or informal settings.

Due to the persistence of informal and communal rights in developing countries, the Bogor declaration recognized a need for “re-engineering” cadastres in some countries (FIG, 1996; Williamson and Ting, 2001). Among other factors, in the “re-engineering” process, there is a need to “identify clearly what restrictions and obligations relate to any individual land parcel” and how the information may be accessed by people (FIG, 1996). The Bogor declaration also highlighted informal aspects of land tenure, such as squatters on public or private land, occupation of land in the form of slums and established communal land rights (FIG, 1996). Thus, despite proposals on how to improve technical, legal, and organisation aspects, the process of “re-engineering” may not be effective if informal aspects of tenure are not tackled adequately.

2.2.4 Bathurst Declaration

In 1999, experts on land issues met in Melbourne, Australia, and released the “Bathurst declaration on Land Administration for Sustainable Development” (Williamson, 2001; Williamson and Grant, 2002). The main aim of the Bathurst declaration was to highlight the possible role of registration systems in enabling sustainable development. In this regard, sustainable development can be described as follows:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The field of sustainable development can be conceptually broken into three constituent parts: environmental sustainability, economic sustainability, and socio-political sustainability (Williamson et al., 2010, p. 457).

The Bathurst declaration provided recommendations that could be used to increase the role of registration systems in meeting sustainable development, some of which are outlined below.

1. **Providing** effective legal security of tenure and access to property for all men and women, including indigenous peoples, those living in poverty and other disadvantaged groups;

2. **Promoting** the land administration reforms essential for sustainable development and facilitating full and equal access for men and women to land-related economic opportunities, such as credit and natural resources;
3. **Investing** in the necessary land administration infrastructure and in the dissemination of land information required to achieve these reforms;

4. **Halving** the number of people around the world who do not have effective access to secure property rights in land by the year 2010.

Approximately fifteen years after the Bathurst declaration was released, the fourth objective, namely, “halving the number of people around the world who do not have effective access to secure property rights in land by the year 2010” does not seem to have been achieved. Thus, as stated in the declaration, “in every continent, there are people whose customary rights to land and natural resources have been ignored” by formal systems (Williamson, 2001; Williamson and Grant, 2002). Therefore, if the international community hopes that registration systems will contribute towards sustainable development in developing countries, there is a need to tackle the “ignored” customary rights among other issues.

### 2.2.5 Development of Spatial Data Infrastructures

Various documents have been produced on how to incorporate registration systems in a Spatial Data Infrastructure (SDI), as a means of contributing towards sustainable development (Groot, 1997; Rajabifard and Williamson, 2001). The term SDI can be used synonymously with the terms “geo-information infrastructure” and “geospatial information infrastructure” (Groot, 1997, p. 3).

SDI is fundamentally about facilitation and coordination of the exchange and sharing of spatial data between stakeholders from different jurisdictional levels in the spatial data community. Understanding of its role and nature are important to the acceptance of the concept and its alignment with spatial industry objectives (Rajabifard and Williamson, 2001, p. 1).

Development of SDI has made some gains in developing countries but seems to be slower in African countries. In 2001, the European Commission started the “Infrastructure for Spatial Information in Europe (INSPIRE)” as a means of enabling availability of spatial information for the “formulation, implementation and evaluation of Union policies” (Bernard et al., 2005, p. 16). Based on INSPIRE, the European Spatial Information Infrastructure (ESDI) is being developed, in which the European Geoportal is a major component (Bernard et al., 2005). In this regard, a geoportal is a website through which geographic data or information can be observed and possibly downloaded by users (Tait, 2005). In 2010, the cabinet in New Zealand accepted a paper which recommended that “Land Information New Zealand (LINZ), through the New Zealand Geospatial Office (NZGO), led the development of an SDI for New Zealand”.

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Subsequently, the New Zealand Geospatial Office has developed a comprehensive 2013 to 2015 Work Programme which takes a cross-system view of the implementation of a national Spatial Data Infrastructure (SDI). Similar efforts of developing SDI have occurred in Australia and North America (Masser, 2005). However, in Africa, implementation of SDI is still “in its infancy” (Makanga and Smit, 2010).

A major challenge of developing SDI in African countries is how to include components of communal tenure. In most cases, technical aspects of SDI have been developed based on “Western” concepts which are not always congruent with components of communal tenure (Rakai et al., 1995; Rakai and Williamson, 1995). In most cases, cadastral information is captured using “crisp” polygons and geo-databases (Burrough et al., 1998), which may not adequately capture some characteristics of communal tenure. “Perhaps the answer to the mapping of such [communal] features lies with using the concept of indistinct ‘fuzzy’ boundaries” (Rakai and Williamson, 1995, p. 9). The legal challenges lie with concerns around access and liability of communal tenure information (Rakai and Williamson, 1995). Access challenges include: who owns the information, whether the people allow information to be shared, whether some political control may be lost by sharing the information and how costs can be recovered (Rakai and Williamson, 1995, p. 9). Liability issues include steps that should be taken if communal information is misused (Rakai and Williamson, 1995, p. 9). Hence, as advancement in computer technology increases, there may be more urgency to address how communal tenure can be included in SDIs as a means of enabling sustainable development.

2.2.6 “Pro-poor land administration”/ “fit-for-purpose administration” systems

The challenge of and need for capturing communal tenure in registration systems has also been highlighted in contemporary efforts at developing “pro-poor” land tools (Zevenbergen et al., 2013), which has also been referred to as “fit-for-purpose administration” systems (Enemark et al., 2014). Internationally, a paradigm shift seems to have occurred, and people increasingly realize that current methods of registration are not fully adequate for developing countries (Chauveau et al., 2007, p. 7; Enemark et al., 2014, p. 10; Zevenbergen et al., 2013, p. 595). In essence, there is now recognition that registration systems “should be designed to meet the needs of people and their relationship to land” (Enemark et al., 2014, p. 6).

In order to develop more adequate registration systems for developing countries, one “pro-poor” approach proposes the use of a “continuum” of land rights (Augustinus et al., 2006;
GLTN, 2008; Zevenbergen et al., 2013). The concept of a “continuum” of land rights recognizes
that there are multiple dimensions of land tenure, which can include “social tenure relationships,
such as occupancy, usufruct, informal rights, customary rights, indigenous right and nomadic
rights” among other factors (Enemark et al., 2014, p. 11). In terms of technical aspects, a “Social
Tenure Domain Model” (STDM) has been developed as a tool that can capture some of the
social aspects of tenure (Augustinus et al., 2006; Lemmen et al., 2007). However, the STDM is
still being tested and improved upon. In this regard, there is still room for investigations on the
current nature of communal tenure, which may be obtained by observing commonalities of how
communal tenure has changed in different registration systems.

The “pro-poor” registration system described above is being developed by various international
partners using specific materials and methods. The “pro-poor” system is being developed by a
collaboration between the Global Land Tool Network (GLTN) and the United Nations Human
Settlements Programme (Un-Habitat) among others (Zevenbergen et al., 2013). The system is
being developed by gathering evidence from various stakeholders and literature, investigating
requirements such as: “grass roots affordability, state affordability, preventive justice, sporadic
or systematic implementation, transparency” and co-management among others, which have
been elaborated by Zevenbergen et al., (2013).

An interesting component for this research is that the “pro-poor” system described above is
attempting to describe a means of capturing “complex layered tenure” which seems to have
eluded current methods of registration. The development team proposes to capture tenure
complexity by “enabling community definition and recordation of existing tenures in use”
(Zevenbergen et al., 2013, p. 597). According to some researchers, analysis of communal tenure
or social institutions is a very complex and challenging affair (Cousins, 2007; Okoth-Ogendo,
1989; Ostrom, 1990). Hence, this research might shed some light on how communal tenure has
changed after being impacted by various registration systems that may contribute towards
development of more appropriate registration systems for developing countries.

Appropriate registration systems might assist some developing countries to get onto the
“property ladder” and gain from some of the possible benefits of registration (Zevenbergen et
al., 2013). As described at the beginning of this chapter, approximately seventy percent of land
in developing countries has not been registered (Augustinus, 2010, p. 1). In countries in which
a majority of the people are poor and live on less than one dollar a day, there may be a need to
leverage some probable benefits of registration as a means of contributing towards poverty
reduction (Enemark, 2001; Zevenbergen et al., 2013).
2.3 Current methods of evaluation

There are various methods that have been used to evaluate land registration systems which show that there is a need for further research on the impacts of registration systems on communal tenure. In this section, some of the methods of evaluation that will be explored include: the Logical Framework Approach (LFA), Steudler framework, systems approach, comparative studies based on the structure of systems, and evaluation of economic aspects such as increasing access to credit, development of land markets, and improving agricultural productivity.

2.3.1 Logical Framework Approach (LFA)

In most cases, donor agencies use a method known as the Logical Framework Approach (LFA) to evaluate land registration projects (Mitchell et al., 2008, p. 467; Steudler et al., 2004, p. 373). The LFA was developed in 1969, by a team of consultants, for the United States Agency for International Development (USAID), in an attempt to “discover where they were going wrong” with some projects (PCI, 1969, p. 1). The study revealed that in most cases, projects failed because “planning was too vague”, in that, objectives were not stated clearly, thus evaluators could not clearly compare what had been implemented on the ground with what had been planned (PCI, 1969). Hence, LFA was developed as a means of improving project planning, implementation and evaluation (PCI, 1969).

The LFA has been adopted by donor agencies such as the Canadian International Development Agency (CIDA), the Swedish International Development Agency (SIDA), the Australian Agency for International Development (AusAID) and the World Bank (Mitchell et al., 2008; Steudler et al., 2004). In broad terms, the use of LFA involves constructing a 4 x 4 matrix in which the columns from left to right represent: activity description, indicators, means of verification, and assumptions. On the other hand, the rows from top to bottom hold information on: expected impact, purpose, intermediate results, and outputs (Australian Government, 2005; SIDA, 2006). A sample LFA matrix as developed by AusAID is shown in Table 1.

The LFA has advantages and disadvantages. A major advantage is that the system provides a method with which to structure the main elements of a project (Aune, 2000, p. 219). In contrast, the contents of the matrix can vary from project to project, and are largely dependent on the expertise of project staff as opposed to standardised detail (Steudler et al., 2004, p. 374). Thus, the ability to use LFA to evaluate impacts of land registration on communal tenure is dependent on the experience of project staff as opposed to a standardised approach.
Table 1 A Logical Framework Analysis Matrix as depicted by AusAID²

<table>
<thead>
<tr>
<th>Activity Description</th>
<th>Indicators</th>
<th>Means of Verification</th>
<th>Assumptions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Goal or Impact</strong> – The long term development impact (policy goal) that the activity contributes at a national or sectoral level</td>
<td>How the achievement will be measured – including appropriate targets (quantity, quality and time)</td>
<td>Sources of information on the Goal indicator(s) – including who will collect it and how often</td>
<td>Assumptions concerning the Goal to Purpose linkage</td>
</tr>
<tr>
<td><strong>Purpose or Outcome</strong> – The medium term result(s) that the activity aims to achieve – in terms of benefits to target groups</td>
<td>How the achievement of the Purpose will be measured – including appropriate targets (quantity, quality and time)</td>
<td>Sources of information on the Purpose indicator(s) – including who will collect it and how often</td>
<td>Assumptions concerning the Purpose to Goal linkage</td>
</tr>
<tr>
<td><strong>Component Objectives or Intermediate Results</strong> – This level in the objectives or results hierarchy can be used to provide a clear link between outputs and outcomes (particularly for larger multi-component activities)</td>
<td>How the achievement of the Component Objectives will be measured – including appropriate targets (quantity, quality and time)</td>
<td>Sources of information on the Component Objectives indicator(s) – including who will collect it and how often</td>
<td>Assumptions concerning the Component Objective to Output linkage</td>
</tr>
<tr>
<td><strong>Outputs</strong> – The tangible products or services that the activity will deliver</td>
<td>How the achievement of the Outputs will be measured – including appropriate targets (quantity, quality and time)</td>
<td>Sources of information on the Output indicator(s) – including who will collect it and how often</td>
<td>Assumptions concerning the Output to Component Objective linkage</td>
</tr>
</tbody>
</table>

2.3.2 Steudler framework of evaluation

Daniel Steudler has developed and tested a framework for evaluating land registration systems (Steudler, 2004). According to Steudler, the framework was developed as a means of enabling the systematic evaluation of land administration systems. A deficiency of land administration projects was captured by an inventory by the United Nations Economic Commission for Europe (UNECE), Meeting of Officials in Land Administration (MOLA) in 1996, in which it was realized that 30 projects were being simultaneously funded by different donor agencies (Steudler et al., 2004, p. 372; Williamson and Ting, 2001, p. 7). The World Bank also noted that in order for registration projects to be effective, there was a need for more focus on “deeply rooted structural issues” (Deininger, 2003, p. 178).

The framework developed by Steudler encompassed four major components of evaluation, namely, objectives, strategies, outcomes, and review procedures (Steudler, 2004, p. 70; Steudler et al., 2004, p. 379). According to Steudler, objectives “define the targets of the whole system” and should be evaluated by investigating “historical and social aspects, the cultural heritage as well as the political, legal, and economic basis.” The strategies are the means with which certain desired objectives will be achieved and can be evaluated by exploring “the set-up of the institutions and organizations, and the financing structure.” The outcomes refer to the end results of the project implementation and should have relevant and measurable indicators. The review procedures are the actual steps which should be taken to find out how and why the project has succeeded or failed. A major challenge that has been levelled against the framework developed by Steudler and many other frameworks for evaluating land registration systems is that “the performance indicators… exclude much wider social considerations” (Mitchell et al., 2008, p. 469). Hence, the framework developed by Steudler may not be adequate for evaluating impacts of land registration on communal tenure.

2.3.3 Systems approach

Another method that has been used to evaluate registration systems is a systems approach (Zevenbergen, 2004, 2002). According to Zevenbergen, in some cases, registration systems can be evaluated in relative detail, such as whether title systems are better than deeds systems and so on. In contrast, the systems approach enables a study of the relations between the elements with an aim at the system as whole. Thus, the systems approach is focused on the idea of wholeness, and interrelations between various components of registration. In this regard, in evaluating registration systems, a system can be described as follows:
A system is a set of elements together with relationships between the elements and between their attributes related to each other and to their environment so as to form a whole that aims to reach a certain goal (Zevenbergen, 2002, p. 87).

In the systems approach it is possible to model static and dynamic aspects. According to Zevenbergen, the static aspects can be modelled using a diagram that shows linkages between a person, rights and a parcel of land, that has been depicted in various forms (Henssen, 1995, p. 6; Kaufmann and Steudler, 1998, pp. 27–28). In contrast, the dynamic aspects should fulfill three major functions, namely, adjudication, land transfers and subdivisions, which can also be referred to as mutation surveys. After adopting the systems approach and using it to evaluate land registration systems in the Netherlands, Indonesia, Austria and Ghana, a conclusion was made that the systems approach still lacks social (communal) aspects as follows:

… the models concentrate on the technical, legal, and organizational aspects. The social-cultural and financial-economical aspects are not forgotten, but they are neither in the main core of the study nor in the heart of the model (Zevenbergen, 2002, p. 113).

The quotation above shows that there is a need for further research on social-cultural aspects, which in this thesis are referred to as communal aspects.

2.3.4 Comparative studies

Comparative studies have also been used to evaluate different types of land registration systems (Fitzpatrick, 2005; Wily, 2003), which also conclude that aspects of communal tenure have not been adequately captured in evaluations. Comparisons have been made of the performance of the (1) minimalist, (2) agency, (3) group incorporation, and (4) land board method of legally recognizing communal tenure (Fingleton, 1998; Fitzpatrick, 2005; Wily, 2003). In addition, the economic aspects of individual registration have been analysed as will be discussed in a subsequent section of this chapter.

2.3.4.1 The minimalist approach

As described earlier, in the minimalist approach, certain areas of land are described as communal in land registers, with no attempts to identify specific rights holders, and minimised intrusion on internal land dealings (Fitzpatrick, 2005, pp. 457–458). According to Fitzpatrick, the main advantages of the minimalist approach are that it is relatively quick and cheap to implement and maintain. The lack of legal intrusions also enables communal tenure to evolve on its own in response to socio-economic factors. The legal recognition of communal tenure through the minimalist approach can help to protect land held by locals from alienation by outsiders. However, in some countries, land held by locals has been expropriated by the State
and sold or leased to international companies for large scale production, which does not often benefit the locals (Cotula, 2009). The minimalist approach is also weak when internal land conflicts occur and the State has no legal footing with which to intervene (Fitzpatrick, 2005).

The minimalist approach of land registration has been introduced in countries such as Mozambique and Kenya. In Mozambique, the 1997 land law enabled demarcation of communal areas without regulating internal land issues (Tanner, 2002; Toulmin, 2009; Toulmin and Quan, 2000). Implementation of the system in Mozambique was influenced by the fact that traditional authorities continued to exist in most parts of the country and were effective in dispute resolution, a major cause of tenure insecurity for the locals was allocation of “unused” land to outsiders by the State and suspicions that due to the complexity of communal tenure, more detailed methods of land registration would not be approved by the government (Fitzpatrick, 2005; Tanner, 2002).

In this study, the Trust Land system in Kenya can to some extent be described as a minimalist approach because the colonial authorities initially demarcated communal boundaries, which were termed as “Native Reserves”, without identifying internal right holders and with limited interference in internal land matters (Sorrenson, 1967). However, with time, both the colonial and post-independence governments have increasingly interfered with internal land issues through ongoing conversion of the Trust Land areas into individual and group rights as will be discussed in subsequent chapters of this thesis.

2.3.4.2 The agency method

As described earlier, in the agency method of registration, the State appoints an agent to act on behalf of local communities. Hence, Trust Lands in Kenya can also be categorised in this system because County Councils can act on behalf of the people. The agency method has also been introduced in the former British territory of Lagos, which is now in Nigeria in West Africa, the Solomon Islands in the South Pacific and Papua New Guinea among others (Fitzpatrick, 2005). In the former territory of Lagos, representatives were selected from a family and registered as custodians of land. In this regard, outsiders who wanted to purchase the land could deal directly with representatives as opposed to whole families or communities. The only caveat was that the representatives were expected to confirm that majority of the members had approved the transaction. In the Solomon Islands, the 1968 Land and Titles Ordinance allowed up to five people to be named and registered as land trustees, with the ability to deal with land on behalf of the local community (Fitzpatrick, 2005; Larmour, 2002, 1986). A negative consequence of the agency approach in the Solomon Islands is that in some cases, the trustees abused their
powers and sold land without obtaining consent from a majority of the members (Fitzpatrick, 2005; Larmour, 2002, 1986). Similarly, as described earlier, in some parts of Africa, State appointed agents have used their powers to sell or lease out land to international companies at the detriment of local people (Cotula, 2009).

### 2.3.4.3 Group incorporation

The third system that has been evaluated is that of group registration. In this system, “a corporate structure grants formal legal identity to a traditional group, which allows it — should it so wish — to enter into legally secure transactions with outside investors” (Fitzpatrick, 2005, p. 460). In Kenya, “group ranches are large parcels of land that were demarcated under the Land Adjudication Act (Cap 284) of 1968 and legally registered to a Group such as a tribe, clan, section, or family, duly constituted under the Land (Group Representatives) Act (Cap 287, Laws of Kenya) of 1968. In Papua New Guinea, the Land Group Incorporation Act of 1974 enables people to incorporate as legal entities with the ability to hold, manage and deal with land (Fitzpatrick, 2005; Larmour, 1986). Similarly, in New Zealand, a type of group incorporation is an option used to register land held by the Māori people, and has sometimes made it difficult to conduct transactions because of the many people who are required to give their consent for land dealings (Berghan et al., 2013; Goodwin, 2011; Kingi, 2008; Strack, 2004). An advantage of group incorporation is that it provides a legal entity with which outsiders can engage in transactions, and normally provides for majority voting as a means of decision making, hence limiting the internal abuse of power (Fitzpatrick, 2005). In South Africa, methods that can be termed as group incorporation have also been introduced in some areas. However, aspects of communal tenure have been retained in areas where the system has been introduced (Cousins, 2007; Cousins and Claassens, 2004).

### 2.3.4.4 Land boards

In some countries, land boards have been introduced as a means of controlling land dealings in communal areas (Coldham, 1978; Fitzpatrick, 2005; Quan and Toulmin, 2000; Wily, 2003). In Kenya, as will be described in chapter five and six, land boards were introduced as a means of regulating subdivisions and transactions in areas where land had been adjudicated and registered to individuals (Coldham, 1978). In Botswana, authority over land is held by land boards that were created by the Tribal Land Act, 1968, in which “the primary duties of each Land Board are to allocate land within its jurisdiction, adjudicate disputes, implement policies for land use and planning, and collect leasehold rents” (Fitzpatrick, 2005, p. 463). In Lesotho, a similar approach has been introduced through the 1979 Land Act, in which non-urban land is administered by decentralized land committees (Adams et al., 1999). An advantage of the land
board method is that there is a degree of formal control over land dealings. In contrast, a
disadvantage is that it can be difficult to separate customary authority structures from
introduced formal authorities (Fitzpatrick, 2005; Quan and Toulmin, 2000; Wily, 2003).

2.3.4.5 Major challenges of the comparisons approach
A major challenge affecting formal systems that seemed to appear in most of the studies on the
different registration systems is the inability of formal laws to completely change or eradicate
communal tenure (Coldham, 1979, pp. 615–616; Fitzpatrick, 2005, p. 462; Goodwin, 2008, p. 8; McAuslan, 1998; Okoth-Ogendo, 2002, p. 10). Hence, there seems to be a need to investigate
how land registration systems have succeeded or failed at changing communal tenure.

Another limitation is that there are more comparisons of the same system across different
countries, as opposed to comparison of different systems within and across countries. Based on
the synthesis above, it can be seen that in most cases, group ranches in Papua New Guinea
(PNG) are compared to group ranches in another country such as South Africa, or land boards
in Botswana are being compared to land boards in Lesotho. In this thesis, an alternative
approach will be used, in which individual, group ranch and Trust Land registration systems
will be compared as a means of contributing to the search of a “best practice” method. The
individual system was not covered in this section because it has mostly been evaluated from an
economic perspective, as will be described in the next section.

2.3.5 Evaluation of economic aspects
Evaluations have also been carried out to find out how and why land registration systems are
meeting proposed economic objectives. In most cases, land registration, especially individual
registration, is promoted as a means of increasing economic growth and development (Dale and
McLaughlin, 2000; Deininger andBinswanger, 1999; Williamson et al., 2010). In some cases,
land administration systems are viewed as a means of facilitating efficient land markets and
effective land use that can lead towards sustainable development (Enemark et al., 2014, p. 13;
Williamson et al., 2010, p. 119).

Considering that the majority of people in developing countries live in extreme poverty, which
in the past was described as living on less than one dollar per day and more recently less than
1.25 USD a day (Zevenbergen et al., 2013, p. 595), there is a great interest in the international
community on how to establish a suitable registration system that might enable the poor to gain
from some of the proposed benefits of registration (Augustinus, 2010; Enemark et al., 2014;
Zevenbergen et al., 2013). Thus, evaluations have also been carried out to find out how existing
systems are succeeding or failing at meeting some of the benefits of registration, which include:
improved access to credit, development of land markets and increased agricultural productivity as elaborated below.

2.3.5.1 Access to credit

Evaluations have been carried out to find out whether land registration has contributed towards an increase in access to credit. In the colonial and post-independence era, it was sometimes assumed that registration would automatically increase access to credit (Lawrance et al., 1967; Swynnerton, 1955). In 1997, a seminal work on land registration in Thailand showed that in some cases, registration can increase access to credit as shown by the following quotation:

Evidence indicated that squatters in the three provinces covered by this study face relatively small eviction risks, but their borrowing from cheap institutional sources is significantly lower than that of farmers with secured land ownership… The empirical analysis thus indicates that the possession of a legal land title contributes significantly to capital formation and land improvements (Feder and Onchan, 1987, p. 318 and 320).

In contrast, in 1991, another study showed that registration has not significantly contributed towards improving access to credit as shown below.

The use of formal credit is limited in the study regions… less than 13 percent of the farms received formal credit during 1987-88 in nine of the ten study regions. The Anloga region of Ghana was the only exception - 37.4 percent of households received formal credit there… we did not find a significant relationship between the possession of title and use of formal credit (Migot-Adholla et al., 1991, p. 165).

At around the year 2000, De Soto reaffirmed that registration can contribute towards improved access to credit. In essence, De Soto argued that one of the reasons why most countries in the “West” have higher economic growth than developing countries is because they have registered instruments of title, as opposed to “poor” countries in which registration is often low.

… most of the poor already possess the assets they need to make success of capitalism...but they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded, unincorporated businesses with undefined liability, industries located where financers and investors cannot see them. Because the rights to these possessions are not adequately documented, these assets cannot be traded outside the narrow local circles where people know and trust each other, cannot be used as collateral for a loan and cannot be used as a share against investment. In the West, by contrast, every parcel of land, every building, every piece of equipment or store of investment is represented in a property document that is the visible sign of a vast hidden process that
connects all these assets to the rest of the economy. Thanks to this representational process, assets can lead an invisible, parallel life alongside their material existence. They can be used as collateral for credit...third World and former communist nations do not have this representational process. As a result, most of them are undercapitalized...without representations, their assets are dead capital (De Soto, 2000, pp. 6–7).

De Soto’s perspective is supported by some donor agencies and researchers. According to researchers from the World Bank, if obstacles, such as limitations on information access regarding markets, deficiencies in government frameworks, and variations in land scarcity are reduced, a well-functioning land register can increase access to credit (Deininger, 2003; Deininger and Binswanger, 1999; Deininger and Feder, 2009). In 2008, a “High Level Commission for the Legal Empowerment of the Poor,” was set up with De Soto and former United States Secretary of State, Madeline Albright as joint leaders, to spearhead formalization in poor countries, as a means of increasing access to credit among other proposed benefits (Bromley, 2009, p. 26; Sjaastad and Cousins, 2009, p. 1).

De Soto’s arguments have been extensively critiqued. To some degree, De Soto’s argument is deficient because it assumes that a single cause, in this case formalisation, can contribute to economic growth (Bromley, 2009; Gilbert, 2002, p. 16; Sjaastad and Cousins, 2009, p. 3). Further criticisms of De Soto’s theory are that it makes assumptions that governments have the financial capacity to implement formalisation (Sjaastad and Cousins, 2009, p. 3). Introduction of formalisation can also interfere with long established communal tenure on which a majority of people depend to gain access to land (Meinzen-Dick and Mwangi, 2009, pp. 36–37).

Apart from the criticisms above, people can be reluctant to use land as collateral due to retained aspects of communal tenure (Atwood, 1990; Migot-Adholla et al., 1991; Shipton, 1992, 2009). In some parts of Africa, “social custom … may make it practically impossible for banks to foreclose on land securing a defaulted loan” (Atwood, 1990, pp. 664–665). In Kenya, an investigation in areas where individual registration has been implemented concluded that people were reluctant to use land as collateral because “mortgaging the land is mortgaging the ancestors” (Shipton, 1992, p. 375).

2.3.5.2 Development of land markets

Investigations have also been carried out on whether registration has led to development of formal land markets. In the past, communal tenure had restrictions against selling land as shown by the quotation below.
In African cosmology such an important natural endowment as land does not have a marketable value … The traditional land tenure system also accepted that land rights were inalienable. Land belonged to the living and to the unborn as well as to the dead. No member of a group could sell or transfer land to an outsider as land was considered a natural endowment in the same category as rain, sunlight and the air we breathe (Cheater, 1990, p. 189).

As a result of the communal restrictions on sales, registration systems were often introduced as a means of “breaking” kinship ties to enable land transactions as shown by the following quotation on the individual registration system in Kenya.

The much expected growth of a viable land market in the small-farm sector was based on the rather simplistic notion that farmers would respond to individual ownership by breaking loose from the supposedly static and retrogressive confines of “communal” living into a world of laissez-faire individualism (Okoth-Ogendo, 1986, p. 7).

Based on the above quotation which can be applied to registration systems in many countries, research has been conducted to find out how communal ties have been “broken” to allow people to sell land. Atwood (1990, p. 663), described how communal tenure continued to restrict transactions. In general, if risks and transaction costs are low, more productive people have an incentive to buy land from less productive people, and put the land to better use. However, in most cases, communal tenure posed risks which made buying land less desirable. Continued restrictions on land sales was also shown by a comparative study of registration systems in Ghana, Rwanda and Kenya, in which only 25.5 percent of registered proprietors could sell their land. Thus, the researchers concluded that “the apparent persistence of indigenous control over land transfers demonstrates the difficulty in altering custom by government decree” (Migot-Adholla et al., 1991, p. 164).

Despite persisting communal restrictions, formal and informal land transactions have emerged in some areas where registration has been introduced (Chauveau et al., 2007; Chimhowu and Woodhouse, 2006; Goodwin, 2013; Sjaastad, 2003). Apart from the influence of registration systems, other socio-economic factors such as population growth, urbanisation, HIV/AIDS and conflict have contributed towards development of land markets (Chauveau et al., 2007, pp. 65–77). In the study on Ghana, Rwanda and Kenya, despite being a low percentage, 25.5 percent of those registered could sell their land (Migot-Adholla et al., 1991). Thereby, indicating that some people have accepted the principle of sale of communal land. Despite the acceptance of the marketability of communal land, most of the transactions are often not recorded in the land register (Haugerud, 1989, p. 67).
Informal transactions are often secured either using written documents that are not recognized in formal laws, or through aspects of custom (Chauveau et al., 2007; Chimhowu and Woodhouse, 2006; Delville, 2002; Goodwin, 2013). According to Chimhowu and Woodhouse (2006 p. 357), in some cases, the transacting parties sign a piece of paper as proof of ownership, in which each often keeps a copy. Despite lacking “legal standing”, in a few cases, government officials can witness a transaction and stamp the documents as a means of adding a “veneer of officiaildom” to the documents. In a number of cases, the purchaser’s name is added to a “non-title register such as a Rural District Council (RDC) rates register as a calculated strategy to secure land rights” (Goodwin, 2013, p. 173).

Transactions can be secured first by “investing in interpersonal links (both with the living and the dead), and second by the pragmatic adaptation of land-related ceremonies and practices to suit contemporary contexts (including that of urban land linked to rural land) and contemporary beliefs (for example, the Christianizing of ceremonies)” (Goodwin, 2013, p. 173). Emergence of informal means of securing land transactions has led donor agencies such as the World Bank to slightly change their stance on converting communal tenure as shown by the following quotation.

… the 1975 World Bank land reform policy recommended that communal tenure systems be abandoned in favor of freehold titles and the subdivision of the commons. Today it is recognized that some communal tenure arrangements can increase tenure security and provide a (limited) basis for land transactions in ways that are more cost-effective than freehold titles (Deininger and Binswanger, 1999, p. 248).

In most cases, the emerging transactions are still “embedded in social relations” (Chauveau et al., 2007, p. 66). According to Chauveau et al., (2007, p.66), in West Africa, “tutorat” in which “autochthons” granted access to land to “incomers” are increasingly being monetarised. Nonetheless, despite buying land, the “incomers” are often expected to continue having a “duty of gratitude and of allegiance toward the customary land holders.” In some parts of Africa, such as Kenya, as will be discussed in more detail in chapter six, “incomers” who have bought land and acquired formal instruments of title can be evicted from their land during political upheavals (Klopp, 2001; Njogu, 2009). Hence, assumptions that registration can lead to development of land markets in which willing sellers can transact with willing buyers has not fully developed in areas in which communal tenure has persisted (Chauveau et al., 2007; Chimhowu and Woodhouse, 2006).
2.3.5.3 Increasing agricultural productivity

Analysis has also been carried out to find out whether registration has led to an increase in agricultural productivity. Land registration is recommended by some people as a way of increasing land tenure security, and in essence enabling improved agricultural productivity (Atwood, 1990, p. 665; Dale and McLaughlin, 2000, p. 34; Swynnerton, 1955). The increased tenure security through registration should give farmers incentives to make more investments in land because they can have higher levels of certainty that they will reap the benefits of their labour (Atwood, 1990, p. 665; Dale and McLaughlin, 2000, p. 34). In contrast, a person with insecure property rights will limit investments, because others who have not invested any capital or energy may also benefit from the land (Atwood, 1990; Larsson, 2000).

…intensified cultivation requires secure land rights, both to protect investments and to secure bank loans for further investment… communal rights do not permit the user to exclude other members of the group from enjoying the possible fruits of their own efforts (Larsson, 2000, p. 10).

A flaw in the above ideology is a presumption that tenure security can only be obtained through formal registration. The World Bank which encouraged subdivision of communal land into individual tenure in 1975 has today changed its view and recommended that in some cases communal tenure can provide adequate tenure security (Deininger, 2003, p. 53; Deininger and Binswanger, 1999, p. 248). Communal tenure security can be enhanced by investing in person-to-land and person-to-person relationships (Goodwin, 2013; Okoth-Ogendo, 1989; Shipton and Goheen, 1992). The relationships are improved by carrying out activities such as building structures on the land, burying the placenta or birth cord of a new born baby on the land, performing traditional rituals when constructing a new homestead, and sending remittances to support family members, among other social obligations (Berghan et al., 2013; Goodwin, 2011, 2008).

A challenge to communal tenure security arises when newcomers settle on the land (Atwood, 1990; Deininger, 2003; Deininger and Binswanger, 1999). Normally, people who belong to the same community respect and participate in customary social institutions and hence, also trust each other as regards dealing with the land and its products. In contrast, newcomers may have no respect for the local customs and may not even realize when they are infringing another person’s rights. Therefore, an influx of newcomers usually leads to greater demand for formal means of securing rights to land (Chauveau et al., 2007, p. 69; Deininger, 2003; Deininger and Feder, 2009).
Evidence regarding the impact of registration on increased agricultural productivity is mixed. In Thailand, research showed that improved ownership security through registration increased land improvements such as clearing of tree stumps, that led to higher agricultural productivity (Feder et al., 1988; Feder and Onchan, 1987). In Ethiopia, over 80 percent of a population that was interviewed stated that registration would increase incentives for planting more trees, implementing soil conservation mechanisms, and adaptation of sustainable land management practices (Deininger et al., 2008, p. 1802). On the other hand, in some areas, registration has not contributed towards an increase in agricultural productivity. In Ghana, Rwanda and Kenya, regression analysis showed that “possession of land title was not significantly related to yields” (Migot-Adholla et al., 1991, p. 169). Proposals that registration can lead to increased investments on land also “overlooks important, informal, extra-legal institutions and practices which are for many people cheaper and more reliable methods of ensuring tenure security than bureaucratic, legally recognized land registration systems” (Atwood, 1990, p. 666). There remains a need to assess how communal aspects of tenure security have been impacted by formal systems.

2.4 A need for comparisons based on impacts on communal tenure

The above literature review has shown that there is a need for further research on communal (social) aspects of land registration. As shown by the various methods that have been proposed for improving registration systems, such as “Cadastre 2014” and “Bogor declaration”, aspects of communal tenure have not been captured adequately by current methods of registration. In the economic study of Ghana, Rwanda and Kenya, the researchers concluded by saying, “we are unable to determine precisely the degree of efficiency with which indigenous systems in our study regions have evolved” (Migot-Adholla et al., 1991, p. 172). In an analysis of methods and frameworks that have been used to evaluate land administration systems, a conclusion was made that “the performance indicators … exclude much wider social considerations” (Mitchell et al., 2008, p. 469). In the systems approach of evaluation, the researcher stated that “social-cultural ... aspects are not forgotten, but they are neither in the main core of the study nor in the heart of the model” (Zevenbergen, 2002, p. 113). In addition, communal tenure often persists in areas where formal registration has been introduced (Goodwin, 2008, p. 8; Okoth-Ogendo, 2002, p. 10), as shown below. Thus, Okoth-Ogendo, who had initially assumed that registration would overcome communal tenure, changed his position as follows.

I am now convinced that indigenous law, including those principles that define the structure and content of the commons, will not succumb so easily to suppression or subversion. To use yet another metaphor, indigenous law, long regarded as a dangerous weed, simply went
underground where it continued to grow despite the overlay of statutory law that was designed to replace it. That resilience and persistence is evident in several ways (Okoth-Ogendo, 2002, p. 10).

Retention of communal tenure may be an alternative means of evaluating land registration systems. In essence, most colonial and post-independence governments introduced registration as a means of converting communal tenure into “Western” forms of property rights (Chauveau et al., 2007, p. 5; Deininger andBinswanger, 1999, p. 262), as a means of increasing tenure security, improving access to credit and increasing agricultural productivity among other reasons (Dale andMcLaughlin, 2000; Deininger, 2003).

The programme [of registration] clearly represents an ambitious piece of social engineering, resting, as it does, on the assumption that changes in the law necessarily produce changes in people’s behavior (Coldham, 1979, p. 616).

In view of the fact that registration systems were introduced as a means of changing communal into “Western” forms of property rights, the success or failure to change communal tenure is an indicator of how land registration systems are performing. Due to the failure of registration systems to fully change communal tenure and development of informal property rights, “legal pluralism” exists in many countries (Griffiths, 1986; Meinzen-Dick andPradhan, 2002; Merry, 1988). In “legal pluralism”, formal laws can exist side-by-side with communal and informal rules (Meinzen-Dick andPradhan, 2002). The same phenomenon can be described as coexistence between de jure (formal rights) and de facto informal rights (Cousins, 1997, p. 3; Schlager andOstrom, 1992, p. 254). In general, people usually make a choice between formal and informal laws based on their perception of whether they will gain or lose, a concept that can be referred to as “forum shopping” (Meinzen-Dick andPradhan, 2002, p. 5). As described in chapter one, according to institutional analysts, people usually take steps to strengthen factors that lead towards positive effects, and measures to reduce factors that can cause negative outcomes (North, 1990; Ostrom, 2009). Thus, the performance of registration systems may be observed by looking for signs of how people have let go, or held on to communal tenure in view of introduced systems.

There is also a need for more comparisons of how different types of land registration are working. As described earlier, registration systems have been introduced using a minimalist approach, agency, land board, group or individual methods (Fitzpatrick, 2005). However, studies seem to be focused on making comparisons across similar systems in different jurisdictions. For example comparing group registration in South Africa and Papua New
Guinea, with possibly very few comparisons of the performance of different systems, for example individual versus group registration. Thus, the main research question for this thesis is as follows.

**Does communal tenure change differently when impacted by different land registration systems?**

There are multiple factors that can “push” people towards “letting go” of communal aspects and accepting characteristics of introduced formal systems. These factors include: “demographic changes, urbanisation, integration in the World Economy, socio-economic and cultural change, HIV/AIDS, conflict, public policy and legislation” (Chauveau et al., 2007, pp. 15–31), as will be described in more detail in chapter three. In this research, the various aspects will be used to explain how some people have accepted changes in communal tenure. However, as described in the previous paragraphs, despite factors that can influence change, people can decide to retain communal aspects or accept introduced systems based on whether they perceive they will obtain negative or positive benefits.

### 2.5 Chapter summary

This chapter has explored some of the literature on evaluation of land registration systems and showed that there is a need to compare different registration systems according to their capacity to effect lasting change on communal tenure. The chapter started by describing various approaches that have been developed for improving land registration systems, such as, Cadastre 2014, the Statement on the Cadastre, the Bogor and Bathurst declarations. A number of methods of evaluating land registration systems were also explored, including, the Logical Framework Approach (LFA), a framework developed by Steudler, a systems approach, comparison of systems, and evaluations based on proposed economic benefits of registration. In the literature review, it was established that there is a need for further investigations of land registration systems based on social aspects, which in this thesis are referred to as communal tenure. Thus, the individual, group ranch and Trust Land systems in Kenya will be compared (evaluated) based on changes in communal tenure.

The next chapter will provide a methodology with which the main research question and specific objectives of this thesis were answered.
3 Methodology

3.1 Introduction

The previous chapter provided a literature review on evaluation of land registration systems and showed that there is a need for more investigations on whether communal tenure changes differently when impacted by different land registration systems. This chapter describes the methodology that was used to answer the main research question and is divided into the following main sections: reasons why case study methodology was selected as the main form of inquiry for this research, development of a theoretical framework for analysis, selection of the Republic of Kenya as a study area and three case studies within the country, and application of the methodology in the study area.

3.2 Selection of case study methodology as the main form of inquiry

Case study methodology was selected as the main form of inquiry for this thesis for the following reasons. Case studies are justified when the phenomenon under investigation is not easily distinguished from its context (Yin, 2009). This aspect was deemed important because communal tenure is not easily separated from components of introduced registration systems (Chauveau et al., 2007, p. 12). Case study methodology allows the researcher to use multiple sources of data, which may include both qualitative and quantitative data (Dooley, 2002; Eisenhardt, 1989; Eisenhardt and Graebner, 2007). Thus, aspects of land registration, which typically involve technical, legal, organizational and social aspects, could be tackled using a multidisciplinary approach (Zevenbergen, 2002).

Case study methodology was also selected because it is a recommended method for research in land registration and cadastral systems (Barry and Roux, 2013; Çağdaş and Stubkjær, 2011; Silva and Stubkjær, 2002). Case study methodology “is multi-disciplinary and draws on elements of theories and methodologies from the natural, the social, the behavioral, and the formal sciences” (Çağdaş and Stubkjær, 2011, p. 869). Hence case studies enable the researcher to carry out in-depth analysis of a phenomenon and to incorporate views from different actors such as government officials and community members within the analysis (Barry and Roux, 2013, p. 9).

Case study methodology also has the advantage of enabling a researcher to compare and analyse single or multiple cases (Miles and Huberman, 1994; Yin, 2011, 2009). The advantage of using a single case is that the researcher can obtain greater detail about the case, but it is limited in the ability to validate findings (Dooley, 2002; Eisenhardt, 1989). In contrast, multiple cases
might produce more generalized results but provide a means of validation by constant comparison of cases. Multiple cases also allow for the possibility of finding a wider scope of findings, or more factors that could have been missed if only one case was used (Dooley, 2002; Eisenhardt and Graebner, 2007; Miles and Huberman, 1994).

Case study methodology also has the advantage of allowing different approaches to reasoning (Barry and Roux, 2013, p. 11). In general, there are three main types of academic reasoning: inductive, deductive and abductive (Barry and Roux, 2013; Blaikie, 2000). In brief, inductive reasoning is a bottom-up process in which the researcher identifies patterns in the data and develops a new theory without a guiding hypothesis. Deductive reasoning can be described as a top-down method in which the researcher starts with a general theory about a topic that is then narrowed down into a hypothesis that can be tested. Abductive reasoning seeks to explain something by developing a new hypothesis that does not already exist. The advantage of the deductive approach is that it gives the researcher a very clear focus. Nonetheless, that clarity of focus is also a disadvantage, because it may limit the researcher from deviating and allowing new insights to emerge. In contrast, the inductive and abductive methods provide more room for a new and rich theory to emerge. Nevertheless, the process is time consuming, full of uncertainty, and challenging for novice researchers (Barry and Roux, 2013, p. 18). Despite its challenge, the inductive approach was used in this thesis since it enables a new theory to emerge.

Case study methodology has the ability to incorporate positive aspects of other forms of inquiry (Dooley, 2002; Eisenhardt, 1989; Eisenhardt and Graebner, 2007). Research into changes in communal land tenure requires the researcher to go back and forth between the data and field work, as described in grounded theory methodology (Charmaz, 2003; Corbin and Strauss, 2008; Glaser, 1998). The same approach is used in theory building techniques of case study methodology (Dooley, 2002; Eisenhardt, 1989). Investigations into communal tenure also require the use of some form of ethnography, which can be described in very broad terms as “writing culture” (Clifford and Marcus, 1986). In this regard, principles of ethnography can be incorporated in case study methodology (Yin, 2011, 2009).

Finally, case study methodology was selected because it allows for development of a new theory (Eisenhardt, 1989; Eisenhardt and Graebner, 2007). Therefore, in this research, case study methodology was used to build a new theory on how communal tenure responds when impacted by different land registration systems.
3.3 Developing a theoretical framework for analysis

Case study methodology requires a researcher to develop a theoretical framework for answering a specific research question (Yin, 2011). In this thesis, a framework was selected that used an interdisciplinary approach that combined land law, theory of property rights and institutional economics. The framework was divided into three parts: (1) selecting attributes of communal tenure for analysis, (2) selecting factors for explaining changes in communal tenure, (3) comparison of changes in communal tenure across different case studies. These three parts are described in more details below.

3.3.1 Selecting attributes of communal tenure for analysis

Communal tenure is broad and so there was a need to limit the scope of observable attributes for the purpose of this thesis. In general, communal tenure, encompasses a broad range of issues such as marriage, rites of passage, access to land, rules regarding alienation and authority structures (Chauveau et al., 2007; Okoth-Ogendo, 1989; Shipton and Goheen, 1992). In addition, communal tenure can vary from village to village and from tribe to tribe (Chauveau et al., 2007, p. 10). Therefore, in order to limit the scope of communal tenure, insights were taken from writings on institutions, institutional change, and property rights (Bromley, 1989; North, 1990; Ostrom, 2009, 1990; Schlager and Ostrom, 1992). Institutional analysis was also considered, because the definition of institutions can be applied to some aspects of communal tenure. In general, “institutions are the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales” (Ostrom, 2009, p. 3). In other words, “institutions are the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction. In consequence they structure incentives in human exchange, whether political, social or economic” (North, 1990, p. 3).

In institutional analysis, a framework has been developed with which researchers can gain insight into the nature of the prescriptions with which people organize social interactions (Ostrom, 2009). The “Institutional Analysis and Development (IAD) framework” was developed as a means of understating five main components of structured human interactions, namely, “exogenous variables, action arena, interactions, outcomes and evaluation criteria” as shown in Figure 1 below (Ostrom, 2009, p. 13). These five components have been likened to overlapping maps with different scales in which a person can zoom in to reveal more detail (Ostrom, 2009, p. 11). By zooming in, each of the components can be unpacked to reveal more complexity, for example, at the second level of depth, the exogenous variables consist of biophysical/material conditions, attributes of the community and rules and the action arena.
consists of action situations and participants (Ostrom, 2009, p. 15). In the IAD framework, analysis of an action arena can be carried out by examining interactions between action situations, such as a shopping area, or football arena, and decisions made by participants in the arena, including effects of exogenous variables. In terms of common property rights, the IAD framework has developed eight principles, which can be investigated as described in the next page.

Figure 1 Main components of the framework for institutional analysis

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3Source, (Ostrom, 2009, p. 15)
According to the IAD framework, long enduring common property rights have the following main principles (Ostrom, 2009, p. 259, 1990, p. 91).

1. **Clearly defined boundaries.** The boundaries of the resource system (e.g., irrigation system or fishery) and the individuals or households with rights to harvest resource units are clearly defined.

2. **Proportional equivalence between benefits and costs.** Rules specifying the amount of resource products that a user is allocated are related to local conditions and rules requiring labour, materials, and/or money inputs.

3. **Collective-action arrangements.** Many of the individuals affected by harvesting and protection rules are included in the group who can modify these rules.

4. **Monitoring.** Monitors, who actively audit biophysical conditions and user behaviour, are at least partially accountable to the users and/or are the users themselves.

5. **Graduated sanctions.** Users who violate rules-in-use are likely to receive graduated sanctions (depending on the seriousness and context of the offence) from other users, from officials accountable to these users, or from both.

6. **Conflict-resolution mechanisms.** Users and their officials have rapid access to low-cost, local arenas to resolve conflict among users or between users and officials.

7. **Minimal recognition of rights to organize.** The rights of users to devise their own institutions are not challenged by external government authorities, and users have long-term tenure rights to the resource.

8. **Nested enterprises (for resources that are part of larger systems).** Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organised in multiple layers of nested enterprises.

These principles were used to form the conceptual analysis of this research, but were not selected as the main attributes of observation. The main challenge was that this research was not only interested in principles that could apply to communal tenure but also to formal land registration systems as a means of examining impact. In this regard, attention turned to aspects of property rights that have been alluded to in articles that formed part of the “Institutional Analysis and Development (IAD) framework”, in writings regarding communal tenure and “Western” forms of property rights (Bromley, 1989; Schlager and Ostrom, 1992).
Characteristics of property rights can be limited to management (authority structures), exclusion and alienation (Schlager and Ostrom, 1992). According to Schlager and Ostrom, “management is the right to regulate internal use patterns and transform the resource by making improvements”. “Exclusion is the right to determine who will have an access right, and how that right may be transferred”. “Alienation is the right to sell or lease either or both of the above collective-choice rights.” In this research, exclusion and alienation (limited to sales) were selected for analysis. The aspect of management was not in the centre of analysis; however, changes in communal authority structures were used to explain some of the changes that were observed in exclusion and land sales.

Exclusion and sales were selected because they are normally also present in formal land registration systems. In most cases, registration is introduced using “Western” concepts of property which includes rights to possess, manage and obtain capital, among others (Bromley, 1989; Honoré, 1961). The rights to possess and obtain capital are most closely related to exclusion and sales, and have been described by Bromley, as follows:

The Right to Possess

Possession or exclusive physical control is said to lie at the center of the notion of ownership. Any legal system must accord the right to be put in control of something valuable, and must also assure that such control cannot be terminated arbitrarily. In the absence of this, there is no ownership. And, in the absence of ownership of valuable assets it is impossible to have a functioning economic system. This does not mean private ownership is necessary; it only requires some form of recognized ownership exist.

The Right to capital

This right comprehends the power to alienate the valuable item, or to consume it, or to destroy (waste) it. As such, this introduces important intertemporal issues into ownership (Bromley, 1989, pp. 187–188).

Communal tenure usually has characteristics that are opposite to “Western” forms of exclusion and the ability to sell land. In communal tenure, individual rights are normally embedded within wider kinship networks (Cousins, 2007; Goodwin, 2011). Communal tenure can also include overlapping rights to land in which different people can simultaneously gain access to resources on the same portion of land (FAO, 2002; Meinzen-Dick and Mwangi, 2009). As described earlier, in most cases, communal tenure restricts people from selling land (Chauveau et al., 2007, p. 66; Cheater, 1990, p. 189). However, there are indications that formal and informal transactions have emerged in some communal areas. Hence, exclusion and sales were selected...
for analysis in this thesis because aspects of each can be observed in both communal tenure and introduced registration systems.

3.4 Factors for explaining changes in communal tenure

In this research, various factors that can cause changes in communal tenure were used to explain how and why some people have “let go” of communal tenure to accept introduced formal systems or “hold on” to communal tenure. In this regard, some of the aspects that were considered in this research include: “demographic change, urbanisation, colonisation, integration in the World Economy, HIV/AIDS, conflict, public policy and legislation” (Chauveau et al., 2007, pp. 15–31). Each of the factors is described below.

3.4.1.1 Demographic change

According to the “theory of property rights” demographic growth may contribute towards an increase in exclusive property rights (Demsetz, 1967). According to the theory, when population is low, people may not have a need to define exclusive rights to land because competition for resources might be low. However, as the population grows and competition intensifies, people are inclined to define more exclusive rights to resources (Boserup, 2005; Chauveau et al., 2007, p. 16; Larsson, 2000, p. 10; Platteau, 1996). In some cases, the theory does not work, because even when population is low people may define exclusive rights to resources, and when population is high, people can retain communal access to land (Chauveau et al., 2007, p. 19). Nonetheless, population growth was considered as a possible factor that might have contributed towards changes in communal tenure in Kenya.

3.4.1.2 Urbanisation

Urbanisation can also contribute towards changes in communal tenure. According to the United Nations, approximately 54 percent of the world’s population lives in urban areas as opposed to rural areas. “In 1950, 30 per cent of the world’s population was urban, and by 2050, 66 per cent of the world’s population is projected to be urban” (United Nations, 2014, p. 1). Expansion of urban areas can lead towards conversion of agricultural land into residential or industrial use (Chauveau et al., 2007, p. 20). The changes in land use may impact communal tenure and in some cases lead towards individualisation of property rights (Chauveau et al., 2007, p. 20). In some cases, people can buy land in peri-urban areas for speculation purposes, with the hope that property values will increase as demand for peri-urban housing increases. Thus, possibly contributing towards emergence of land markets in peri-urban areas (Olima and Obala, 1998). In a few cases, financial remittances from urban employment to rural areas can contribute towards development of land markets and or an increase in exclusive property rights, since rural
families who receive remittances may make greater investments on land and can exclude other persons from gaining from their land (Chauveau et al., 2007, p. 21).

3.4.1.3 Integration into the World Economy
Integration of developing countries into the World Economy may have impacted on communal tenure. In Sub-Saharan Africa, colonial and post-independence governments have increasingly made efforts to increase their share in international trade. In Kenya, the Swynnerton plan was mainly geared towards increasing cash crop production among the local people, among other factors such as individualisation of land rights, as will be discussed in the next chapter (Swynnerton, 1955). Similarly, introduction of group ranches was a means of increasing commercial livestock farming among nomadic tribes such as the Maasai (Davis, 1970; Mwangi, 2007a). The increase in international trade “may increase the value of land and trigger processes of individualisation of tenure” and reinterpretation of traditional authority structures (Chauveau et al., 2007, p. 23).

Remittances from international trade can also impact on communal tenure (Chauveau et al., 2007, p. 24). Recipients of remittances are empowered to: purchase land through formal or informal means, secure their land rights by paying for titling processes, lease or rent land where sales are prohibited, among other possible benefits (Chauveau et al., 2007, p. 24).

3.4.1.4 HIV/AIDS
The impacts of HIV/AIDS may also change communal land tenure. As described earlier, under communal tenure people were usually not allowed to sell land (Cheater, 1990, p. 189). However, due to HIV/AIDS pandemic, people may be forced into distress land sales as they seek money for medical and funeral costs (Chauveau et al., 2007; Geissler and Prince, 2013; Okuro, 2007). HIV/AIDS also shortens the lifespan of primary care givers such as parents, and may lead children to sell land as coping mechanisms. HIV/AIDS also limits the ability of people to cultivate the land, hence can diminish communal means through which people gain from the land. In some cases, affected families may lease out land, even to outsiders, as a means of coping, thus changing some aspect of communal tenure. In some cases, widows and orphans of HIV/AIDS victims may lose land to relatives who do not uphold communal access to land after a husband or father is deceased. The disease has also changed inheritance practices because in many families, younger generations have passed away before elders, hence the land has to pass on to other relatives or be sold to outsiders (Chauveau et al., 2007; Geissler and Prince, 2013; Okuro, 2007). In Kenya, by 1990, approximately half a million people had HIV/AIDS and by
the year 2000, the figure had increased to about two million people (Akwara et al., 2003, p. 386).

### 3.4.1.5 Conflict

Armed conflict is also a factor that has shaped communal tenure in parts of Sub-Saharan Africa (Chauveau et al., 2007, p. 29). Such conflicts can occur when people are competing for scarce resources or due to ethnicity, which in some cases is politically motivated. “In Rwanda, for instance, unequal access to land was one of the structural causes of poverty which was exploited by the organizers of the genocide” (Chauveau et al., 2007, p. 29). Similarly, limited access to land for youth can lead them towards joining “militia” groups as was the case in Liberia (Chauveau et al., 2007, pp. 29–30). People who have been displaced by armed conflicts can also migrate into other communal areas and contribute towards development of formal and informal land markets.

In Kenya, armed conflicts during post-election violence seems to have impacted on land tenure (Klopp, 2001; Njogu, 2009; Rutten and Owuor, 2009). As will be described in the next chapter, during the colonial era, some tribes such as the Kikuyu were displaced by settlers and moved to areas occupied by other tribes (Sorrenson, 1967). At the same time, there are people from other tribes who have not only moved to live among the Kikuyu, but also in areas occupied by other tribes. In a number of cases, when people are not happy with election results they have turned their anger towards people from other tribes who live among them, including armed violence. Leading to displacement of people from land in which they might have thought that they have secure land rights (Njogu, 2009; Rutten and Owuor, 2009). In some cases, the armed conflicts have evoked aspects of communal tenure which may have been dormant. For example, in some cases, displaced persons return to their ancestral villages and are granted access to land by other clan members (Njogu, 2009).

### 3.4.1.6 Public policy

The main aim of this thesis is to investigate how registration systems which were introduced due to colonial and post-independence government policies have impacted on communal tenure. In this regard, assumptions are made that the other factors above contribute towards acceptance or rejection of introduced government policies. In general, introduction of land registration through various government policies has led to both intended and unintended consequences (Benjaminsen et al., 2009; Berry, 1993). Introduction of formal laws has also led to “legal pluralism” in some places, in which formal laws exist side-by-side with informal or communal aspects as described earlier (Griffiths, 1986; Meinzen-Dick and Pradhan, 2002;
“Legal pluralism” also leads to “forum shopping” in which people might decide whether to use formal or informal channels for decision making depending on where they perceive they will get a favorable response (Meinzen-Dick and Pradhan, 2002).

### 3.4.2 Comparison of the different case studies

Based on the previous factors, changes in communal tenure were investigated within and across the three case studies. In this regard, investigations were carried out on how the individual, group ranch and Trust Land systems were introduced in Kenya, after which comparisons were made on how components of communal tenure that are contrary to exclusivity and sales as ushered in by the formal systems has changed among the Luo, Maasai and Pokot people. This is illustrated in Figure 2.

**Figure 2 Framework for comparing different registration systems based on changes in communal tenure**
3.5 Limitations of the framework

The framework described above has some limitations. The main limitation is that it is very difficult to isolate the impacts of registration systems on communal tenure from other factors. As stated in chapter two, communal tenure has changed due to other factors such as “demographic change, urbanisation, integration in the World Economy, HIV/AIDS, conflict and public policy and legislation” (Chauveau et al., 2007). Therefore, in this thesis, these other factors will not be ignored, but will used as aspects that have contributed towards the impact of different registration systems.

Another challenge is that analysis of changes in communal tenure is tantamount to explaining changes in human behaviour or institutions, which are very complex and difficult to capture in such a limited document. This complexity has been captured by other researchers as follows. “Institutional analysis…is frequently a difficult and complex theoretical and empirical task…the greatest challenge for the social sciences is to explain change – or more specifically, social, political, economic, and organizational change” (Ostrom, 2009, pp. 65–66). “The analytical challenge is to characterize complex and dynamic realities using appropriate concepts and theories…” (Cousins, 2007, p. 282). “What has become known as ‘the African agrarian crisis’ is an extremely complex phenomenon” (Okoth-Ogendo, 1989, p. 6). Despite these complexities attempts will be made at analysis.

The next section describes how a study area and case studies were selected, after which explanations will provided on how the methodology was applied in the selected cases.

3.6 Selection of study area and case studies

3.6.1 The Republic of Kenya as the main study area

The Republic of Kenya was selected as the main study area for this thesis because it is a developing country in which land registration has been extensively introduced over communal land and this has been done via three different systems (Atwood, 1990; Bruce, 1998; Bruce and Migot-Adholla, 1994; Green, 1987; Larsson, 2000). In Kenya, these forms of registration were introduced by the then British colonial government, and were subsequently perpetuated by post-independence governments (Coldham, 1978; Sorrenson, 1967). The details of the process that was used to introduce registration will be captured in chapter four.

The three types of registration in Kenya that were selected for this research are the individual, group ranch and Trust Land systems. The detail and exact descriptions of each of these systems will be described in subsequent chapters. As described earlier in chapter one, the individual
system is one in which all rights to land are vested with a person (including legal persons), with conditions that the State may retain some overriding rights. Group ranches are large parcels of land, which are demarcated and registered in the name of a tribe, clan, section or family, among others. In each ranch, right holders select between 3-10 people to have their names entered in the land register on behalf of the community (Mwangi, 2007b; Wayumba and Mwenda, 2006). Trust Lands represent a minimalist or agency approach to registration, in which land is demarcated and allocated to County Councils, which act on behalf of the government and allow people to continue dealing with land based on custom (Republic of Kenya, 1970). Thus, the aim of this thesis is to compare how these three different systems are working based on changes in communal land tenure.

There were certain limitations associated with selecting these three formal systems. The first limitation was that the fine details of individual registration are more complex than could be captured within the scope of this thesis. In Kenya, before the introduction of the new constitution in 2010 there were many Acts of Parliament which circumscribed different variations of individual registration. These Acts include the Registration of Titles Act, Land Titles Act, Registration of Documents Act, the Registered Land Act, and the new Land Registration Act, 2012. The historical background and function of each of these Acts will be elaborated on in chapter four. In order to achieve the objectives of this thesis, individual registration was limited to areas governed by the Registered Land Act (RLA), Cap 300 that was introduced in 1963. The RLA was selected for this study because the RLA is the substantive law which governed most of individual registration areas in rural areas of Kenya. In addition, among the Luo people selected as a case study, as will be described below, the RLA was the main law with which individual registration was introduced.

Another challenging limitation is that it is not easy to make clear distinctions between the systems in some areas. For example, group ranches have been subdivided and converted into individual systems (Mwangi, 2007b), and Kenya government policy has often aimed at converting Trust Land areas into individual registration (Mwenda, 2001). Thus, in some areas, there might have been overlaps of individual and subdivided group ranch areas and Trust Land areas. However, the researcher made attempts to identify from relevant officials which areas were related to which systems. Finally, despite choosing Kenya as the main study area, attempts were made to incorporate findings from other countries, particularly in Sub-Saharan Africa, in the analysis. Three case studies were selected in Kenya as described below.
3.6.2 Selection of the Luo people in individual registration areas

The Luo people were selected to represent communities within areas in which individual registration has been implemented primarily because they can be studied without tackling restitution. During the British colonial era, very few Europeans settled among the Luo because of the tribe’s proximity to Lake Victoria, which is heavily infested by mosquitoes which spread malaria (Hobley, 1970). In preference, most of the Europeans settled in the highlands (Sorrenson, 1968), which are less prone to malaria (Snow et al., 2005). Hence, investigations in the highlands would include aspects of restitution which are invariably politically sensitive. Another reason for selecting the Luo people is because the researcher is from this community and has an adequate understanding of their customs and an entry point for conducting interviews. In order to avoid bias of the researcher being a member of one tribe, information was obtained from different sources such as books and evidence from case studies, as a means of validation. Similarly, the researcher has worked as a surveyor among the Maasai people and conducted previous academic research on group ranches. Among the Pokot, the researcher had two separate interpreters for two different sets of field work, who validated each other.

3.6.3 Selection of the Maasai people in group ranches

The Maasai people were selected because they are one of the tribes in which group ranches have been extensively implemented (Kimani and Pickard, 1998; Mwangi, 2007b; Rutten, 1992). In the pre-colonial era, the Maasai occupied large parts of the Rift Valley Highlands in which they practised nomadic pastoralism (Spear and Waller, 1993). Due to their nomadic lifestyle, colonial and post-independence governments assumed that group ranches would be the most suitable form of registration for the Maasai (Davis, 1970; Mwangi, 2007a). The Maasai were also selected because the researcher has carried out previous research among them and therefore had an adequate entry point for data collection (Wayumba and Mwenda, 2006).

3.6.4 Selection of the Pokot people in Trust Lands

The Pokot people were selected to represent communities living in Trust Lands because they can represent both nomadic and sedentary communities, and furthermore the researcher had an entry point for research. The Pokot community is generally divided into two groups, the *pi-patich*, “people of cattle” and *pi-pa-pagh*, “people of grain” (Bollig, 2010; Peristiany, 1951; Porter, 1965). The researcher, who studied land surveying at the University of Nairobi, has classmates who work among the Pokot and were willing to introduce him to community members for purposes of interviews.
A map of the study area including selected case studies is shown in Figure 3 below. The map shows three Districts in Kenya in which research was conducted. Kisumu District, which is by the shores of Lake Victoria, was selected among the areas which are mainly occupied by the Luo people in Kenya. Within Kisumu, individual registration is the predominant system that has been introduced. Kajiado District which is mainly occupied by the Maasai people was selected in the Southern part of Kenya, because it is an area in which group ranches have been extensively introduced. Finally, West Pokot District which is mainly occupied by the Pokot tribe was selected in the Northern parts of the country because it is one of the areas in which the Trust Land system is still dominant.
Figure 3 A map of Kenya and selected study areas
3.7 Application of the methodology in the study area

Application of case study methodology and the framework for analysis in the study area involved (1) data collection, (2) within-case analysis, (3) cross-case analysis, (4) maintaining validity and reliability, and (5) ethical considerations. Each of these steps is described below.

3.7.1 Data collection

In case study methodology, data can be collected through interviews, documents, focus group discussions, newspapers and observations (Corbin and Strauss, 2008; Eisenhardt, 1989; Miles and Huberman, 1994). In this regard, these different approaches were used in this research, as described below.

3.7.1.1 Semi-structured interviews

In case study methodology, as in other forms of qualitative research, there should be an iteration between field work and analysis (Corbin and Strauss, 2008; Eisenhardt, 1989; Miles and Huberman, 1994). This overlap enables the researcher to inquire more about questions that have arisen after initial fieldwork, and helps not only to clarify but also strengthen already emerging themes (Eisenhardt, 1989; Glaser, 1998; Yin, 2009). In this research, two sets of interviews were conducted. The first set was conducted between December 2010 and April 2011, as a means of teasing out key issues. The second set was conducted between January and March 2014. The interviews were conducted using semi-structured questions as shown in the Appendix of this document. The flexibility of semi-structured questions allowed the researcher to change tack, by introducing new questions, or eliminating some questions as the circumstances required. This first provided the possibility of obtaining in-depth information, second allowed the researcher to take ethical considerations into account (i.e. permits a researcher flexibility to change a line of questioning that seems uncomfortable for a respondent). Third, the semi-structured interviews allowed respondents to articulate what they view to be important (Blaikie, 2000; Miles and Huberman, 1994).

In each interview, if the respondents consented, a voice recorder was used to capture data, or where the respondent declined, written notes were used for data capture. In general, most of the respondents allowed the researcher to use a voice recorder. Nonetheless, some officials in government offices were reluctant to have their voices recorded; hence hand written notes were taken. Also, after explanations that a recorded interview might be more accurate to quote and that coded names would be used, some of the officials also allowed the voice recorder to be used. In addition, some respondents in the villages tried to become more formal as soon as they were asked if a voice recorder can be used. However, despite attempts at giving formal answers,
the researcher observed that as soon as the interview went in-depth, the respondents tended to relax and give as genuine answers as possible. The researcher also carried on conversations after finishing the “formal” part of the interview, in which, sometimes, more salient issues came up. Recorded interviews were then transcribed into field notes. In total, 74 interviews were conducted, distributed as shown in the table below.

### Table 2 distribution of interviews during the study period and in case studies

<table>
<thead>
<tr>
<th>Period</th>
<th>No. of interviews in the individual registration</th>
<th>No. of interviews in group ranches</th>
<th>No. of interviews in Trust Lands</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>December 2010 – April 2011</td>
<td>15</td>
<td>14</td>
<td>14</td>
<td>43</td>
</tr>
<tr>
<td>January – March 2014</td>
<td>11</td>
<td>10</td>
<td>10</td>
<td>31</td>
</tr>
<tr>
<td>Total</td>
<td>26</td>
<td>24</td>
<td>24</td>
<td>74</td>
</tr>
</tbody>
</table>

3.7.1.2 Sampling of interview respondents

Among several techniques, snowball sampling was used to select interview respondents in this research. In general, sampling can be divided into either probability or non-probability sampling (Marshall, 1996). In the probability approach, each person in the population has a known chance of being selected as a respondent. The common methods of probability sampling are: random sampling, systematic sampling and stratified sampling (Burrough and McDonell, 1998; Marshall, 1996). In non-probability sampling, the interview respondents are selected in a non-random manner, which includes: convenience sampling, judgment sampling, quota sampling and snowball sampling (Marshall, 1996).

In this research, snowball sampling was selected because it was difficult to have prior knowledge of which respondents would be available for the interviews. The method was also chosen because in snowball sampling, initial interview respondents can refer the researcher to the next respondents (Marshall, 1996). In each of the tribes, the researcher had very few people with whom to start the interviews. Among the Luo people, he started with his grandparents and uncles in the village, who subsequently referred him to other people. Among the Maasai, he started with seven group ranch officials with whom he had prior contacts, before being sent to
other people within the ranch. Among the Pokot people, he only had two former classmates who introduced him to all the other respondents.

A major challenge of snowball sampling is that it can introduce bias in the sample because the researcher can only be referred to respondents who are like minded (Marshall, 1996). In order to reduce the bias, different sources of data were used, for example, apart from the interviews, hearings from court cases, books and journal articles were used. The varied sources of data ensured that different points of view were captured.

The next section describes the demographics of the interviewees who came about from the snowball sampling.

### 3.7.1.3 Demographics of interviewees and their relationships to the land

Based on the snowball sampling, there was a wide variety of interview respondents who had a communal relationship with the land. As was shown in Table 2, there were a total of 74 interview respondents across the three study areas, with the following demographics.

**Gender distribution**

In the three case studies, most of the interview respondents were male. Among the Luo people, only 12 out of the 26 respondents were female, which means approximately 54 percent of the respondents was male. Among the Maasai, only 2 out of the 24 respondents were female, hence, about 92 percent were male and among the Pokot people only 3 out of 24 were female, thus, about 87 percent were male. The main reason for the distribution is a cultural practice in all the three tribes, in which male visitors are usually directed to senior male members of a homestead. In this regard, in most of the rural homesteads, the researcher who is male was automatically directed to a house or under a tree in which the male homestead head was seated.

The number of women who were interviewed among the Luo people is higher because the researcher is from the tribe and was not hindered by culture from speaking to his grandmothers and aunties. Among the Maasai, the 2 women who were interviewed were in their shops in market centres, hence were not in a homestead where the cultural barriers are usually upheld. The 2 Pokot women who were interviewed were educated wives of the researcher’s former classmates.

In order to counter the bias of male respondents, the researcher obtained information from different sources, which provided a female perspective to the land tenure issues. As stated
earlier, evidence from court cases were used, quotations from books and journal articles and also articles from local newspapers.

**Relationship of interview respondents to land**

In each of the case studies, three respondents were government officials, while the rest had communal rights to land. In each of the study areas, interviews were conducted with the District Land Surveyor, the District Land Registrar and the District Land Adjudication officer, who were all male.

Apart from the three government officials, all the interview respondents had communal and in some cases also formal rights to land. As will be described in chapter five, all the male interview respondents had inherent communal rights to land by virtue of being born in the tribe. The men who were interviewed were all homestead heads, either in the form of grandparents or parents. Among the Maasai people, seven of the men who were interviewed were group ranch officials, but were also members of the tribe. The women who were interviewed all had rights to land as wives and mothers within the homesteads. The women’s rights to land were attributed to the fact that in communal tenure, women normally have rights to land either as daughters, wives and mothers (Yngstrom, 2002).

Apart from the communal rights, the respondents also held formal rights to land. In the individual section, some of the male respondents held formal title deeds to land, however, in this research it was not clarified what percentage had formal titles. All the individual sections among the Luo people had been formally adjudicated hence had at least one registered formal owner. In the group ranches, all the men I talked to were registered members of the ranch. In the Trust Land, all the respondents were registered people within the West Pokot area.

**Age of interviewees**

In each of the three study areas, the age of the interviewees ranged from about 40 to 80 years old. In most cases, the homestead heads who were interviewed were married with children, and in some cases, some were grandparents. The age-group was targeted because they are normally mature and have a rich history of land matters.

**3.7.1.4 Collection of documents**

Apart from the interviews, documents related to communal tenure among the three selected tribes, and to the three registration systems were collected. These included books, journal articles and newspaper cuttings regarding each of the case studies. In addition, evidence from
court cases was collected as a means of indicating how communal tenure had been impacted by the different registration systems. According to Simpson, (1984, pp. 221-222), changes in communal tenure can be investigated by looking at evidence from courts or what might be called case law. Simpson describes how in most cases, court cases are at first determined based on custom, which is later converted into case law before eventually becoming part of precedent. Hence, evidence from courts was used as part of the data for this research. The researcher also collected documents on the three tribes and land registration systems from various sources, such as the Government Printers in Nairobi, University of Nairobi Library, and Ministry of Lands offices in Kenya.

### 3.7.1.5 Observations

In qualitative research, observations are a major part of data collection and analysis. The perception of the researcher forms a very large part of data collection and analysis (Charmaz, 2003; Corbin and Strauss, 1990, 2008; Dooley, 2002). Ideally, the researcher should be as neutral as possible in their observation. However, the researcher entered the field as a Kenyan with an academic background in land surveying and land management. In this regard, observations may have been inadvertently affected by this background. In this regard, the researcher attempted to remain objective and unbiased as possible, and to capture the situation as it exists. In addition, in some cases, triangulation of evidence from various sources helped to reduce bias. A digital camera was used to capture some images of the study areas and, where ethical considerations allow, images will be included in subsequent chapters.

### 3.7.2 Within-case analysis

The main aims of within-case analysis are “to become intimately familiar with each case as a stand-alone entity” and “to help investigators cope with the deluge of data” (Eisenhardt, 1989, p. 540). The process of within-case analysis usually involves writing detailed descriptive documents of each case (Eisenhardt, 1989; Eisenhardt and Graebner, 2007; Miles and Huberman, 1994). Ideally the description of each case should be in one document. However, in this research, several descriptions of the cases were written, enabling an intimate knowledge of the data. The final part of analysis involves explaining key themes and patterns (Dooley, 2002; Eisenhardt, 1989). Therefore in this thesis, explanations made using data and existing literature, on how and why communal tenure has changed due to the impacts of different registration systems.
3.7.3 Cross-case analysis
The aim of cross-case analysis is to limit the researcher from drawing conclusions from limited data (Eisenhardt, 1989; Yin, 2011). Comparison of the same theme in different cases enables the researcher to look at the data in divergent ways, hence leads to conclusions that are closer to reality (Eisenhardt, 1989, p. 540). Cross-case analysis can be done by selecting themes that can be used to derive similarities and differences (Dooley, 2002; Eisenhardt, 1989). In this thesis, two main themes, namely, exclusivity and alienation (limited to sales) were selected, after which similarities and differences of change due to impacts of different land registration systems were provided.

3.7.4 Validity and reliability
In this research, qualitative techniques were used as means of maintaining validity and reliability. Unlike quantitative methods, which rely on statistical tests, qualitative techniques maintain validity and reliability by (1) triangulation of data, (2) conflicting theories, (3) conducting data collection in different periods and using different instruments (Corbin and Strauss, 2008; Miles and Huberman, 1994; Yin, 2009).

3.7.4.1 Triangulation of data
In case study methodology, triangulation is a technique of ensuring validity and reliability. In this case, information about the same phenomenon is collected from different sources before being compared to each other (Yin, 2009). In triangulation, if a person who is being interviewed in the village says something that is similar to what was reported in a court of law that they are not aware off, and at the same time has been written in a book or newspaper by somebody else, then the information being reported is tentatively verified. As an example, interview respondents were asked how land registration has affected the ability to exclude “welcome strangers”, jodak, among the Luo people. Similar information was obtained from published books and court cases. Finally, the information from the different sources were compared and presented as a means of showing that the responses from interviewees are similar to what has been presented by other researchers. An example can be seen in section 5.2.2.3 in which the same information on the “welcome strangers” is presented from different sources, namely, Shipton (1984), Ocholla-Ayayo (1976), Malo (2003) and interview respondents. In this regard, because the different sources provided the same information as the interview respondents, the responses that were provided were considered to be an accurate representation of aspects of communal tenure.


3.7.4.2 Conflicting theories

In case study methodology, conflicting rival theories are also used to retain validity and reliability. In this case, the rival theories that were used are related to current debates regarding land registration. In current literature, one side of the debate shows that communal tenure should transition into “Western” forms of property rights, as a means of increasing tenure security, improving access to credit and developing land markets among other perceived benefits (Deininger andBinswanger, 1999; De Soto, 2000; Lawrance et al., 1967; Swynnerton, 1955). The other side of the debate argues that communal tenure should be retained, because current models of registration are contributing towards reducing access to land on which most of the poor depend for their livelihood (Bromley, 2009; Cotula, 2009; Meinzen-Dick and Mwangi, 2009).

3.7.4.3 Data collection in different periods

In order to enhance validity and reliability, data was also collected in two different periods as was shown in Table 2. The first period was December 2010 – April 2011 and the second was January – March 2014. The first period can be described as exploratory, in which the researcher was trying to find out the main themes to be investigated and the second period can be described as explanatory, in which more insights on selected themes were being explored. However, during the second period, there were still instances of exploratory researchers as new themes kept emerging.

The main advantage of the two interview periods is that in the second instance, there were aspects of tenure that were mentioned in the first round of interviews that were brought up again. Thus, because the same themes emerged in the second round of interviews, it can be confirmed that they are pertinent to the community. For example, in the first interviews, a respondent mentioned that livestock friendships are important to communal tenure among the Pokot people. During that time, the researcher thought it was a secondary issue because it was about livestock as opposed to land. However, in the second round of interviews, more respondents brought about the issue of sharing livestock as a major part of Pokot land tenure, hence the researcher concluded that it is an important theme to be described. Similarly, age-set structures were continuously brought out among the Maasai and Pokot people in the first and second interviews.
3.7.5 Ethical considerations

Ethical considerations were also put in place for this research in line with University of Otago guidelines. Before each of the interviews, the respondents were given information about the project and asked for their consent. In the consent form, the respondents were informed that their participation in the research was voluntary in that they were free to withdraw from the interview at any time without experiencing any disadvantage. The respondents were also told that their personal information would not be used in the output of the research. Thus, in this research, coded names were used to quote respondents. For example, the first respondent among the Luo people in Kisumu District was coded as KSM001. A respondent among the Maasai people in Kajiado District was coded as KJD001, and a person from the Pokot people in West Pokot District was coded as WPKT001. As stated earlier, the respondents were also requested whether they would allow the researcher to use a voice recorder. Details of the ethical considerations and semi-structured questions are provided in the Appendix of this document.

3.8 Chapter summary

This chapter has explained a methodology that was used to answer the main research question for this thesis. The first part described why case study methodology was selected as the main form of inquiry. This was followed by a description of a theoretical framework for analysis, and how the methodology was applied in the study area. The next chapter will be on the historical background of land registration systems in Kenya.
4 **Historical background of land registration in Kenya**

4.1 **Introduction**

This chapter will explore how the three registration systems were introduced in Kenya. The historical background will provide a platform with which to understand how and why communal tenure has changed or not changed in areas where the different registration systems have been introduced. A chronological approach will be taken in this chapter, in which the three systems will be described in the order in which they were introduced by colonial and post-independence governments. To this end, this chapter will be divided into the following main sections. Section 4.2 – European settlement and land acquisition in Kenya. Section 4.3 – Introduction of the Trust Land system. Section 4.4 – Introduction of Individual registration. Section 4.5 – Introduction of group ranches. Section 4.6 – Current extent of the three registration systems and section 4.7 – amendments that have been made through the introduction of a National Land Policy.

4.2 **European settlement and land acquisition in Kenya**

Introduction of land registration systems in Kenya is intertwined with European settlement and subsequent colonisation under the British government. At around 1870, various European countries vied to control the territory around Lake Victoria, the source of River Nile, and in effect control trade routes to the East on the Suez Canal (Okoth-Ogendo, 1991; Sorrenson, 1968). The French sent an expedition from the West African Coast, while the British went round the Cape of Good Hope in South Africa and started exploration from the Indian Ocean shoreline with East Africa (Sorrenson, 1968). After attempts by several explorers, John Hanning Speke, reached the shores of the lake in 1872, and called it Lake Victoria after the then British monarch (Bridges, 1982). In order to control the territory around the lake, Queen Victoria granted a charter to a company known as Imperial British East Africa Company (IBEAC) in 1888, with a mandate to administer and prospect for minerals in the region (Sorrenson, 1968). At that time, IBEAC led by Sir William MacKinnon obtained a loan from the British government for construction of a railway from the Indian Ocean shoreline to the shores of Lake Victoria, as a means of “opening up” the territory for trade and exploration (Miller, 1971; Sorrenson, 1968).

A major challenge for IBEAC was how to acquire land for construction of the railway. At the coast, a solution was found by signing agreements with Arab Sultans who seemed to control approximately ten miles of the coastal strip (Miller, 1971). Arabs had been trading with Africans at the coast from about 600 A.D and had acquired rights to land on some parts of the coast (Chittick, 1963; Miller, 1971). To this end, the British signed agreements with some Arab
Sultans, in which the British acquired rights to certain land within the ten mile coastal strip (Miller, 1971; Sorrenson, 1968). A bigger challenge was how to acquire land beyond the coastal strip, in which local tribes lacked authority figures who could sign agreements that would be acceptable to other members of the tribe (Sorrenson, 1967). In 1891, IBEAC became bankrupt and handed over control of the territory to the British government, including the responsibility of acquiring land in the interior and of completing the railway. The government took over the territory and named it the East Africa Protectorate on 15th June 1895 with headquarters in Zanzibar under a Commissioner known as Sir Arthur Hardinge (Hobley, 1970; Sorrenson, 1968).

In order to acquire land beyond the ten mile coastal strip, Hardinge and other Legal Officers proposed that the Crown should assert original title because the local tribes were deemed to have no more than a usufructory claim to the land (Okoth-Ogendo, 1991, pp. 10–11; Sorrenson, 1967, p. 17). The Legal Officers of the Crown informed the Foreign Office that “the right to deal with unoccupied lands accrue to Her Majesty by virtue of her right to the Protectorate” (Sorrenson, 1967, p. 17). A 1901 Order in Council gave legal effect to the opinion as described below.

The 1901 Order in Council gave legal effect to this opinion by defining Crown land, not as unoccupied or waste land, but as all ‘public’ land subject to the control of His Majesty – a definition which in effect allowed the Protectorate authorities to assume a title to and alienate any land in the Protectorate (Sorrenson, 1967, pp. 17–18).

Subsequently, the Crown Lands Ordinance was passed in 1902, which defined Crown lands as follows.

Crown Lands are all public lands within the control of His Majesty by virtue of any Treaty, Convention, or agreement, or of His Majesty’s Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under ‘The Lands Acquisition Act, 1894’ or otherwise howeversoever (Sorrenson, 1968: 53).

The Crown Land Ordinance, 1902, enabled the Commissioner to alienate land in the interior for railway construction and for European settlers (Sorrenson, 1968). Despite the lack of legal provisions, Protectorate staff had gone ahead and started construction of the railway from the coast, through the highlands and the Rift Valley, to the shores of Lake Victoria (Miller, 1971). In the process of construction, the administration brought in labourers from India, who were more familiar with railway construction than local Africans, and also borrowed heavily from the British government (Miller, 1971). Approximately £1,000,000 was spent to complete the
railway, and treasury was applying pressure on Hardinge to make the territory profitable in order to pay back the loan (Sorrenson, 1968, p. 66). In 1902, Sir Charles Eliot took over from Hardinge as Commissioner of the Protectorate with a mandate to improve productivity. Eliot was advised to bring in European settlers who would engage in large scale commercial farming to enhance economic output. To this end, Eliot sent his Collector of Customs A. Marsden, to South Africa to attract people of European descent into the Protectorate (Sorrenson, 1968). The settlers who came in were granted freehold and leasehold titles to land. At that time, because the Lands Office was understaffed, most of the settlers chose a portion of land and drew a sketch map, which was then deposited to the Lands Office for processing (Okoth-Ogendo, 1991).

The settlers started by acquiring land along the railway and near Nairobi before spreading outwards (Sorrenson, 1967). During the construction of the railway, engineers had decided to create a “mid-point” at Nairobi, which in Maasai language can translate as “a place of cool waters”. At the same time, Nairobi is approximately 1700 meters above sea level, with a cool climate and rich soils that were favourable to the settlers (Sorrenson, 1968). To this end, most of the tribes around Nairobi, especially the Kikuyu people were displaced to make room for the settlers (Sorrenson, 1967). In some cases, “military” type operations were used to subdue the locals to make room for settlers as described below.

They [Kikuyu] also resisted the introduction of British administration – at least until they were subdued by a series of para-military operations … by burning their huts, looting their crops and rounding up their cattle … they could no longer resist the alienation of their land (Sorrenson, 1967, pp. 16–17).

Among the Maasai people, Europeans acquired land by allegedly signing two agreements, one in 1904 and another in 1911 (Hughes, 2006; Mwangi, 2007a). In the pre-colonial era, the Maasai held a vast territory in the Rift Valley and Highlands, in which they practised nomadic pastoralism (Spear and Waller, 1993). In 1904, the Protectorate administrators proposed that the Maasai should be moved from parts of their land into two separate reserves, one in the North at a place called Laikipia and another in the South on the Kenya – Tanzania border at a place which is today known as Kajiado District as shown in Figure 4(Hughes, 2006). A few administrators held meetings with a Maasai ritual leader known as Prophet Olonana and some of his peers to discuss the possibilities of the move (Hughes, 2006). At this point it is worth noting that Olonana’s father, Mbatian, who was also a Maasai Prophet foretold of the coming of the Europeans in the form of “white birds in a dream” and had warned of possible negative consequences of resistance (Hughes, 2006, p. 27). After several meetings, Olonana and his
peers allegedly placed their thumbprints on a document and agreed to move into the two reserves, as shown in more detail in the following quotation.

The decision to remove the Maasai from the Rift Valley disposed of one of the most serious obstacles [to the settlers]… Lansdowne gave his blessing to the 1904 Maasai agreement, signed in August … the Maasai signatories were Olonana, Masikonde and 18 representatives of eight sections, 12 of them il-aiguenak, including Ole Gilisho. This is important because it implicitly recognised the authority and representatives of the age-set spokesmen. The Loitai were said to be represented, but none actually put their mark to this document. The signatories agreed to vacate the whole of the Rift Valley and move into two reserves – linked by a connecting road – which were promised in perpetuity. The Purko, Keekonyokie, Loitai, Damat and Laitutok (Laitayiok?) sections were to move to Laikipia, while the Kaputei, Matapato, Loodokilani and Sikirari were to move to the south. A sacred site on the Kinangop in the Aberdares, where circumcision and other ceremonies were traditionally held, was to be retained for Maasai use (Hughes, 2006, pp. 33–34).

In 1908, the administrators started plotting how to move the Maasai from the Northern Reserve into an extended Southern Reserve to make room for more settlers (Hughes, 2006). Officials such as Herbert McClure, Hollis and Bagge made a tour of the Southern Reserve in order to establish possibilities of extension, in which they reported that the reserve had a water shortage that could be remedied by irrigation (Hughes, 2006, p. 38). Similarly, during the meeting with Olonana, one of his peers, “Ole Gilisho, the one dissenting voice, made it very clear that he now opposed the move, because the proposed territory was not large enough and lacked sufficient water” (Hughes, 2006, p. 43). Nonetheless, after a series of meetings, the Maasai are said to have set their thumbprints on an agreement in which they agreed to vacate the Laikipia Reserve and move in the extended reserve in the South as shown in Figure (Hughes, 2006, p. 49). In June 1911, the administrators moved the Maasai South through a move in which Charles Miller said, ‘Napoleon’s retreat from Moscow may have been a dress parade by comparison” (Hughes, 2006, p. 50). Planned routes were forgotten as approximately 10,000 Maasai families and their livestock were moved south. Thus, the British acquired the Northern Reserve and added it to what by then was being called the “White Highlands” (Hughes, 2006; Sorrenson, 1968).
Figure 4 A picture of Olonana with Sir Arthur Hardinge, left, and other colonial administrators⁴

Figure 5 A map showing changes in Maasai territory after the 1904 agreement⁵

⁴Source, Sorrenson, (1968, p. 53).
⁵Source, Hughes, (2006, p. xviii)
Figure 6 A map showing changes in Maasai territory after the 1911 agreement⁶

⁶Source, Hughes, (2006, p. xix)
4.3 Introduction of the Trust Land system

This section will describe how the Trust Land system was introduced in the country as a whole, after which explanations will be provided on implementation among the Pokot people.

4.3.1 In the country as a whole

The Trust Land system was first introduced in the form of Native Reserves probably as a means of managing constant agitation for land among the Africans (Okoth-Ogendo, 1991; Sorrenson, 1967). In 1921, a political body known as the Young Kikuyu Association (YKA) was formed as a means of making demands for land, reduction of taxes and closure of labour camps among other issues (Furedi, 1973; Ochieng, 1985). YKA was led by Harry Thuku, a Kikuyu, who had been trained at Kambui Gospel Mission before he became a typesetter for the Leader, a settler magazine. Harry Thuku led several demonstrations against the colonial administration, which led to his arrest in March 1922 (Furedi, 1973). By that time, Kenya had been converted from a Protectorate into a British Crown Colony in 1920 (Ochieng, 1985). The agitation for land and other African grievances were also agitated by the Young Kavirondo Association (also YKA), which had been formed by Luo people who had been educated by missionaries. An interesting aspect of the agitation is that the Luo people were making demands for individual titles, possibly as a means of securing land from further alienation from European settlers as shown by the quotation below.

The Young Kavirondo Association, a political pressure group, was formed in 1921 under the leadership of Jonathan Okwiri, Benjamin Owuor and Simeon Nyende, all ‘Mission Boys’… On 7 February 1922, at a meeting at Nyahera, the Senior Commissioner received a memorandum from the Association outlining the grievances of the members. The memorandum demanded the abolition of the Native Registration system and the system of central labour camps; it demanded the reduction of the Hut and Poll Tax, the increase of the Chiefs pay, and the appointment of a Paramount Chief for the District. What was even more revolutionary for the time, the Association demanded individual title deeds for the African reserves (Ogot, 1963, pp. 261–262).

After the colonial government banned the Young Kikuyu Association, other missionary trained leaders such as James Beauttah, Joseph Kang’ethe and Jomo Kenyatta (who later became the first President of Kenya), formed the Kikuyu Central Association (KCA), which also continued bombarding the administration with land grievances (Ochieng, 1985). The Maasai also staged several uprisings as a means of attempting to get some of their land back (Hughes, 2006). Similarly, the Pokot people had grievances concerning land and taxation (Nangulu et al., 2001).
Due to agitations by local communities, the colonial administration had to devise a means of creating law and order, especially as regards further alienation of land for settlers (Okoth-Ogendo, 1991). The 1902 Crown Lands Ordinance was amended in 1915 to accommodate formal creation of Native Reserves (Okoth-Ogendo, 1991, p. 54). The amendments in the Ordinance enabled the administration to demarcate Native Reserves and to publish boundaries in the Official Gazette as a means of limiting further alienation of land for settlers (Okoth-Ogendo, 1991). In essence, the Native Reserve was supposed to be for locals living within the gazetted boundaries only, hence forming exclusive property rights that outsiders were not supposed to violate (Okoth-Ogendo, 1991).

The colonial administration also set up various commissions to look into African land grievances. The Ormsby-Gore Commission was set up between 1924-25 and the Hilton Young Commission met between 1927-29 (Sorrenson, 1967). The most significant recommendations in the African land seem to have come from the Kenya Land Commissioner, 1932, which was also known as the Carter Commission, after its chair, Sir Morris Carter (Mwangi, 2007b; Okoth-Ogendo, 1991). The Carter Commission was supposed to investigate the following main factors:

- The needs of the native population, present and prospective, with respect to land, whether to be held on tribal or individual tenure,

- the desirability and practicability of setting aside further areas of land for the present or future occupation of communities, bodies or individual natives of recognised tribes, or detribalised natives,

- the nature and extent of the claims exerted by natives over land alienated to non-natives, and the making of recommendations for adequate settlement of such claims whether by legislation or otherwise,

- the area of land within which persons of European descent are to have privileged position in accordance with the White Paper of 1923 (Okoth-Ogendo, 1991, p. 59).

According to Okoth-Ogendo, the Carter Commission made some of the following main recommendations. The local communities were not expected to make any claims to land in the areas that had already been granted to Europeans in the “White Highlands”. However, if certain groups of people made a claim for land in the highlands, if necessary they were to be compensated by being granted alternative parcels of land. The Commission advised that the settlers should be given assurance that their land rights would not be violated by the government (Okoth-Ogendo, 1991, p. 59). The Commission also recommended that “each reserve be built
on the basis of its native custom, but that it should be guided toward private tenure, proceeding through the group, the family and toward individual holding” (Mwangi, 2007b, p. 69). Hence, the recommendations of the Carter Commission were influential in future introduction of group ranches for the Maasai, and individual titles for high agricultural potential reserves as will be discussed in a subsequent part of this chapter. During field inquiries by the Kenya Land Commission, various tribes complained about exclusive “tribe” boundaries (reserves) that had been created by the government.

Antipathy toward government policies was expressed with words as well as with things. Consider, for example, the testimonies of Pokot elders before the 1933 Kenya Land Commission convened to assess competing territorial claims. “All is well in our land except the boundary,” observed a man from the western part of the district. “The land is spoilt because we have no room,” another man remarked. “Before the government arrived,” a third man explained, “we went where we liked. The Government marked the boundary and prevented us from crossing it. Government found us round about Kitale and said you are strangers, you must go. When we were sent off we went into the plains and went to Kaddam. We were then told that the area about Kaddam belonged to the Karamoja. We were given an area no bigger than the table [at which the commission members were seated]” (Bianco, 1996, pp. 33–34).

Based on the quotation above, the Native Reserve boundaries, which were later converted into Trust Land boundaries were supposed to be “exclusive” property of the group of people living within the boundaries. The aspect of exclusive reserves can be emphasised by the following quotation. This aspect of exclusivity will be explored in more detail in chapter five.

Imprecisely drawn boundaries hardened and became policed borders that divided rather than united communities on either side. This tightening was partly in response to colonial administrative policies and to the creation of legally defined and ethnically exclusive Reserves … official policy until 1940 was to exclude aliens from the Maasai Reserve, or at least to keep them to an ‘irreducible minimum’ … and remove the Kikuyu who had entered Masailand without permission since the Maasai move from Laikipia (Spear and Waller, 1993, p. 227 and 234).

The recommendations of the Carter Commission were implemented through the Native Lands Trust Ordinance, 1938 (Okoth-Ogendo, 1991, p. 59). “All areas formerly known as ‘Native Reserves’ were re-designated ‘native lands’ and removed from the Crown Lands Ordinance, 1915. The Native Lands were placed under a “Native Lands Trust Board”, headed by the Governor and consisting of ten other persons. An advisory board was also set up, which
consisted of the Provincial Commissioner (PC) as the Chairperson, the District Commissioner (DC), and nominated European representatives and where possible an African. The main mandate of the Native Lands Trust Board was to manage and control land issues in land held by the natives (Okoth-Ogendo, 1991, pp. 56–57). After independence in 1963, the Native Lands Trust Ordinance was amended and reintroduced as the Trust Lands Act, Chapter 288, of 1970, which will be the major focus of the study on changes in communal tenure among the Pokot people.

4.3.2 Among the Pokot people

Among the Pokot people, Trust Lands were introduced in a similar way to the other tribes. As already shown in a previous quotation, the Pokot people complained to the Morris Carter Commission about their land that had been taken by settlers at a place known as Kitale and restrictions that had been imposed on them against crossing into Trust land areas that had been demarcated for the Turkana people in Northern Kenya and the Karamoja people in Uganda (Bianco, 1996; Nangulu et al., 2001). According to Nangulu, the first contact between the Pokot and the British seems to have occurred at around 1908 when the British established an outpost on the boundary of the Kerio Valley as a means of controlling the Pokot and Turkana people as well as other tribes in the area. In 1910, the outpost was moved to Nyabatok where it remained until about 1913 as the administrative centre of Turkana District. In 1914, the administration established another outpost at place known as Maerich, which is the present day market centre of Wakor in Sigor Division. In 1918, West Pokot District was created and later gazetted as a Native Reserve for the Pokot people in that area. At that time, West Pokot was administered as part of Uganda, while other territories east of a place called Naivasha in the Rift Valley were under the Kenya colony. However, in order to bring the railway under one administrative unit, West Pokot and other areas were removed from Uganda and placed under the Kenya colony. Initially an administrative station for West Pokot was created at Kacheliaba, but was moved in 1930 to Kapenguria, which is still the administrative centre of the District today (Nangulu et al., 2001; Patterson, 1969).

In West Pokot District, the people were expected to pay “Native Hut and Poll Tax” like other parts of the colony (Nangulu et al., 2001, p. 27). In the colony, locals were expected to pay a “hut tax” for every dwelling (hut) that had been constructed within a homestead. As will be seen in chapter five, this could be very expensive in African communities in which people built more than one hut within a homestead, for various members of the extended family. “A poll tax at the prescribed rate was payable by all able-bodied African males who were not liable to pay hut tax” and were to be collected by District Officers (DOs) (Nangulu et al., 2001, p. 27). Due to the taxes
and land grievances, the Pokot also agitated against the colonial government (Nangulu et al., 2001; Patterson, 1969).

To some degree, the colonial administration did not have as much interference with Pokot land issues as they did with other tribes that within the immediate vicinity of the railway and “White Highlands”. The Pokot people live in Northern parts of Kenya which are often arid and semi-arid (Bollig, 2010). Hence, the land and climate did not appear to be suitable for the large scale commercial agriculture that the settlers were interested in. However, the changes which have occurred in communal tenure among the Pokot people after introduction of Trust Land areas will be explored in chapter five and six. Apart from the Trust Land system, the colonial government also introduced individual registration as described in the next section.

4.4 Introduction of Individual registration

4.4.1 In the country as a whole

In some areas, colonial administrators later converted Trust Lands (Native Reserves) into individual property units. After World War Two the Africans had renewed vigour to agitate for their land, possibly because some of them had fought side by side with the British soldiers and realized that they were also vulnerable and because the conditions in the reserves had worsened. Some reserves, such as those held by the Kikuyu people, were overpopulated partly because missionary hospitals had controlled diseases that formerly decimated tribes and the people were crammed in a small space (Sorrenson, 1967).

The Africans also started agitating not only for land but for independence from the British. Various political parties were set up as a means of agitating for independence. In most cases, the parties were led by people who had been educated by missionaries. Agitation by Africans for political representation led to the inclusion of Eliud Mathu, a Kikuyu teacher, into the Legislative Council (Ochieng, 1985; Sorrenson, 1967). In 1945, the African Study Union was formed, under the leadership of Jomo Kenyatta, and later changed its name to the Kenya Africa Union (KAU). Among the Luo, the Young Kavirondo Association was transformed into the Kavirondo Taxpayers Welfare Association (KTWA) which became popularly known as Piny Owacho, ‘the people have spoken’ (Ogot, 1963, p. 264). However, KTWA which had Archdeacon Owen as the President, was soon seen as a political “mouth piece” of the colonial administration and was abandoned in favour of other movements such as the Kenya African Union, the Ramogi African Welfare Association, the Nyanza Ex-Soldiers Association and the Luo Union (Ogot, 1963). In 1960, KAU changed its name to the Kenya Africa National Union (KANU) through which Kenya obtained independence in 1963 (Ochieng, 1985; Ogot, 1963).
In Central Kenya, the *Mau Mau* revolution also erupted among the Kikuyu people and other neighbouring tribes, in which the locals held armed resistance towards the settlers (Maloba, 1993; Sorrenson, 1967). The colonial government declared a State of Emergency in 1952 as a means of containing the *Mau Mau* revolution (Maloba, 1993; Sorrenson, 1967).

Due to the various political agitations the colonial government had to find a solution to the African land grievances. Initial government sentiments seemed to lean towards strengthening communal tenure as opposed to individualisation. In 1945, a committee led by Lord Hailey recommended that the government should reinforce communal land holding as a means of protecting Africans from the possible negative consequences of individualisation (Sorrenson, 1967). Similarly, another administrator known as Humphrey who did not favour individualisation wrote a memorandum in which he claimed that it was the moral duty of government to “restore communal feelings” as a means of stopping sentiments of individualisation that were growing among some of the locals who were in close contact with Europeans (Sorrenson, 1967, p. 22). Additionally, Lambert and Wyn-Harris who were also administrators supported reinforcement of communal tenure in which land was vested in a kinship group in which individuals had inalienable rights (Sorrenson, 1967, p. 59).

A change in government attitude towards individualisation seems to have started in 1948 when a meeting of Provincial Commissioners recommended that there was a need to explore possibilities of granting individual titles to some Africans (Sorrenson, 1967). According to Sorrenson, recommendations were made that maybe individual titles could be issued to Africans through the setting apart procedures that had been provided for in the Native Lands Trust Ordinance, ideally, in the setting apart procedures, the government could take some land from the reserves for public purposes such as development of roads, schools and hospitals. However, after some investigations, the setting apart procedure was found to be too cumbersome for individualisation of land rights. Nonetheless, the government was “faced with the choice of ‘clinging to the ideal of communal ownership … or, on the other hand, giving impetus towards individual tenure, the trend towards which was already evident amongst the Kikuyu” (Sorrenson, 1967, p. 61). As described earlier, the Kenya Land Commission had also recommended that communal tenure should be guided gradually towards individual land holdings (Mwangi, 2007b, p. 69).

Apart from the Carter Commission, the East Africa Royal Commission, 1952, also recommended individual registration in high agricultural potential areas, among other aspects (Mwangi, 2007b, p. 74). The Commission was also referred to as the Dow Commission, after...
its chairperson, Sir Hugh Dow. The main mandate of the commission was to evaluate feasibility of development among Africans through “better farming” and also to look into land tenure issues (Mwangi, 2007b). In “better farming”, the Africans were to be allowed to grow cash crops such as tea and coffee, and were also expected to participate in soil conservation by planting trees and building gabions (Lawrance et al., 1967). Among the Luo, “better farming” appears to have been first introduced at a place called Nyakach. Among the Pokot people, “better farming” was also introduced in various places and also involved destocking and the use of farmyard manure to improve agricultural productivity (Nangulu et al., 2001). In the Maasai areas, the Dow Commission proposed introduction of collective rights with regulations on the number of livestock and rotational grazing techniques. The commission also recommended individual registration for Africans living in high agricultural potential areas (Mwangi, 2007b, pp. 74–75).

Individual land registration for Africans was also supported by the Swynnerton Plan, 1955. The plan was named after the Director for Agriculture who was given the mandate to find ways of increasing agricultural productivity among the Africans and possible solutions for the land grievances (Swynnerton, 1955). The Swynnerton plan “emphasised individual land holding and individual enterprise, since development based on communal land tenures were deemed to have failed” (Mwangi, 2007b, p. 75). Among the pastoral communities, the plan recommended increased livestock marketing, controlled grazing, improved water supply and better treatment of diseases among other factors.

Due to the recommendations by various commissions and agitation for land among various tribes, the administration had to come up with a solution for possible individualisation of land among the local tribes. The Provincial Commissioners asked D.J. Penwill to draft rules that could be used for individual land registration among some of the tribes (Sorrenson, 1967, p. 66). Initially, an administrator called Lambert, who was concerned about the direct application of European legal concepts on African land had recommended that “special titles” should be introduced instead of the normal freehold and leasehold titles that were held by settlers (Sorrenson, 1967). According to Simpson, in the Penwill draft rules, Africans in the colony could apply for rights of occupancy to a local land board. The applicant was required to obtain a certificate from the Department of Agriculture as proof that the land they had formed an economically viable unit. They had to agree to follow agricultural rules of “good husbandry” and show proof that they were owners of the land according to custom. The application was to be advertised for six months, after which if there was no challenge, certificates of title would be awarded. If there was a challenge, the matter was to be solved by local elders. “Thereafter
the title was to be regarded as indefeasible against previous claims.” The allocated rights were to be “perpetual, inheritable and transferable” (Sorrenson, 1967, p. 66). According to Sorrenson, the Penwill rules also stated that there were to be restrictions on transfer of land, and land was not supposed to be subdivided, mortgaged or rented out without permission from a land control board. Possibly due to these recommendations by Penwill, land boards were introduced to control land dealings in rural areas as will be described in subsequent parts of this chapter.

In 1952, the Provincial Commissioners asked the Legal Department to give their opinion about the possibility of introducing individual registration based on the Penwill draft rules (Sorrenson, 1967, p. 67). According to the Legal Department, the Native Lands Trust Ordinance had to be amended if the rules were to have any effect. In essence, the Native Land Trust Ordinance vested land held by natives in the Native Lands Trust Boards, and laid down a principle that the land was held according to custom and hence could not be “injected” with European legal concepts. Thus, according to Mills-Owens, a Legal Draftsman, “there could be no half-way house between the continuation of native law and custom and the introduction of the English law relating to title and the disposition of land” (Sorrenson, 1967, p. 67). In this regard, the government had to decide whether to either amend the Ordinance and replace the words “native law and custom” with “substantive law” as was used in the setter areas, or live things as they were (Sorrenson, 1967).

Despite legal challenges, due to mounting pressure, particularly due to Mau Mau, the government continue to seek possible ways of using the Penwill draft rules for registration (Sorrenson, 1967). According to Sorrenson, in 1953, C.M. Johnston asked Windley to introduce the Penwill rules as a means of issuing individual titles, especially among the Kikuyu people. In the same year, S.R. Simpson who was the Colonial Office land tenure specialist and former Land Registrar in Sudan, arrived in the colony and was requested to look at the draft rules. In Simpson’s opinion, the rules were not suitable and had to be amended before implementation. Simpson recommended that somebody should travel to Sudan and study the registration system which had been implemented there. He also recommended that two sets of rules should be introduced, “one to regulate settlement (the adjudication of existing rights, prior to consolidation) and registration; the other to control transactions in registered land” (Sorrenson, 1967, p. 123).

The responsibility of amending the draft rules was placed in the hands of a Legal Officer known as M.N. Evans (Sorrenson, 1967). Evans visited Sudan to study a registration system that had already been implemented there. Based on observations and Simpson’s advice, Evans
recommended systematic adjudication as opposed to sporadic adjudication which had been deemed to be too slow in Sudan. Evans presented his draft rules in a meeting which was attended by representatives from the Legal Department, the Lands Department, Treasury and the Department of Agriculture. In the meeting, the Attorney-General, requested to be assured in writing that custom in the Native Reserves was to be replaced by substantive law which was in operation in the European parts of the colony. Representatives from Treasury wanted the government to consider long term financial and political effects of introducing individual tenure to Africans (Sorrenson, 1967). In the meeting, recommendations were made that after registration, jurisdiction of the African Courts would be taken over by Resident Magistrate Courts where possible. The registered proprietors were to be granted indefeasible title with powers to bequeath, assign, mortgage, and sublet their land. Local land boards were also to be created as a means of controlling subdivisions, land transfers and, in case of intestacy, succession (Sorrenson, 1967).

After a meeting that was held in Arusha Tanzania, a working party was established to ‘clean up’ the Evans draft rules and to present a bill to the Legislative Council (Sorrenson, 1967). The working party which was appointed in March 1957 was required to draft a bill which would cover adjudication of land rights, consolidation, methods of survey, the nature of titles to be issued, succession and transfers. However, the working party was unsure of the type of boundaries to implement among the natives. Simpson, who was part of the working party, recommended that instead of using high accuracy surveys, the boundaries could be based on physical features such as hedges which had been used in the English System (Sorrenson, 1967).

The legislation was to apply to all Native Reserves. It was obviously too expensive to insist on a full cadastral survey for each family land holding and was desirable to complete the registration of titles as quickly as possible. Simpson further recommended that the maps based on physical boundaries should be replaced in future by accurate surveys, based on aerial triangulation. A method was developed for demarcating boundaries using hedges after which aerial photographs were flown at a scale of 1: 25,000 and later enlarged to scale of 1:12500 to form Photo Index Diagrams (PIDs), which were later converted into Registry Index Maps (RIMs) (Adams, 1969; Caukwell, 1977; Mulaku, 1995). The working party also stated that once land was registered it would be removed from the domain of the Native Lands Trust Ordinance and brought under substantive law (Sorrenson, 1967).

The bill was passed as the Native Lands Registration Ordinance of 1959 which was later amended to reflect aspects of adjudication, registration and control of transactions. After
independence in 1963, the Native Lands Registration Ordinance was repealed and replaced by Registered Land Act, 1963, and its adjudication and consolidation aspects were retained in a separate Act known as the Land Adjudication Act, 1964. Subsequently, components related to adjudication were separated into a Land Adjudication Act, 1968, and consolidation aspects taken under land Consolidation Act, 1968 (Coldham, 1978a).

A Land Control Act was also introduced as a means of controlling subdivisions, transactions and succession in areas where individual registration had been introduced for Africans (Coldham, 1978b). In 1957 a working party which had been appointed to look into African land questions recommended that legislation should be introduced for controlling land dealings among the Africans (Coldham, 1978b). As a result, the Land Control (Native Lands) Ordinance was passed in 1959, alongside the Native Lands Registration Ordinance which was mentioned above. In 1961, the Land Control (Native Lands) Ordinance was amended and reintroduced as the Land Control (Special Areas) Regulations. The Ordinance was revised again and reintroduced as the Land Control Act, 1967 (Coldham, 1979), which has been subsequently revised several times (Republic of Kenya, 2010). In the Land Control Act, the government is supposed to have Divisional and Provincial Land Control Boards. The Divisional land control boards usually consist of a District Officer (DO) as the Chairman, two public officers appointed by the Provincial Commissioner (PC) and between 6-15 other members who are appointed by the PC, who are normally required to be residents within the area in which the board has jurisdiction. The Divisional board is supposed to “grant or refuse consent to all dispositions” and “comply with any directives from the Provincial Board” (Okoth-Ogendo, 1991, p. 75).

The Provincial Land Control Boards usually consist of a PC as the Chairperson, two public officers appointed by the PC and about ten other persons appointed by the PC from a panel compiled by the DC (Okoth-Ogendo, 1991, p. 75). The main functions of the Provincial board are to determine appeals from the Divisional boards and to determine the size of land which is considered to be economically viable in an area (Okoth-Ogendo, 1991, p. 75).

In the development of a National Land Policy as will be described towards the end of this chapter, The Land Control Act was retained, through which decisions regarding land should be made based on the following main economic considerations:

9. (1) In deciding whether to grant or refuse consent in respect of a controlled transaction, a land control board shall-
(a) have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement of standards of good husbandry within the land control area;

(b) act on the principle that consent ought generally to be refused where -

(i) the person to whom the land is to be disposed of -

(a) is unlikely to farm the land well or to develop it adequately; or

(b) is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or

(c) already has sufficient agricultural land; or

(ii) the person to whom the share is to be disposed of -

(a) already has sufficient shares in a private company or co-operative society owning agricultural land; or

(b) would, by acquiring the share, be likely to bring about the transfer of the control of the company or society from one person to another and the transfer would be likely to lower the standards of good husbandry on the land; or

(iii) the terms and conditions of the transaction (including the price to be paid) are markedly unfair or disadvantageous to one of the parties to the transaction; or

(iv) in the case of the division of land into two or more parcels, the division would be likely to reduce the productivity of the land (Republic of Kenya, 2010, p. 9)

As a measure of legal reform, consolidation and registration were designed to end the uncertainty of customary tenure, already considerably modified by fifty years of European contact, and to provide an indefeasible title guaranteed by the State. This in turn was meant to provide the basis for an agricultural revolution: the consolidation of scattered holdings was expected to facilitate the planting of cash crops and rapid improvements in the technique of farming, and issuing of indefeasible title was to provide security from litigation and improving access to credit. The final objective though not publicised, was essentially political: to create a stable middle class built around African loyalists, who were seen as the natural leaders of the future (Sorrenson, 1967).

In December, 1963, Kenya became independent, but this did not result in any deceleration of the land consolidation and registration programme. On the contrary, the programme is seen as
playing an important role in the development of rural Kenya, and it has been implemented with
great vigour. Although the programme was originally devised in response to a very specific
situation in the Kikuyu Land Unit, it now covers virtually all the agricultural areas of the former
Native Lands and has recently been extended to the pastoral areas of Maasailand. The benefits
of the programme are almost invariably stated in economic terms, but an examination of the
validity of such claims is outside the scope of this thesis. Here it is proposed to consider the
way in which customary land rights are dealt with during the land adjudication process; as the
registration of land operates to replace customary law by statute (in particular the Registered
Land Act, 1963) as the relevant law, the effective protection of customary rights obviously
becomes a serious matter.

4.4.2 Among the Luo people
Among the Luo people, individual registration was based on principles that had been
Consolidation was introduced among the Luo people only in the Nyabondo area (Coldham,
1978a). In other areas, probably due to the urgency of registration, only adjudication and
registration seems to have been carried out.

The process which was used for adjudication can be described as follows. The Minister of Lands
was given powers to declare an area to be an adjudication section, and to appoint adjudication
officials. The officials were supposed to include an adjudication officer, demarcation officer,
survey officers, and recording officers (Coldham, 1978a; Republic of Kenya, 1977). The
adjudication team was required to fix a period within which people could claim interests to land
by giving notice to the recording officer, either in writing or in person. With the help of District
Commissioners, the adjudication officer was required to establish an adjudication committee of
not less than ten people in the area to be adjudicated. Usually, the committee was made up of
local people who were familiar with customary claims to land in the area. If there were any
special discrepancies, the Minister could appoint a special arbitration board of eight persons to
review the matter.

After claims were made to the recording officer, the demarcation officer was supposed to make
arrangements for demarcating land. Usually, the adjudication committee, together with other
government officials such as Chiefs, District Officers and Divisional Officers walked along
boundaries and encouraged people to plant hedges where necessary. After planting hedges, the
Survey Department flew aerial photographs and created Preliminary Index Diagrams (PIDs)
which were later converted into Registry Index Maps (RIMs), which were used for registration
(Adams, 1969; Caukwell, 1977; Mulaku, 1995). In some cases the demarcation officers and survey officers used plane survey techniques to map the boundaries.

After the recording and demarcation process, an adjudication register would be prepared. The recording officer would produce a list of owners related to Land Registration Numbers on the demarcation map. The demarcation map (in some cases RIM), together with the adjudication record (list of owners) were together known as the adjudication register (Republic of Kenya, 1977). The adjudication register was advertised in public for sixty days, during which any person could object to its contents. After the time for objections was over, the land adjudication officer was required to prepare a “No objections register” and present it to the Director of Land Adjudication (Republic of Kenya, 1977). The Director would declare the register to be final, and forward it to a Chief Land Registrar who would convert it into a final and authoritative register of land ownership in the section. The rights of a registered person were final and could not be defeated by any other rights apart from those in the Act, including communal land rights (Okoth-Ogendo, 1986; Republic of Kenya, 1963, sec. 28).

4.5 Introduction of group ranches

Group ranches were initially introduced in the form of grazing schemes (Coldham, 1982; Davis, 1970; Mwangi, 2007b). As described earlier, the Maasai people had signed treaties with the British which saw them lose large tracts of land and be confined to a Southern Reserve (Hughes, 2006). At around 1932, the colonial administrators became concerned about the possible negative effects of large herds held by tribes such as the Maasai (Mwangi, 2007b, p. 67). The large herds could contribute towards soil erosion, degradation of pasture for European livestock, and possibly spread diseases such as rinderpest to settlers livestock (Davis, 1970; Mwangi, 2007b, p. 68). The Carter Commission also proposed that the Native Reserves should be guided slowly towards individual registration in areas where agricultural potential was high, and grazing schemes in the plains where communities practised nomadic pastoralism (Mwangi, 2007b, p. 69 and 72). The grazing schemes were implemented under the African Land Development Organization (ALDEV) (Lawrance et al., 1967; Mwangi, 2007b). ALDEV introduced grazing schemes primarily as a means of improving pastoralism among tribes such as the Maasai, by digging water holes in “ranch-like” units, introducing regular veterinary visits and destocking when necessary (Mwangi, 2007b, pp. 72–73).

A model grazing scheme was set up in a place called Konza in 1946 as a means of showing the Maasai people how to improve livestock production (Coldham, 1982; Rutten, 1992). The chosen Maasai families took up residence in the Konza ranch in January 1949, and agreed to
follow proposed plans such as using cattle dips on a regular basis, adhering a rotational grazing pattern, and restricting livestock numbers (Mwangi, 2007b). Initially, the Konza scheme seemed to be working, but as soon as drought set in, most of the families moved out of the boundaries in search of pasture (Mwangi, 2007b; Rutten, 1992). Nonetheless, the scheme had planted “the seeds of change” in the Maasai mind on the possibilities of a sedentary life (Mwangi, 2007b, p. 73). Introduction of the grazing schemes was also supported by the East Africa Royal Commission and Swynnerton plan. Based on recommendations of the Commission and Swynnerton, individual ranches were introduced for some prominent members of the Maasai tribe as a means of demonstrating the benefits of a well-managed ranch (Mwangi, 2007b).

The Maasai expressed their concerns about creation of individual ranches that led towards establishment of group ranches. Many Maasai people complained that allocation of large tracts of land to individuals would limit movements and increase landlessness (Mwangi, 2007b, p. 77). The concerns were highlighted in the Lawrance Report on 1966 which proposed creation of group ranches (Lawrance et al., 1967). The Land Adjudication Act of 1968, enabled establishment of group ranches among nomadic tribes such as the Maasai. In order to adjudicate rights to land, groups were incorporated under the Land (Group Representatives) Act of 1968, in which between 3 – 10 representatives were selected for each group ranch (Coldham, 1982; Rutten, 1992).

Under the Land (Group Representatives) Act, every member of the group ranch is deemed to share in the ownership of group land in equal, undivided shares. And each is entitled to reside in group land with family and dependents … the group representatives are also authorized to hold property on behalf of, and to act on behalf of and for collective benefit of all ranch members. The Act empowers the group to craft its own rules regarding the running of its own affairs such as procedures for administration of its property, the registration of new members, and the disbursement of funds for group projects (Mwangi, 2007b, p. 79).

Despite the potential of group ranches, today, most of the original ranches have been subdivided. There are various factors that contributed towards subdivision of group ranches (Galaty, 1992; Mwangi, 2007a; Rutten, 1992). In summary, between 1983 and 1989, the then President, Daniel Moi, stated several times in public meetings that the Maasai should subdivide their ranches into individual property units (Mwangi, 2007a, p. 92). The President may have made the recommendations based on influence from within the Maasai community (Mwangi, 2007a, p. 93), and could have also been promoting policies such as those of the 1975 World
Bank report which recommended that commons should be subdivided into individual units (Deininger and Binswanger, 1999, p. 248). The Maasai also seem to have decided to subdivide because as their population increased, the share of each person increasingly diminished (Rutten, 1992). Further, the Maasai in group ranches may have envied those in individual ranches and other tribes which had individual registration and which were generally performing better economically, hence decided to subdivide (Mwangi, 2007a; Rutten, 1992). Today, approximately 72 percent of the original ranches have been subdivided (Kimani and Pickard, 1998; Mwangi, 2007b).

4.6 Contemporary extent of the three registration systems

As described above, the Kenya government has continued with the process of converting some of the Trust Land areas into individual registration. Concurrently, as described above, most group ranches have been subdivided into individual units. Thus, within Kenya, the individual, group ranch and Trust Land systems exist to varying degrees. According to data collected from the Ministry of Lands during the field work for this research, approximately 1,700,000 parcels of land had been registered to individuals by January 2011, and the parcels covered approximately 13 percent of the total land area of the country. About 31 out of 43 group ranches have been subdivided. Thus, as stated above, only approximately 28 percent of the original ranches have been retained, covering about 6 percent of the total land area of the country. Thus, Trust Land areas cover approximately 81 percent of the total land area of Kenya. The extent of the three registration systems is summarised in Table 3 following.
Table 3 Extent of the three land registration systems in Kenya by January 2012

<table>
<thead>
<tr>
<th>Registration system</th>
<th>Approximate area of country covered by the system</th>
<th>Approximate percentage area of country covered by the individual system</th>
<th>Approximate number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>78,000 km²</td>
<td>13 %</td>
<td>1,700,000 parcels</td>
</tr>
<tr>
<td>Group ranch</td>
<td>33,100 km² (before subdivisions started)</td>
<td>6 %</td>
<td>43 original ranches</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>31 subdivided</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>12 remaining</td>
</tr>
<tr>
<td>Trust Land</td>
<td>468,900 km²</td>
<td>81 %</td>
<td>Part of country which is not under individual or group registration</td>
</tr>
</tbody>
</table>

There are various legal, organizational and technical challenges that have contributed to the low extent of individual registration systems (Mwenda, 2001; Njuguna and Baya, 2001). In terms of legal challenges, there are multiple Acts that govern land issues, which are sometimes difficult to understand.

Much of the law governing the ownership and use of land in Kenya is essentially English land law simply extended to Kenya in colonial times, and others passed around the time of independence … Although fairly well documented, these laws…are often complex…lack uniformity … Sometimes, even the professionals in the legal and landed professions find them difficult to decipher (Njuguna and Baya, 2001, pp. 10–11).

As proposed in this research, the formal laws are normally incongruent with communal tenure and have in some cases led to lengthy litigations which slow down the process of registration.

The present legal and institutional framework of land tenure, land use, and the system of acquisition and disposition of land rights which have been in place since the colonial times has brought about tension, strife and litigation in land matters (Njuguna and Baya, 2001, p. 1).

In terms of organizational challenges, the procedures for implementing registration appear to be lengthy and expensive for Kenya. According to Bromley (2005), most developing countries
normally have so many pressing needs that spending large sums on adjudication is seldom a priority.

In terms of technical challenges, most of the Registry Index Maps which were flown during the early days of registration have not been rectified, geodetic control points which are required for surveys are sparse, and District Offices usually do not have adequate numbers of trained staff and equipment to extend registration systems. The sparse geodetic network has been described as follows.

Most of the monuments in control network the country have been destroyed, creating a need for re-establishment of control in many parts of the country. It was estimated in 1990, that about 60% of monuments in the national control network in Kenya had been destroyed (Mwenda, 2001, p. 8).

The Kenya government has initiated various processes, such as implementation of a National Land Policy and amendment of land laws as described in the next section.

4.7 Amendments through a National Land Policy

Due to the various challenges, the Kenya government introduced a National Land Policy (NLP) in 2009, and amended land laws after the promulgation of a new Constitution in August 2010. There are multiple factors that led towards introduction of the NLP. First and foremost, there had been various violent conflicts, especially after elections, which were normally attribute to unsolved land grievances that started during the colonial era and were perpetuated by the independent Kenya governments (Klopp, 2000; Njogu, 2009; Oyugi, 1997). There was also constant Public outcry on illegal allocation of government land to private individuals through corruption and issues concerning inefficiencies in government Lands Offices (Ndungu, 2006; Njonjo, 2002; Southall, 2005).

The National Land Policy was crafted as a means of leading the country towards achieving “efficient, sustainable and equitable use of land for prosperity and posterity” (Republic of Kenya, 2009, p. xi). In the past, there have been complaints that government procedures are bureaucratic and inefficient (Njonjo, 2002). Similarly, misuse of powers by government officials in allocating land had also been raised in various quarters as a stumbling block to development (Southall, 2005). Hence, during the formulation of the NLP attempts were made to design a system of land administration and management that would provide the following main aspects as captured in the National Land Policy.

All citizens with the opportunity to access and beneficially occupy and use land;
Economically viable, socially equitable and environmentally sustainable allocation and use of land;

Efficient, effective and economical operation of land markets;

Efficient and effective utilization of land and land-based resources; and


The process with which the NLP was developed has been critiqued for being rushed and lacking in “deep redistributive land reform” (Manji, 2014, p. 124). During the time leading to the first and second readings of the Land Bill, the Land Registration Bill and the National Land Commission Bill, commentators struggled to find copies of the draft bill (Manji, 2014, p. 118). According to Manji, some documents were available for download from government websites. However, it was not clear which of the documents was the latest version of the bills. Further, members of a Land Committee that was charged with the aim of obtaining views from the public appear to have rushed their consultation process, possibly due to deadlines that had been imposed in the legal process, and do not seem to have adequately used the views of the public to amend the draft bills. In this regard, a section of The Standard Newspaper of April 8th 2014 held the following quotation.

Concerns have been raised over the manner in which the committee led by Reverend Mutava Musyimi conducted public hearings on the Bills with stakeholders accusing the committee of ineptitude and complacency. “In one of the public hearings, I was shocked that the committee arrived without copies of the bills and proceeded to tell the villagers to download them from the website,” says a senior member of a civil society organisation [who] cannot be named because he is still involved in the negotiations. “How do you say that in a village with no electricity [,] leave alone computers— it just shows the level of unpreparedness and casual manner in which the committee is handling the process,” he says. In other places the committee barely spent 15 minutes, leaving the venue of the meeting even before all stakeholders arrived. “Such actions raise the question whether what the committee will present before parliament truly reflects the wishes of the public,” he says.

The speed with which the Land Committee carried out its work appears to have been due to deadlines that had been set for enactment (Manji, 2014, p. 121). In Kenya, specific dates were imposed with which certain laws had to be enacted in the process of promulgating a new constitution, possibly, to “prevent legislative drift, as has occurred in other jurisdictions after
the promulgation of new constitutions” (Manji, 2014, p. 122). In this regard, the eighteen months which was allocated for formulating, debating and reviewing the new land laws appears to have been too short to allow appropriate solutions to land issues that started during the colonial era (McAuslan, 2013). Due to the tight timelines and other issues, some of the bills that were presented to the Kenya National Assembly have been stated as follows:

[According to some commentators] the weakness of the bills include incoherent drafting; widespread borrowing of the provisions of the land laws of other African countries without due attention to their relevance or suitability for Kenya; the failure to identify misconduct that the land laws needed to address; inconsistencies between the National Land Policy and the Constitution; and the failure to specify in detail the functions of devolved land administration bodies (Manji, 2014, p. 120).

The NLP seems to only enable “shallow” land reforms as opposed to “deep” land reforms (Manji, 2014, p. 124). In “deep” reforms, the aim is to “change the nature and foundations of land ownership by redistributing land from the wealthy to the poor and landless,” while “shallow” reform is “concerned solely with land administration and aims to wrest control over land from centralized and corrupt states”. The NLP appears to be geared towards “shallow” land reforms by improving land administration structures. The NLP has been structured in such a way that rights to allocate land that were previously held by a Commissioner of Lands have been transferred to a National Land Commission (NLC), as a means of possibly reducing irregular allocation of land that was witnessed in the past. The NLP also aims at modernizing key land administration aspects such as cadastral surveying and Land Information Management through computerization and adoption of new technology (Republic of Kenya, 2009, pp. 36–40). The NLP also aims at developing efficient land markets which is in consonance with most World Bank Policies on formalisation in Africa (Manji, 2014; Republic of Kenya, 2009), which have been criticized as being inappropriate for some parts of Africa (Bromley, 2009; Joireman, 2008; Sjaastad and Cousins, 2009). Thus, the NLP appears to uphold, most of the land tenure principles that were introduced by colonial and post-independence governments, as opposed to developing a new approach to registration which might be suitable for land issues in Kenya (Manji, 2014; McAuslan, 2013).

Despite the challenges, the NLP made some changes in which some new laws were introduced and a few old Acts of Parliament were repealed. The three new land laws are: the National Land Commission Act, 2012, the Land Registration Act, 2012 and the Land Act, 2012. The land laws that have been repealed are: the Indian Transfer of Property Act of 1882, the Government Lands Act, the Registration of Titles Act, the Registered Land Act, the Land Acquisition Act, the Land
Titles Act and the Way leave Act. Land laws that were in existence and have not been repealed include: the Sectional Properties Act, the Land Control Act, the Landlord and Tenant and the Distress for Rent Act (Republic of Kenya, 2009).

The NLP also changed names which were used for the various categories of land. Under the old laws, land in Kenya was generally classified as government land (held by State Institutions), Trust Land (held by County Councils for the people), and private land (registered to individuals or groups). Under the NLP, the categories above are now respectively referred to as Public Land, Community Land and Private Land (Republic of Kenya, 2009, p. 15). However, in this research, the terms individual and Trust Land are maintained because analysis is being based on the previous laws, since the old laws were in force when this research started, and the new laws are yet to have an impact on custom.

The NLP has also changed the land administration structure in Kenya. As stated earlier, a National Land Commission (NLC) has been introduced to take over some roles that were held by a Commissioner of Lands. However, it is still not clear to what extent the NLC and Minister of Lands share administrative duties. In summary, some of the main functions of the NLC have been outlined as follows in the Sessional Paper No.3 of 2009 on National Land Policy, p. 58.

Hold title to and manage public land on behalf of the State;

Establish the realization of the multiple values of land, namely, economic productivity, equity, environmental sustainability and conservation of national heritage;

Exercise the powers of compulsory acquisition and development control on behalf of the State and local authorities or governments;

Levy, collect and manage land tax revenues except rates which shall be collected by local authorities or governments;

The National Land Policy should also enable implementation of a devolved system of land administration. The National Land Commission (NLC), Ministry in charge of Lands and High Court are directly under Parliament in the proposed organisation structure in the NLP. The functions of the Ministry should include “giving policy direction to the NLC, making policies on land and coordinating implementation, mobilizing additional resources for the land sector, undertaking policy advocacy and providing political leadership” among other functions. The High Court is supposed to coordinate “Land Dispute Tribunals (LDTS) and Alternative Dispute Resolution (ADR) mechanisms”. Under the NLC, there should be “District Land Boards
(DLBs) and Community Land Boards (CLBs). The functions of the DLBs and CLBs should be supported by a Trust Fund (Republic of Kenya, 2009, pp. 57–63).

In this research, as will be described in other sections, investigations were carried out based on the laws that were introduced by the colonial and post-independence governments because they have been in force for a long time, and were in place when this research started. The new laws are also relatively recent and may not have had an impact yet. However, research should be carried out in future on how communal tenure will have changed after the introduction of the National Land Policy.

4.8 Chapter summary

This chapter has provided a historical background on how the individual, group ranch and Trust Land systems were introduced in Kenya. In brief, implementation of the registration systems was intertwined with European settlement in Kenya and subsequent colonisation by the British. In the beginning, the colonial administration set up Native Reserves as a means of separating land occupied by local African tribes from land that had been alienated for settlers, among other various reasons. After independence, the Native Reserves were converted to Trust Lands under County Councils, which hold the land on behalf of the people living within its boundaries. Due to political agitation by Africans for land to be returned by the settlers, and a need to devise means of reducing armed conflicts and developing economic growth among the Africans, the colonial government converted some of the Trust Land areas into individual land holdings. In arid and semi-arid areas, among nomadic communities such as the Maasai, the colonial and post-independence governments introduced group ranches as a means of enhancing commercial livestock production among other factors. As described in the immediate section above, in August 2010, Kenya promulgated a new Constitution, under which a National Land Policy (NLP) has been introduced. Under the NLP, some land laws have been repealed and new laws introduced. Thus, through the NLP, the government hopes to establish efficient, sustainable and equitable use of land.
5 Impacts of exclusivity on communal access to land

5.1 Introduction
This chapter will explore how exclusivity as introduced by the individual, group ranch and Trust Land systems has impacted on communal access to land among the Luo, Maasai and Pokot people respectively. In most cases, land registration systems are introduced based on “Western” concepts of ownership which normally include exclusivity (Bromley, 2009, 1991). In this research, exclusivity is the ability of a registered proprietor to block other people from gaining access to land (Schlager and Ostrom, 1992).

Access is the ability to benefit from the land (Ribot and Peluso, 2003). In communal tenure, rights to land are usually embedded within wider kinship networks and are normally not exclusive (Cousins, 2007; Goodwin, 2011). Communal tenure can also include overlapping rights to land in which different people can access the same piece of land simultaneously or at different times (Chauveau et al., 2007; FAO, 2002; Meinzen-Dick and Mwangi, 2009). In order to explore impacts of the different introduced land registration systems, focus will be on aspects of communal tenure that have been retained which enhance kinship networks as opposed to exclusive rights and the ability of registered proprietors to block others from gaining access to overlapping rights to land.

The ability of registered proprietors to block others from gaining access to land will in this research be categorised into women, men and outsiders. The categories have been selected because in communal tenure access to land can vary based on membership and status within a social unit (Berry, 1989; Okoth-Ogendo, 1989; Shipton and Goheen, 1992). Further, in Kenya, land was often registered to male homestead heads who may exclude other people from the land. Registration of land to men may have also jeopardized communal access for women (Haugerud, 1989; Kevane and Gray, 2008; Yngstrom, 2002). The outsiders have been selected as a category because in communal tenure “tutorat” arrangements can exist in which “autochthons” grant temporary land rights to “incomers” as shown by the following quotation (Chauveau et al., 2007).

The term “tutorat” refers to the relationship that develops when an incomer (or group of incomers) and his (their) family are received into a local community for an unlimited period of time, which may span several generations. The tutorat entails a transfer of land rights from a customary landholder, who is either an autochthon or someone who holds some prior right over the land (referred to as the tuteur), to the incomer (Chauveau et al., 2007, p. 68).
This chapter will be divided into the following main sections. Section 5.2 – Impacts among the Luo people in individual land registration areas. Section 5.3 – Impacts among the Maasai people in group ranches. Section 5.4 – Impacts among the Pokot people in Trust Land areas and section 5.5 – cross-case comparisons.

5.2 Among the Luo people in individual land registration areas

5.2.1 Retained aspects that enhance communal access to land

The Luo people have retained aspects that enhance communal access to land in areas in which individual land registration has been introduced. Ideally, under the individual registration system, registered owners can exclude others from the land (Okoth-Ogendo, 1986). In Kenya, the Registered Land Act was written in such a way that the rights of an individual cannot be defeated by any other rights, except those outlined in RLA, which do not include communal tenure (Okoth-Ogendo, 1986, p. 7; Republic of Kenya, 1963, sec. 28). Thus, colonial and post-independence governments assumed that individual land registration would “break” communal ties to land as shown below.

The much expected growth of a viable land market in the small-farm sector was based on the rather simplistic notion that farmers would respond to individual ownership by breaking loose from the supposedly static and retrogressive confines of "communal" living into a world of laissez-faire individualism. Thus, the Registered Land Act (Cap. 300, Sections 27, 28, 30) was carefully drafted to make it clear inter alia that the rights of an individual proprietor were not liable to be defeated by anything not shown in the register. Indeed, the act went so far as to convert all “customary rights of occupation” into tenancies from year to year, thus giving the registered owner the power, upon giving one year's notice, to terminate such occupation (Okoth-Ogendo, 1986, p. 7).

Despite hopes that individual land registration would “break” communal ties, the Luo people tended to retain aspects that enhance communal access to land as opposed to exclusivity. In this research, the aspects that enhance communal access to land that were captured are: embedded social structure, embedded homestead structure, a need to start a new homestead, inherent rights to land, marriage and burial rights.

5.2.1.1 Embedded social structure

The Luo people have retained an embedded social structure which is contrary to the inherent exclusivity of the introduced land registration system. In the retained social structure, the Luo tribe in Kenya is divided into lineages known as dhoudi, or ogendeni. The lineages are divided into clans known as libembni in plural, or libamba in singular. The clans are divided into villages known as gweng and the villages are divided into homesteads which can be either
Among other reasons, a factor that has contributed towards retention of the tribal structure is that the colonial government introduced formal administrative boundaries which were sympathetic to the social structure of the Luo people (Ogot, 1963, p. 252). A Provincial boundary under a Provincial Commissioner (PC) was introduced in line with the tribe territory as a whole. District boundaries under a District Commissioner (DC) were based on lineage boundaries. Division boundaries under a Divisional Officer (DO) were based as closely as possible to clan boundaries. Location boundaries under a Chief were based as close as possible on village boundaries. The social structure has also been retained as a form of social identity. When people from the Luo tribe who do not know each other meet for the first time, they usually inquire about each other’s descent through the lineage, clan, village and family. One practical benefit, considering that the Luo people are exogamous, in order to avoid marrying close relatives, a potential marriage suitor is always asked to trace their descent by stating their lineage, clan and family among other factors.

5.2.1.2 Embedded homestead structure

The Luo have also retained a homestead structure which allows access to multiple people and counter exclusivity. In general, among the Luo people individual land registration was conducted by mapping demarcated homestead boundaries and registering the land to a male homestead head (Caukwell, 1977; Coldham, 1978). Even before the process of individual land registration, the Luo were already demarcating homestead boundaries using euphorbia plants (Cohen and Odhiambo, 1992; Ogot, 1967). As described earlier, after registration, the formal law allowed the registered proprietor to exclude others from the land. However, based on observations and interview responses, most of the Luo people have retained homesteads in which multiple members of the family are allowed rights to build and plant crops among others.

Among the Luo people, polygamous and monogamous homes have a similar spatial structure (Achieng’Abonyo, 2005; Ocholla-Ayayo, 1976). In a polygamous home, the first wife, known as mikayi, has her hut built towards the back of the homestead facing directly towards the main entrance. The second wife known as nyachira has her hut built on the right hand side of the first wife, facing towards the centre of the homestead, and the third wife, reru, has her hut on the left hand side of the first wife, also facing towards the centre of the homestead. Any additional wives are known as nyi-udi, are attached to any of the existing three wives. In monogamous homes, the wife is also known as mikayi and has her hut in the same position as in a polygamous
home (Mboya, 1967; Ocholla-Ayayo, 1976, pp. 120–124; Wilson, 1961). The spatial structure of the homestead can also be described by the following quotations and Figure 7, Figure 8 and Figure 9.

The first wife, second wife and third wife follow each other. The first wife is the owner of the homestead, the second one builds on the right hand side, and the third one on the left side that is how they follow each other. If another one comes they follow each other, one on this side, and another on the other side … if you see somebody who has differed with this pattern, that is not custom, that is a person who has gone against custom (KSM009).

This house in which we are sitting is for my first wife, while the one you saw on her right hand side belongs to my second wife (Respondent KSM012).

Apart from the wives, sons are also expected and usually allowed to build a bachelor hut known as a simba within the homestead (Achieng’Abonyo, 2005; Mboya, 1967). At around seven years old, boys are expected to move out of their mother’s house and live with an elderly lady in a hut known as siwindhi as will be described in the next section. After reaching puberty, boys are usually expected to move out of the siwindhi and construct a bachelor hut in a pattern that is dependent on their birth order. In a monogamous home, the first born son is supposed to move out first and build a bachelor hut, on the right hand side of the mother’s house while looking towards the main entrance. The second born son is expected to move out next and build on the left hand side of the mother’s house. In this regard, all boys born on an odd number should build on the right hand side of the homestead and all sons born on an even number should build on the left hand side as shown in Figure 7, Figure 9 and Figure 10. In a polygamous home, the sons of the first wife should build using a similar pattern to the monogamous family, but this time they are limited to a central strip of land that runs from their mother’s house towards the main entrance. The sons of the second wife should build on the right hand side on a strip of land that coincides with their mother’s hut and the sons of the third wife are expected to build on the left hand side of the homestead on a land that coincides with their mother’s house. If there are any additional wives they are normally attached to any of the other three wives, hence their sons can build based on the house in which they are attached (Ocholla-Ayayo, 1976). Retention of the simba can be shown by the following quotations.

We always build with the same pattern … You see that house there. It is for my first born son, and that one is for my second born son. That is how the Luo build their homes (Respondent KSM009).
The Luo people had something called chik, custom, meaning you must do it. It was chik to make sure you do not go astray … the first born son must build first, as a sign of respect that he is the eldest. Then the second boy builds also a sign of respect that he now grown up … but this things of culture, let us say you have many sons, the first born son should build on the right hand side, and the second born son on the left hand side. The third born son builds on the right hand side away from the main house towards the fence (Respondent KSM004).

As alluded to earlier, there is a house in the homestead known as siwindhi, which girls who have reached puberty are also supposed to live before they get married (Mboya, 1967; Ocholla-Ayayo, 1976). A general expectation is it is within the siwindhi, the girls will be taught about marriage and will also be courted before getting married and moving to their husband’s simba. In the siwindhi, the elderly lady uses songs and stories to teach customs and family history among other issues. Thus, the Luo people have a saying which they always use on people who lack moral values, which reads, “You are uneducated, like the one who never slept in siwindhi”, in Dholuo language, “Iming’kamaneno ok onido e siwindhi nade!” (Ocholla-Ayayo, 1976, p. 73).
Figure 7 A spatial pattern of an idealized Luo homestead as drawn by the researcher
Figure 8 An image from Google Earth showing shared access to land in which the wives' huts and sons' huts are in one homestead.

Figure 9 A Luo homestead with the wife's house facing the gate, the first born son's house on the left and a grandmother's house in the background as captured by the researcher.
Figure 10 The first born son’s house is on the right hand side, and second born son's house on the left as captured by the researcher while standing at the first wife's house.
5.2.1.3 A need to start a new homestead

The Luo people have retained a need to start a new homestead which has in some cases been impacted by individual land registration. After a man has been married for a few years in the bachelor hut, and has fathered children, he is expected to move out and found a new homestead. Ideally, the young man should by this stage have a son to help him with the move. If he does not have a son, he is expected to adopt one of the male orphans in the village as his own son. As soon as the young man is ready, his father identifies a piece of land outside the main homestead, which belongs to the family, on which the young family can move. In the past, a cockerel was taken to the identified building site at around 11 pm and left to spend the night there. If the cockerel was alive at sunset, the land was considered to be clean and suitable for construction. If not, the land was considered to be cursed, and was abandoned, or cleansed by a medicine man known as jabilo. Today, the son of the young man who is moving out carries the cockerel, thuongweno, and an axe, le, at day break, while the father carries fire and other garden tools and the mother carries some food, including grains for planting and cooking implements.

On arrival at the building site, the man should be the first person to create an entrance to the land, dig the first hole for construction, and light a fire. The family is then assisted by community members to build a hut using a mixture of mud and cow dung, and some sticks and grass for thatching the roof. Nowadays, some people use bricks and iron sheets for the construction. Ideally, the construction should be finished before sunset and the house slept in on the first night, to avoid it being occupied by evil spirits at night. Retention of this social institution of constructing a new homestead is shown by the following quotation.

You see, a man should build a house. If you don’t build where will you take your wife and visitors … if it is good, you should build, when you die, they place you in that house (KSM004).

In the quotation above the respondent shows that it is important to build not only as a means of gaining access to land, but also having a place to have a family, welcome visitors, and finally have a resting place in which one can be buried. Another respondent said,

The axe and cockerel is in the customary law of the Luo people. In the past, when a man was going to found a new homestead, he would take the cockerel to the proposed building site. If something ate the cockerel, that land was not suitable for building. He went with his first born son, carrying the axe and cockerel. But nowadays they carry it in the morning. It is our clock; it is how we know a new day has started. But nowadays we have combined the land [consolidation]…this has changed the way we build … the people are increasing
but the size of the land is constant, the young men cannot move out of the home, they create a new entrance on the fence, and say they have started a new home (KSM009).

The quotation shows that Luo custom requires a man to found a new homestead for his family. However, an important point comes out, namely, that consolidation, which was part of land registration in some areas, has impacted on the ability to found new homesteads. Among the Luo, land consolidation, that is joining scattered parcels of land that were being tilled by one family into one large more economically viable portion of land was introduced (Coldham, 1978; Larsson, 2000; Sorrenson, 1967). Thus, in the consolidation areas such as Nyakach, the external portions of land on which people could move and found new homesteads were greatly diminished. In order to overcome the challenges, in areas where consolidation has been introduced, or in a situation where the family does not have external land parcels, the young man can “puncture” a new door on the simba and close the “old” door as a sign that he is in a new house. In addition, if possible, the young family should fence off the “new” house from the main homestead, and “open” a new entrance in the fence as an indicator that they are now in a “new” homestead”. Thus, despite socio-economic changes, most of the Luo people have retained the custom of starting a new homestead.

5.2.1.4 Inherent rights to land
In most cases, the Luo people have also retained inherent rights to land through which people who have moved away can gain access to land that has been registered to another family member. According to traditional Luo custom, all men who are born within a family have a right to land that is held by the family. As described earlier, for women, the inherent rights may change after marriage in which they can lose some rights in their father’s homestead and gain new rights in their matrimonial home as will be described in the next section. In addition, like some societies such as the Māori people in New Zealand, and the Shona and Ndebele people in Zimbabwe, the inherent rights to land are also linked to the homestead in which a person’s birth cord or placenta was buried (Goodwin, 2013, 2011, 2008), as shown by the quotations below for the Luo people.

… Odongo does not feel at home because home is where the placenta is. People is Siaya say that the weak and awkward are those whose placentas were buried outside their respective homesteads and, worse still, those whose placentas were buried away from the lands of familiar people. They refer to these people as jooko, the ‘outsiders’. Indeed, those who are thought of as weak and clumsy may be referred to as biero (placenta), as in the remark ‘Nene oyikdhano to owe biero’ (“we buried the human being and left the placenta”). In contrast, those whose placentas are buried within their respective homesteads are seen
to belong, to be upright, to be secure… the discussion of *biero* also places pressure on young women to return to their country homes to give birth … (Cohen and Odhiambo, 1989, p. 25).

For Luo, the burial of the body ‘at home’ completes a trajectory begun when a placenta (*biero*) is buried in the homestead at a child’s birth. Luo say men should return to the land where their placentas are buried. Married women should return to where the placentas produced by their wombs have been planted. From birth, the living are already bound up with the dead… The rituals of placental and body burial in homes promote family cohesion and reinforce lineage memory … (Schwartz, 2000, p. 435).

Based on the inherent rights to land, some people have been able to gain access to family land after they had originally moved away. In a specific case, during the post-election violence that occurred in Kenya in 2008, a man from the Luo community who had been chased from land which he had bought within an area which is predominantly occupied by another tribe, was able to return to his ancestral home in which his family made room for him and granted him a parcel of land on which to build a house (Njogu, 2009). In another case, according to an interview respondent, after consolidation, a man sold his ancestral land and moved to another area. However, as will be described in more detail in the next chapter on sales, after he had moved to the new place, he faced multiple challenges from his new neighbours. Due to the challenges, the man moved back to his ancestral village in which he had sold land. However, due to his inherent rights, his brother gave him some land on which he could build a house and grow crops. In a third case, a man who had moved out of the village and passed away in Nairobi City and did not have land in the village in which he could be buried. According to an interview respondent, the clansmen approached his brother and requested him to make room for the man to be buried and for his widow to build a house. The brother agreed and allowed the villagers to bury the man on a portion of his homestead and to build a house for the widow and her children.
5.2.1.5 Marriage

Among the Luo people, aspects of marriage also help to retain communal access to land which is contrary to the exclusivity principle inherent in the individual land registration system. Through marriage, the access to land for women changes based on their membership and status within a family. As described earlier, before marriage, all girls ideally have rights to land in their father’s homestead, where they can live in their mother’s house before moving to a siwindhi. The rights to land for the girl essentially change through an elaborate marriage process. In summary, during the process of getting married, the suitor’s family usually sends an emissary known as jawangyo, ‘the one who lights the path’, to find out more information about the girl’s family (Mboya, 1967; Ominde, 1970). If the emissary comes back with good news that the family in which the girl belongs is “clean” and is not involved in witchcraft, the boy’s family sends another group of emissaries, this time not in secret, with some gifts, including a few livestock, to ask for the girl’s hand in marriage in a ceremony known as ayie, ‘I have agreed’. If the girl’s clansmen are happy with the proposal they grant their consent and the next part of the ceremony can be organised.

On the day in which the girl is to be married, the suitor and some people from his clan, drive some livestock as part of the agreed dowry and also carry some gifts such as honey and dried fish to the girl’s village. On arrival, a great celebration breaks out, lasting until night, when the suitor and his peers are expected to spend the night in a simba which has been converted to a visitor’s hut. In the past, very early in the morning, the suitor and his peers were supposed to “break into” the siwindhi “using force” and carry the girl shoulder high while running and “fighting” off her brothers in a mock combat (Mboya, 1967; Ominde, 1970). In the modern era, after the traditional celebrations, some people go to church for a Christian ceremony or to the Attorney General Chambers for a civil marriage. In the past, as soon as the young men had carried the girl into their own village and into the simba, the married girl automatically lost some rights in her father’s homestead, in which she was now considered a visitor, and acquired new rights as a wife in her matrimonial home (Ominde, 1970). Further, the bride price was usually shared by various members of the girl’s family and was not easy to retrieve if separation was desired. Thus, according to most respondents, in the pre-colonial era, divorce was very rare among the Luo people. However, in the contemporary era, some separations have occurred.

As stated, the married girl acquired new rights within the husband’s homestead in which she had rights to live in the simba and use the mother-in-law’s kitchen for a period of time before constructing her own kitchen. Thus, the rights of the new bride in her matrimonial home can be described as follows.
Every bride begins her marriage working for her mother-in-law. Initially the bride has no land of her own but assists her husband's mother in farming and cooking. With the passage of time the new wife is given the right to cook for herself and her own farm which is part of the husband's portion. He too has a plot, the *mondo*, which is used to provide stores of food for emergencies. As the son takes additional wives, they may be given land from the *mondo*, the husband's mother may provide land, or, in extreme cases, some lands of a senior wife may be redistributed. Each woman's land is used to provide food for herself, her children and her husband and eventually the land is unequally distributed to her sons’ wives (Potash, 1978, p. 388).

If the husband died first, the widow retained access to land through a levirate marriage (Mboya, 1967; Ominde, 1970). In essence, in the past, when a husband died and the period of mourning had been completed, the widow was “inherited” by a close kinsman of the deceased person such as a brother or a cousin. The culture is very similar to a story in the Bible in which a widow called Ruth was redeemed by a man called Boaz (Bible, Ruth, Chapter 1–4). Among the Luo people, the role of the “kinsman redeemer” was not only to protect access to land for the widow and her children but also to propagate the name of the deceased man by ensuring that any children born through the levirate marriage were reckoned to the deceased man (Mboya, 1967; Ominde, 1970). The levirate marriage among the Luo people has been described as follows.

Among the Luo levirate marriages play a significant role…levirate marriage requires, upon the death of a married man, his widow to marry one of his classificatory “brothers” within the extended family network…it is predicated upon the notion that the woman once married becomes irreversibly attached to her husband’s patrikin especially if bride wealth was paid to the woman’s kin…Culturally, children born to the levir were considered to belong to the deceased’s lineage alongside his own biological children (Nyambedha et al., 2003, pp. 302–307).

Today, socio-economic factors such as HIV/AIDS have modified levirate marriage. Due to the impacts of HIV/AIDS, some potential redeemers are now afraid of taking on widows lest they also contract the disease (Nyambedha et al., 2003). Similarly, some widows refuse to be inherited due to the challenges of HIV/AIDS. Due to the challenge of HIV/AIDS, if a woman becomes widowed before moving out of the *simba*, she usually faces a dilemma of how to start a new homestead without her husband who has a specific role to play in the process. In this regard, according to some interview respondents, the Church has stepped in and acts as the “new husband” of the woman and can help her to construct a new homestead.
The Luo also had a hut known as *duol*, ‘the hut in which the male homestead head entertains visitors’, in which widows could gain support (Nyambedha and Aagaard-Hansen, 2007). The hut was normally built in the middle of the homestead near the livestock kraal (Ocholla-Ayayo, 1976). However, based on personal observations during field work, the central hut does not seem to exist in most homes. Thus, some of the support that was offered to widows and orphans by the *duol* have in some cases, been taken over by the church as described below.

In the recent past, the term *duol* has re-emerged and even come to dominate the daily operations of the churches and individuals in Luo social life. Mainstream churches such as the Catholic and Anglican have now re-invented *duol* as a network and an institution through which their followers organize church activities. It has become an effective means through which the church is now reaching out to and even mobilizing its followers. In fact, the role of *duol* has become central to church efforts to assist its vulnerable members and the community in general – including the orphans and widows (Nyambedha and Aagaard-Hansen, 2007, p. 251).

5.2.1.6 Burial rights

Another aspect that enhances communal rights to land and which can be contrary to exclusivity is retention of burial rights. Among the Luo people, most people have retained a preference for being buried in their ancestral home. According to interview respondents, in the pre-colonial era and early days of colonisation, the Luo people used to bury some people in a hut that would later be abandoned. During that time, the Luo people used to construct round huts in which the walls were made using a frame of sticks and a mixture of mud and cow dung, and the roof was made of grass. Inside the hut, a bed was made on the left hand side, while walking into the hut, by creating a mound of soil and placing a skin on it. Along the internal walls of the hut, a form of platform, about one foot high was built on which pots and other cooking and farm implements could be placed (Achieng’Abonyo, 2005; Andersen, 1977). According to interview respondents, men were buried under the mound of soil, which formed the bed, after which the hut was abandoned and left to decompose. When the wife passed away, she was then buried in the location where the hut stood.

The contemporary practice, due to construction of modern houses which normally have a cement floor, is for the man and wife to be buried outside the house on the left hand side, while facing towards the house, essentially on the same side that the bed was and is usually placed. Due to socio-economic changes, some families are now designating certain parts of the homestead as a cemetery instead of burying next to the main house. Despite the changes, most of the Luo people have retained a ritual in which a deceased person should be placed in their
house for one night before being buried. To this end, based on personal observations and interview respondents, most people who pass away in the urban areas are normally transported back to the village in which they are first placed in their house for a night before being buried.

The retention of a need to be buried in ancestral homes is contrary to exclusivity because in some cases the person who is being buried had moved out of the village and did not seem to have rights to land. However, as described earlier, due to inherent rights to land, in a number of cases, village elders talk to the deceased person’s brothers and ask them to provide a piece of land from their registered parcel, on which the deceased can be buried. As described above, before the person is buried, he is normally supposed to be placed in his first wife’s hut. Thus, the land provided by the brothers is usually not only for burial, but also for constructing a house for the first wife. Based on several interview respondents, the practice of providing land for burial is still common, especially in homes in which people had moved to urban areas or other countries.

The vigour with which the Luo have retained a need to be buried in their ancestral home was shown in a court case in which a widow from another tribe who wanted to bury her husband in the city, lost the case to villagers who insisted that according to custom the man had to be buried in his ancestral home (Gordon, 1995; Stamp, 1991). A few details of the case are shown in the following quotation.

In 1987 a Kenyan widow was taken to court by her dead husband’s family in a sensational contest over the burial of his remains. Wambui Otieno, the wife of a prominent criminal lawyer, S. M. Otieno, became the eye of a storm about customary law, women’s rights, and intertribal marriages following the lawyer’s death intestate in December 1986. Wambui is a member of the Kikuyu ethnic group; Otieno was a Luo. Otieno’s clan, Umira Kager, blocked the widow’s plans to bury her husband in Nairobi, the home where he had lived out his married and professional life and raised fifteen children and where he had asked to be buried. A series of court cases, involving twelve separate court actions and concluding in May 1987 with a Court of Appeal ruling, awarded the custody of Otieno’s remains to his clansmen for burial in his birthplace in Western Kenya according to Luo custom (Stamp, 1991, pp. 808–809).

The above sections have shown some aspects of custom that have been retained which enhance communal access to land as opposed to exclusivity. In the next section descriptions will be provided on how some people have accepted some characteristics of exclusivity as introduced by the individual land registration system.
5.2.2 Acceptance of the ability to exclude

5.2.2.1 Women
Due to the impacts of HIV/AIDS and other socio-economic changes such as a “breakdown” in levirate marriages, some women have been evicted from land in which they should have rights according to custom (Luginaah et al., 2005). In the study area, two women respondents described how they had been excluded from land after their husbands had died of HIV/AIDS as described below.

I live in the market centre with my daughter. After my husband passed away, his relatives threw me out of the land … they said I am sick and cannot be inherited (KSM010).

When my husband passed away, his brother removed me from the land. You see that tree there, and there, my husband’s land reached there… but they said I have no son and I am sick… I was told to move away. But I pleaded … I was left with this small portion, where I live with my daughter (Respondent KSM011).

Similarly, in another case, a woman was evicted from land by her husband’s brothers who claimed they were the ones who were entitled to inherit the land as described by quotation below.

I still do not know how this land issue will turn out…. if you are chased from the land and you have young children under your care... Sometimes they (in laws) start taking parcels of your land after your husband’s death claiming that they were the ones who had given the land to them. If you try to protest, they bewitch you using herbs and after a short while you die.7

Despite the effects of HIV/AIDS in some cases, the women have no choice but to agree to be inherited, or risk being evicted as shown by the quotation below.

My brothers-in-laws gave me two choices: either to be cleansed and later on be placed under a guardianship institution, or to go away and lose all the property. I obliged8

Another widow described how she had to accept the levirate marriage as shown below.

If I had any other way, I would have avoided the ritual. But I lacked money and land to keep me going. I had to do what my in-laws wanted so that I could continue living in their home.9

7 A respondent quoted in (Luginaah et al., 2005, p. 1224).
8 Widow quoted in (Ambasa-Shisanya, 2007, p. 611).
5.2.2.2 Men

In a few cases, men who were eligible for rights to land according to custom have also been excluded from land. In a seminal case, entitled Obiero versus Opiyo and others, a Luo man called Opiyo passed away and left a widow, who was the plaintiff, and a number of sons with another woman, who were the defendants. In 1968, during the process of land adjudication and registration, the plaintiff was registered as the owner of the ancestral homestead after her husband had passed away. In 1970, she brought a case against the defendants claiming that they were trespassing on her land and that they should pay damages for the same. In addition she wanted an injunction to stop the defendants from continuing to trespass on her land. According to the defendants, they had access to the land by customary law in which one was a wife to the deceased person and the others were children of the deceased. However, according to the court, even if the defendants claimed that the title had been obtained by fraud, which it doubted; the plaintiff had an indefeasible title under the Registered Land Act (RLA), since it was a first registration. Thus, the Court rejected claims to land by defendants and upheld the plaintiff’s desire to have an injunction to stop the defendants from trespassing (living on the land), as shown by the quotation below.

I am not satisfied on the evidence that the defendants ever had any rights to the land under customary law, but even if they had, I am of the opinion that these rights would have been extinguished when the plaintiff became the registered proprietor. S. 28 of the Registered Land Act confers upon the registered proprietor a title ‘free from all other interests and claims whatsoever subject to the leases, charges and encumbrances shown in the register and such overriding interests as are not required to be noted in the register... Rights arising under customary law are not among the interests listed in s. 30 of the Act as overriding interests (Coldham, 1978, p. 104).

Based on the case above and evidence on the Kenya Law website, various people, not only within the Luo tribe, but among other communities which are under individual land registration have lost rights to land because another person has indefeasible rights to land according to the land register. In one of the cases, which was referred to as Esiroyo versus Esiroyo and another, a plaintiff who was the registered owner of a twenty-two acre parcel of land had allocated ten acres of the land to his two sons, who were the defendants. However, after several family quarrels, the plaintiff brought a case to court against the defendants, and requested for an injunction to block his sons from continuing to trespass on his land. “The court gave judgment for the plaintiff on the grounds that, although the defendants did have rights of occupation under customary law, such rights were not overriding interests and they were extinguished on the registration of the plaintiff as the owner of the whole plot” (Coldham, 1978, p. 104).
In the year 2011, a similar case to the above occurred in the study area in which the court upheld a petition to block a person who may have had rights according to custom from gaining access to land. In the case, Joseph Otieno, the plaintiff or applicant, while Pande Rombo and Oliech Rombo were the defendants. The plaintiff wanted the court to grant a temporary injunction to restrain the defendants, from interfering with his rights to land. The plaintiff claimed that he was a joint owner to the land from which the defendants were blocking him from gaining access. However, the defendants claimed that according to custom, the plaintiff was the first born son and had moved out to start a new homestead and should therefore discontinue using the land in question. After listening to the detail of the case, the court decided to grant the restraining order as a means of enabling the case to “run its full mile in court” (Kenya Law, 2011).

This case illustrates how various members of the Luo community are using land registration as a means of either upholding or breaking customary law. In the specific case, according to custom, the plaintiff should have lost some rights to land after moving out to start a new homestead. However, because he was registered as a joint owner, the court upheld his rights to the suit land and issued an injunction against his brothers against interfering with his rights to land.

Apart from changes to access for insiders, people who belong to the family, land registration has also impacted on access for outsiders as described in the next section.

5.2.2.3 Outsiders from living on the land
Acceptance of exclusivity as prescribed by the individual land registration has impacted on access to land for outsiders who want to live on the land. In the pre-colonial era, the Luo could take in outsiders and grant them temporary rights to land under the title jadak or jodak in plural (Coldham, 1978; Malo, 2003; Ocholla-Ayayo, 1976; Odenyo, 1973; Shipton, 1984). The jadak was only granted access to land on “usufructory” basis because he had no kinship links in the clan. Further, his children could not inherit the land and could only renew the “usufructory” rights (Ocholla-Ayayo, 1976, p. 127).

People who lived on lands controlled by their lineages claimed these permanent and freely inheritable rights. They were called weglowo (sing. wuonlowo), masters or owners of the land. Anyone else whom a wuonlowo allowed to live on and cultivate a piece of land on a usufructory basis was considered a jadak (pl. jodak), literally “one who stays,” meaning, roughly, a non-rent-paying tenant-at-will. Commonly these land clients were affines who had chosen not to remain among their own agnates for reasons such as land shortage or feuding. The rights of a land client were temporary and conditional, and they could not be inherited without permission of the host (Shipton, 1984, p. 126).
According to custom, the rights held by a *jadak* could only become permanent through marriage or participation in war as shown below (Mboya, 1967; Ocholla-Ayayo, 1976).

If … the tribe in which a *jadak* is a squatter was at war with another tribe, and the *jadak* shows bravery in the battle field, his position was changed to that of *japiny* or *jalowo* since he fought for the land and was able to sacrifice his life for it, just in the same way as the ancestor of the present member did (Ocholla-Ayayo, 1976, p. 128).

According to Luo laws, *chike*, settlers who border the clans and fight for the clans in times of war are not considered as settlers anymore when land is being acquired, distributed and allocated. Whatever land they acquire is theirs in perpetuity because of the war they fought for the clan. They become like sons of the clan. However, if the settler moves South and his grandchildren (descendants) follow him, all the land that were his and the farms he had revert back to the land in whose midst they lived (Malo, 2003, p. 78).

The introduction of land registration and other related formal laws converted most of the usufructory temporary rights into permanent ownership rights (Coldham, 1978; Ocholla-Ayayo, 1976; Odeny, 1973). During the process of land registration, the British colonial government and the post-independence governments registered permanent rights to land in the name of “welcomed strangers” (Coldham, 1978). In addition, the Limitations of Actions Act, Cap 22 in 1968, was introduced as part of the reforms process, and introduced the ability of tenants to claim ownership through adverse possession (Odeny, 1973). According to the Limitation of Actions Act, a person who has lived on the land continuously for twelve years can claim ownership of that land (Odeny, 1973). Therefore, some of the strangers who had lived on the land for more than twelve years made claims and were granted absolute ownership. These changes in strangers’ rights are shown by the following quotation.

*Jodak* are many, during the process of land registration many of them were given a number [titles to land] … we complained, it is not custom…but what can we do? They have title deed… if you try to remove them it will be a long case… (KSM009).

When colonial authorities and Luo elders in the 1950s codified what they considered the customary laws, they left out this discretionary element. By the new code, a *jadak* and his descendants were *jodak* forever (Shipton, 1984, p. 126).

The principles of *jadak* seem to be repugnant to the British traditions and therefore in many cases of this type, the *jadak* have won titles to land over a person who is regarded by Luo customary laws as the rightful holder, *wuonlowo*, the land owner (Ocholla-Ayayo, 1976, p. 127)
Conversion of temporary rights that were allocated to a *jodak* through registration, and other socio-economic changes such as population growth have made it difficult for some people to continue granting access to land for outsiders who are seeking refuge.

Today, it is very difficult to give a stranger land. Even giving land to your brother or brother’s child is very difficult … the only person who can benefit is your child, you can give them some land to build … but an alien it is very difficult … if a person makes a mistake to bring a stranger, even the family members will not agree, the land is not there (KSM007).

Introduction of formal laws diminished this social institution through which “outsiders” could gain refuge among the Luo people. As soon as registration was introduced, and some outsiders started obtaining permanent rights, some land owners attempted to evict outsiders.

There was an overload of case work on the African courts which arbitrate land disputes. The *jodak* rushed into the courts to take advantage of the law to claim titles which they never held before. In addition, the rightful owners of the land, frightened by the law, sought to evict many a *jadak* with whom they had lived harmoniously (Odenyo, 1973, p. 776).

In some cases, the land owners went to court as a means of enforcing their customary right to evict the outsiders and succeeded as shown by the case below.

This suit has been pending before this court for exactly 30 years … Samuel Odede (herein referred to as Samuel) had limited Abanya Nyamori (herein referred to as Abanya) to stay him on his land as a stranger/visitor. From the pleadings and proceedings of other matters I understand that according to Luo customary law a person who owns land can welcome a stranger or visitor to stay with him on the said land. There comes a time though that the stranger and/or visitor must leave … A dispute arose in 1950. Samuel filed court proceedings in the African Land Court. That court upheld Samuel’s claim and allied that Abanya must leave the land … Abanya not being satisfied and pleasure went to the Kisii District officers in land case No.34/1950. The matter further went to appeal being Kisii appeal … land case No.43 of 1950. The matter was finalized with the orders that the said Abanya must completely vacate Samuel’s land (Kenya Law, 2007).

Despite success by some people at evicting or limiting outsiders, there are many outsiders who were able to obtain permanent rights in the process of registration and have remained in their benefactor’s land (Odenyo, 1973). However, according to the locals, the outsiders are still considered to be *jodak*.
We have always had *jodak*, the people of that family are all *jodak* their grandfather came here and begged for land. We know them, they came from *Karateng*, and everybody refers to them as *Jo-Karateng*, they are our “welcome outsiders” (Interview KSM007).

The accounts above show that in some cases outsiders continue to live on the land which is contrary to exclusivity and in some cases they are being evicted, which shows some acceptance of exclusivity. However, in general, land registration has changed the ability of the Luo people to take in outsiders because the outsider might demand permanent rights to land through adverse possession.

### 5.2.2.4 Outsiders from grazing livestock on the land

In a few cases, people have embraced individual exclusive rights and are limiting overlapping grazing rights. In the past, the Luo normally had “holes” or secondary entrances known as *rot* in the homestead hedge, through which other people could gain access to land. The fences normally comprised euphorbia plants through which livestock could cross and get into the land after the harvesting season. In addition, during the harvesting season, widows and orphans in the village were allowed to walk behind the main land owners and glean maize, sorghum and any other edible plants that the owner had left behind, and also collect medicinal plants and firewood (Geissler et al., 2002; Geissler and Prince, 2013). A few respondents stated that population growth and the effects of registration have led some people to accept exclusivity as follows:

> Don’t you see nowadays people keep only one cow; there is no place to graze. If you enter someone land you go to court. So there are too many people on the land, the white man brought the concept of this is my place and that is your place, everyone was given a number, so you cannot enter another person’s land without asking. But you cannot even ask him because he has more need for that land, so how do you ask them. They also have children who are digging and building (KSM002).

> We are doing zero grazing; you cannot graze on another person’s land. If you go to get grass from another person’s land, you have to pay. But in our days, when we were young, ah, we would graze everywhere, we could even plant everywhere. I would just go to somebody and say give me you land for planting crops, and they would give me. I would plant even for eight years, but now you must pay (KSM006).

> In our area, when I was a young boy, that area was an open field, the land was so much that as the cows grazed we would play football. There was no fear that the cows would spoil somebody’s land. When the cows were tired they would go drink in the river and sometimes after finishing the cows would stand and wait for us to finish playing. But today, people
have known the value of land. They have decided to fence even the grazing areas. In the past they left that land open. But today they have also planted on grazing areas. People were few, now we are many. As we speak with you now, it is even very difficult; it is reaching a stage where we will have to pay for a place to graze livestock. As we speak now, my boy has gone to an area that is faraway place, about two and a half kilometres to look for grass for my cows…now it looks like zero grazing…they say no, this is my area. People have known the value of land after the 1980s and 1990s…The land belonged to families, we used to graze on land that belonged to specific families, but it was left fallow. But now, even a trench, you cannot find it. You cannot even cut the grass, it is an offense. You must ask him for permission … it is very difficult to keep even five cows (KSM004).

The Luo have also started having gates that can be closed and barbed wire fences as a means of not only protecting their property, but also keeping off other people’s livestock from grazing on their land. This introduction of gates and closed hedges is contrary to custom in which hedges were permeable and allowed “outsiders” to access secondary rights such as rights of way, collection of firewood and medicinal plants, gleaning in harvested gardens, and grazing livestock. A fence and hedge is shown in Figure 11 and Figure 12.

To some degree, introduction of exclusive land rights has an impact on food security for vulnerable members of the tribe, especially widows and orphans. As already described, in the past the vulnerable members would glean in harvested fields. Due to the introduction of “impermeable” fences and gates, there is a need for the tribe and country as a whole to find alternative means of providing for vulnerable members of the tribe.
Figure 11 a contemporary Luo homestead with a gate and hedge as a sign of some form of exclusivity.

Figure 12 a barbed wire fence around a contemporary Luo garden shows some form of exclusivity against overlapping grazing rights.

Construction of fences and gates are indicators that in some cases, aspects of individual exclusivity have been accepted.
5.3 Among the Maasai people in group ranches

5.3.1 Retained aspects that enhance communal access to land

The Maasai people have also retained aspects of communal tenure that enhance communal access to land. In this research, the main aspects that were captured are: an embedded social structure, an embedded homestead structure, age-set structure, livestock friendships and marriage, as shown by the descriptions below.

5.3.1.1 Embedded social structure

The Maasai people have retained an embedded social structure which transcends group ranch boundaries, that is divided into sections (singular. *olosho* plural *ilosho*), localities (*inkutot/* *enikutoto*), homestead (*elatia*), and household (*enkang’* or *boma*) (Mwangi, 2007, pp. 36–37; Spear and Waller, 1993; Spencer, 2013, 2004). The Maasai tribe as a whole is divided into sections that hold specific portions of land within Kajiado District, which was created from the extended Maasai Reserve as was described in the historical background. The sections include: *Purko, Matapato, Loodokilani, Laikipiak, UasNkishu, Purko, Kisongo, Loita and Parakuyo*. Among others (Mwangi, 2007; Sankan, 2006; Spear and Waller, 1993).

The *olosho*, ‘section’ is held by different parts of the tribe, who share pasture and water. The sections have recognized boundaries that are protected by members of the section, particularly the warriors as will be described in this chapter. Thus, if non-members want access to the section, they must seek consent from the elders. In most cases, the *olosho* has different types of ecologies that are used by the people in the section according to the rainfall seasons. During the dry seasons, the members retreat to highlands, or areas around permanent springs and rivers for pasture. As the season changes and long rains start, the members of the *olosho* move to the lowland plains to graze their livestock and to maximize on seasonal rivers and springs. In this way, the Maasai are generally nomadic within their own *olosho*. However, in very dry seasons, they seek permission from other sections and move their livestock to where they can get water and pasture (Mwangi, 2007, p. 35; Rukwaro and Mukono, 2001; Spear and Waller, 1993). This aspect of *olosho* can be shown by the following quotation.

The Maasai traditional settlement reflected their social life with kinship, mythology and socialties playing important roles. First, the global settlement was generally divided according to clan lineage with clan members occupying a clear region called *Olosho* in their language... The coming of modernity among the Maasai can be said to have been in 1963 when Kenya became independent. It is then that certain aspects of their culture appear to have undergone almost revolutionary transformation. At the global settlement level, they
have maintained their clan lineages with the clans still occupying the *oloshon* (Rukwaro and Mukono, 2001, p. 5 and 10).

The quotation above shows that the *ilosho*, ‘sections’ have been retained by the Maasai despite the introduction of group ranch boundaries. In each section, there is a traditional authority structure that is different from the introduced formal structure as will be discussed in the chapter on authority structures.

In each section, the Maasai are divided into localities known in plural as *inkutot* and in singular *enkutoto* in the Maa language (Mwangi, 2007, 2006). The locality is a collection of several homesteads. In each locality, there are more detailed rules regarding grazing of livestock than at the *olosho* level. In each locality, local authority structures determine which areas of land should be left fallow to allow grass to grow, which areas to be left for grazing young livestock and lactating cows, and which areas to be left for grazing all other livestock. The age-set authority structures are also embedded at this level of the community. This aspect of localities is described in more detail below, and is shown in Figure 13.

The local community (enkutoto) is harder to define. It consists of local concentration in the network of interaction that cultivates a shared concern for opinions and events (Spencer, 2004, p. 15).

The locality was the basis of the Maasai transhumant herding system, which involved herd and family movements from permanent pasture reserves to temporary wet-season grazing areas… Various traditional management techniques were employed, such as the regular burning of portions of grassland to help regenerate new grass growth… (Mwangi, 2006, p. 161).

In the quotations above, it is clear that the Maasai have retained localities *inkutot* as a means of not only gaining access but also controlling land. In view of the fact that demarcation of group ranches did not align with traditional boundaries, there are cases where two or more localities which could not have joined together in custom are now under one group ranch.

5.3.1.2 *Embedded homestead structure*

At a more micro-level, the locality is divided into homesteads known as *elatia* (Grandin, 1991; Mwangi, 2006; Rukwaro and Mukono, 2001). In some cases, the word “*elatia*” is used to refer to a mini-locality, and in other cases it is used to refer to a homestead (Grandin, 1991; Mwangi, 2006; Rukwaro and Mukono, 2001). In this thesis, it is used to refer to a homestead. To some degree, the Maasai have retained a system in which two or more households combine forces and establish one homestead. Considering that the Maasai people live in a part of the country.
that has one of the highest densities of predators such as lions, leopards, hyenas and cheetah; that is close to the Maasai Mara National Park and Amboseli National Park in Kenya, and the Serengeti in Tanzania, they have adapted combined homesteads as a way to cope. As a result of their environment, two or more households construct a homestead and cooperate in grazing and providing protection from predators (Kissui, 2008; Rutten, 2002).

The Maasai have retained a pattern with which they build the homestead. Maasai huts are built by women, while the men set up the outer hedge and thorn enclosures for livestock. Normally, the homestead is set up in a circular shape. The number of entrances to the homestead is determined by the number of male homestead heads. Ideally, each man should have his own entrance. In a polygamous household, a hut is built for the first wife on the right hand side of the man’s entrance, while walking from outside into the homestead, and a hut is built for the second wife on the left hand side. If the man marries a third wife, the first one moves her hut further inside the homestead on the right hand side to make room for the third one to build on the right side near the entrance, similarly, the second wife moves further inside on the left side to make room for a fourth wife. Thus, the junior wives are always closest to the entrance.

…the home is circular like this, and the entrance is here [drawing on the ground]. If you have a wife, the first one is on this side [right], the second you put on the left… the third right the fourth left, like that… (Respondent KJD008).

In the homestead, each household has a small enclosure in which they keep young livestock and lactating cows, while all their other livestock are combined in a central kraal which is made of thorns (Rukwaro and Mukono, 2001; Sankan, 2006; Spencer, 2004). Thus, it is through the homestead that households, gained access to land.

The communal nature of the homestead structure is shown in Figure 14 and Figure 15.
Figure 13  structure of a Maasai Locality which shows distribution of homesteads and shared resources such as pasture and water holes\textsuperscript{10}

\textsuperscript{10}Adapted from (Spencer, 2004, p. 16)
Figure 14 A Maasai homestead which shows many huts within a homestead as a sign of communal access to land

Figure 15 Aerial view of a Maasai homestead also showing multiple huts in a shared homestead and a central livestock kraal that is shared by the different households\footnote{Source: \url{http://www.travel2light.com/?p=59} downloaded on 9th October 2012}
5.3.1.3 Age-set structure

The Maasai have also retained an intricate age-set structure which determines the age at which men are expected to move out of their parents’ homestead, or to build a hut, and also enables access to land in other group ranch sections. The age-set structure is modelled on the male life cycle as perceived by the Maasai, and consists of boyhood (*ilaiyok*), warriorhood (*ilmurran*), junior elderhood (*ilmuruak*) and senior elderhood (*ildasit*) (Mwangi, 2007, p. 40; Sankan, 2006; Spencer, 2004). A boy who has not been circumcised is an *ilaiyok* and has rights of access through his parents. Generally, at the *ilaiyok* stage, the boys are charged with looking after small livestock within walking distance of the homestead. They help their parents with homestead chores and learn about the customs of the Maasai through song and dance. If a man passes away before his sons are circumcised, his kinsmen can take over his livestock because uncircumcised men like women, are often likened to children among the Maasai, and children cannot be entrusted with property as described below:

If a man dies before his son is circumcised, his brothers can take over the wife and cattle … we cannot leave a child with property … it is irresponsible (Respondent KJD008).

Boys are not circumcised until they are mature … nevertheless certain boys whose cases are regarded as being special may be circumcised before this stage is reached… A boy, for instance might be circumcised to take charge of his dead father’s property… (Sankan, 2006, p. 25).

As soon as the boys reach mid-teenage years, they undergo circumcision and are joined into a warrior stage known as *ilmurran* (Mwangi, 2007; Sankan, 2006; Spencer, 2004). Today, as in the past, teenage boys in all sections of the Maasai, including in Tanzania are circumcised in the same season. After initiation, the boys should move out of their parents homestead for approximately ten years, in which they live in the bush or forest in homesteads known as *manyatta*. In this stage, the *ilmurran* are under a strict code of conduct, in which they are not supposed to eat meat in the presence of women and not allowed to drink milk unless they are two or more together. In addition, at this stage the young men allow their hair to grow very long and plait it to symbolize they are warriors. The main task of the warriors is to protect the community and in the past, raid livestock from other communities. The *ilmurran* are also responsible for grazing the strong livestock to faraway lands during the dry seasons. Therefore, at the warrior stage, the young men forge strong bonds through which they gain access to and protect their land (Mwangi, 2007; Sankan, 2006; Spencer, 2004). Transition into the *ilmurran* can be described as follows.
The circumcision ordeal is a watershed in a young Matapatoi’s career. Once he has surmounted the ordeal and proved himself worthy to become a *moran*, this forms the basis of the pact with his age-mates … the notion of unswerving loyalty to a responsible group of peers who have proved themselves now becomes dominant (Spencer, 2004, p. 76).

All boys who are circumcised in the same season are joined into an age-set, and two age-sets are joined together to form an age-group.

Each age-set consist of two age-groups, the “right”, one i.e. the one that is circumcised first being known as *Ilmanki*, and the “left” one (circumcised later) known as *Ilmania* (Sankan, 2006, p. 31).

After finishing the warrior stage, the young men graduate into junior elders through an elaborate ritual known as *eunoto*, after which they are allowed to marry and start new households and if necessary homesteads. During the *eunoto* ceremony, all the warriors from the different Maasai sections are gathered together in a special homestead also known as manyatta in which they are shaved by their mother as a sign of transition into adulthood (Sankan, 2006; Spencer, 2004).

During the *eunoto* ceremony, traditional leaders are selected for the age-set who can influence decisions regarding land. The first leader to be appointed is *olotuno*, ‘the man who is planted upright’. The second to be appointed is his deputy known as *oloboru-enkeen*, ‘the man of the cut thong’, who is expected to assist the *olotuno* in performing all rituals. A young man from whom the elders obtain a bullock for the ceremony is also installed as an *olopolosi-olkiteng*, and finally, the *oloiboni*, ‘prophet’, for the group is selected. In traditional Maasai communities, the prophet was the most powerful person, because he had linkages with the spiritual World (Sankan, 2006; Spencer, 2004). Thus, as described in the historical background, it is with prophet Olonana and his peers that the colonialists signed the 1904 and 1911 Maasai agreements (Hughes, 2006).

The final stage in the age-set structure is that of the senior elders, known as *ildasit* (Sankan, 2006; Spencer, 2004). In order to become a senior elder, a man is required to have gotten married, and had children. At the appointed time, the elderly man performs a ritual known as *loolbaa*, ‘the feast of the great ox’. In this feast, a special bull is slaughtered and its meat shared by most members of the community. This stage also marks the end of a generation, and enables the elders to circumcise a new group of boys. At this stage, the man and his wives have forged strong ties with other members of their age-group, and share resources together (Sankan, 2006; Spencer, 2004). In the contemporary era, the process of being installed as a senior elder has
been retained to an extent that even educated Maasai men travel back to the village for the ceremony as shown by the following example.

The ceremony revolves around the Chief Park Warden … a holder of a Masters degree from the United Kingdom, a widely travelled man, who has worked in several National Reserves in the country, who is returning to his roots, in the quest for traditional recognition, who when interviewed said, “in the tradition, it is like your peers, or your cohorts will never recognize you until you perform this ceremony, actually you will be regarded a young man,”… the ceremony was orokiteng-loolbaa, transition into senior elderhood (Nation Television Kenya, December 2009)12.

In some cases, the Maasai people have retained access to land across group ranch boundaries through their age-set structures. In essence, members of one age-set are supposed to support each other to an extent of sharing resources when in need (Spencer, 2004). During dry seasons, when men from one section cross into another section, they are supposed to seek refuge with a person from their age-set as they seek permission for grazing from elders. In this regard, two respondents described access to land across formal boundaries as follows.

Last year during the drought we migrated to Tanzania. When I arrived there, I went to the homestead of my age-set, one of the men with whom I was circumcised...he gave me a hut to sleep and a kraal for my livestock. Then he approached the elders of that village on my behalf to request for permission to stay there...when the rains returned I came back (Respondent KJD005).

You see those cows there. They belong to a rich old man from Tanzania. He came here last month due to the drought in Tanzania...He is staying with that elder... they are in the same age-set (Respondent KJD012).

5.3.1.4 Livestock friendships
The Maasai also forge communal bonds through livestock friendships known in singular as sotwa and in plural as sowani (Spencer, 2013, 2004). Due to persistent drought and the threat of cattle rustlers, the Maasai have developed livestock friendships as a coping strategy. In this social institution, a man lends one or more of his cattle to another man for an unspecified period of time. In most cases, Maasai men distribute a varied number of livestock among their age-groups. Therefore, in case of calamity such as drought or a livestock raid, a man can replenish his herd by retrieving some of the cows from his age-mates. This unique social institution is described in detail as follows:

12Downloaded from You Tube (https://www.youtube.com/watch?v=mJjMOnz[1bA]) August 2010.
[Among the Maasai], prudence and skill are not the only factors which affect the size of a man’s herd. There is also an element of luck. Substantial loss through enemy raids (mainly in the past), confiscation [colonial era] or epidemics may affect any man regardless of his skills. It is necessary for him to insure himself by developing a wide range of social ties so that he can rely on others more fortunate than himself in times of difficulty. Those who develop a relationship based on mutual help in times of need are referred to as stock friends (s. sotwa, pl. sotwatin)... a stock friendship is formed when one man is given a beast by another: normally he will have to ask for it first. In future either of them can turn to each other for support. Each Maasai can relate the gifts that have passed between him and each of his stock friends and the extent to which he feels he is on the whole the creditor or the debtor (Spencer, 2013, pp. 27–28).

A claim can be made that by distributing livestock to friends, the Maasai are essentially retaining access to water and pasture in other group ranches.

5.3.1.5 Marriage

Registration of group ranches also had an impact on access to land for women. In the past, Maasai women also gained access to land through their membership and status in the tribe. As young girls, they had inherent rights to land in their parents homestead. After reaching puberty, the girls were also circumcised after which they were required to get married (Kirk and Burton, 1977; Spencer, 2004; Talk, 1987). The married girls were usually attached to the age-set of their husband (Spencer, 2004). During the marriage ceremony, the husband would pay part of the bride price, after which he was allowed to take the girl to his home. As soon as the girl left her parent’s homestead, and entered her new home, her rights changed. Essentially, she acquired stronger rights in her husband’s home and lost some rights in her parents’ home. If she went back she would most likely be treated as a visitor. As long as part of the bride price had been paid, the wife had secure rights in her husband’s home because divorce was normally not allowed among the Maasai.

On the wedding day the bridegroom brings two heifers and one bull or bullock, all of which must be of the same colour, with no scars and no unusual peculiarities … there cannot be divorce in any marriage carried out in this manner. The woman is regarded as the first and paramount wife in that home, and since all the prescribed routines have been adhered to, divorce becomes unthinkable (Sankan, 2006, pp. 46–47).

As described earlier, each wife has rights to land in the homestead in which her husband lives. In brief, the first wife will build on the right hand side of the entrance and the second wife builds
on the left hand side of the entrance while walking towards the homestead. Thus, through marriage women continue to gain access to land among the Maasai people.

5.3.2 Acceptance of the ability to exclude

5.3.2.1 Women
Subdivision of group ranches has had an impact on women’s access to land. In traditional Maasai custom, women were usually considered to be like children hence could not own property without the supervision of a man (Sankan, 2006). In most cases, married women were not registered as owners of group ranches and were assumed to have access through their husband’s share. In the process of decision making about subdivision of group ranches, widows were often represented by male relatives because Maasai custom normally hinders women from sitting in a meeting with men (Mwangi, 2005, p. 34). However, male relatives are allowed to vote on behalf of the widows. Nonetheless, in most cases, the widows received smaller portions of land which were normally in the drier sections of group ranches (Mwangi, 2005; Rutten, 1992). Subdivision of group ranches has also “cut off” some paths and places which women used to fetch water and firewood, hence, today the women are normally confined to fetching firewood from their small family portion of land, and have to walk long distances round other parcels of land in order to fetch water (Mwangi, 2005, p. 34).

5.3.2.2 Men
Despite retention of some access through birth and age-structures, introduction of group ranches impacted on the rights of men. At around 1980, when the Maasai were contemplating subdivision, members of some ranches voted and decided to stop adding new members in the register as a means of maintaining the share of land that each member would receive after subdivision (Mwangi, 2007; Rutten, 1992, p. 305 and 455). Thus, some young men who were entitled to land by custom were locked out and could not be registered as part of the ranch owners. Exclusion of younger generations from the group ranch register led to some conflicts during the process of subdivision as shown by the following example.

The exclusion of youths in these group ranches did not go unchallenged. They argued that land in traditional customary practice belonged to all, access being conferred to adult males via their membership in the community rather than by inheritance from their fathers. As such, they were well within their rights to demand for registration. They subsequently organized to challenge their exclusion (Mwangi, 2005, p. 36).
After subdivision, men who did not receive any portion of land are expected to inherit land from their parents. In this regard, the subdivided portions of group ranches are individualised under the Registered Land Act (RLA).

### 5.3.2.3 Outsiders from living on the land

In the pre-colonial and early days of colonisation, Maasai boundaries were “permeable” and outsiders could move in and out of the Maasai territory. The Maasai people were able to take in outsiders from neighbouring tribes such as the Kikuyu and Kamba, normally as herding labour (Spear and Waller, 1993, p. 226 and 228). The Maasai also captured some people during livestock raids and took them in as labourers (Sankan, 2006). As soon as the outsider arrived into the Maasai homestead, they went through a ritual in which they were made part of the homestead as follows.

As soon as the man arrives at his new home, he is shaved, washed with water mixed with milk from cattle belonging to the home, and dressed up. Sandals are carved out for him and thereafter he is taken outside the house where he is made to sit down and told that he has now become a member of the family. He is given a new name, given cattle and sheep and told the traditions of his new family. Thereafter he is treated like every other member of the family, and acquires all rights, including inheritance, of his new home. He is also given responsibilities that are common to the rest of the family (Sankan, 2006, p. 19).

According to Sankan, if outsiders wanted to depart from the community, if they had come with a wife and children, they would be allowed to leave with them. If the community had provided a wife for the outsider, in some cases, he would be allowed to depart on condition that he leaves the wife and children behind. This ability to take in outsiders is similar to the Jodak system that was described among the Luo people. The main difference is that in the Maasai system the outsider was granted permanent rights, while in the Luo system, the outsider held temporary rights which could only become permanent through marriage and participation in war.

Introduction of group ranches has had an impact on the ability to take in outsiders permanently. In most cases, outsiders cannot be taken in because it is difficult to get a majority vote to allow their names to be included in the register. As described earlier, most group ranch registers have also been closed not only to outsiders but also younger generations. The change in attitude towards granting outsiders land can be shown by the quotation below.

How can we give outsiders land? They are visitors … they are not in the register. After subdivision they will find a new place to go to (Respondent KJD015).
Despite a shift in attitude, some people who are considered outsiders by the Maasai have gained access to group ranches either through formal or fraudulent means. In a particular case, a man whom the Maasai considered to be an outsider and was to be evicted from the ranch retained access because somehow his name was in the land register.

In the Court of Appeal at Nakuru, Lontebes group ranch (appellant) brought a case against Mr. Kipkemoi Arap Memndera (respondent) on 27th September, 1994. In the case, the appellant’s advocate said that in 1992 the appellant filed a suit in the superior court against the respondent seeking, among other reliefs, an order for ejecting the respondent from a parcel of land No. Narok/CIS-Mara/Lemek/129 (the suit land) and damages for trespass … In his defence filed on 27th October, 1992, the respondent denied being a trespasser and averred that the suit land was a group land held by the appellant under section 7 of the Land (Group Representatives) Act (Cap 287) (the Act) on behalf of the members of the group of which he was also a member … On his part the respondent placed before the learned Judge a copy of the Register of Members under section 17(1) of the Act. In that register the respondent is shown as member No. 8, the other members being Leleito Cheusi, Purpuria Ezekiel, Chelule Kenduywa, Leleito Towet, Leleito Chepkulul, Leleito Kosiom and Kaplelach Kiptangusi. He also produced a copy of the Land Certificate issued to Lontebes Group Ranch dated 2nd September, 1986. He also produced copies of letters from the Provincial Administration confirming that he was a genuine member of the Group Ranch. The appellant produced no credible evidence to the contrary beyond a mere assertion by word of mouth that the respondent is not a member …. The Judge held that the respondent was a member of the Group and not a trespasser as alleged by the appellant (Kenya Law, 2000).

Subdivision of group ranches has also enabled outsiders to buy land among the Maasai as will be described in more detail in chapter six.

5.3.2.4 Outsiders from grazing livestock on the land
As stated earlier, in the past, the Maasai had overlapping grazing rights across various sections. As long as a person requested permission from elders, they would be granted grazing rights for a certain period of time. Despite introduction of group ranch boundaries, the overlapping grazing rights have been retained within group ranch areas due to changes in weather patterns. When asked whether he can cross ranch boundaries for a pasture, a respondent said,

Yes I can, because they have grass … when God gives them rain we have drought, and when we have rain they have drought … so if we migrate this year, they will migrate next year. We help each other … if you block them, you will also be blocked when you need access … we allow them temporary access … we show them where to graze … that is the
place for calves, that is the place for cows … we migrate because of drought (Respondent KJD012).

In some cases, the Maasai have started blocking outsiders from grazing livestock on their land because they are becoming more aware of their boundaries. In a number of cases, outsiders are being asked to pay for grazing rights which were initially free under custom.

Group ranches have affected the ability to graze, but only a little, because in the past we used to migrate as if there were no boundaries. But today everyone knows their group ranch boundaries. And then there are those ones that have been subdivided … In this one of ours that is not subdivided, it is easy to enter because they can pass the other side and meet a few people who allow them to enter … but the ones which have been divided into individual lands, nobody can give you. The only place where there is rescue is [undivided] group ranches, because they don’t sell for you grass or water … like in 2009, the Maasai came, even all the way from Narok … in the individual area they will tell you I have this section, pay this money … if you cannot pay you just get hurt (Respondent KJD014).

Subdivision of land into individual portions has led more and more people to charge money for grazing rights (Lengoiboni et al., 2010). The Maasai are increasingly asking to be paid for money to graze on their individual portions, and are also being asked to pay when they cross with livestock into land held by other tribes. In this regard, in subdivided portions, the Maasai gain access to land through verbal or written agreements (Lengoiboni et al., 2010).
5.4 Among the Pokot people in Trust Land areas

5.4.1 Retained aspects that enhance communal access to land
Ideally, the Trust Land system can be described as a minimalist approach of land registration in which the State has little interference with internal land dealings. Nonetheless, as described in the historical background, the Trust Land system was introduced as Native Reserves which were supposed to separate people in different Trust Land areas (Sorrenson, 1967). Particularly, the West Pokot Trust system was intended to keep out other tribes such as the Turkana, Samburu and Karamojong.

5.4.1.1 Embedded social structure
Within the Trust Land boundaries the Pokot have retained aspects of their socially embedded social structure through which people gain access to land. The Pokot as a tribe are divided into two main sections, namely, ‘people of grain’, *pi-pa-pagh*, who live in the hills and river valleys, in which they practice sedentary agriculture, and ‘people of livestock’, *pi-pa-tich*, who live in the lowlands (grassland plains) in which they practice nomadic livestock keeping. The two sections are further divided into clans and households as described below (Bollig, 2000; Du Plessis, 2005; Nangulu et al., 2001; Peristiany, 1954, 1951; Porter, 1965).

5.4.1.2 People of grain (*pi-pa-pagh*)
In the pre-colonial era, some of the ancestors of the Pokot settled on the hills and river valleys in which they specialized in sedentary agriculture (Bollig, 2010; Du Plessis, 2005; Porter, 1965). These agriculturalists in the Pokot language are known as *pi-pa-pagh*, ‘people of grain’. These agricultural Pokot held communal fields known as *parahgomucho* and are divided by ridges known as *korok* (Conant, 1965; Porter, 1965). Each clan held land both within the valleys and on hill tops which appears to have been a method of spreading risk, therefore if crops in the hill tops failed, they would depend on irrigated crops within the river valleys (Bollig, 2010; Porter, 1965). Apart from growing crops, the agricultural Pokot also kept livestock from which they obtained milk, meat and hides and also used oxen for initiation rituals (Bollig, 2010; Schneider, 1957).

5.4.1.3 People of livestock (*pi-pa-tich*)
Apart from agriculture, some of the Pokot specialised in nomadic pastoralism and were known as *pi-pa-tich*, ‘people of livestock’ (Bollig, 2010; Peristiany, 1951; Porter, 1965). These people live in the plains, in which they migrate with their livestock from place to place in search of pasture. These pastoralists keep livestock such as cattle, goats and camels from which they obtain subsistence products such as milk, meat and hides (Bollig, 2010). According to historical accounts, the ‘people of livestock’ are related to the ‘people of grain’, with whom they seek
refuge during very dry seasons (de Vries, 2007). The retention of these two main separations among the Pokot can be shown by the following quotation.

The more sedentary and primarily agricultural Pokot have traditionally inhabited the ethnic core area comprising of the Cherangani and Sekerr hills. These people are known as pipöpagh (people of the grains), or Hill Pokot, and traditionally practice rain-fed and irrigated agriculture. In the past, they primarily produced millet (or sorghum) and eleusine (or finger millet), whereas nowadays cultivation has been extended, mostly by growing maize, but also to other crops such as beans and cassava. Besides cultivating, the pipöpagh traditionally possessed small numbers of livestock (de Vries, 2007, p. 78).

5.4.1.4 Access through clans (orten)
The Pokot have also retained access to land through clans, known as orten in the Pokot language (Bollig, 2010, 2000). In the Pokot tribe, there are approximately twenty clans which are associated with lineages of pre-colonial settlers. Each clan has a totem known as lilo, with which it is identified, such as ngusur, ‘rain’, kiptinko, ‘snake’, koîmo, ‘fire’ and talai, ‘Monkey’ among many other totems (Bollig, 2000). The clans are exogamous and people are not allowed to marry within their own clan. The clans are also identified using specific branding patterns on livestock. Thus, the livestock are seen as property of the clan as a whole, as opposed to families. The quotation below shows how a man from another tribe described how he felt a common bond with a Pokot family with which they shared a clan totem.

When I came to work in Alale, I was invited for lunch by the people of the Siwotoi clan [a Pokot clan that has the buffalo as its totem], after I had explained that I belonged to the Siwotoi of Sabaot [even though the Sabaot clan with the buffalo is probably named otherwise] and the buffalo was my animal. Because we share the buffalo as a totem, it makes us belong to the same clan … I am not sure if our ancestors are the same, but the animal binds us (de Vries, 2007, p. 38).

Another person described how he was able to gain access to shelter in a Pokot home with which he shared a clan as follows.

My clan, and my fathers’, the Baboon, originated at Tapasiat, which is now known by its Karamojong name, Moroto. These days, as with all clans, we are greatly dispersed. For example, one day recently I walked to Kirikiripa and came across two women speaking a language strange to me, yet when I greeted one she responded! Curious, I asked her, “when you used to talk to your father long ago, where did he tell you your people came from? She answered, “He said we came from Moroto, at a place called Tapasiat.” “Yes, and what was your clan?” “We are Baboon,” she said. I replied, “ Then you are my sister, for I also am
of the baboon Clan of Tapasiat.” The woman rejoiced, She and her husband took me to their home, where she cooked for me and offered me a place to sleep on my journey (Robbins, 2010, p. 78).

The quotations above show that the clan totems create social bonds within and across tribes, through which people share resources in Trust Land areas (Bollig, 2010, 2000; Du Plessis, 2005; Robbins, 2010).

5.4.1.5 Embedded homestead structure
In each clan, there are households known in singular as kaw, and in plurals as keston through which people gain access to land (Bollig, 2010, 2000). In some cases, two or more households come together to form a homestead, or a homestead is formed by one extended family. The Pokot have also retained a pattern with which they construct their homesteads. In general, in a polygamous home, each subsequent wife builds on the right hand side of the first wife, while following the perimeter of the homestead. Young men build closest to the homestead entrance and livestock are kept in the middle of the homestead (Bollig, 2010).

Figure 16 A Pokot homestead with a hut in the background and a granary that is used by multiple members of the family in the foreground
Figure 17 Two Huts occupied by different Pokot brothers within the same homestead as a sign of shared access to land
5.4.1.6 Age-set structure

In the Pokot tribe, land rights for men were linked to an age-set structure. Pokot like the Maasai and other Kalenjin communities such as the Nandi, Kispsigis and Tugen, have evolved a complex age-structure through which they share resources (Bollig, 2010; Du Plessis, 2005). In the social structure of the Pokot, after boys are circumcised, they join a warrior age-set known as *miron*, after the warrior stage, the young men graduate into junior elders through a ceremony known as *sapana*, and after they get married and have children, they graduate into senior elders known as *poy* (Bollig, 2010, 2000; Du Plessis, 2005). In similarity to the Maasai people, to a large extent, Pokot women are also circumcised, and joined to their husband’s age-set (Bianco, 1991; Du Plessis, 2005; Edgerton, 1964). However, due to interventions by the government and some non-governmental organisations, the rate of female circumcision is reducing (Conroy, 2006).

The process through which men go through initiation is elaborate and creates lasting bonds through which people share resources. As soon as boys reach puberty, they are taken into the forest and circumcised together, after which they are taught the customs of the Pokot. At the warrior stage, the young men raid livestock from other communities such as the Turkana and Karamojong. Finally, they go through an elaborate ritual known as *sapana*, through which they graduate into junior elders. A few days before the ceremony, an initiate’s father identifies an ox or camel to be speared for the ceremony. If the family does not have an appropriate animal, the father borrows an ox from one of his kinsmen. On the day of the ceremony, the initiate’s mother and other female relatives prepare local brew and food, while the men sit in a ritual semi-circle known as a *kirket*, and young people engage in a dance known as *adongo*. After much celebration, a time comes when the initiate is supposed to kill the animal with one stroke of the spear. If he fails, it is considered to be bad luck, and his father must slaughter a choice goat to appease the spirits. The elders gather around the stomach contents of the speared animal and predict the boy’s future. Finally, the young man is washed in the stomach contents of the animal as a mark of transitioning into adulthood (Bollig, 2010; Du Plessis, 2005; Peristiany, 1954, 1951). These ceremonies create bonds within the community as described below.

When asked about the significance of the *sapana* ceremony, an elder said:

> Blood means togetherness, now that blood you see, we share, so it means that when we take that blood we don’t see each other as enemies, that is why we don’t raid each other (Respondent WPKT005).
In the quotation, the elder shows the value of the ceremony as a tool of creating bonds within the community. The importance of the ceremony can also be highlighted as follows.

This ceremony [sapana] is surely the most important in Pokot culture...It is widely attended to by the whole district and publicly marks a boy’s transition into adulthood (Du Plessis, 2005, p. 126).

After the sapana ceremony, the young men become junior elders and are allowed to participate in decisions regarding access to land. The elders are divided into two main sections, one known as ngetei, ‘stones’ and the other ngimur, ‘leopards’. The ngimur wear ornaments made from iron and copper, while the ngetei wear ornaments made of brass (Bollig, 2000). In some cases, during the process of land adjudication, it is the elders in the kokwa determine and mark property boundaries (Nangulu et al., 2001).

In general, among the Pokot people, a man can start a new homestead after getting married (Bollig, 2010). After a young man has graduated as a junior elder, his family members usually look for an appropriate bride and pay dowry from part of the household herd. According to Bollig, after the man has enough children or has married a second wife, hence has enough labour is he allowed to start a new homestead. However, the young man can hasten the process by convincing his mother and some of his siblings to move out with him to start a new homestead. During the time of moving, the young man is entitled to take some livestock from the household herd and from the herd that was allotted to his mother (Bollig, 2010, p. 29).

5.4.1.7 Livestock friendships
The Pokot have also retained access to land across adjudicated boundaries and Trust Land boundaries through livestock friendships known as tilya (Bollig, 2010; Nangulu et al., 2001; Schneider, 1957). As stated earlier, some sections of the Pokot country have been demarcated into individual and group ranch properties (Nangulu et al., 2001). However, most of the tribe lives in Trust Lands. Across these boundaries, Pokot people exchange livestock and in essence gain access to pasture and water. The Pokot have evolved livestock friendships as a means of coping with the arid and semi-arid terrain in which they live, and heavy losses that can be inflicted by raiding tribes such as the Turkana and Karamojong, as described below.

You know we exchange cows. This is like our traditional bank. If a person needs a bull for sapana, he can give me a cow and I give him the bull. Later, that person can come for a calf or a goat from me ... He can come as many times as possible. This is how we help each other ... my father once lost his cows during a raid by the Karamojong ... we built back our herd through his livestock friendships (Respondent WPKT02).
Severe drought and disease, which occur at least once in five to seven years, can decimate herds of livestock and bring families to poverty and famine within a very short time. One of the ways through which Pokot families have over the years tried to reduce the danger of complete loss of livestock is through *Tilya* (literally meaning “joint cow ownership”). It is an insurance system (Nangulu et al., 2001, p. 103).

The quotations show that *tilya*, livestock friendships not only create solidarity within the tribe, but also show that to some extent the exchange of livestock provides access across formal boundaries.

### 5.4.1.8 Marriage

Access for women was also linked to their relationship to men either as fathers or husbands. As stated earlier, in the past, the Pokot circumcised girls when they reached puberty, after which they would get married (Yegon, 1996). After marriage, Pokot women were entitled to livestock in their husband’s herd and subsequently grazing land in the tribe territory.

### 5.4.2 Acceptance of the ability to exclude

#### 5.4.2.1 Introduction of informal adjudication

A major change in communal tenure among the Pokot people is the introduction of informal land adjudication (Rionokal, 2011). According to some interview respondents, informal adjudication started among the highland Pokot at around 1964 when formal adjudication started in other parts of the county. At that time, the government called village elders and asked them to demarcate individual and group land parcels in readiness for formal registration. However, due to the slow process of formal adjudication, some of the areas are still continuing with informal adjudication. In the process, elders known as *kokwa* walk round the boundary of a homestead and blaze trees, or plant cactus hedges as shown in Figure 18, Figure 19 and Figure 20. After demarcating the land, the elders, neighbours and land owner share a meal as a symbol of acceptance of the demarcation.

The elders also have a book in which they enter the name of the person to whom land has been registered. The book includes columns which have the name of the proprietor, a parcel number assigned by the elders, if available, the National Identity Card number of the land holder, and his signature. However, the exact nature of the informal land register and how it is updated was not properly captured in this research, hence can be the subject of further research. The process of informal adjudication was described as follows.
We cut trees. The elders of *kokwa* meet and agree. They say, his land starts from that tree to that tree … they walk with the land owner and his neighbour and make marks on the bark of the tree, that is how we create boundaries (Respondent WPKT003).

![Figure 18 A boundary tree that was blazed in the past](image18)

![Figure 19 A boundary tree that has been blazed recently](image19)
Figure 20 A planted hedge among the highland Pokot as a sign of some form of exclusivity

Figure 21 Planted boundaries among the highland Pokot as a sign of some form of exclusivity
5.4.2.2 Women
The Trust Land system and informal land adjudication has had an impact on access to land for women. In the Trust Land system, the government and County Councils have a right to alienate land held by locals for public purposes (Republic of Kenya, 1970). In West Pokot, some areas of land on which women depended for collecting firewood, grazing livestock and walking across in search of water have been alienated and in some cases fenced off (Klopp, 2000; Southall, 2005). As described in the historical background, the Pokot people complained to the Kenya Land Commission, 1932, that introduction of Native Reserves (Trust Land boundaries) had impinged on their rights to gain access to land in some areas (Bianco, 1996; Nangulu et al., 2001). A number of the Pokot people also complained that alienation of land by the government and construction of the Turkwel dam had impacted on their access to land within their tribal areas as shown by the quotation below.

Pokot leaders met yesterday to demand compensation from the Turkwel Hydro Electric Project that was built on seized land in 1986 without their approval. They claim that the electric company generates masses of wealth while driving the local people even further into poverty (Cultural Survival, 2004)

Since the inception of the Suam project Turkwel dam in 1984, you realize that our land was swallowed by the water, our people lost their land, no compensation was done, people lost their beehives, grazing land and arable land, that means our people lost much (West Pokot County Assembly, 2014, p. 4)

Despite the impacts of the Trust Land system on access for the Pokot people as a whole, it is not immediately clear how the system has specifically impacted on access to land for women. In this regard, there is a need for further research on how the Trust Land system has impacted on women.

5.4.2.3 Men
The Trust land system seems to have had the same impact on men as described above. In general, the government and County Councils have in some cases alienated land from the Pokot for public purposes, which have impacted on access for the community as a whole. In terms of informal land adjudication, a male respondent described how elders took part of his land and allocated it to another person who does not belong to the clan, which has led him to follow a lengthy process of trying to recover his land as described below.

I am following on my land. The elders took part of my land and allocated it to another person who does not even belong to our clan. I was forced to get a lawyer. We made several trips to the court but did not find a solution ... the process of travelling to town for hearings
and the expenses are too much... I am forced to resort to other "sophisticated means", such as witchcraft (Respondent WPKT005).

The quotation above shows how the informal process of adjudication may be unfair if the elders collude and make a unilateral decision that is against a land holder. The quotation also shows that the formal systems is limited in its ability to deal with land disputes within the Trust Land areas, possibly as a reflection of a weakness of the minimalist approach in which the State does not defined rules of interfering with internal land dealings (Fitzpatrick, 2005). Finally, the quotation also shows that when all else fails, some people continue to revert to witchcraft for solutions.

5.4.2.4 Outsiders from living on the land
According to some interview respondents, in the past, the Pokot were able to take in outsiders known as rwakan, ‘welcome outsider’. The rwakan could be a child or adult who was captured during war or a livestock raid on another community. A respondent described how an outsider can be accepted as follows.

If a person comes to you for help and you give him a place to stay, he is rwakan, ‘a welcome outsider’, if he came as a child, when he grows up and knows Pokot custom, you give him land like you would your own child. He has drunk the milk of that home. He is like your own child, so you give him land. There is an example in our village. After a war, one person had a good luck and found a child from the other side, the person took the child and hid him in the roof and fed him until he was strong. Then one day he said this is my child, when those people came for war, this child remained behind, he has drunk my milk, he is now like my child, everyone agreed that the child is rwakan. The child was taken in as part of the clan, they shaved his hair so that he starts afresh … they say the hair of your side is gone, and now you are a member of this family. Normally it is a person who is from another tribe, who has respected Pokot custom, until the Pokot give him a clan he is given a certain clan such as the frog clan. They tell you from today onwards you do not belong to your tribe, you are a Pokot … during adjudication he is given land, he is free, his hair was shaved, even when we go to war he fights as a Pokot (Respondent WPKT007).

Informal adjudication in Trust Land areas seems to have had an effect on the ability to take in outsiders. According to a respondent, in some cases, outsiders were allocated land during the informal process. Hence, today, people are suspicious of taking in outsiders lest they claim permanent rights to land. In one case, a respondent described how he moved his hut towards land that was allocated to an outsider to make sure that if the person claimed permanent rights the portion that they might be awarded was very small.
5.4.2.5 Outsiders from overlapping grazing rights

Introduction of Trust Land boundaries has had an effect on grazing rights across different tribes. In the past, Pokot people and their neighbours such as the Turkana, Samburu and Karamojong in Uganda crossed into each other’s territory in search of water and pasture for livestock (Bollig, 2010). However, as indicated in the historical background, when Native Reserves were introduced, the Pokot were told they should not cross into reserves held by other tribes (Bianco, 1996). In this regard, a claim can be made that introduction of Trust Land boundaries heightened the awareness of exclusive tribal territories among the Pokot and other tribes. Thus, the boundaries might have contributed towards tensions that erupt regularly among the Pokot and their neighbours when one tribe crosses over Trust Land boundaries.

Violence and warfare in north-western Kenya have created an environment of insecurity ... 

The twin phenomena of banditry and cattle rustling have become endemic in the region, affecting approximately two million people, ranging from the Turkana in the north, the Samburu and Pokot in the centre, and the Keiyo, Marakwet and Tugen (Osamba, 2000, pp. 31–32).

According to an interview respondent, the Pokot and their neighbours are also constantly trying to shift their Trust Land boundaries as a means of controlling more pasture for livestock as shown by the following quotation.

If you look at grazing, when it is dry you can go to the hills, but during the rainy season like now, you can go to the plains. When the rains start, the plain area has more grass, so in the plains, where the grass is in plenty is in Turkana. So, the Pokot cross into Turkana and take grass, they guard that grass. They want the [Trust Land] boundary to be there so that they get grass. On the other hand, the Turkana want the boundary to move towards Pokot so that they control the grass. That is why we fight, up to now we are not satisfied. Even yesterday, no, even now as we speak, people are fighting for that grazing ground …we also cross into Karamajong in Uganda for grass (Respondent WPKT002).

Despite the feuds, during dry seasons Pokot people and their neighbours continue to cross into each other’s Trust Land areas because it is a means of coping with the harsh climatic conditions, what has been referred to as “risk management in a hazardous environment” (Bollig, 2010).

Inside the Trust Land, introduction of boundaries through informal adjudication does not seem to have hindered overlapping grazing rights. A number of respondents among the highland Pokot said that after fields have been harvested; livestock owned by another person can enter the land to graze. A picture of livestock grazing on a harvested field is shown in Figure 22.
Figure 22 Livestock grazing on a harvested field as a sign of shared access to land
5.5 Cross-case comparisons
The main aim of this thesis is to find out whether communal tenure changes differently when impacted by different land registration systems. Hopefully, the results can contribute towards development of more appropriate registration systems for communal tenure. In this regard, focus was on how exclusivity as introduced by the three registration systems in Kenya is working or not working. There are similarities and differences concerning impact of exclusivity in the three case studies. Nonetheless, exclusivity as introduced by the formal systems has not been fully accepted by the people, as shown by the following comparisons of effects on embedded rights, access through membership and overlapping grazing rights.

5.5.1 Embedded land rights
Exclusivity as introduced by the individual, group ranch and Trust Land systems does not seem to be working properly because embedded rights to land have been retained by the Luo, Maasai and Pokot people. Assumptions were made that individual registration should have “cut off” communal ties to enable individuals to exclude others from the land and possibly participate in economic activities such as using land as collateral for credit, participating in formal land markets and improving agricultural productivity. However, the Luo people, have retained communal ties through which majority of people can gain access to land. Similarly, group ranches should have “cut off” communal ties and “released” people within the group from social ties within the tribe. Despite changes such as subdivision of most group ranches, the Maasai have retained a nested social structure through which people can access land across group ranch boundaries. The Trust Land System can be described as a minimalist approach and was not expected to interfere with internal land dealings of the people. Thus, despite introduction of informal adjudication, the Pokot have also retained an embedded social structure through which people might gain access to land.

Despite the general failure of registration systems to eliminate embedded land rights, there are similarities and differences in changes that have occurred. From a wide perspective, embedded land rights have been retained across the three registration systems. At a detailed level, the characteristics of embedded structures differ across the three cases.

5.5.2 Access through membership and status
There are similarities and differences of changes in access to land through membership and status in the three case studies. In general, exclusivity in the three registration systems has not succeeded at completely eliminating access to land through membership and social status. In the three communities, most men continue to have inherent rights to land by virtue of being born in the tribe, and the rights can change as their status changes in the community. Among
the Luo people, men have rights to build a temporary bachelor hut in their father’s homestead in which they are expected to get married. After getting married and having children, the men lose some rights in their parent’s homestead and acquire rights to start a new homestead. Among the Maasai, boys live in their parent’s homestead until they undergo circumcision, after which they are allowed to move out and live in a warrior village known as manyatta. After completing the warrior stage, the young Maasai men have a right to marry and build a new house either in their father’s homestead, in another homestead, or to start a completely new home altogether. Nevertheless, in similarity to the Luo, Maasai men are allowed to start a new homestead after marriage. Among the Pokot, young men are also allowed to start a new homestead after getting married.

Changes that have occurred on access for men due to the impacts of the three systems can be summarised as follows. In the individual registration system, some of the Luo men are no longer able to move out of their parent’s homestead to start a new homestead because consolidation eliminated external parcels of land on which they could build. However, the men are still expected to build a new house in the parent’s homestead, and if possible fence it off. Among the Maasai, some group ranches “closed” their registers and in essence denied young men “ownership” rights over land that they should have inherent rights by birth. Subsequently, in some subdivided group ranches, some young men were not allocated parcels of land because their names were not in the group register. The Trust Land system as a whole does not seem to have changed access for Pokot men. However, informal adjudication that has developed among the Pokot people changed access rights for some men. According to a Pokot respondent, local elders allocated part of his land to a person from another clan without his consent, hence, hindering him access to part of his own land. However, within the “open” Trust Land areas Pokot men seem to continue gaining access to land according to custom.

There are also similarities of change in access for women through membership and status. A major similarity is that in the three cases, most women continue to gain access to land through their relationship with men as fathers, brothers or husbands. Among the Luo people, girls have inherent rights to land in their father’s homestead until they get married. As soon as they get married, they lose some rights in the father’s homestead and gain new rights in the father-in-law’s homestead. After bearing children, the woman is allowed to move out with her husband and start a new homestead. If a girl is unmarried, she can usually gain usufructory rights in her father’s homestead, which should normally revert back to one of her brothers when she passes away. Similarly, among the Maasai, young girls lose some inherent rights in their parent’s homestead after getting married, and gain new rights in the husband’s homestead. A difference
with the Luo is that the Maasai are not always expected to move out and start a new homestead. They can stay in the parent’s homestead as long as there is enough space and feel comfortable. However, if necessary, a young couple can move out into another existing homestead, or start a completely new home within the group ranch boundaries. The Pokot people also seem to have similar social institutions in which girls lose some rights to land in their father’s home and gain new rights in their matrimonial home.

Changes that have occurred in access for women appear to be different across the systems. Among the Luo people in the individual system, some people have accepted aspects of exclusivity and have evicted widows who had customary rights from the land. Among the Luo people, some widows, especially those affected by HIV/AIDS have been evicted from land by in-laws who were supposed to protect them under custom. Among the Maasai people, some women, especially widows were also disadvantaged, especially during the process of subdivision. In most cases, widows were allocated smaller portions of land after subdivision, possibly because they were not usually present in meetings and were represented by male relatives because Maasai custom normally hinders women from sitting in meetings with men. The Trust Land system seems to have the lowest impact on women. Hence, the individual registration system seems to have had the most negative effects on women’s rights to land, followed by group ranches and then Trust Land systems.

Access to land also changed across the three case studies. Among the Luo people, the ability to take in “welcome outsiders” known as jodak has diminished because some “welcome outsiders” were allocated “permanent” rights to land during the process of adjudication which could not have been allowed under custom. Thus, “autochthons” have become weary of granting access to land to outsiders lest the usufructory rights are converted into permanent rights. The individual system also fixed customary boundaries which may have shifted to accommodate population growth. Hence, because the size of land has been fixed, homesteads which have many people are unable to take in outsiders, while in the past, larger families might have talked to their neighbours and shifted to land occupied by smaller families.

Closure of group ranch registers has limited the ability of Maasai people to take in outsiders. In the past, the Maasai could also take in outsiders and grant them access to land. However, when subdivisions started, most if not all group ranches “closed” their registers and stopped taking in new members as a means of securing the share of land that each person might receive. Hence, many vulnerable people, especially from neighbouring tribes often cannot access land among the Maasai except through commercial transactions, which many may not afford.
In the Trust Land areas, some of the Pokot people continue taking in outsiders known as *rwakan*. According to an elderly interview respondent, a person who wants to take in an outsider is only required to approach elders, known as *kokwa* for permission. Hence, the individual and group ranch systems seem to have blocked the ability to take in outsiders in similar ways. The Trust Land system is different in that outsiders may continue to seek refuge among the Pokot when needed.

5.5.3 Overlapping grazing rights

There are also similarities in the changes in overlapping grazing rights across the three case studies. Among the Luo people, individual registration has contributed towards people blocking others from grazing on their land. In most cases, people have put up “closed” fences made of barbed or meshed wire and gates which livestock cannot cross. Thus, even people who have large parcels of land that might have more than enough grass for their cows have blocked other people who might have benefited by grazing their livestock on harvested fields. A Luo respondent described how in the past, widows and orphans would glean after harvesters in large field held by wealthier members of the clan and were referred to a *jofuno*, ‘gleaners’, a concept that seems to have disappeared in the contemporary era.

Among the Maasai, overlapping grazing rights have been retained in most group ranches that have not been subdivided. However, in some cases, outsiders can be blocked from grazing within a group ranch. In subdivided portions of group ranches, the overlapping rights seem to have greatly diminished especially because some people have put up fences. Additionally, in some subdivided portions, outsiders are required to pay for pasture. Thus, as stated by one respondent, if a drought breaks out in the Maasai territory, the only place where people might find “rescue” is in group ranches that have not been subdivided.

Trust Land boundaries have also impacted on overlapping grazing rights among the Pokot people. On one hand, introduction of Trust Land boundaries have contributed towards the Pokot attempting to limit neighbouring tribes such as the Turkana from grazing livestock within the Pokot land. On the other hand, due to harsh environmental conditions, the Pokot have to some degree retained overlapping rights as a coping mechanism. A summary can be made that overlapping grazing rights have diminished most in the individual system, followed by group ranches and finally in Trust Land areas.
5.6 Chapter summary
The main aim of this thesis is to find out whether communal tenure changes differently when impacted by different land registration systems. The findings above show that from a wide perspective, communal tenure has changed in the same way after being impacted by exclusivity as introduced by the three different land registration systems. In terms of the wide perspective, aspects of communal tenure that are contrary to exclusivity have been retained in all the three case studies. Concurrently, in all the cases, some people have accepted the ability to exclude as introduced by the three land registration systems. At a detailed level, there are similarities and differences as described above. In conclusion, because the three different land registration systems have not been able to completely change communal tenure, there is a need to develop more appropriate land registration systems for developing countries that can accommodate some of the retained aspects of communal tenure.
6 Impacts of the ability to sell land on communal tenure

6.1 Introduction

This chapter will explore how the ability to sell land as introduced by the individual, group ranch and Trust Land systems have impacted on communal restrictions against selling land among the Luo, Maasai and Pokot people respectively. In this research, assumptions are made that in communal tenure, people were not allowed to sell land (Chauveau et al., 2007, p. 66; Cheater, 1990, p. 189). In contrast, registration systems are normally introduced as a means of developing land markets among other proposed benefits (Dale and McLaughlin, 2000; Williamson et al., 2010). In this regard, investigations were carried out on whether people are “holding on” to communal restrictions against selling land or whether they have accepted the principle of selling as introduced by registration systems.

In areas where people have accepted the principle of selling land, investigations were also carried out on challenges facing sales. A major challenge facing sales is that in some cases people continue to use informal or communal procedures to secure transactions as opposed to using formal systems (Chauveau et al., 2007, p. 74; Chimhowu and Woodhouse, 2006, p. 357; Goodwin, 2013, p. 164). In some cases, people secure transactions “through papers that have no legal value, but which are becoming a ubiquitous instrument in local land transactions” (Chauveau et al., 2007, p. 74). The informal documents may even be witnessed and stamped by government officials as a means of adding a “veneer of officialdom” (Chimhowu and Woodhouse, 2006, p. 357). In other cases, transactions can be “bolstered by investment in social ties and by the pragmatic adaptation of land-related ceremonies and practices to suit contemporary contexts and contemporary beliefs” (Goodwin, 2013, p. 164). Due to the persistence of informal transactions, some transactions are not recorded in land registers (Coldham, 1979; Haugerud, 1989). In a few cases, transactions are marred by reversed sales. “Even where a vendor does not return and attempt to reverse a sale, extended families and/or communities, sometimes responding to population pressure, may attempt to retrieve land sold by group members” (Goodwin, 2013, p. 171).

In order to show how communal tenure has changed within and across the three case studies, this chapter is divided into the following main sections. Section 6.2 – Changes among the Luo people in the individual system. Section 6.3 – Changes among the Maasai in group ranches. Section 6.4 – Changes among the Pokot in Trust Land areas. Section 6.5 – Cross case comparisons.
6.2 Among the Luo people in the individual system

6.2.1 Retention of custom against sales

In the pre-colonial era, communal tenure among the Luo people restricted the ability to sell land (Ocholla-Ayayo, 1976, p. 125; Shipton, 1984; Shipton and Goheen, 1992). According to Ocholla-Ayayo, land could not be sold because it belonged to the tribe as a whole, by virtue of the fact that ancestors of the tribe had fought for the land. Similarly, according to Shipton, (1992), people were normally not allowed to sell land because ancestors had been buried on the land and also because land was considered to be a family asset on which people depend for survival.

As described in the previous chapter, communal tenure among the Luo people also contained, and continues to contain, embedded and overlapping rights to land which may have hindered transactions. In brief, the Luo as a tribe was divided into lineages, clans, villages, homestead and families, through which individuals obtained rights to land based on their membership and social status (Okoth-Ogendo, 1989; Shipton and Goheen, 1992). The tribe also had overlapping rights to land in which various people could simultaneously or in different seasons gain access to the same portion of land (Ocholla-Ayayo, 1976).

The individual land registration system was introduced as a means of “breaking” communal tenure to allow for sales and other aspects as shown by the quotation below.

The much expected growth of a viable land market in the small-farm sector was based on the rather simplistic notion that farmers would respond to individual ownership by breaking loose from the supposedly static and retrogressive confines of “communal” living into a world of laissez-faire individualism. Thus, the Registered Land Act (Cap. 300, Sections 27, 28, 30) was carefully drafted to make it clear inter alia that the rights of an individual proprietor were not liable to be defeated by anything not shown in the register (Okoth-Ogendo, 1986, p. 7).

Based on the quotation above, registered proprietors were supposed to be able to sell land without being restricted by persisting aspects of communal tenure.

6.2.1.1 The use of land as a major source of livelihood

According to some interview respondents, land should not be sold because it is the major source of livelihood. In most developing countries, access to land is critical for the livelihood of most people (Deininger, 2003, p. 1). As stated in chapter one, in most developing countries, most people live on less than one dollar a day (Zevenbergen et al., 2013, p. 595).
In most rural parts of Kenya, the majority of the people depend on land for growing crops and grazing livestock as their main forms of economic activities. To this end a respondent said that land is the principal means through which people provide for their families.

What would the children eat? We depend on the land. If you sell land and use the money, what will your children eat when you have gone? We know some people who sold their land, and now their children are begging in the market centre...it is not good (Respondent KSM009).

A person may be willing to sell land but can be stopped by family members and land control boards if the transaction may jeopardize livelihoods. As stated earlier, in communal tenure, individual land rights are usually embedded within wider kinship networks (Cousins, 2007, p. 293; Goodwin, 2011, p. 5). Thus, family members may block a sale if they perceive it will have negative consequences. Similarly, as described in the historical background, land control boards were introduced by the colonial government and perpetuated by independent Kenya governments as a means of controlling subdivisions, transfers and succession of land in rural areas where individual registration has been introduced (Coldham, 1978; Republic of Kenya, 2010). Hence, according to some respondents, the customary prohibition against selling land may be upheld by family members of land control boards.

My mother in law tried to sell our parent’s land but we refused. You see, our late brother has a wife and young sons who live on the land. So, if she sells the land what would they eat? She tried to sell the land to a rich man in the village but we refused. We went to the chief and to the land control board and asked them to stop the sale (Respondent KSM011).

Another respondent concurred with the above by saying,

If a person wants to sell land, the land control board will ask him if he has enough land to feed his family. If it is small, they will not agree; because it will hurt him (Respondent KSM008).

6.2.1.2 Respect for burial grounds

Among the Luo people, land sales may also be restricted because of respect and fear of burial grounds. According to Luo customs, different members of the household were buried in a specific place in the homestead. In the pre-colonial era, a man was buried inside the first wife’s circular mud hut on the left hand side while entering the hut. Normally, this was the place where an earthen bed had been created. Thus, a grave was dug under the bed. After burial, the mud hut was deserted and left to disintegrate. During the colonial era, and several years after independence, the Luo started burying the dead outside the house. This may be attributed to the
permanent houses that were introduced by the settlers. Thus, a deceased man and his wife were buried on the right hand side of the first wife’s hut while looking towards the entrance. Unmarried male children were also buried outside the same hut, but the side was dependent on their birth order. All sons born as odd numbers were buried on the right hand side, and any born on an even number were buried on the left hand side. All unmarried girls were buried close to the hedge of the homestead, because according to the Luo, the spirit of an unmarried girl can torment the home. In the recent past, some of the Luo people have changed custom, and are creating a burial site within the homestead, in which all deceased members are buried (Malo, 2003; Mboya, 1967; Ocholla-Ayayo, 1976; Stamp, 1991). These burial sites have been retained and affect the ability to sell land as described below.

My parents are buried here. I come as often as possible to sit by their side and tend the grave site. How can I sell their graves? We grew up here. It is not good (Respondent KSM017).

My sister wanted to buy that land, the land you saw at the corner when you were turning in to come here … yes, that one near the main road. But it has a grave in it…. when we found out it has a grave on it, we withdrew from the transaction. How can you buy a gravesite? (Respondent KSM017).

6.2.1.3 Negative consequences that have been witnessed

A few respondents said land should not be sold because of negative effects that they have witnessed in some cases where people sold land. In some cases, people who bought land in areas which are far away from their own people have been vilified, mostly because of jealousy when they start thriving beyond the locals. The aspect of jealousy towards people who are thriving beyond others is common in most societies, and can be referred to as the “tall poppy syndrome” (Kirkwood, 2007; Moulya and Sankaranb, 2000), or better put, “though shalt not be a tall poppy” (Peeters, 2004, p. 71). Among the Luo people, like most other African tribes, the aspect of jealousy is socially engrained, to an extent that a co-wife in a polygamous home is called nyieka, which means “my partner in jealousy” (Meekers and Franklin, 1995, p. 316). According to two Luo respondents, buying land in other communities is discouraged because if a person is seen to be successful, they are often attacked by members of the host community as shown below.

Just after adjudication, that man sold his land and went down to the plains where he bought a piece of land. He grew many crops and seemed to be prospering. The people of that place became jealous and starting cutting down his crops. They would come in the night and cut
down all the maize and sorghum before it matures. He had no choice but to come back. His brother gave him a place to stay (Respondent KSM007).

I cannot leave here and go to another lineage to buy land. That is looking for death. There is another young man in the village. He went and bought land in that other lineage. He was working and had some money. But the person who sold him land started frustrating him. Every time he would put in an investment, they would bring it down ... You should buy land with your own people. You don’t know the heart of those people. They can sell to you and sell to another person (Respondent KSM013).

The examples above have shown some reasons why a portion of the Luo tribe has retained custom against selling land in areas where formal individual registration has been introduced. Nevertheless, in some cases, people have accepted the ability to sell land due to various reasons as described in the next sub-section.

### 6.2.2 Acceptance of sales

A number of the Luo people have “let go” of custom and accepted the ability to sell land as provided for in the individual registration system due to a breakdown in traditional authority structures, the impacts of HIV/AIDS, a need for more land within a family and a need for money to invest in business among other factors.

#### 6.2.2.1 Due to breakdown in traditional authority structures

In some cases, land sales are occurring due to a breakdown in authority structures. In the past, the Luo had an authority structure through which they could block certain activities which were perceived to possibly carry negative consequences for the tribe. The structure consisted of recognised laws known as *chike*, an elders’ court known as *Buch-Jodongo*, the community as a whole who could implement decisions of elders and traditional religious leaders who could inflict either good or harm as shown below.

Chike Luo are principles and rules abstracted from living behaviour. They form the content of legal verbalized ideals in the repository of the minds of elders, who often assemble as adjudicators, *Jodong-Bura*, which could be regarded as forming a part of the legal institution. The other part of it is formed by the members of the society themselves who may act in a verbal manner to restore law and order. A third part is played by religious leaders who may use magicopsychological authority (Ocholla-Ayayo, 1976, p. 88).

There was a criterion that was used to select elders who could reprimand people from selling land among other activities and they listen to him. According to an interview with an elderly respondent, the main characteristics that were used to select a leader are as follows.
There are three things we used to look at when selecting a leader. First, we used to ask ourselves which man in the village is old enough to lead people? Second, does he have a voice? If he reprimands people do they listen to him? Third, does he have a granary in his home that can feed orphans?\(^\text{13}\)

As shown in the above quotation, the traditional authority structure also consisted of religious leaders who could use magicopsychological authority to uphold custom (Ocholla-Ayayo, 1976, p. 88). The Luo have concepts known as *kwer*, ‘something forbidden’ and *chira*, ‘a curse’ (Ocholla-Ayayo, 1976, p. 146). *Chira* underlies all “moral acts, the consequence of which may inflict misfortune, suffering, and punishment upon the individual and his family.” On the other hand, committing *kwer* can lead to negative consequences not only for the individual but the tribe as a whole (Ocholla-Ayayo, 1976, p. 147). In the past, apart from elders, there were spiritual leaders who upheld *chik*, ‘customary law’ and attempted to hinder people from committing a *kwer* which could lead to *chira*. Similarly, there were various “spiritual” people in the tribe who could inflict harm either when called for or by their own choice. There was a *jadangla* “a sorcerer believed to bring harm to his enemies by anti-social and illegitimate use of destructive magic”. There was *janawi*, who could cast a spell on people. *Jabilo*, “with protective magico-medicine against destructive medicine” and *jaajuok*, a witchdoctor, among many others (Ocholla-Ayayo, 1976, pp. 153–164). The Luo also believed in a supreme being called *Nyasaye*, who has been described as follows.

*Nyasaye* is conceived of as a dominant universal power that knows everything, sees everything and hears everything. It moves slowly in a human’s body. Indeed it can be too close to be touched, but sometimes too far to be reached. It is unknowable and invisible (Ocholla-Ayayo, 1976, p. 168).

Based on the various spiritual aspects, in the past, the Luo would reprimand a person from breaking custom and they would obey, lest they suffer spiritual consequences. During the field research, a respondent described how when walking in the field a person would tie a plant made in the form of string around a mushroom and no one else would touch it because it had already been claimed. Another respondent stated how at some point somebody stole something in the village and a witchdoctor was called to solve the problem. The witchdoctor planted something known as *manyasi* and asked several suspects to pass over it. According to the respondent, when the person who had stolen the goods passed over things with the spell, he fell down as “started eating grass like a cow”. Finally, several respondents said that if people continuously harm

\(^{13}\)Interview with a Luo elder downloaded from https://www.youtube.com/watch?v=7radW99xx6Y on 20 October 2014.
other people by breaking custom, Nyasaye can stop rain from falling on the land, which may lead to famine. Hence, through spiritual aspects, law and order was maintained.

In the contemporary era, socio-economic factors have changed the traditional authority structure and in a few cases enabled people to sell land even when they have been advised against sales by elders. Colonial administrators introduced new authority structures which undoubtedly eroded some of the traditional authority structures. In Kenya, Chiefs were appointed in Locations, District Officers (DOs) in Divisions, District Commissioners (DCs) in Districts and Provincial Commissioners (PCs) in Provinces, with a mandate to implement colonial policies (Ogot, 1963). Considering that just before and after independence the government policy shifted towards individual land registration as a means of enabling land markets among other reasons, government authorities presumably contradicted communal authorities who were attempting to block sales. In most cases, young people have today gained formal education and employment and are often in a position to challenge their elders (Berry, 1989, p. 43). Hence, in parts of West Africa, “young men seeking social recognition challenge the authority of their elders through unauthorised settlement of incomers and increasingly open opposition to land sales” (Chauveau et al., 2007, p. 74). Introduction of Christianity and other religions may have also eroded the fear of harmful traditional spiritual leaders. In addition, due to modern education, some people no longer respect Nyasaye and do believe he can allow droughts if people engage in harmful acts. Thus, according to some respondents, some people have accepted the ability to sell land due to a breakdown in traditional authority structures as described below.

The problem is that we have accepted many things from outside. Honestly, in the past the Luo did not sell customary land. Even if a person had a difficulty, he would approach a kinsman and say I have this problem can you take this part of my land in exchange of livestock? In this way the land remained within the family. But now, what we see in the urban centres has crept in the community. Now they even sell ancestral land, even where there are graves … If you try to advise him not to sell the land, he will ask you, why are you stopping me? Who are you? (Respondent KSM008).
There are many outsiders who have bought land in the village. They have come from other lineages and bought land in the village … In the past it did not happen … But now it has changed; now people are selling to outsiders … the young men don’t care what the elders say … they are hungry for money (Respondent KSM017).

Due to the breakdown in traditional authority structures, another respondent described the ability to sell land like a “power saw” which may cause harm if used in the wrong way, as follows.

The ability to sell land is like a power saw for cutting trees. It is so destructive, as soon as you get it; the only thing you think about is cutting trees. You cut the trees and do not know how they are planted. You cut it and don’t replace it. This is the way I would describe the land brokers. They are so many in the village. Now people are selling land even without finding out whether the land has a title deed, and finding out who is the owner. In the past, if the elders heard that you were selling land that you inherited for free, they would consider it to be a great crime. It is a crime and you will not eat it. They would divert it and find out why you would want to sell it. But today they are selling and you cannot stop them. The young people do not listen to the elders (Respondent KSM004).

6.2.2.2 HIV/AIDS

In some cases, people sell customary land as a means of paying for medical needs. In particular, HIV/AIDS has ravaged most parts of Kenya, including areas occupied by the Luo people (Geissler and Prince, 2013; Nyambedha et al., 2003). In most cases, the impacts of the disease led people towards distress sales as a means of coping with the ever increasing medical needs (Chauveau et al., 2007, p. 28; Geissler and Prince, 2013; Okuro, 2007). According to some of the respondents, they have accepted sale of customary land to meet medical costs as described below.

I sold land to buy medicine. I did not want to sell, but my daughter is sick. How else do I get medicine? I talked to that man, he gave me cash money for the medicine, and I gave him land (Respondent KSM006).

Another researcher described a distress sale that occurred in a Luo family due to the effects of HIV/AIDS as follows.

My husband had around six ha of land in different places. He fell sick in 2000 while working in Nairobi […] He stopped working and returned to ancestral home… while at home his health did not improve. We had to look for money to take him to the hospital … in the year 2001 he sold one parcel at Kshs. 15,000 to establish a home and to seek for treatment. Things did not improve. In January 2003, my husband, without my knowledge, sold another
parcel at Kshs. 21,000 ... I was against the sale, but he did it in cohort [sic] with the assistant chief who by then was also very sick and desperately needed money ... there was nothing I could do. I have 1.5 ha left for my children. My husband eventually died on May 14th 2005. The assistant chief has also died and that parcel was sold at a low price and not even paid for fully according to the records ... However, the person who bought the land insisted having paid for it in full ... I am still following the matter (Okuro, 2007, p. 113).

6.2.2.3 A need for capital
In a few cases, respondents described how people are selling land due to a need for capital to engage in business, pay school fees and other reasons. The need for capital appears to be consistent with proposed reasons for registration in which people use land as collateral for credit (De Soto, 2000). However, as stated by some people, opening the possibilities of selling land may lead to indiscriminate sales, which might in turn lead to landlessness and poverty (Atwood, 1990; Chimhowu and Woodhouse, 2006). To this end, people have sold land for capital and in some cases incurred negative consequences as shown by the following quotation.

A new business has started called pikipiki [motor bike for carrying passengers and goods] that the young men are riding … the young men are selling land at a throwaway price so that they buy a motorbike for business. They go and point land to a land broker, even up to four acres. Not realizing that the price of four acres is much more than the motorbike … the young men have sold so much land in the name of starting a motor bike business. When the motorbike breaks down they come back to the village and don’t have the land anymore… this is a time bomb (Respondent KSM004).

6.2.2.4 Due to a need for more land for a family
A few people have engaged in transactions because they need more land for the family. In the past, population density was low and people could move to fallow areas in the community and start a new homestead (Ocholla-Ayayo, 1976). Similarly, according to some elderly respondents, in some cases, clan elders had a right to re-allocate land from a small family, or abandoned land, to another family which was in greater need. After registration, the size of land held by a family was “fixed” and was only supposed to be changed through formal procedures such as consolidation or subdivision (Sorenson, 1967). Thus, today, among the Luo, if the number of people has increased in a family, they usually have to buy land from another family which may have a bigger portion as shown by the quotation below.

Nowadays people buy land. In the past, the land was fallow, and a person could move to a place where people have not lived before and set up a homestead … You know that land demarcation was done here in our village in 1969. That is when a map was drawn. In 1969,
1970 until 1974 is when the maps were drawn for the land that was given to each person. Now you know that place where a person was given is his land. He cannot get land elsewhere … Now if you see that the land that was demarcated for you is too small for you and your people, and you need more land, you can talk to a person whose land is a bit bigger and ask them to sell to you. This is why people are buying and selling land (Respondent KSM007).

6.2.3 Challenges facing sales
Land sales among the Luo people in the individual registration areas are impacted by challenges such as informal transactions, dependence on custom to secure transactions and possibilities of sales being reversed.

6.2.3.1 Informal transactions
A major challenge facing the individual registration systems is informal sales which are not recorded in the land register. According to respondents at the Ministry of Lands, some people process transactions through the formal system and obtain legal titles to land. However, the Ministry Officials also stated that there are many transactions which go on in the villages without their knowledge.

Strictly, there is a formal procedure which should be followed when people are transacting land in rural areas. According to The Land Control Act, if a person wants to sell land they should apply to a land control board for permission to sell. If the person is only selling part of the land, they are first required to apply for permission to conduct a mutation survey using specified forms. The applicant is usually invited to attend the land board meeting, together with some family members if possible, and the matter is deliberated and a decision is often given on the same day. If the person is allowed to subdivide, they can engage a private surveyor who should conduct the survey using specified mutation forms. A mutation form should be filled in triplicate giving the registered proprietor’s instructions to the surveyor on how to conduct the mutation. The surveyor draws a map of the survey to scale on a transparent paper which can be used to transfer the drawing on a Registry Index Map (RIM) for amendment. Subsequently, after completing the Survey, the forms are submitted to the District Surveyor to make changes on the RIM and issue new Land Registration Numbers (L.R.No.). After amending the RIM, the District Surveyor forwards the information to the Land Registrar in the District Office to cancel the old title, and produce two new separate titles. After the two titles have been produced, the registered proprietor is supposed to apply again to the land control board for consent to sell one or both of the parcels. If consent is granted, the proprietor should be able to sell the land to a
buyer at an agreed price, after which the name of the owner should be changed in the land register (Republic of Kenya, 2010, 1963).

In a number of cases, people are circumventing the formal process and using corrupt means to obtain legal documents. In Kenya, corruption has been a major challenge in land procedures and is being tackled by various government initiatives (Ndungu, 2006; Njonjo, 2002; Southall, 2005). Two respondents described informal transactions as follows.

People can buy land without title deeds. If people want to make a transaction, they should first conduct a search in the Lands Offices. The search should show us who is registered as the owner, and the acreage. Now after we have done the search, we come back and write the agreement. Then we start paying … but the procedure is being floated [flouted] … You find that a person has bought land without a title deed, and in the long run you find that he will obtain a title through the back door (Respondent KSM007).

People sell land without titles. But it is not legal. There are brokers and corrupt people … They use fake documents to process titles. Then they sell the land. It normally happens … (Respondent KSM016).

Informal transactions can also be conducted through government appointed Chiefs. A seller and buyer might meet in the office of a Chief and ask him/ her to witness a transaction. As described earlier, people might engage a Chief in a transaction and ask him to stamp documents, to add a “veneer of officialdom” to the transaction (Chimhowu and Woodhouse, 2006, p. 357). The process through which transactions are conducted through Chiefs can be described as follows.

A land sale begins when a buyer approaches a local landowner and expresses his interest in obtaining a plot. The seller then shows the buyer around and the two agree on the right size. The price negotiations then begin. Once an agreement is reached between the parties, the two proceed to the area Chief and express their interests in conveyancing in the identified piece of land. The Chief, usually in the company of local community elders, may visit the site to ascertain the boundaries. He (chiefs are invariably male) then drafts a sales deed detailing the particular of the transaction. These include the name of the seller, his national identification number, and the size of the land being offered for sale. Likewise, the buyer’s name and national identification details are recorded; together with similar details of four witnesses … The Chief retains a copy of the sales deed for his records, while parties to the sale each get a copy. There is always a ‘token of appreciation’ offered to the Chief and the community elders for their services in processing the transaction … (Midheme and Akach, 2013, pp. 6–7).
6.2.3.2 Dependence on communal aspects to secure transactions

In some cases, people depend on communal aspects to secure transactions as opposed to formal systems, hence, unregistered transactions, which may render the register obsolete. As described at the beginning of this chapter, transactions may be secured by investing in “social ties” and “by the pragmatic adaptation of land-related ceremonies and practices to suit contemporary contexts and contemporary beliefs” (Goodwin, 2013, p. 164). Hence, communal tenure usually goes beyond “person-to-land links” and also encompasses “person-to-person links” (Okoth-Ogendo, 1989, p. 9). Among the Luo people, the person to land links can be enhanced by building a hut on the land, planting crops, and sometimes burying the dead, usually with assistance from other community members as a sign of acceptance of the person’s right to occupy land. To this end, a respondent stated they felt confident in their land holding, despite not having formal title, because other members of the village helped them to start a new homestead.

This is now my portion. I worked hard and the whole community helped me. They helped me to build. We ate and drank together. The whole village knows that this is now my place...if they did not accept it they would not have helped me. This is now my place (Respondent KSM005).

In communal tenure a person can often secure a parcel of land by planting crops or living on the land for an extended period of time without being asked to leave by neighbours. However, in the past, if the person moved away, they could lose their land holding and would have to obtain another parcel on their return (Atwood, 1990; Ocholla-Ayayo, 1976). A similar principle, known as adverse possession, occurs in formal systems, in which if a person lives on the land for about ten years without being formally asked to vacate the land, they can claim legal ownership of the land (Coldham, 2000; Gardiner, 1997). Thus, a respondent in the study area appeared to derive security from the fact that they had planted crops on the land without objections from anybody in the village.

I do not have a title deed; everybody knows this is my place. I grow crops here every year … even my father has not collected his title deed … who will evict him from the land? He has been living there for many years (Respondent KSM001).

The person-to-person links can be enhanced by participating in social functions such as weddings and funerals. A respondent described how among the Luo people, outsiders, known as Jodak, may not be allowed to carry the coffin of a deceased person lest they think they belong to the clan. Thus, an assumption can be made that an outsider who is allowed to carry the coffin
and possibly to participate in other social functions has been accepted as part of the social unit. Similarly, the rights of outsiders could be converted from usufructory to permanent rights if the outsider participated in war for the clan or married a daughter of his benefactor (Ocholla-Ayayo, 1976). Hence, through marriage, an outsider may enhance their rights. In urban areas, the Luo people also normally meet to contribute money for sending the body of a deceased relative back to the village for burial. To this end, a claim may be made that an outsider may participate in contributing towards funeral costs as a means of possibly being considered as a “relative”, which may lead to more secure rights to land.

Finally, an outsider can also send remittances to the village as a means of bolstering their rights to land (Chauveau et al., 2007, p. 104; Goodwin, 2013, p. 166). In communal tenure, an individual’s right to land “arises from and is maintained by fulfilment of obligations to other persons in society. The obligations, however, derive from membership in a particular socio-political entity, and it is this fact of membership that gives access to land” (Okoth-Ogendo, 1991, p. 17). In other words, “individualised property rights are still hedged in by a wide-ranging set of social obligations in which the interests of the group are articulated” (Cousins et al., 1992, p. 17). Members of the Luo tribe who live away from their ancestral homes, especially those in paid employment, normally send money back home as a way of assisting family members as shown by the following quotations.

… many of Uhero’s young people were moving between village and town, working or looking for work. Most households relied for their cash needs such as schooling and medical care on the remittances of these migrants (Geissler and Prince, 2004, p. 99).

Many people spend at least part of their lives working in the towns and cities of Kenya, often moving back and forth, and their cash remittances are an important source of income to relatives in Nyanza … Luo people working outside of Nyanza retain strong connections with their rural homes and are expected to build and maintain houses and relations there (Prince and Geissler, 2001, p. 450).

Based on the foregoing descriptions, a claim can be made that a certain amount of tenure security may be enhanced through remittances that are not only sent as an obligation but also as part of a culture of assisting one another where possible. Thus, in some cases, outsiders who live in urban areas can buy land in a village, possibly as a holiday and retirement home, and then start sending remittances to a neighbour in the village with whom they are not related, as a means of not only helping, but also improving security over purchased land.
6.2.3.3 Possibilities of sales being reversed

Another challenge facing sales in individual registration areas is the possibility of sales being reversed by the seller or other family members. The possibility of sales being reversed diminishes confidence in buyers and limits their willingness to buy land. Due to the limitations of selling land, financial institutions may be unwilling to lend money to registered proprietors because in case of foreclosure, the institution might not be able to sell the land (Atwood, 1990, p. 665). The ability to reverse land sales also contributes towards diminished land markets. In the study area, a respondent described a sale that was reversed as follows.

A man in the village bought land but did not acquire legal title … the land had been sold without the approval of the seller’s family members. When the sons of the seller grew older, they conducted a search in the land register and discovered that the land was still in the name of their father. They played things cool and went and obtained a certificate of administration. After which, they went and transferred the land to their own names … Then one day, when the son of the buyer wanted to move and build on that land, he was chased (Respondent KSM014).

The above section has shown how on the one hand some members of the Luo tribe have retained custom against selling land, while others have accepted the ability to sell land. Further, some challenges facing sales such as informal transactions, dependence on custom to secure land and possibilities of sales being reversed have been described. To this end, the ability to sell land as prescribed by the individual registration system is not working properly among the Luo people and should be amended to meet local conditions. The next section will explore changes among the Maasai people in group ranches.
6.3 Among the Maasai in group ranches

In some cases, the Maasai people have retained communal aspects which hinder the ability to sell land and in others they have accepted aspects that enable people to sell land as described below.

6.3.1 Retention of custom against sales

Among the Maasai people, restrictions on land sales can be linked to retention of “communal” land holding through group ranches. As described in chapter one, group ranches are usually large parcels of land that may be registered to a collection of families, clans or part of a tribe (Mwangi, 2007a). In every group ranch, between three to ten persons are selected as representatives and have their names entered in the register on behalf of other members, but all decisions should be made by a majority vote of at least sixty percent of members in a meeting (Mwangi, 2007b; Republic of Kenya, 1970a). By holding on group ownership, members essentially retain a single title deed to which all members have a right, and hence not easily sold. Thus, reasons that have been given for rejection of subdivisions can be used to explain why some people are against sales. As described in the historical background, today approximately seventy percent of the Maasai group ranches have been subdivided into individual land holdings. During debates regarding subdivisions, the following were some of the main reasons why some people were against subdivisions, both within ranches that have not been subdivided, and those that have been subdivided.

6.3.1.1 A need to retain communal grazing rights

According to some respondents group ranches should not be subdivided into portions that might be sold because of a need to retain communal grazing rights. As described in the previous chapter on exclusivity, in most cases, the Maasai have retained overlapping grazing rights across group ranch boundaries. Considering that the Maasai live within semi-arid regions, a respondent stated that the ranches should not be subdivided because they provide a place of refuge for people during dry seasons, a security which may be jeopardized by subdivisions and subsequent sales.

If a drought occurs, and the only place for rescue is in the individual areas, let us say survival chances are very minimal. Because, you will go to a person and he will tell you, “I have this area, so pay this money”. But in the group ranches you are not charged. Are you getting the limitations? For example, I have these few cows and I do not have the ability to pay for them, what does it mean? It means you just have to get hurt. The ones who will survive are the ones with ability … that is why we are against subdivision. In the group
ranch you cannot buy land, it is not possible, where will you get your documents (Respondent KJD007).

Two other respondents described reasons for not subdividing as follows.

Some of the women did not want subdivision. They said how will our children eat, where will we graze our livestock? (Respondent KJD005).

If you subdivide, how will you feed the livestock, on ten acres? It is not possible. This is a big problem … (Respondent KJD008).

6.3.1.2 Due to negative effects in other areas

Two respondents said that they were against subdivision of group ranches because of negative effects that they had seen in other already subdivided ranches.

Some of the people who have sold have moved to towns like beggars. After they sell, they eat all that money, and then they are left with nothing… many have been hurt by the process (Respondent KJD003).

It is not easy. It is not easy...what are the reasons for selling? If possible even the family can sit down and ask, ‘what is your problem?’... that problem is solved...You see in other ranches like Kimana, people have sold a lot of land; too much land has been sold. But we are lucky...You know this thing depends on leaders...The way the leaders inform the people is important. We are telling our people that selling land is not good; it will bring poverty (Respondent GRP08).

The possibility for negative effects of subdivisions and subsequent sales are highlighted by the following quotations.

Mr. Ole Pertiet, who attended school up to Grade 4, worked with the armed forces for 3 years before leaving his job. He has sold a total of 200 acres at Ksh.4,000 per acre, for a total of Ksh.800,000. He purchased a used automobile for Ksh.70,000, built a house with corrugated iron roof (mabati), and bought furniture and a television set. He married, gave five cows in bride wealth, and now has two children. When the money was finished, he sold the car for Ksh. 6,000 (after having it for nine months), sold the television and some furniture, and now has nothing (Galaty, 1992, p. 33).

Mr. Ole Koros, who has some education, was named chairman of the land committee that allocated portions of land to a select number of individuals. He first sold a 16 acre portion of land near the Ngong Hills which had belonged to his father, and was paid cash. After the sale he rarely returned home; he stayed in the small towns just outside the Nairobi periphery without seeing his wife or children for months. After a time his wife fled to her father’s
home, leaving behind two children. Then he bought a four-wheel drive vehicle, and boasted because of the car that was the richest man. He did not work but drank beer continuously. He and his counterparts, drinking all day long boasted about being ‘rich men’ and ‘men without problems’ (*Ilotimiraosina*). After about a year, the money ran out and began coming home to his family (Galaty, 1992, p. 35).

The quotations show that in some cases people sell land and squander the proceeds on alcohol to the detriment of other family members.

### 6.3.2 Acceptance of sales

Acceptance of the ability to sell land is linked to subdivision of group ranches into individual land holdings. As described in the historical background, only about thirty percent of the Maasai ranches have not been subdivided. A number of reasons why the Maasai accepted subdivision of their land and allowed subsequent sales by individuals are described below.

#### 6.3.2.1 Due to recommendations by political leaders

The decision to subdivide group ranches was supported and promoted by prominent political leaders. After 1983, the then President, Daniel Arap Moi, made several speeches in public meetings, in which he encouraged the Maasai to subdivide their ranches into individual portions as shown by the following quotations.

The turning point in the race to subdivide group ranches in the Maasai districts of Narok and Kajiado came when President Moi on several occasions between 1983 and 1989 voiced his support for the process. In 1983, President Moi, speaking at a fund drive in neighbouring Narok district urged members of the group ranches to subdivide (Mwangi, 2007a, p. 93).

By March 14th 1989 President Moi directed that subdivision of group ranches in Kajiado District should no longer be curtailed because of failure to repay loans and that title deeds should be issued as soon as possible (Rutten, 1992, pp. 299–300).

#### 6.3.2.2 A need to secure the size of land holding

A number of people supported subdivisions as a means of securing the size of their share in land in an era when younger people were coming up and would possibly call for the group title to be split into smaller portions (Mwangi, 2005, p. 17). At around 1970, when group ranches were introduced, the population of the Maasai people was relatively low and each member may have had a substantial share within the group ranch. However, as more generations were born and added to the register, the share of each member increasingly diminished. To this end, most ranches “closed” their registers and were no longer taking in new members, with a view that unregistered people would inherit a share through their parents (Mwangi, 2007a; Rutten, 1992).
Subsequently, most ranches have been subdivided into individual portions which can be sold based on the provisions of the Registered Land Act (RLA), 1963.

6.3.2.3 Demands for peri-urban housing

Demands for land for peri-urban housing was also a catalyst for subdivisions, especially in group ranches that used to border Nairobi City. The attractiveness of group ranches for buyers for housing has been described as follows.

The ranches nearer to Nairobi are more attractive to those seeking to buy plots for residential purposes. This seems to be supported in the case of Kisaju, Emboli and Saikeri [group ranches], which had the highest number of companies and cooperatives owning plots within their boundaries, compared with other former ranches (Kimani and Pickard, 1998, p. 207).

Portions of group ranches can also be “cut off” by members and sold to create market centres. According to a respondent, in market centres, individuals can sell their portion as follows.

If it is a plot in the market centre, you can sell even if you don’t have the title deed. When the land is being allocated to members, you are given a small receipt to show that you have paid for your share. You can sell using that receipt. Then, the buyer will go and make a transfer for himself (Respondent KJD007).

To some degree, the receipts have become negotiable title deeds that can be used to transact land.

The ability to sell land within subdivided portions can also be shown by the following quotations.

In the subdivided area you can buy. In that group ranch that has been subdivided, you can buy, and you buy as much as the individual owner is willing to sell (Respondent KJD009).

Initially on group ranch sub-division, all the plots were allocated to Maasai. However, in six of the ten former group ranches studied fragments of plots have subsequently been sold to non-Maasai. In four of the ranches, more than 50 per cent of the plots created since the original sub-division had been sold to non-Maasai by July 1996 (Kimani and Pickard, 1998, pp. 207–208).
6.3.3 Challenges facing sales

6.3.3.1 Informal transactions

In subdivided portions of group ranches, formal procedures as described in the individual section above should also be used for transactions. In brief, a registered proprietor is supposed to apply to the land control board for consent to subdivide and sell land. However, due to various factors, such as urgent requirement for money and possibly due to bureaucratic formal procedures, some people sell land using share certificates or receipts instead of waiting for formal instruments of title. According to some respondents, during the process of group ranch subdivisions, members are often given a share certificate as proof of ownership of their individual portion as shown in Figure 23, as they await formal instruments of title. A respondent described how in some cases, people lease out land to other people, especially for farming purposes, based on the share certificates. Similarly, a respondent described that it is possible to sell subdivided land through the share certificate as follows.

I can sell. I have a certificate. I was given by the group representatives. It shows my name and plot number (Respondent KJD003).

As alluded to in the previous sub-section, in areas where group ranches have been subdivided to create a market centre, people may sell land using receipts which they are issued as proof of ownership that they have paid for their portion of land. According to a respondent, the market centres can be created as a means of enabling members to develop themselves. Hence, willing members can buy a portion of the market centre to set up a shop or to sell. Ideally after acquiring the land, the Maasai should wait for formal titles to be released before applying to the land control board for consent to sell. However, as already stated, some sell using a receipt. A copy of a receipt which a person was issued as they were awaiting formal title deeds is shown in Figure 24.
Figure 23 A certificate issued as proof of ownership in a subdivided group ranch as members awaited formal title.

Figure 24 A receipt issued as proof of ownership while awaiting formal title.
6.3.3.2 Dependence on communal aspects to secure transactions

Among the Maasai, people may also depend on communal aspects to secure transactions. In some cases, tenure security is derived from social relations that were forged during the pre-colonial and colonial eras. In the pre-colonial era, some members of tribes such as the Kikuyu and Kamba moved into Maasai territory where they were often taken in as herdsmen or wives before being assimilated into the tribe (Sankan, 2006; Spear and Waller, 1993).

Boundaries between different Maa-speaking communities and between pastoralists, cultivators, and hunters in the Rift Valley region were permeable, constantly shifting subject to continuous redefinition. Individuals and groups moved between different communities and economies, altering their identities as they did so. Communities were able to absorb – and to shed – members easily and rapidly in response to changes in availability of resources and demand for labour (Spear and Waller, 1993, p. 226).

Due to “permeable” boundaries, members of tribes such as the Kikuyu and Kamba were able to join the Maasai and become part of Maasai tribe. Hence, when the Maasai Reserves were created and published in the official gazette as “exclusive” property for the Maasai people only (or what was referred to by colonial administrators as “closed districts” in which people from other tribes were not supposed to enter) the Kikuyu people were often able to gain access through their relatives within the Maasai.

When the frontiers of Maasailand were effectively closed by the demarcation of reserve boundaries just before the First World War, there were already numbers of the Kikuyu who regarded themselves as assimilated Maasai or ‘adoptees’ and were so regarded by the Maasai. Many of them had been with the Maasai on Laikipia and had moved into the Maasai Reserve with them. They were the product of the long tradition of intermarriage, patronage and trade contacts between the Maasai and Kikuyu households (Spear and Waller, 1993, p. 231).

In subdivided portions of group ranches, most of the parcels have been bought by Kikuyu people (Galaty, 1992; Kimani and Pickard, 1998), maybe because they have blood relations among the Maasai and might be more comfortable living among the Maasai than people who do not have blood relations.

Among the Maasai, outsiders may also secure transactions by participating in age-set rituals. In essence, by participating in the age-set rituals, the Maasai become “blood brothers” because they share blood, milk and meat from the same ritual animals. To this end, if an outsider participates in the ceremony, they may also be considered to be part of the “brotherhood” and
may have more secure rights to land. As described also in the previous chapter, if an outsider was captured during a livestock raid, or war, and the outsider was from a tribe that does not practice circumcision, the outsider would be required to go through the Maasai rituals, including circumcision before being accepted as part of the tribe (Sankan, 2006). Hence, based on personal observations, some prominent people who were not Maasai participate in the eunoto ceremony to not only gain political mileage but possibly also to bolster rights to land which they have bought among the Maasai.

The above section has shown how some Maasai have retained communal aspects against sales, while others have accepted the ability to sell. Further, complications facing sales such as transactions of land through the use of share certificates and receipts which could contribute towards transactions not being recorded in the register have been shown.
6.4 Among the Pokot in Trust Land areas

6.4.1 Retention of custom against sales

To some extent, the Pokot have retained custom discouraging land sales. In general, the Pokot have largely retained a communal way of life that does not allow sales. The Pokot who live in Trust Land areas are mostly nomadic and generally transact in livestock as opposed to land. As shown in the previous chapter on exclusivity, they have also retained strong social ties through nested social structures, age-structures and livestock friendships, which work against land sales. In most cases, retention of social ties is an indicator that exclusivity, which is normally a pre-condition for sales, has not been fully accepted (Berry, 1993, 1989; Goodwin, 2008; Okoth-Ogendo, 1986; Shipton, 1992; Shipton and Goheen, 1992). In the informally adjudicated sections, a respondent said the following when asked whether it is possible to sell land.

The community will sit down and ask you, what problem do you have that you want to sell land? How can you sell where your ancestors are buried? It is very hard, it is very hard, it is very very hard. It is not possible to sell land where people are buried. If you want you can go away, but don’t sell the land. Just leave the land for the others, one day your grandchildren will come and use the land (Respondent WPKT005).

The respondent indicated that land sales are strongly frowned upon. Another respondent described restrictions against sales as follows.

Why should a person sell land? If you don’t want it you should leave it for your children or other family members … in my family, our brother wanted to sell land, he wanted to sell that land on which our parents are buried. We refused. We told him to leave it for the children, now one of his children lives on that land (Respondent WPKT006).

Despite retention of custom against land sales, in some cases, sales have been accepted, as described below.

6.4.2 Acceptance of sales

6.4.2.1 A need to access land

In the areas where formal and informal adjudication has occurred, some of the Pokot people have accepted the ability to sell land. In the formal adjudication section, individuals sell land in processes that are similar to the Luo people. Similarly, in the informal adjudication areas, which are technically still under Trust Lands, sales have in some instances been accepted, as stated below.
If you want to sell part of your land, you have to call the *kokwa* [land committee]. If they allow you to sell, they will walk with you and make marks on the trees...you have to have witnesses, and the buyer must also have witnesses...your neighbour should also be there...to make sure you do not cut trees on his side...when they finish, you all sit down and drink a local brew and eat a goat...then they enter the changes in that book. They draw a sketch and enter your names in that book (Respondent WPKT003).

In the area where land has been allocated to you by the elders, you can sell. Even now we have somebody from that other tribe who came and bought land here … we have people from many different tribes who have bought land here, they have bought land very deep among the Pokot, you would not believe it. They are here (Respondent WPKT011).

I do not have a title deed. But I know my land … I am an immigrant. I bought the land … I bought through the respected village elders … The village elders are like lawyers. They have the authority … you call them and say I want to buy land from this person. We call them and agree. They ask both of you if you have agreed. They are witnesses. After that it is finished, you are now the owner … The elders confirm that the land is sold (Respondent WPKT011).

### 6.4.3 Ability to sell land in Trust Lands

There is a formal process through which land can be set apart and sold in the Trust Lands. Ideally, if a person wants to sell land in the Trust Lands, they should approach the concerned County Council that holds the land on behalf of the people, for permission. After the County Council grants its consent, formal documents are forwarded to the former office of the Commissioner of lands, now replaced by the Kenya Land Commission, for permission. After receiving consent from the Commissioner, a licensed surveyor is engaged to demarcate the portion of land to be hived off for sale. Based on the preliminary map produced by the Surveyor, a Part Development Plan (PDP) is produced for approval by the Planning Department and the Director of Surveys. After approval, the Department of Surveys develops a Deed Plan which is forwarded to the Land Registrar to produce documents of title. Finally, the person to whom the title is registered can sell the land (Republic of Kenya, 1970b, 1963). In most cases, this formal process is too expensive for local people, who then revert to informal processes.

The informal process of land transactions is facilitated by the process of informal adjudication. As described earlier, due to the slow process of formal adjudication, the Pokot people have developed an informal process of demarcating and adjudicating land rights. In the demarcation process, the bark of trees is cut, after which the owner’s name is entered in an informal register, which is usually held by village elders. After a person has received their informally adjudicated
portion, they can sell it to a willing buyer as shown in more detail in the acceptance section below.

6.4.4 Challenges facing sales

The sales described above show that to some degree, people have rejected the formal process of sales. As described earlier, the formal process of sales in Trust Lands involves an elaborate and expensive setting apart procedure that is too expensive for most locals.

6.4.4.1 Ability to reverse sales

A concept that emerged among the Pokot is that of reversionary sales after realizing that the portion of land that was sold is larger than initially anticipated. According to respondents, in most cases, people estimate the size of land before selling, for example, a person can write an informal agreement saying, “I am selling 3 acres of land to this person”. However, the size of the land is estimated by sight. In other cases, a person can sell land and write an agreement saying, “I am selling my land from that tree to the river to this person”. In the first case, if the buyer calls in a surveyor after the transaction has been completed, they might find out that the land was not 3 acres but 5 acres or more. Thus, disputes arise as on whether the buyer should give back the extra land to the seller. In the second case, the transaction stands because the size was not estimated. According to some respondents, the cases are solved as follows.

We would agree on a price and pay. But later this issue of calling a surveyor started. After selling, some people call a surveyor and they find out they estimated wrongly. For example, they wrote an agreement to sell 2 acres. But after the surveyor comes, he measures and says the land that was sold is 3 acres. Now the land committee [village elders] will say the extra acres should go back to the seller (original owner) (Respondent WPKT011).

It takes a process, it has a penalty, the person who bought should compensate. The one who bought can decide to leave the extra land, or he can pay for the extra land so that it becomes his land (Respondent WPKT0013).

In both cases, the land committee, or village elders are called in to resolve the case. In the first quotation, the elders can rule that the extra land should revert to original owner. In the second case, they can rule that buyer should pay more money to keep the extra amount of land. These cases show that even the informal process of sale has differences. In some cases, only village elders are involved, and in others a surveyor is called in to measure the size of the land. Nonetheless, informal transactions are occurring in the Trust Lands.
Depending on custom to secure transactions

Among the Pokot in Trust Land areas, people can also depend on communal aspects to enhance security of purchased land. As alluded to in the previous sections, the Pokot have evolved an informal means of adjudication in which people essentially depend on custom to secure their rights. In the procedure, as described earlier, boundaries are marked by blazing trees, and sanctioned through elders and a shared meal with neighbours.

Age-set rituals among the Pokot may also provide a means through which rights are enhanced. As described in the previous chapter, like the Maasai people, the Pokot have an age-set structure in which boys are circumcised together into warrior age-set in which they serve for approximately ten years, after which they graduate into elders through a ritual known as sapana. In some cases, people from tribes which have similar rituals, such as the Nandi, Kipsigis, and Tugen among others might be more comfortable buying land among the Pokot than people from other tribes which do not have the rituals.

Acquired rights to land may also be enhanced through shared clan symbols within the Pokot. As shown in the previous chapter, the Pokot have several clans which have specific symbols (Bollig, 2000). In some cases, people who belong to other tribes which have similar symbols to the Pokot have been able to gain access to land through Pokot clans with which they share symbols (de Vries, 2007, p. 38; Robbins, 2010, p. 78). Similarly, a proposition can be made that people from other tribes which have clan symbols may have more secure rights to purchased land in areas occupied by Pokot clans with whom they share symbols, as opposed to areas where they do not share symbols, and more than people who do not have clan symbols.

The Pokot also enhance tenure security through livestock friendships as described in the previous chapter. In summary, due to the harsh environment in which the Pokot live, they exchange livestock with each other in an arrangement known as tilya. If a person loses their herd to a raid or a disease outbreak, they can approach tilya friend and obtain calves with which to start a new herd (Bollig, 2010; Nangulu et al., 2001). Hence, through tilya, tenure security can be enhanced by people who have purchased land.

This section has described some aspects of sales among the Pokot people in Trust Land areas. The development of informal procedures of registration and subsequent informal transactions are a sign that aspects of sales as prescribed by the Trust Land system are not working as intended. The next section will provide cross-case comparisons.
6.5 Cross case comparisons

6.5.1 Ability to sell land

6.5.1.1 Pre-colonial aspects
There are similarities and differences in pre-colonial restrictions against selling land across the three tribes. The main similarity is that land sales do not appear to have occurred in the three tribes during the pre-colonial era. A major difference is that among the Luo people, there seems to have been a custom against selling land as opposed to the Maasai and Pokot people because they did not recognize the concept of individual land ownership. The difference may be because to a large extent the Luo people were more sedentary than the Maasai and Pokot people who led a nomadic lifestyle (Bollig, 2010; Ocholla-Ayayo, 1976; Spear and Waller, 1993).

6.5.1.2 Provisions in the law
There are also similarities and differences in the legal provisions to sell land in the individual, group ranch and Trust Land systems. In essence, today, the three systems all provide for formal land sales. In the individual systems, a registered proprietor should be free to sell land to any willing buyer without being hindered by any other rights apart from those spelt out in the Registered Land Act (RLA) (Okoth-Ogendo, 1986, p. 7; Republic of Kenya, 1963). In the Land (Group Representatives) Act, 1970, a group can be dissolved and their land subdivided into individual portions which may be sold. The Trust Land System provides a setting apart procedure through which land can be “bought” by the State of a County Council, by paying compensation instead of market value, in order to use the land for public purposes. Trust Land areas can also be converted into individual registration areas through formal adjudication and registration, hence creating individual property units that can be sold. In Trust Land areas, the Pokot have also evolved an informal means of adjudication and registration of individual claims to land which are being informally transacted.

A major difference is that in the individual and group ranch systems, transactions should be carried out after consulting the land control board, while in the Trust Land system, the setting apart procedure is largely dependent on the State and County Councils. Further, informal transactions among the Pokot are determined by elders known as kokwa, as opposed to land boards. Additionally, in group ranches land must be subdivided before it can be sold, while in the individual areas a person may sell a whole portion without conducting a mutation survey. Trust Land areas also have to be set apart or adjudicated before being sold.
6.5.1.3 Retention of custom against sales

In each of the three systems, aspects of custom have been retained against selling land. In the individual system, some people have rejected the ability to sell as provided by formal laws because land is still a major source of livelihood, due to respect for burial grounds and negative consequences that have been witnessed by some people who have engaged in transactions. Among the Maasai, a number of people interviewed rejected the ability to subdivide land, and in essence the ability to sell due to a need to retain large parcels of land that can support communal grazing. The Maasai have also resisted sales because in some cases, people who have sold land have squandered the money and ended up in poverty. Among the Pokot, the issue of retaining land as a source of livelihood also came up on why a few people are against marketability of land. Another similarity across the three cases is that some people retain custom against selling land because of negative repercussions on those who sold land and ended up in poverty.

6.5.1.4 Acceptance of sales

Across the three cases, some people have accepted the ability to sell land due to various socio-economic reasons. In the individual system, transactions have emerged because of reasons such as breakdown in traditional authority structures, distress sales due to the impacts of HIV/AIDS in which people sell land to meet medical and funeral costs (Geissler and Prince, 2013; Okuro, 2007), and others have accepted sales as a means of raising capital, which has sometimes led to losses if the business collapses. Among the Maasai, subdivisions which led to sales were accepted due to influence by political leaders including the then President. Subdivision, and in essence, sales have also been accepted due to high demand for housing in peri-urban areas (Mwangi, 2007b; Rutten, 1992). Among the Pokot people, outsiders buy land as a means of securing their access to land. As stated by some respondents, outsiders who are in need of land may approach a willing seller and start negotiating for the land, a transaction which can be allowed by elders if the land is available.

6.5.2 Challenges facing sales

Across the three case studies, challenges facing sales include informal transactions, dependence on communal aspects to secure transactions and the possibilities of reversing sales.

6.5.2.1 Informal transactions

Informal transactions have emerged across the three case studies. Among the Luo in the individual system, some respondents described how they have used written documents which are not part of the formal system to secure transactions. Among the Maasai in group ranches,
some people have sold land using share certificates and receipts which they had been issued as proof of ownership while formal titles were being processed. However, by the time the formal titles are processed, the certificates and receipts may have been used for subsequent transactions which might not be easy to capture in the land register. Among the Pokot, transactions can be conducted through elders who have their own informal land book which is separate and different from the formal land register. If the challenge of informal transactions is not resolved, some transactions will continue outside the formal register, which at some point, the formal registers might become obsolete (Coldham, 1979; Haugerud, 1989).

6.5.2.2 Dependence on communal aspects to secure transactions
As described at the beginning of this chapter, people may also depend on communal aspects to enhance security of purchased land. Among the Luo people, transactions can be bolstered through factors such as getting community support to build a new homestead, living in quiet enjoyment of the land, participation in burial and marriage ceremonies and through remittances. Among the Maasai, transactions may be bolstered through long standing marriage ties and participation in age-set rituals such as circumcision or sapana in which warriors graduate into junior elders. Similarly, among the Pokot, transactions may be strengthened by participating in age set rituals and livestock friendships. The dependence on communal aspects to strengthen transactions may be an indicator that tenure security goes beyond person-to-land connections which might be verified through instruments of title, but also includes person-to-person relations which are normally not captured in formal systems.

6.5.2.3 Possibilities of reversing sales
In this research, the possibility of reversing sales appeared among the Luo and Pokot but not among the Maasai. Among the Luo, disgruntled family members have in some cases reversed sales and taken back land that had already been purchased. Among the Pokot, where a surveyor is called in to verify the portion of land that has been sold, if the land that was sold is bigger than the agreed amount then the buyer can be asked by elders to either give back part of the land to the seller or to add more money. As described earlier, the ability to reverse sales can make buyers unwilling to engage in transactions of land which they may never occupy and banks may be reluctant to lend money against land which they may not be able to sell if a foreclosure occurs (Atwood, 1990; Deininger, 2003).
6.5.2.4 Overall changes

In general, communal tenure appears to have changed in the same way towards aspects of sale as prescribed by the three registration systems. At the detailed level, there are differences as shown above. However, at the “global” level, on the one hand, some people have retained customary restrictions against selling land and on the other hand some have accepted the ability to sell land. In general, across the three systems, transactions are being secured using formal, informal and, or communal means. To this end, “legal pluralism” exists in which formal rules are existing side by side with informal and communal aspects (Griffiths, 1986; Meinzen-Dick and Pradhan, 2002; Merry, 1988). Therefore, in order to develop more appropriate registration systems for developing countries, there is a need for further investigations on how and why people conduct transactions in areas where different land registration systems have been implemented.

6.6 Chapter summary

The main aim of this research is to find out whether communal tenure changes differently when impacted by different land registration systems. In broad terms, communal tenure has responded in the same way to the ability to sell land as introduced by the individual, group ranch and Trust Land systems. In each of the case studies, on the one hand, some people have retained communal restrictions against selling land and on the other hand a number of people have accepted the ability to sell land. Further, in each of the cases, there are challenges facing transactions, such as, the use of informal and or communal means to secure purchased land instead of relying on introduced formal systems. At a detailed level, there are similarities and differences of impacts as described above.

Reliance on informal and communal aspects to secure transactions is a sign that some aspects of the formal methods of conducting land transactions are not working as intended across the three case studies. However, as described above, some people have accepted and are using formal methods for transactions. Thus, in order to bring in more people into formal methods of conducting sales, there is a need to amend the current methods of land registration to either include informal and communal aspects which are in consonance with how land tenure is actually regulated on the ground.
7 Conclusion

7.1 Introduction
This chapter will provide a conclusion for this thesis. The chapter is divided into: section 7.2 knowledge claims, section 7.3 theoretical implications on what should be optimized in an appropriate land registration system for countries with remnants of communal tenure, section 7.4 policy recommendations arising from the implications and section 7.5 recommendations for further research.

7.2 Knowledge claims
The knowledge claims that can be made in this thesis are linked to the specific objectives and main research question. The specific objectives of this thesis were (1) to ascertain how the individual, group ranch and Trust Land registration systems were introduced among the Luo, Maasai and Pokot people respectively, (2) to ascertain how the three land registration systems have impacted aspects of communal tenure that are contrary to exclusivity and the ability to sell land among the three tribes, and (3) to compare and contrast impacts of land registration on communal tenure across the three case studies. The specific objectives were used to answer the main research question, which was, does communal tenure change differently when impacted by different land registration systems?

7.2.1 Historical background of land registration
As regards the first specific objective, chapter four provided a historical background of how the three land registration systems were introduced by the colonial British government and perpetuated by the independent Kenya government. In summary, land registration in Kenya started at around 1890, when Europeans settled and colonized the country. At around 1930, the Trust Land system was introduced in the form of Native Reserves, as a means of reducing agitation by local communities, for their land which had been taken by the European settlers. Subsequently, at around 1950, some of the Native Reserves, especially in the high agricultural potential areas, such as those occupied by the Luo people, were converted into individual land holdings through a process of land adjudication. Similarly, in the arid and semi-arid areas which were occupied by tribes such as the Maasai, the Native Reserves were demarcated into group ranches. The areas which were not adjudicated into individual or group holdings, such as parts of West Pokot, remained as Trust Lands. Thus, the individual, group ranch and Trust Land registration systems were chosen for investigations in this research.
There are various claims that can be made from the historical background. The first is to reiterate findings by institutional analysts that historical events determine future outcomes (North, 1990; Ostrom, 2009). In this regard, systems that were introduced by the colonial government have an impact on land tenure choices today. For example, it was seen in section 4.4 that there was a debate among colonial administrators whether to introduce individual land registration among the Africans or to leave the land as communal. The fact that they made a choice to individualise land rights in high agricultural potential areas, means that some of the Luo people today have accepted aspects of “Western” individual property rights. Similarly, the fact that group ranches were introduced as a first step towards individualisation is an indicator why in the contemporary era; over 70 percent of the original ranches have been subdivided into individual holdings. Thus, development of more appropriate land registration systems should be taken as a serious endeavor because the systems that are introduced today will affect tenure outcomes tomorrow.

A second claim that can be made from the historical background is a confirmation that “across rural Africa, land legislation struggles to be properly implemented, and most resource users gain access to land on the basis of local land tenure systems” (Chauveau et al., 2007, p.1). As shown in section 4.6, since 1960, individual land registration has been introduced in only 13 percent of the area of Kenya and group ranches cover only about 6 percent of the area. The remaining part of the country is covered by the Trust Land system, in which people continue to use communal tenure to gain access to land. Since the Kenya government policy has been to convert all Trust Land areas into individual or group ranch holdings, the low extents of coverage by the two systems is an indicator that the systems have not been fully accepted, and people continue to rely on custom to access land.

7.2.2 Exclusivity
As regards exclusivity, at a general level, communal tenure has not changed differently towards the three different land registration systems in Kenya. In all the three case studies, some people have retained communal ties and a few have accepted the ability to exclude. At a detailed level, there are differences that can be attributed to the tribes being different as opposed to the systems. For example, both the Maasai and Pokot people have age-set structures and livestock friendships which were not witnessed among the Luo people. In contrast, all the tribes have retained communal ties which are contrary to exclusivity, such as: nested social structures, shared homesteads and access to land through marriage.
Due to some negative effects, a claim can be made that exclusivity as introduced by the three formal systems is at variance with deeply rooted communal principles that still have currency today. In the individual land registration system, some members of the Luo tribe have evicted widows, orphans and outsiders who originally had secure rights through custom. Among the Maasai, some of the young people have been omitted from the land register, after it was closed from taking in new members. Hence, the young Maasai who initially had secure inherent rights to land are now insecure. In the Trust Land areas, the boundaries have in some cases blocked communal grazing rights. It is difficult to say whether one system is better than the others as regards exclusivity. However, a general conclusion can be made that exclusivity in itself is contrary to communal tenure in which people normally share access to land.

### 7.2.3 Ability to sell land

The second specific objective also sought to find out whether communal tenure has changed differently towards the ability to sell land as introduced by the individual, group ranch and Trust Land systems. In general terms, the response of communal tenure towards the ability to sell land has been the same across the three registration systems. In all the three cases, some people have retained communal restrictions against selling land, while others have accepted marketability of land. In addition, in all the systems, people have devised informal means of selling land and others continue to depend on custom to secure purchased land.

The reasons why people have retained communal restrictions against selling land are similar across the three case studies. Among the Luo people, some people have rejected sales because they view land as a major source of their livelihood, they respect land as a burial ground and because of negative effects which they have seen in people who have sold land. Among the Maasai, a number of the people have rejected sales because they would like to retain communal grazing areas and due to negative effects that they have witnessed on people who have already sold land. A majority of the Pokot people also rejected sales because they view land as a major source of their livelihood.

The reasons why some people have accepted sales are also similar across the individual, group ranch and Trust Land systems. Among the Luo, some of the interview respondents attributed acceptance of sales to a breakdown of traditional authority structures. The respondents stated that because the traditional authority structures have collapsed, there are no elders who can stop the youth from selling land, for details see section 6.2.2.1. The Luo respondents also said that people are selling land as a means of obtaining money to deal with the effects of HIV/AIDS and as a need for obtaining capital to start business.
In group ranches, some of the Maasai have accepted subdivision and in essence sales, due to political pressure to subdivide their land, a need to secure the size of land holding within the group and due to demands for peri-urban housing, for details see section 6.3.2. Among the Maasai, informal transactions have also emerged in which people sell land using share certificates and receipts instead of transacting through the land register. Further, participation in age-set rituals is used by some buyers as a means of bolstering security of purchased land.

A few of the Pokot people in areas where informal adjudication has occurred have also accepted the ability to sell land. The main buyers are people from other parts of the tribe or from different tribes who are looking for a place to set up a home. Thus, transactions are mainly as a means of securing access to land. In addition, considering that the adjudication is informal, see section 5.4.2.1, the sales are also informal.

A conclusion can be made that communal tenure has changed in the same way towards aspects of sales in the different case studies. In each case study, there are aspects of communal tenure that have been retained. In addition, informal transactions occur in each of the study areas and some people continue to depend on communal means to secure their purchased land. Negative effects, such as squandering money obtained from sales to the point of poverty has also been witnessed in the formal registration areas. Thus, the ability and process of selling land should be reviewed in all the three systems, as will be described in section 7.3.

7.2.4 Changes in communal tenure in general

The findings from the specific objectives can help to answer the main research question. In both exclusivity and sales, communal tenure has responded in the same way to the three different land registration systems. As indicated in the previous sections, some people have retained aspects of communal tenure while others have accepted exclusivity and/or the ability to sell land. Further, in areas where sales have been accepted, informal transactions occur in each case study, and a number of people rely on customary means to bolster their land transactions. However, as stated earlier, there are minor differences across the three systems. Nonetheless, the differences are not large enough to warrant a different opinion from what can be seen from the broad perspective. Therefore, in general terms, communal tenure does not change differently when impacted by different “Western” based land registration systems.

The fact that at a general level, communal tenure has responded in the same way towards the three land registration systems is an indicator that at the core the systems are actually the same. In essence, the three land registration systems were all introduced by the British colonial government and were all based on “Western” concepts of ownership. Ownership in this regard
includes the ability to exclude others from the land, the ability to sell land and many other possible benefits (Bromley, 1989). Thus, there is a need to come up with alternative land registration systems which are based on communal principles of sharing resources. The next section describes some of the principles that might contribute towards the better systems of registering communal tenure.

7.3 Theoretical implications for appropriate land registration

This section will provide theoretical implications for development of appropriate land registration systems for developing countries. The implications will be provided in the form of the descriptive and map section of the land register. In this case, the descriptive part contains ownership details, while the map section includes a survey plan of the registered land.

At this juncture it is important to note that the development of an appropriate land registration system for communal tenure is a very complex endeavor that would require several experts and local communities working together. At first, communal tenure varies from place to place and from tribe to tribe, hence it is very difficult to have a “one size fits all solution” (Fitzpatrick, 2005). An appropriate land registration system, like a good means of managing common-pool resources should be also developed after considering “the biophysical environment, social attributes of the community, internal rules, and interactions between participants” (Ostrom, 2009, p.15). Therefore, this section provides only key aspects that should be considered in the design of appropriate systems as opposed to a detailed or final solution.

7.3.1 The descriptive part of the register

The main implication for the descriptive part of the land register from this thesis is that the concept of ownership should be abolished and replaced with one of stewardship or custodianship. Internationally, there is a paradigm shift that land registration systems “that focus on opportunities of landowners and their rights without considering their restrictions and responsibilities will fail to deliver sustainable development” (Williamson et al., 2010, p. 91). In this case, sustainable development is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Williamson et al., 2010, p. 457). The “rights, restrictions and responsibilities (called RRRs in most literature)” are also referred to as “rights, obligations and restrictions (RORs)” (Williamson et al., 2010, p. 88). The RORs can be linked to the description of communal tenure in which, “individualised property rights are still hedged in by a wide-ranging set of social obligations in which the interests of the group are articulated” (Cousins et al., 1992, p. 17).
The impacts of exclusivity and sales in the three case studies in this research have shown that in some cases, the ownership concepts of the “West” have been used by registered land owners to the detriment of other members of the community. In the individual land registration areas, widows and orphans who had a right land through custom have been evicted by relatives who are registered land owners. Among the Maasai, a large portion of land sales have led to misuse of money by the sellers, to an extent that it is said the Maasai are “selling wealth to buy poverty” (Rutten, 1992). In the Pokot areas, one respondent stated that informal adjudication had led to allocation of his ancestral land to another person, and due to failure to get redress in the formal system, he has now turned to witchcraft as a solution. Hence, because the registration of owners, who have exclusive rights to land, has led to such negative effects, there is a need to shift attention towards registering stewards who would be more responsible towards the needs of other community members.

The principle of stewardship or custodianship should have a legally accepted means through which land can be transacted. The reason being that despite a need to retain communal ties to land, there will be legitimate reasons why some people want to sell land. As an example, a person with a large tract of land may want to sell of part of it to pay for school fees or to cover medical needs. The legal descriptions can borrow from the Land Control Act in Kenya, in which a land board should sanction all transactions within the individual and group ranch registration areas. However, the concept should go further and embrace principles of informal transactions among the Pokot people, in which village elders, who are familiar with families, are in charge of regulating transactions. If the people regulating transactions are well known in the village, people may desist from selling land without good reason.

The procedures of selling land should also be devised after looking at informal and communal means of securing land. As described in chapter six, despite the presence of formal procedures, informal transactions have emerged in all three case studies and some people secure purchased land through retained aspects of custom. The emergence of informal procedures is an indicator that the formal procedures are not working properly. As stated by a traditional Luo saying, there is a reason why a river follows a certain path. The formal procedures may be too bureaucratic and expensive for the locals.

7.3.2 The map section
Apart from the register, appropriate land registration systems should have a map component. In general, a land register should be as simple as possible to enable quick implementation, provided it captures all the necessary aspects of land tenure (Larsson, 2000; Williamson et al.,
There are two different ways in which boundaries can be depicted in the appropriate land registration systems. In the first place, systems can be devised which show all levels of boundaries within each tribe. In the second type, only the most relevant level of boundary can be captured and the other types of boundaries either ignored or described in legal documents. In the first case, complex hierarchal and nested spatial data structures can be used to show the various levels of boundaries. In this regard, a spatial tree data structure can be used, in which one node holds other structures within it (Burrough and McDonnell, 1998). As an example, the tribe boundary could be the first or primary node, under which there could be the lineage, sub-lineage, clan, village and homestead boundaries. In addition, communal boundaries are normally not crisp and can overlap with each other. In this regard, the nested boundaries can be formed using fuzzy data structures. A fuzzy data structure is one in which the external parts of the boundary dissipate from a range of zero to one, instead of having one crisp or unique value (Burrough and McDonnell, 1998). Thus, interviews can be conducted at the margins of each communal boundary to determine extents of overlap.

In this thesis, a recommendation is made that **only one level of boundary should be captured in the land register as a means of retaining simplicity**. As stated in section 1.1, only about ten percent of land in Sub-Sahara Africa has been registered, and the hope is to speed up the process, so that more people can benefit from registration. Among sedentary tribes such as the Luo, who live in high agricultural areas, the homestead boundary seems to be a sufficient level of demarcation. However, the boundary should not alienate other members of the tribe from accessing required rights. Among nomadic tribes such as the Maasai and Pokot, a discussion should be held with the communities whether the land should be demarcated along clan, sub-lineage or lineage boundaries, or any other method. The main consideration is that the parcels of land should not be so small, that nomadic grazing of livestock is hindered. All other forms of communal boundaries which are not captured in the system should be described in legal documents. The details of the proposed registration system can be developed after a consultations between various experts on land and local communities.

This section has provided some key issues that should be considered in the design of appropriate land registration systems. As shown in section 2.2.6, there are international efforts that are currently ongoing in an attempt to develop the “fit-for-purpose” or “pro-poor-land registration” systems (Enemark et al., 2014; Zevenbergen et al., 2013). The systems are being developed
based on a concept of continuum of land rights, which recognises that there are multiple dimensions of tenure, which include “social relationships, such as occupancy, usufruct, informal rights, customary rights, indigenous rights and nomadic rights” (Enemark et al., 2014, p.11). As shown above, these various aspects of social tenure can be captured either in the descriptive or map part of the land register. However, a caution should be taken to avoid creating complex systems that would be too expensive and time consuming to implement.

A major challenge that would face introduction of the alternative ways of land registration is how to change ideologies that have been entrenched by existing systems. In most countries, legal pluralism exists, in which formal and informal rules exist side by side. As shown in this thesis, some people have accepted introduced formal aspects while others hold on to communal tenure. In order to change the existing perceptions of land, especially to reverse “Western” notions of ownership, there will be a need for some policy changes as described in the next section.

7.4 Policy recommendations

In order to develop and introduce the more appropriate land registration systems, there should be some changes in land policies. The current land policies are based on “Western” concepts of ownership which were introduced during colonisation and previous views held by donor agencies such as the World Bank. As stated in the historical background, section 4.4, in Kenya, individual land registration was introduced as a means of “breaking” communal ties to enable development of land markets, to improve access to credit and to increase agricultural productivity. Similarly, the 1975 World Bank Land Policy stated that communal tenure should be abandoned and replaced by freehold titles to land (Deininger and Binswanger, 1999). Today, the World Bank has changed its stance and recognized that in some cases communal tenure can provide adequate tenure security and act as a limited basis for conducting land transactions (Deininger, 2003).

In order to introduce retained aspects of communal tenure in land policies, there is a need for “deep” analysis. As stated in section 4.7 of this thesis, land reforms can be either “shallow” or “deep” (Manji, 2014, p. 124). In countries such as Kenya, “deep” land reforms should be carried out as a means of challenging ideologies that were introduced during colonisation and by looking at prevailing social structures. In order to have appropriate land policies, there is a need for international and local experts to sit together and look “deep” into land issues as a means of developing appropriate land policies. The “deep” analysis should not be based on “Western” concepts of land tenure but rather on how people in developing countries view land today. Thus,
a realization that communal tenure is not static and people in countries such as Kenya view land with two lenses, one formal and the other communal.

Policies should also be revised to change the way land professionals are trained in developing countries. In most developing countries, such as Kenya, the education of land professionals is still largely based on principles or curriculums that were introduced by the colonial governments. Thus, the ideology of land is usually taught from a “Western” perspective, which is often contrary to communal tenure. In order for land professionals, especially in Sub-Saharan Africa, to be able to devise more appropriate land registration systems for communal areas, there is a need to change how they are trained, so that they are not blinded by “Western” models of land tenure from seeing how land tenure exists on the ground.

7.5 Recommendations for further work

There is still further work that can be done to improve the quality of this study and to test the theories that have been provided. The work includes: investigations of impacts of registration systems on authority structures, impacts on lease agreements, similar work among other tribes, quantitative analysis of impacts on communal tenure, and design of appropriate land registration systems, each of which is described below.

In order to enhance this study, further work can be conducted on the effects of different land registration systems on communal authority structures and on lease agreements. In general, communal tenure can be categorized as having three main components, namely, authority structures, exclusivity and alienation (sales and leases) (Schlager and Ostrom, 1992). In this thesis, the scope of communal tenure was limited to exclusivity and sales. Thus, aspects of authority structures were not tacked in detail and lease agreements were not investigated. Therefore, future research can be conducted on changes in authority structures, and lease agreements in areas where different land registration have been introduced.

The same type of analysis in this thesis can also be carried out among other tribes, possibly in other countries to see if there are similarities. In Kenya, out of forty two tribes, only three were selected. There are also many other tribes in Africa and other parts of the World who have been affected by different forms of land registration, for whom further research can be conducted.

There is also room for further research on the extent of changes in communal tenure after being impacted by registration systems. In this thesis, the focus was to tease out qualitative aspects of changes in communal tenure. In future, statistical techniques can be used to find out how much
change has occurred, for example, a sample can be taken among the Luo people to find out what percentage have accepted exclusivity or the ability to sell land.

Despite recommendations provided in section 7.3, more research needs to be conducted on the nature of appropriate land registration systems for areas which have a mixture of communal tenure and formal systems. In particular, there is a need for investigations on appropriate spatial data structures that can be used and on legal descriptions that can capture the mixture of formal and informal laws.

7.6 Concluding remarks

The main aim of this thesis was to find out whether communal tenure changes differently when impacted by different land registration systems. The findings show that if minor differences which can be mainly attributed to variations in the tribes are ignored, at a general level, communal tenure has responded in the same way to the three different land registration systems in Kenya. In essence, in all the three systems, some people have retained aspects of communal tenure, while others have accepted aspects of the introduced formal systems.

A recommendation has been made in this thesis that appropriate land registration systems for communal tenure should be based on the concept of stewardship as opposed to ownership. As shown in this research, land registration systems which are based on “Western” concepts of ownership have in some cases led to negative effects such as widows and orphans being excluded from land and people squandering money from land sales, to an extent that they end up in dire poverty. Stewardship would be a better principle to consider because the registered persons would be required to retain obligations to other members of the community. Stewardship if well captured in a land registration system would ensure that as population grows and the size of land remains static, people in communal areas will continue to have access to land, on which they depend for their livelihood.
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Appendix: Questionnaire

Introduction
Thank you for showing an interest in this project. Please read this information sheet carefully before deciding whether or not to participate. Alternatively, the researcher or a person acceptable to you can read this information sheet and explain the project to you. If you decide to participate we thank you. If you decide not to take part there will be no disadvantage to you of any kind and we thank you for considering our request.

Aim of the project
This project is part of my PhD studies in land surveying at the University of Otago in New Zealand. The main aim of my project is to find out how land registration has impacted or changed communal land tenure.

Required participants
The required participants for this study are people who are over 18 years old, who use land in the rural areas for any reason. These participants can be either male or female. There will be no material benefits for agreeing to participate in this study. However, your contribution may help improve land administration in Kenya and other countries.

What will you be asked to do?
Should you agree to take part in this project, you will be asked to answer a set of semi-structured questions about land-use in your community. This will take approximately forty five (45) minutes.

Information to be collected and use of the information
You will be asked whether you mind my using a voice recorder during the interview. However, if you prefer not to be recorded then handwritten notes will be taken. All the collected data will be kept securely during the period of this study.

After this study has been completed, all the raw data will be destroyed. The outcome of this study may be published in conferences or academic journals. Some of the information obtained during this study may be published in my final PhD thesis, which will be available in the University of Otago Library (Dunedin, New Zealand). However, every attempt will be made to preserve your anonymity.

This project involves an open-questioning technique. The general line of questioning will include grazing rights, building rights, firewood rights and land transfers. In the event that the questions asked develop in such a way that you feel hesitant or uncomfortable, you are at liberty
to decline to answer or to completely withdraw at any stage without any disadvantage to you of any kind.

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.

Consent form for participants

I have read the Information Sheet concerning this project and understand what it is about. All my questions have been answered to my satisfaction. I understand that I am free to request further information at any stage.

I know that:-

1. My participation in the project is entirely voluntary;

2. I am free to withdraw from the project at any time without any disadvantage;

3. Personal identifying information such as audio information will be destroyed at the conclusion of the project;

4. The researcher has indicated that he will be asking me open-ended questions, and I am aware that if the discussion moves towards a direction that is uncomfortable for me I can decline to answer or even withdraw from the study.

5. I am aware that there will not be any discomfort for me during the course of this interview session.

6. I am aware that there are no direct benefits from this study for me, and that only long term policy benefits may accrue.

7. I am aware that the results of the project may be published and will be available in the University of Otago Library (Dunedin, New Zealand).

I agree to take part in this project.

................................................................. ..............................................
Signature of participant (Date)
(Alternatively, verbal agreement on audio recorder)

This study has been approved by the University of Otago Human Ethics Committee. If you have any concerns about the ethical conduct of the research you may contact the Committee through the Human Ethics Committee Administrator (ph 03 479 8256). Any issues you raise will be treated in confidence and investigated and you will be informed of the outcome.
NB: Change questions depending on interview respondent and location.

Questions related to communal access to land/ embedded rights to land

1. What is the general structure of your tribe as a whole? Has land registration changed the structure?

2. How do people construct homesteads in your tribe? Has land registration affected the homestead structure?

3. Are there social activities that are carried out across the tribe as a whole, such as circumcision etc.

4. Is it possible for outsiders to graze livestock on your land?

5. Is it possible for outsiders to be granted land on which to build and live within the tribe?

6. In your own opinion, has the land registration system in your areas (individual/group ranch or Trust Land) affected the way you use land?

Questions related to sales

7. Is it possible to sell land in the village?

If no, why________________________________________________________
If yes, why________________________________________________________

8. If yes, what is the process through which people buy or sell land?

9. Is there something you would like to add about the topic we have been discussing?

Thank you very much for your time.