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CONTENT

1	Introduction and statement of the problem	1
1.1	The importance of land in Kenya	1
1.2	The research question and outline of the paper.....	4
1.3	The methods used and difficulties that arose in the study	5
2	Introducing Kisumu.....	8
2.1	Facts and figures.....	8
2.2	History	8
2.3	Location.....	9
2.4	The economic and social situation	11
3	Definitions	13
3.1	Categories of land	13
3.2	Definitions of land tenure.....	14
3.3	Tenure systems in Kisumu.....	19
3.3.1	Public land tenure	20
3.3.2	Private land tenure: freehold and leasehold tenure	21
3.3.3	Neo-customary tenure as a special form of informal tenure.....	23
3.4	Security of tenure.....	24
3.5	Slum as a kind of informal settlement	25
3.5.1	Informal settlement.....	27
3.5.2	Slum.....	28
4	The historical development of the slums in Kisumu.....	30
4.1	The history of land adjudication.....	31
4.2	The adjudication procedure from a legal perspective	32
4.2.1	Analysis of the land adjudication procedure.....	36
5	The administration of land in Kisumu.....	38
5.1	The Ministry of Lands (Central Government of the Republic of Kenya).....	38
5.1.1	The Lands Department	38
5.1.2	The Department of Land Adjudication and Settlement	40
5.1.3	The Survey Department.....	41
5.1.4	The Department of Physical Planning	41
5.2	The Municipal Council of Kisumu	42
5.3	Institutional constraints of the administration of land in Kisumu.....	43

5.4	The Land Control Board.....	44
5.4.1	History and applicability.....	45
5.4.2	The composition of the Board.....	46
6	The statutory procedure of land purchase.....	48
6.1	Case study: Land Control Board meeting	50
6.2	Analysis of the statutory procedure of land purchase.....	53
6.3	Impressions with regard to the efficiency of the procedure.....	57
7	The statutory procedure for succession of land.....	59
7.1	Analysis of the statutory procedure for succession.....	64
8	The <i>de facto</i> acquisition procedures	66
8.1	The areas of research	66
8.1.1	Manyatta 'A'	66
8.1.2	Gonda.....	68
8.2	The field survey	71
8.3	A tentative explanation of the empirical results	77
9	Summary	79
10	Bibliography.....	81
10.1	Books and articles.....	81
10.2	List of interview partners	84
10.3	Acts of the Republic of Kenya.....	85
10.4	Online sources	85
10.5	List of figures.....	86
10.6	List of photos.....	86
10.7	List of tables.....	87
11	Appendices	88
11.1	Appendix 1: Questionnaire for the survey	88
11.2	Appendix 2: A map of Gonda	90
11.3	Appendix 3: A Title Deed.....	91
	English abstract	95
	German abstract/Zusammenfassung.....	97
	Curriculum Vitae in German/Lebenslauf.....	99

1 INTRODUCTION AND STATEMENT OF THE PROBLEM

This thesis is based on a seminar paper on “Land rights in Kisumu” written by the author in 2011 in the course of the interdisciplinary project: “Project 3: Integrated Regional Development in Developing Countries” which was organized by the Vienna University of Technology. The project was based on co-operation with HORIZONT3000 – the Austrian Organisation for Development Co-operation and its partner organization, STIPA (Support for Tropical Initiatives in Poverty Alleviation), in Kisumu, Kenya. Central part of the project was a journey to Kenya in February 2011 to carry out field work in Kisumu as part of the project. During the preparation of the field trip to Kenya in autumn 2010 the author gained a deep interest in land issues in Kenya and decided to make a further investigation into the land rights situation beyond the university course. For that reason, the author spent three more months in Nairobi (March to May 2011) and six more weeks in Kisumu (November and December 2011) to deepen the former research in the field.

1.1 THE IMPORTANCE OF LAND IN KENYA

Land may be seen as one of the most important economic goods in Kenya with a number of different functions for practically each and every Kenyan. In a country that is marked by poverty, it is first and foremost that which is essential to sustain millions of people. “[B]y providing them with the means with which to meet their needs and wants [...]”, this basic factor of production is a “[...] principal source of livelihood and material wealth” (Sifuna 2009: 41). Moreover, it is – in the truest sense of the word – the basis for each and every construction that contributes to the increase of both personal incomes and public revenue, from the market stall to the highway. In addition, it can serve as a collateral for economic investments and as a security for emergencies.

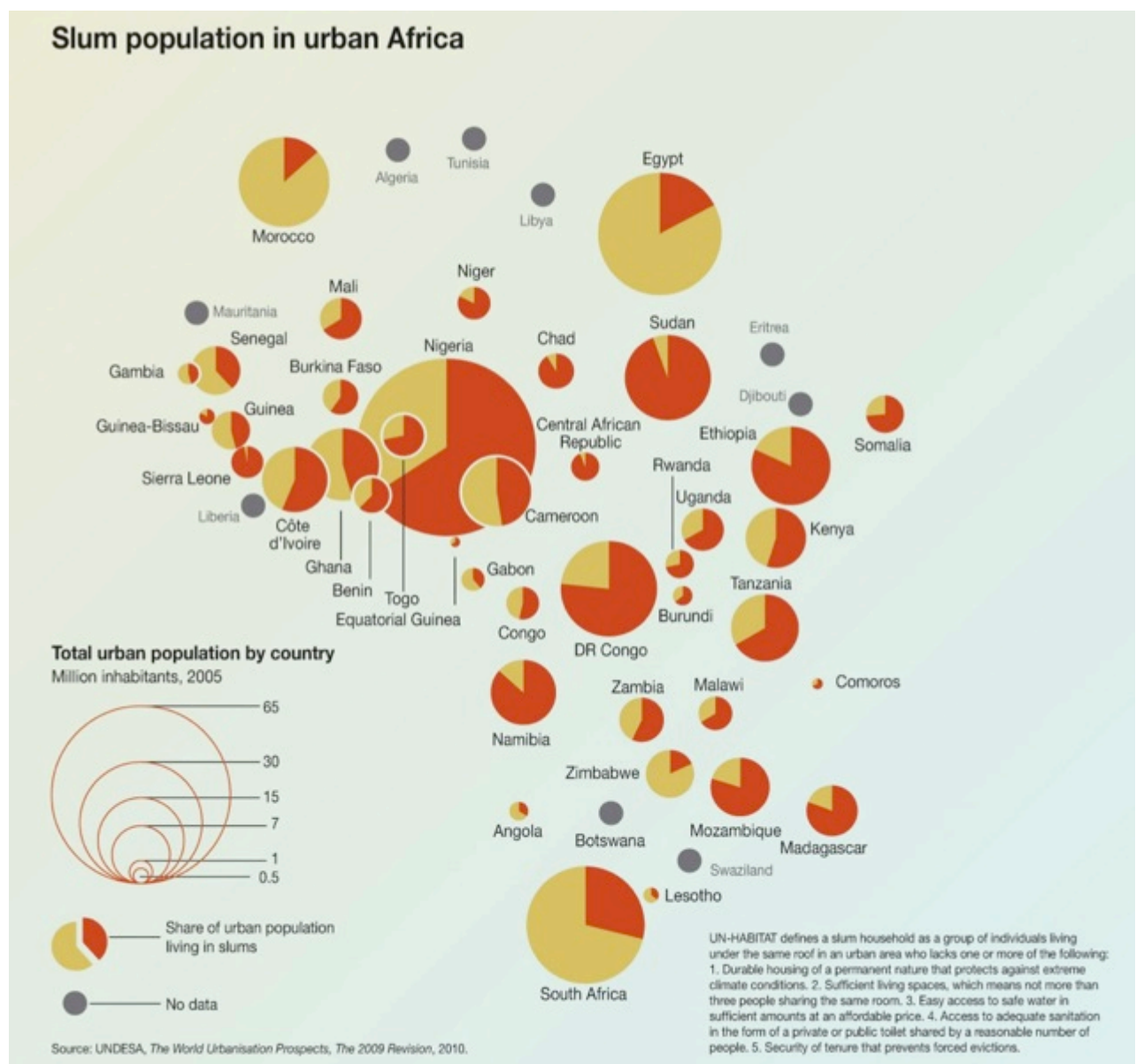
Besides the economic aspect, land and its availability is for many people still a very emotional topic in Kenya. There are several reasons for this. On the one hand, many tribes identify strongly with their land and their ancestors, who lived there in former times. On the other hand, the colonial acquisition of land caused severe disturbances in the country and resulted in an enormous degree of inequality. As soon as the British left,

and Kenya became independent, there were hundreds of thousands of landless, impoverished native-born inhabitants, most of whom had formerly worked as farm-hands for the white settlers. The historical injustice that the British administration left behind was at the root of the many struggles over land ownership among the different social groups and ethnic communities, and caused many of the problems that, up to the present day, have still not been solved. By addressing them, the clash of different political interests has held up progress and, still today, some politicians tend to exploit the struggles over land for their personal interests, as the riots after the election in 2007 show. Thus the allocation and use of land is also a highly political issue.

Besides the different functions and evaluations of land, it is well worth having a look at its characteristics. One feature seems to be quite obvious and simple, but may involve some serious consequences and that is: "land is a finite resource and can neither be made nor moved" (Payne 2000: 2) at least in its natural form. In Kenya, as in every society, there are many different persons and groups whose interests diverge with regard to how land is to be used. For example, there are food-crop farmers, private land-developers, foreign investors, landlords and spatial planners, to name but a few. All of these individuals may have partly or completely different ideas about how the land should be utilized and a lot of interesting different questions arise that are well worth investigating. However, for this thesis, it was necessary to keep the focus on a specific field of interest. The author decided to concentrate on private land acquisition processes within the slum settlements in Kisumu.

According to the UN, approximately 62 % of the people in sub-Saharan Africa live in slums (United Nations 2008: 43). Figure 1 shows that in 26 out of 40 African countries where data was available the majority of all the urban inhabitants are slum dwellers, which is also true of Kenya. The majority of these people cannot afford to acquire a formal title with regard to land ownership or use of land, and, in the years ahead, the situation is unlikely to change because there is a rapid urbanization process, in both absolute and relative numbers, going on in Kenya. While in the year 2010 9.5 million Kenyans, that is 23.6 % of the total population, lived in urban areas, there will be 21.9 million urban dwellers, i. e. 33.2 % of the total population, in 2030 (UNDESA 2012).

Figure 1: Slum population in African countries as share of the urban population 2005



Source: UNDESA 2010, The World Urbanisation Prospects, The 2009 Revision, Credit to Riccardo Pravattoni, UNEP/GRID-Arendal.

It is quite obvious that land rights cannot be ignored when it comes to improving the lives of poor people. Goal 7 of the UN's Millennium Development Goals "Ensure Environmental Sustainability" includes the target of improving the "lives of at least 100 million slum dwellers" significantly (United Nations 2008: 43). Getting to know about the procedures of land acquisition and secure access to land is an important precondition for any improvement of the lives of slum dwellers. Moreover, a clear understanding of the legal norms allows further investigation into numerous land-related topics, such as local economic development, spatial planning, land grabbing or the rights of women to own land, to name but a few.

1.2 THE RESEARCH QUESTION AND OUTLINE OF THE PAPER

Now that the reasons as well as the significance of this topic have been made known, it is time to take a closer look at the research question and the outline of the thesis. The focus of this paper is on the processes to acquire a freehold interest of land namely through inheritance or purchase, which are the predominant means for becoming a landowner within the slum settlements in Kisumu. This includes the identification of the parties involved and the legal procedures as well as *de facto* practices carried out in these transactions.

The research question of this paper is: *“How does private land acquisition work within the slum settlements of Kisumu?”*

To be able to answer this question, it is necessary to find out about the following topics:

- a. How has the land in the slums of Kisumu become private individual land?
- b. How should private land acquisition be carried out in Kenya according to statutory law?
- c. How is private land *de facto* transferred in the slum settlements of Kisumu?
- d. What discrepancies occur through this dual system and what problems arise as a consequence?

The thesis is organized in eleven chapters: in Chapter one the reader is given a general idea of the importance of land in Kenya, followed by basic information concerning the thesis in general, and an explanation of the methods in particular. This chapter concludes with some remarks on the current constitutional situation in Kenya, which is characterized by the transition of the old Constitution to the new Constitution.

Chapter two is a short introduction to Kisumu. In Chapter three, the three categories of land in Kenya are defined. In addition, the main terms are defined, and the key concepts of land tenure are discussed. Chapter four is of major importance because the process of land adjudication is described and explained, which provides an answer to the first research question (a.) stated above. In Chapter five, the main parties involved in the administration of land in Kenya are presented, and the institutional constraints are pointed out. In Chapter six, the statutory procedure of land purchase is described, while Chapter seven deals with the statutory procedure for succession. Together, these two chapters provide an answer to the second research question (b.). In Chapter eight the procedures of the *de facto* acquisition processes of becoming a landowner are described

and commented on. Moreover, the results of the research carried out in Manyatta 'A', with regard to its unit Gonda, are presented and discussed. These two chapters are the answer to the third research question (c.). In this chapter the third (c.) and forth (d.) research questions are answered. Finally, in Chapter nine the most important findings of the thesis with regard to the research question [*"How does private land acquisition work within the slum settlements of Kisumu?"*] are summarized and a recommendation is given.

In order to find satisfying answers to the questions addressed above several methods were employed: the relevant literature was reviewed, an analysis of the different sources of Kenyan laws was made, key informants were interviewed, personal observations were noted, and primary data was collected by interviews with slum dwellers.

1.3 THE METHODS USED AND DIFFICULTIES THAT AROSE IN THE STUDY

During the preparatory phase of the University project in February 2011, and in the months in Nairobi (March until June 2012), a documentary review was carried out. The analysis of the relevant literature made it possible to gain an insight into the subject matter, to focus on a special point of interest and to draw up a plan on how to carry out the research. The analysis of the relevant Acts was a very time-consuming task, as approximately 42 Kenyan Acts deal with questions concerning land. To survey this large number of Acts was a real challenge, especially as some of these Acts contain contradictory passages. In order to make sure that the information gained through studying the laws was correct, it was necessary to talk to a number of different authorities in Kisumu. First and foremost, the heads of the different departments of the Ministry of Lands were a valuable source of information through which the data already at hand could be verified. To make an appointment with them, or to catch them in their office, was among the most difficult things in this research. However, because of the many hours of waiting that were spent in the Ministry of Lands, a lot of other people, such as public officers, secretaries and lawyers could be addressed, and they proved to be very interesting and useful informal sources of information. Those people helped the author to create a better understanding of many things, especially to gain an insight into the daily work carried out in the Ministry of Lands. Beside studying legal Acts and talking to key informants, the attendance of the Land Control Board meeting was very

useful for research purposes. As explained later in more detail, this meeting is one of the key processes for transferring a piece of land under freehold tenure.

Last but not least, information concerning the land ownership patterns and procedures in the slum settlements had to be obtained. Although a socio-economic enumeration project, i. e. a kind of household survey, had been carried out by a number of different governmental and non-governmental organizations and institutions in Manyatta 'A' in 2010, these data focus more on the general aspects of living conditions and less on land tenure, therefore it did not provide enough information as answers to the questions concerning the *de facto* land acquisition processes. Nevertheless, this report [Urban Matters et al. (2011), A preliminary report made by Manyatta A and B settlement on the enumeration and mapping process carried out in August 2010, Kisumu.] was extremely useful to delineate the exact geographical boundaries of the research area and to obtain the number of extant households at that time. The primary data collection through a household survey in Gonda, an administrative unit of Manyatta 'A', was carried out by the author within just one week. A community worker from the 'Kosawo Community Centre', Mr. Edward Ogutu, helped the author in this task. His assistance was extremely helpful in three ways: orientation, language and personal acceptance. First of all, the research assistant himself lives in the area and so he was very well able to orientate himself within the occasionally very densely populated area. Secondly, the assistant speaks fluent Luo, the prevalent local language in Kisumu, which was very helpful because some (older) landowners within Gonda do not speak English. Thirdly, and maybe most important of all, was the fact that he is a member of the 'Kosawo Community Centre', sent by the Assistant-Chief of Manyatta 'A', Mr. George Ojowi, to help the author in her research work. Both, the Assistant-Chief and the Kosawo Community Centre seem to enjoy a high degree of acceptance within the population, which helped enormously to overcome any resentment and also promoted the willingness to participate in the survey. The survey was conducted with the questionnaire shown in Appendix 1.

When writing or reading about land rights in Kenya, one has to be aware that Kenya finds itself in a transitional period as a mixture of the laws and Acts of the old and new constitutions characterizes the current legal situation since August 2010 when Kenya got a critically acclaimed, new modern Constitution. Although the new Constitution is legally already in force, the implementation process is still going on because a considerable amount of further legislation is still missing and many of the legal norms

that provide more detailed arrangements in a substantial and/or procedural way have either not been formulated or have not become effective yet. The transformation process that is currently going on has the following effect: until the new legislation is enacted, the legal norms of the old Constitution, that were in force immediately before the effective date of the new Constitution, are still valid – with the limitation that they “shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this [note: the new] Constitution” (Republic of Kenya 2010: sixth schedule, Art. 7).

Because of the current changes and the continuing implementation of new laws it is necessary to state clearly that this thesis explains the legal basis of the situation during the field research in December 2011. One has to keep in mind that it is very likely that there will be legal changes, i. e. revisions and amendments of the current laws, in the near future and that even some new laws may be passed in the years to come. However, the *de facto* procedures will most probably remain more or less as they are at present. Therefore, it is very likely that this thesis will remain valid beyond the transitional period.

2 INTRODUCING KISUMU

2.1 FACTS AND FIGURES

A relatively small stretch of the western border of Kenya lies on the shores of Lake Victoria, and that is where Kisumu is situated. With an area of 417 sq. km (260 sq. km of land and 157 sq. km of water) Kisumu is Kenya's third largest urban agglomeration (UN-Habitat 2005: 13). According to the Census of 2009, the official population at that time was 409,928 inhabitants (Kenya National Bureau of Statistics 2010: 194). On account of the on-going migration from the surrounding areas, it is quite likely that the population of Kisumu already exceeds 500,000 inhabitants (KENSUP 2005: 15). Kisumu is also one of the three municipalities in Kenya, which have gained the status of being a city besides Nairobi and Mombasa. At the same time it constitutes the headquarters of Kisumu district and the capital of Nyanza Province, which is one of the eight provinces in Kenya. Therefore Kisumu is one of the most important political centres in Kenya as well. Whenever the term Kisumu is used within this paper it refers – except otherwise explicitly mentioned – not to the district, but to the city or the municipality, which are congruent.

2.2 HISTORY

Kisumu is a relatively young town, whose official history began with the British settlers. As generally known, the British imperialists had the intention to conquer all the African States from the "Cape to Cairo". Less widely known by the public are the strategic interests of Great Britain in the area later called Uganda, where the River Nile has its source. On the way from the most important harbour of Eastern Africa, Mombasa, to the British protectorate Buganda (later called Uganda Protectorate) roughly north-west of the Lake Victoria, people had to cross the southern part of the East Africa Protectorate which was situated largely on the area of the later Republic of Kenya (Okoth-Ogendo 1991: 7). The aim was to create a terminal station for the Uganda railway at Lake Victoria. For this reason Kisumu was officially founded as "Port Florence" by the colonial administration in 1898. At the end of December 1901, the project was finished and the town began to develop rapidly (UN-Habitat 2005: 16). This was, of course, not the real beginning of the settlement. Long before the colonial intrusion, the area around

contemporary Kisumu used to be a lively trading place for members of different ethnic communities. A reference to this can be found in the name 'Kisumu' itself. The etymological origin of the name is the word 'Kisuma' in the Luo language, which means "a place where the hungry get sustenance" (KENSUP 2005: 15). Later, in 1903, the town was officially gazetted as 'Kisumu'. The further developments of Kisumu were dictated by the demands of the colonial administration, which also exerted a strong influence on the spatial design of the town. The consequences of the colonial period are still felt today, even though Kenya gained independence in 1963.

2.3 LOCATION

Owing to its location, Kisumu is often characterized as a trading hub and an economic growth zone stimulated by the great economic potential of the Great East African Lakes region. In actual fact, the shipping on the lake has become more and more limited because of the hardly controllable growth of the water hyacinth that poses a real threat to shipping and the fishing industry.

Photo 1: Lake Victoria with water hyacinths, Kisumu



Source: Alexander Muhm, February 2011.

The railway also lost its importance over the past five decades, and so the only connection that still operates is that to Nairobi three times a week.

Photo 2: Kisumu railway station, Kisumu



Source: Alexander Muhm, February 2011.

Most of the goods, both outgoing and incoming, are transported by road via Kisumu, which has become an important transportation junction with connections to Nairobi, Kakamega and Kisii within Kenya, as well as to the neighbouring countries Tanzania and Uganda. In addition, Kisumu relies increasingly on air transport to further its economic possibilities and connections abroad. In 2011, the airport at Kisumu was upgraded to become an international one.

Figure 2: Kisumu in a map about Kenya's major land transportation links



Source: Physical Planning Department Kisumu, 2011.

2.4 THE ECONOMIC AND SOCIAL SITUATION

The challenges that the city and its inhabitants are facing are manifold. The most important is the high level of poverty: About 60 % of the population live below the poverty line compared to the national average of 50 % (Urban Matters at el 2011: 7). The

average life expectancy in the Kisumu district is 49 years. The fertility rate amounts to 5.8 children per woman, and 67 % of the population are under the age of 25, which means that the population of Kisumu, as in the rest of the country, is very young (Republic of Kenya 2005: 3). The health situation in Kisumu is rather poor as malaria, anaemia, typhoid and HIV/Aids are the most common diseases (Urban Matters et al 2011: 7). One of the main reasons for the low life expectancy is the high HIV/Aids-prevalence. In 2000, 35 % of the population in the Kisumu district were HIV positive (Republic of Kenya 2005: 16). The high death toll resulting from AIDS is a big burden for very many families and for the society as a whole, and has a highly negative effect on economic productivity and the gross domestic product as well. Concerning the economic situation, one has to add that the majority of the people earn a living in the informal sector, which is called 'Jua Kali', Swahili for 'glowing sun'. The people who work in the informal sector are to be found mainly in the urban streets, which are full of small kiosks used for selling all kinds of food and agricultural products, such as vegetables, fruits or fish, as well as articles required for the basic needs of day to day life. Moreover, hawkers are on almost every street corner. A considerable number of people earn a living as Boda-Boda cyclists or motorbike drivers, who are also a vital part of daily life and the cityscape. Less than 30 % of the working population has a job in the formal sector (KENSUP 2005: 9).

Photo 3: Nyalenda street scene, Kisumu



Source: Wilfried Schönback, February 2011.

3 DEFINITIONS

3.1 CATEGORIES OF LAND

Before elaborating on the different aspects of land tenure, it will be useful to shed light on the categories of land that officially exist in Kenya. As already mentioned in the introduction, at present (December 2011) Kenya finds itself in a transitional period especially with regard to the laws on land tenure. Those whose task it is to administer the law have to be aware of this fact whenever they deal with questions concerning land rights. Before 27. August 2010, the date on which the new Constitution came into force, land was classified as government land, trust land or private land. The new Constitution changed these designations without changing the tripartite system and so there is now again a tripartite system of land: public, community and private land (Republic of Kenya 2010: Art. 61). In the Articles 62 – 64, both the characteristics and the responsibilities, which are attached to each of these three categories, are described in detail. It should be mentioned that public land shall be vested in and be held by a county government, or by the Central Government in trust for the people resident in that county, or the people of Kenya as a whole (Republic of Kenya 2010: Art. 62). Community land shall be vested in and be held by communities identified on the basis of ethnicity, culture or a similar community of interests (Republic of Kenya 2010: Art. 63). Although community land can somehow be seen as the legal succession of trust land, the two categories are not congruent. The shift from trust land to community land will be the most far-reaching change within the three categories. It has to be mentioned that one point of criticism on the new Constitution is that it is not very clear how a community will be defined in detail and how trust land will become community land. However, it is already clear that there will be a change of the people who are responsible to administer this land, which may be seen as the most important distinctive feature between the two. At the moment trust land is vested in the County Councils who hold the land as trustees for the residents of the area. In contrast, community land will be directly vested in the communities. Private land is held by a person either on a freehold or a leasehold basis (Republic of Kenya 2010: Art. 64).

Although this new classification of land is already in force, a considerable number of substantial and procedural norms are still missing. An example of this is that the legal norms for community land, as set down in Article 63, will be enacted by the Parliament

within five years after the coming into force of the Constitution (Republic of Kenya 2010: Art. 63, Art. 261). So at the moment until the new legislation is fully enacted both classifications have to be taken into consideration.

3.2 DEFINITIONS OF LAND TENURE

Scanning through the literature for a definition of land tenure makes it clear that the academic community provides a very large number of different definitions as well as categorizations of that term. In this chapter several definitions are presented and discussed. Finally, the author makes an attempt to define land tenure in a way that is appropriate for this study.

In Kenya's National Land Policy, which provides a programmatic direction concerning issues on land in Kenya and which has had a very strong influence on the provisions made concerning land in the new Constitution, land tenure is described in the following way: "Land tenure refers to the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed of, or transmitted" (Ministry of Lands 2009: 15). This definition has several shortcomings. First of all, a definition that starts with the term "refer" is too vague because it does not say what the term that has to be defined – in this case "tenure" – is, but only what the term is related to, which is not a clear statement. Moreover, a look into the dictionary reveals that tenure is a "condition under which land or buildings are held or occupied" (Oxford Dictionary of English 2010: 1834). This makes it clear that land tenure describes a condition, namely the legal position between a person and an object or a person and a matter. However, if it is a condition, it cannot be a single legal act of law made by an entitled person at the same time. As a consequence of this observation, it is contradictory to list possible ways to actively handle rights of dispositions together with the mere condition to hold land. In other words, what land tenure is and how an entitled individual with legal competence or the State handles land tenure are two different things.

Another interesting definition is the following one: "Land tenure is the term commonly used to describe the different interests in land, i. e. who owns the land, who has the right to occupy the land and for how long. Effectively, it is the right to hold land" (Mortgages4Mortgages.co.uk 2012). This definition points out that different people may have different interests in land next to each other. The right to hold land may be, but does not necessarily have to be, exclusive for one person. The different interests in land (freehold and leasehold interests) will be further discussed below in Chapter 3.3.2.

Beside that it is well worth mentioning that this definition brings in the reference of time.

Other definitions can be found in the literature on land issues in developing countries. In general one can distinguish between definitions that refer only to those rights and provisions concerning land that are laid down in the different legal Acts and statutes of the State (so-called statutory tenure definitions), while others go beyond this rather narrow definition and try to include other, mostly non-“legal”, informal rights and provisions which traditionally characterize relationships between people and land as well.

The two following definitions emphasize the possibility that either an individual or a group/community may have certain rights to land. UN-Habitat, the Settlement Program of the United Nations, defines land tenure as follows: “Land tenure refers to the rights of individuals or groups in relation to land” (UN-Habitat 2003: 168). Very similar to this definition is that of Durand-Lasserve and Selod: “Land tenure designates the rights individuals and communities have with regard to land, namely the right to occupy, to use, to develop, to inherit, and to transfer land” (Durand-Lasserve, Selod 2007: 4). Although it is important to note that not only a single person may have rights in relation to land, both definitions do not clearly differentiate who may be the right holder. In general one can identify five basic kinds of actors: (1) private households (or, to be more specific, members of such units, i. e. private persons), (2) enterprises, (3) public institutions, (4) non-profit institutions and (5) specific companionships for achieving a limited purpose, or partnerships of convenience of at least two or more units of (1) to (4). “Groups” or “communities”, as mentioned in the two quoted definitions above, fall within the fifth category. Moreover, one has to criticize the activities concerning land that Durand-Lasserve and Selod mention: to introduce the term “occupy” instead of “acquire” is a regression arising from not understanding what civilized societies have, within the framework of a State under the rule of law, invented to solve the problem of allocating scarce resources. In addition, this makes it necessary to introduce an additional way of dealing with land, namely to inherit it because, otherwise, inheritance would be simply one kind, among others, of acquisition.

Another possibility is to put the main emphasis of land tenure on the social element: “Tenure is, first and foremost, a social relation” (Cities Alliance 2002: 4). It is further stated that it is the social linkage between the people, which plays the main role with

regard to land usage. Although this approach presents an interesting point of view, it is too limited for the purpose of this paper.

Olima and Obala provide a broader definition; they quote that “land tenure connotes a systematic land holding that embodies legal, contractual and communal arrangements under which people gain access to and utilize land. It constitutes various laws, rules, procedures and obligations that govern the rights, interests in land, duties and liabilities of the people in their use and control of land resources” (Olima, Obala 1998: 114). A remarkable aspect of this definition is the rather wide conception of tenure. They do not comprehend tenure in terms of legal arrangements only, but also in terms of “contractual and communal” ones. Thus, they explicitly do not see land tenure solely from a juridical-technical point of view, but also from a point of view in which other determinants of tenure of land outside the legal norms may be realized. This wide approach of Olima and Obala can be seen as a precondition for its applicability in developing countries, such as Kenya. Moreover, this change of perspective makes a key point of this thesis obvious: it shows that there is a systematic dualism between the system of statutory norms and that of other norms, which has been developed and selected by social tradition of the local or regional communities. This system is less formal in the sense that the norms defining them are not stated in detailed written laws and that the procedures of enforcing them are applied with the consent of non-state authorities. This system of norms is called “neo-customary tenure system” because it has its roots in pre-colonial, customary, practices, which have further developed over time. In order to get a better understanding of the present-day dualism of statutory tenure and the so-called neo-customary tenure, the origin of this dualism will be explained now.

As mentioned above, the term statutory tenure is used to consider only those provisions that have its basis in a legal norm of the State. In comparison to that, customary tenure refers to the rules of land management that are based on communal landholding according to the customs of a certain ethnic group. Customary tenure was the dominant practice in pre-colonial Kenya, and statutory tenure was an alien concept introduced by the British colonial administration. In order to have a better understanding of what customary tenure is and how this dualism has developed, a short introduction into the colonial intervention in land tenure shall be given: Before Kenya became a British colony, Kenya was not a nation state but consisted of many ethnic communities, which had their territories largely within the present day boundaries of Kenya. Therefore a

homogeneous political unit or a countrywide legal system did not exist. The regulation of land in pre-colonial Kenya was quite different to the laws that were practiced in Europe at that time. Christopher Leo describes the former African land tenure system as a “kaleidoscope of regulations”, that were differently designed by each ethnic group depending on the type of land in question and the personal status of the individual in the group (Leo 1984: 29). While the European concept, under the very strong influence of the ancient Roman system of law, developed a sophisticated land rights system, there was no formal regulation of land use like that in pre-colonial Kenya. This does not at all mean that Kenya was a legal vacuum and everybody could do whatever he or she wanted to do. No, the existing form of regulations was full of taboos and practices (Sifuna 2009: 42). Land was held by the community or clan whose elders decided how the land was to be allocated to its members and how it was to be utilized. There were different possibilities for the members to use the plots. Some of the options were to cultivate diverse crops as a source of food, to use it as pasture for their livestock, as well as to collect firewood, honey and fruits (Sifuna 2009: 43). In doing so, the people acted according to the rules and ethos of the particular clan to whom they belonged and they passed on the land from one generation to another by inheritance under the terms of customary law.

This is in strong contrast to the European concept of land rights, which is mainly characterized by individuality, as well as exclusivity, concerning the access to (and use of) land. However, the pre-colonial arrangements were also not fully communal and equal for everybody. Leo points out that, on the one hand, the access to and use of land was very widespread and the property owner was not allowed to do whatever he wanted, but bound by obligations to his family and friends. On the other hand, there was also land demarcated by boundaries and differences of income inside the group (Leo 1984: 31).

Although a, sometimes more and sometimes less, complex system of regulations concerning the access and use of land at that time did exist, the early British settlers considered the country in this regard as a kind of tabula rasa. To their mind the land was not legally owned by the indigenous residents and so they imposed their own laws and ideology on the country's land tenure regime. Moreover, the argument of under-utilization, or the sparse settlement by the indigenous people, served to justify their interference and in some cases the racist opinion of being superior wiped out the last doubts about the legitimacy of their activities (Leo 1984: 35). The introduction of the

statutory norms by the British settlers constantly limited the importance of customary tenure in favour of the statutory tenure system of the colonial regime. This does not mean that the customary norms were substituted completely, but it did lead to a dualism with two systems of norms existing simultaneously. Therefore, it can be said that this was the beginning of a dualistic land rights system in Kenya.

Today the situation looks the following way: Although customary tenure is still common in the rural areas, it is becoming less important in the urban areas. Customary tenure in the pure sense, as it was in the pre-colonial era, cannot be found in Kisumu anymore (Interview District Land Officer: 25.11.2011). This is notably the case since the Ministry of Lands promoted the process of land adjudication, and also because of the progressive commercialization of land that is going on in Kisumu. Moreover, “[...] money economy, increase in population and the disintegration of the fabric which bound together communities” are some reasons why customary tenure is continuously eroding (Olima, Obala 1998: 117). However, also in the urban areas people continued to apply customary norms in the way that they adopted these norms to present-day requirements. In order to highlight this recourse to the customary traditions, while at the same time pointing out that these traditions have experienced a further development, the term “neo-customary” land tenure is used nowadays when talking about this system of norms (a more detailed explanation with regard to neo-customary land tenure follows in 3.3.3).

Most of the various definitions and views regarding land tenure presented above contain valuable ideas although all of them are limited to a certain extent for the purpose of this study. Therefore, an attempt is made to integrate them after necessary modifications have been made and to define land tenure in a way probably more appropriate for the aims of this study.

The following kinds of legal transactions of pieces of land can be basically distinguished:

- (1) to acquire one
- (2) to utilize one for a specific purpose representing a separate legal transaction, in particular
 - 2.1 to lease one
 - 2.2 to take up a mortgage
- (3) to sell one
- (4) to bequeath one.

This results in the following two definitions made by the author:

A) Land tenure are the conditions under which land *has to be*

- (1) acquired,
- (2) utilized,
- (3) sold and
- (4) bequeathed.

This is called the *statutory approach* of defining how land tenure has to be handled.

Beside that approach a second one is suggested:

B) Land tenure are the conditions under which land *is*

- (1) acquired,
- (2) utilized,
- (3) sold and
- (4) bequeathed.

This is called the *de facto approach* of defining how land tenure has to be handled.

The hypothesis is that the differences between these two approaches show the influence and effects of the neo-customary norms applied in the land transaction cases studied. The difference between statutory law and neo-customary law concerning land tenure can be best examined if a relevant legal act, such as the sale of land is analyzed. The mere exercise of a right of disposition, such as the cultivation or the development of a plot in order to increase the value of the plot, is not a good example to show the difference between the two approaches. Therefore the exercise of the right of disposition is not analyzed within this study. The focus in this thesis is on the procedures of acquisition and bequest of pieces of land. The author will, in her case study in Manyatta A, identify differences between the two approaches and try to find out whether they are caused by the application of neo-customary norms. If this were the case, they would be a part of the neo-customary or informal land tenure and would be in force instead of specific norms of the statutory land tenure.

3.3 TENURE SYSTEMS IN KISUMU

Besides the different definitions of land tenure there are also several possibilities as to how different land tenure systems may be theoretically distinguished from one another. Tenure systems in general, but especially that in Kenya, where a dualistic legal system is

very common, are not to be seen in a black-and-white schema. It is not at all uncommon that many different forms of tenure exist simultaneously within one country or even one city (Payne 2000: 2). Payne gives the following examples: customary tenure, private tenure, public tenure, religious land tenure and non-formal tenure (Payne 2000: 2f). He emphasizes that each of these has its advantages and disadvantages, depending on the context (Payne 2000: 2).

In Kenya, five main land tenure systems can be identified (Pamoja Trust 2011: 2). The so-called ten-mile coastal strip regulates land ownership on the coast. It takes a distinct position in Kenya and is of no importance with regard to questions on land tenure in Kisumu. Customary tenure is still important in the rural areas, but it is seldom if ever applied in Kisumu any more. The three remaining tenure systems that play a role in Kisumu are public tenure, private tenure and informal tenure (Pamoja Trust 2011: 2). These three forms of tenure are described in some detail in the following subsections:

3.3.1 PUBLIC LAND TENURE

Public land tenure is the term to describe the legal norms that exist for managing public land, formerly government land. In Kisumu this refers to land that is held by the Central Government or government agencies, on the one hand, and by the Municipal Council, on the other hand. Roads, parks, forests and also the plots of public institutions are some examples of areas that belong to this category. About 15 years ago, Olima and Obala carried out an assessment of tenure systems in Kisumu. They came to the conclusion that 6.4 % of the Municipality is un-alienated government/public land (Olima, Obala 1996: 116). Unfortunately, more recent data is not available, but it is very likely that the figures have not changed significantly. Besides the new Constitution, there are numerous legal Acts that deal with the regulation of public land, depending on the issue at question. The most important of these is the Government Lands Act (Cap 280) that states how public land has to be administered by the responsible government agencies. Among the numerous provisions of the Government Lands Act, attention shall be drawn to those that deal with the allocation of public land and the issuance of leases, respectively. In the urban context, the Physical Planning Act (Cap 286) is also noteworthy. As the name infers, this Act is concerned mainly with the procedures of physical planning and development control in the urban, as well as in the rural contexts. To present a comprehensive view of the situation, it should be mentioned that since Independence was declared, a large number of public land plots have been illegally

allocated. To find out the extent of these land grabbing activities, President Mwai Kibaki installed a special investigation commission to carry out a survey. In 2004, the so-called Ndungu Commission presented its results in the “Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land”. The Commission found out that especially “key public officers abused their offices in the allocation of public land” (Republic of Kenya 2004: 182). The corrupt activities of authorities in the past posed a real threat to the proper allocation of land in Kenya (International Land Coalition 2011: 35). The investigations revealed that the practices were “[s]o pervasive [...] that by the turn of the Century, there was real danger that Kenya could be without a public land tenure system” (Republic of Kenya 2004: 1). It can be assumed that the appalling results of the Ndungu Commission were one reason why the Parliament changed the responsibilities for the management of public land in the new Constitution. Article 62 states that “Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, [...]” (Republic of Kenya 2010: Art.62.2). This shift of power from the Minister of Lands to the National Land Commission shall guarantee that there is a higher level of transparency and less space for corruption. The changes will come into force as soon as the National Land Commission is in place (Republic of Kenya 2010: sixth schedule, Art. 2.4).

3.3.2 PRIVATE LAND TENURE: FREEHOLD AND LEASEHOLD TENURE

In Kenya, as in many formerly colonized countries, the concept of private tenure was imported to serve the colonial settlers’ interests (Payne 2000: 2). “The system permits the almost unrestricted use and exchange of land and is intended to ensure its most intense and efficient use” (Payne 2000: 3). A major limitation of the private tenure system is that it has made it difficult for the urban poor to gain access to land through this system. Within private land tenure freehold tenure and leasehold tenure has to be distinguished. This paper is focussed on the acquisition of freehold land.

Freehold tenure is “the greatest interest in land that a person can possess” (Olima, Obala 1998: 117). It includes the power to do as the owner wishes without interference from others and is unlimited with regard to time. For these reasons it is sometimes referred to as ‘absolute possession’ or ‘absolute proprietorship’. However, there are at least four basic and two or more possible additional government interventions that can, under certain conditions, override the owner’s right. The first four basic State interventions are

or may be taxation, compulsory purchase by the government, police power and escheat if the freeholder dies and does not have a heir (Mortgages4Mortgages.co.uk: 2012). In addition, there might be a public right of way over the plot (Mortgages4Mortgages.co.uk: 2012). Furthermore, public, in particular local, regulations on land use may restrict the use of the land and, as a consequence, even the price. In Kenya, freehold interests are held under the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282) or the Government Lands Act (Cap 280) (Ministry of Lands 2009: 20). The Registered Land Act (Cap 300) is of great significance as well. It lays down how ownership rights have to be registered and provides the necessary forms for transactions in, and the certification of, private land, such as Title Deeds. The Title Deed is the most important proof of private ownership over land under freehold tenure within the Kenyan statutory system, an example of this document can be found in Appendix 3. Land under freehold tenure is very well protected by Article 40 of the new Constitution, which deals with the protection of the right to property. In order to prevent misuse by expropriation of land for the public good, a just compensation has to be paid to the owner of the land (Republic of Kenya 2010: Art. 40).

In comparison, leasehold tenure “is the right to use land for a defined period of time in exchange for the performance of certain obligations, such as the payment of rent”(Ministry of Lands 2009: 20). A leasehold is a form of property for which the lessor sells the right to occupy and use the land to a lessee [i.e. tenant] for a given period of time (Mortgages4Mortgages.co.uk: 2012). The purchase of the lease from the owner (the freeholder) is carried out by paying the ground rent before an arranged date. This entitles the tenant to occupy and use the land as agreed. “Once the lease has expired, the property again becomes possession of the freeholder” (Mortgages4Mortgages.co.uk: 2012). Consequently, a leasehold property is generally cheaper than a freehold property. In Kisumu the Government or the Municipal Council grants the lessee the right to use public land that, thereafter, is treated as private land under leasehold tenure. As mentioned above, these procedural provisions are laid down in the Governments Lands Act (Cap 280) as well as in the Registered Land Act (Cap 300). As with private land under freehold tenure, the Registered Land Act provides the specific certificates for securing land under leasehold tenure, the most important of which is the Certificate of Lease. Government leases for urban land are usually fixed for periods ranging from one year to 99 years. A period of 99 years is also what the new Constitution has provided as the maximum time for a leasehold agreement. Another important and memorable

change concerning leaseholds that has been introduced by the new Constitution (and is already enforced) is, that foreigners are allowed to own land only on the basis of leasehold arrangements. Moreover, also for them, the period may not exceed 99 years (Republic of Kenya 2010: Art. 65).

3.3.3 NEO-CUSTOMARY TENURE AS A SPECIAL FORM OF INFORMAL TENURE

As already mentioned above, the majority of people in Africa's urban agglomerations cannot afford to acquire land through the statutory system, but have to look for alternatives. In actual fact, there are many persons with land who do not have legal land rights according to statutory law. Therefore the State usually does not recognize their right to own land. These non-statutory arrangements can be summarized as informal land tenure. Not only the extent, but also the variety of informal tenure arrangements is great. The informal tenure system itself provides a wide spectrum of different informal possibilities to acquire land. One possibility is through "non-formal de[-]facto tenure", which is commonly known as squatting (Olima, Obala 1998: 117). Squatters are people who settle down on a plot without the permission of the plot owner, which may be a private person or a public body (Olima, Obala 1998: 117). This can happen either because the people are not aware that the (undeveloped) land belongs to somebody else or they simply disregard the existing property rights of the landowner. Though squatting seems to become more and more popular in Kenya generally, it is not of great relevance in Kisumu. According to Olima and Obala it represents only 0.2 % of the land tenure cases in Kisumu (Olima, Obala 1998: 117).

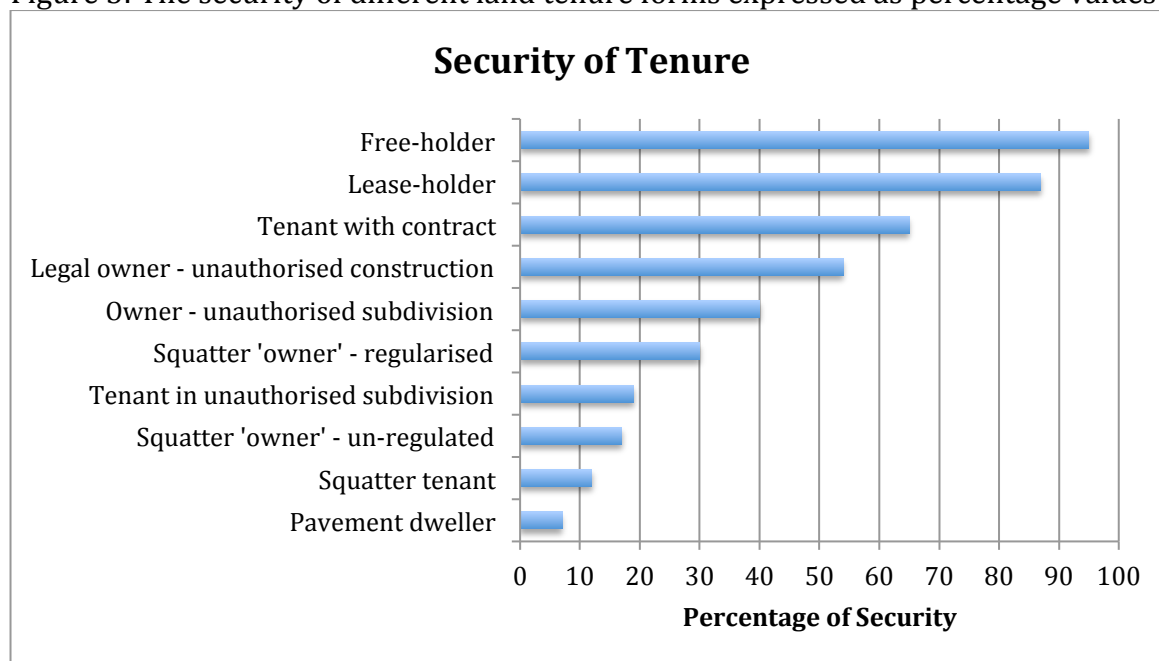
In comparison to squatting, the neo-customary tenure system plays a much bigger role within the broad spectrum of informal tenure forms. As already hinted at in the previous subsections, neo-customary tenure is a further development of traditional customary tenure rules. Durand-Lasserve defines the neo-customary practices as "[...] a combination of reinterpreted customary practices with other informal and formal practices" (Durand-Lasserve 2004: 2). The main distinguishing feature between the neo-customary land tenure form and an ordinary informal land tenure form is that neo-customary parties "[...] transfer rights through practices derived from customary land delivery systems" (Durand-Lasserve 2004: 2). The acquisition of land according to the neo-customary tenure form involves parties that used to play an important role in the customary systems, mostly traditional authorities, such as the village elders. Because of this recourse to already known practices and elements of the customary form, the neo-

customary system provides a higher level of security than an ordinary informal one (Durand-Lasserve 2004: 3).

3.4 SECURITY OF TENURE

It may have become clear already from the definitions above that the different kinds of land tenure have different characteristics, which have to be fulfilled to make use of them. Each kind of land tenure is characterized by a different set of rights and obligations and by a different degree of security with regard to enforcing the claims or rights of the respective stakeholders. Payne refers to a “tenure continuum” and identifies ten different categories that can be found in many cities: from the pavement dweller, who is confronted with the highest level of insecurity up to the freeholder who enjoys the highest possible level of security (Payne 2000: 4).

Figure 3: The security of different land tenure forms expressed as percentage values



Source: Anna Schinwald, on the basis of Payne 2000: 4.

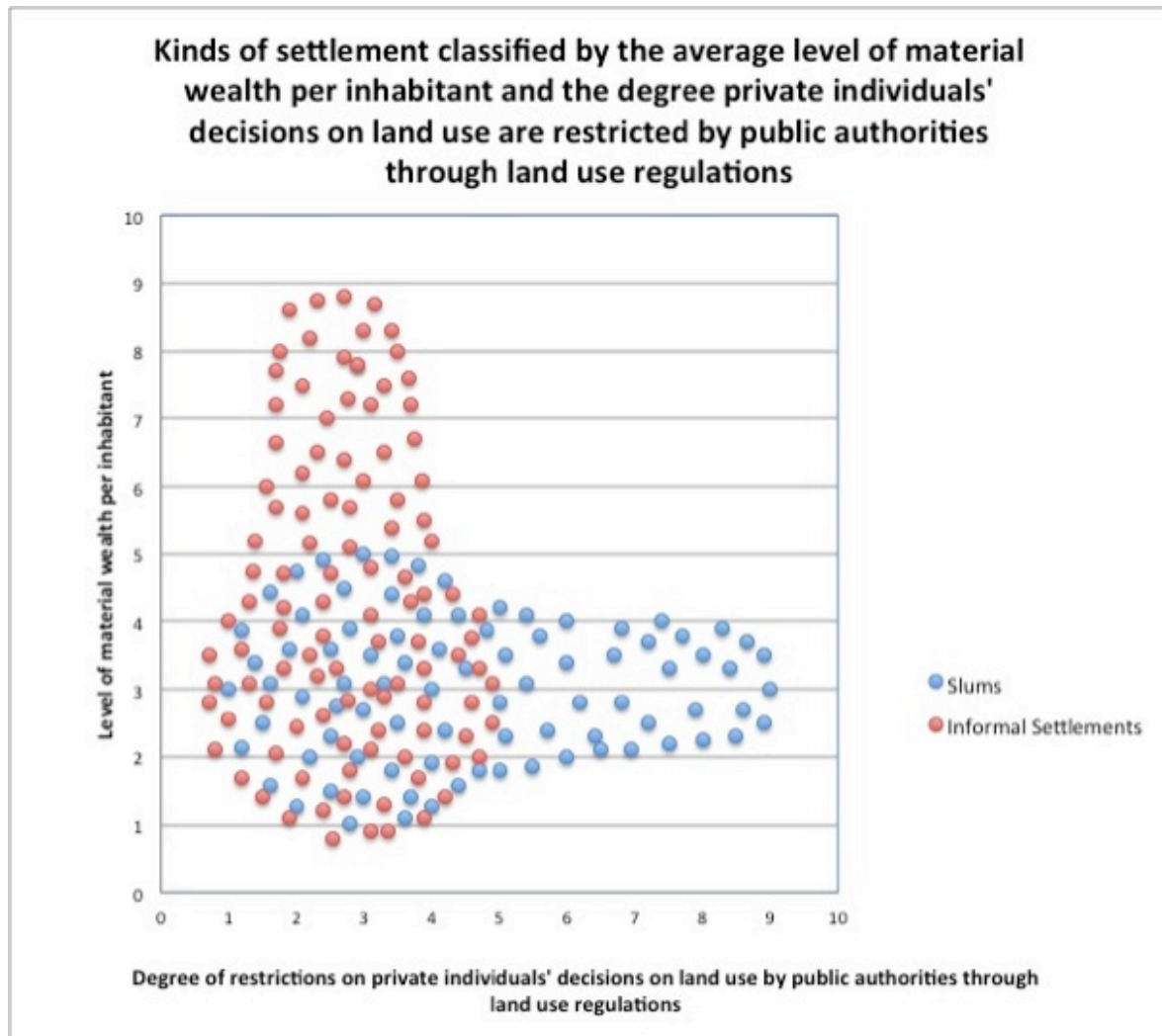
In this context the term ‘ownership rights’ is introduced and explained in some detail: “Rights of ownership refer to the quantity of rights that different tenure systems confer on individuals, groups of individuals and other entities” (Ministry of Lands 2009: 19). The right of ownership usually consists of three main parts, namely, the right to use land, the right to dispose of land and the right to exclude others from one's land (Ministry of Lands 2009: 19). “While some users may have access to the entire ‘bundle of rights’ with full use and transfer rights, other users may be limited in their use of land

resources” (Durand-Lasserve, Selod 2007: 4). Moreover, the existing land tenure forms have a far-reaching effect on the physical urban pattern. They exert, for instance, an influence on the ability to access shelter, the population density, housing development or the possibilities for spatial planning in towns (Olima, Obala 1998: 114 ff.).

3.5 SLUM AS A KIND OF INFORMAL SETTLEMENT

Another question that arises is what the characteristics of slums are within the range of informal settlements. To answer this question, the definitions put forward by the United Nations and by Pamoja Trust Kenya, as well as by research workers, provide guidelines as to how the settlements in Kisumu are to be categorized. Before these definitions are given, Figure 4 shows how slums and informal settlements as two partly overlapping kinds of settlements are in proportion to each other.

Figure 4: Kinds of settlement classified by the average level of material wealth per inhabitant and the degree private individuals' decisions on land use are restricted by public authorities through land use regulations



Source: Stromer 2009: 19, modified by Anna Schinwald according to suggestions by Wilfried Schönbäck (personal communication), October 2012.

The figure highlights that there are two main factors how the two kinds of settlements are to be characterized: the average level of material wealth per inhabitant of a settlement as well as the degree how private individuals' decisions on land use are restricted by public authorities through land use regulations. Those settlements whose residents have a very low level of material wealth are to be found closely to zero on the x-axis. Those settlements whose residents can use their land more or less without any public intervention on land use are also located close to zero on the y-axis.

3.5.1 INFORMAL SETTLEMENT

There are several possible ways by which informal settlements can be distinguished within the broad spectrum of informal land settlement forms. The UN Economic Commission for Europe identifies five fairly distinct forms of informal settlements:

- “squatter settlements on public or private land”,
- “upgraded squatter settlements”,
- “settlements for refugees and [other] vulnerable people”,
- “illegal suburban land subdivisions on private or public land” and
- “over-crowded, dilapidated housing without adequate facilities in city centres or densely urbanized areas” (UN Economic Commission for Europe 2009: xvii).

In accordance with this categorization, the slums of Kisumu belong to the two last categories. Focusing on the informal settlements in Kenya, Pamoja Trust, a non-profit organization that focuses on the improvement of the lives of the urban poor, identifies four major categories of informal settlements by taking the kinds of land tenure as well as the history of the settlement into account:

- “settlements situated on government land”,
- “settlements on private land”,
- “settlements on indigenous land” and
- “settlements on private land owned by absentee landlords” (Pamoja Trust 2011: 3).

The informal settlements in Kisumu fall into the third category because they were originally situated on indigenous land before they were integrated into the city of Kisumu and adjudicated.

Tranberg Hansen and Vaa have made another very interesting categorization of informal settlements. Focusing on the different aspects of illegality they made a subdivision between

- “illegal occupation”,
- “illegal subdivision” and
- “house construction in conflict with building codes and planning regulations”

(cited in Nielsen 2007: 16).

Both, the second as well as the third category describe the situation in the slums of Kisumu very well. As stated above, the original acquisition of the slum areas was not informal, since the slum areas of Kisumu were indigenous freehold land before the adjudication process took place. However, it should be stated that, after the land

adjudication, several informal land developments, such as the informal subdivision of land or informal inheritance processes, took place. Moreover, a disregard of planning and construction provisions has led to the present characteristic appearance of the Kisumu settlements with densely populated areas, poor housing facilities and a lack of public infrastructure.

3.5.2 SLUM

According to the United Nations, five main indicators that make an area a slum area can be identified (UN-Habitat 2005: 7):

- poor access to water
- poor sanitation facilities
- insecurity of tenure
- non-durability of housing
- insufficient living area

Depending on the area under surveillance these indicators are to be found to a greater or lesser degree. In the slum belt in Kisumu, almost all of the indicators mentioned above, are to be found in the individual slum settlements, but not all to the same extent. However, it has to be mentioned that tenure security is relatively high throughout the slums in Kisumu because of the land adjudication that the Ministry of Lands has carried out (Pamoja Trust 2011: 5).

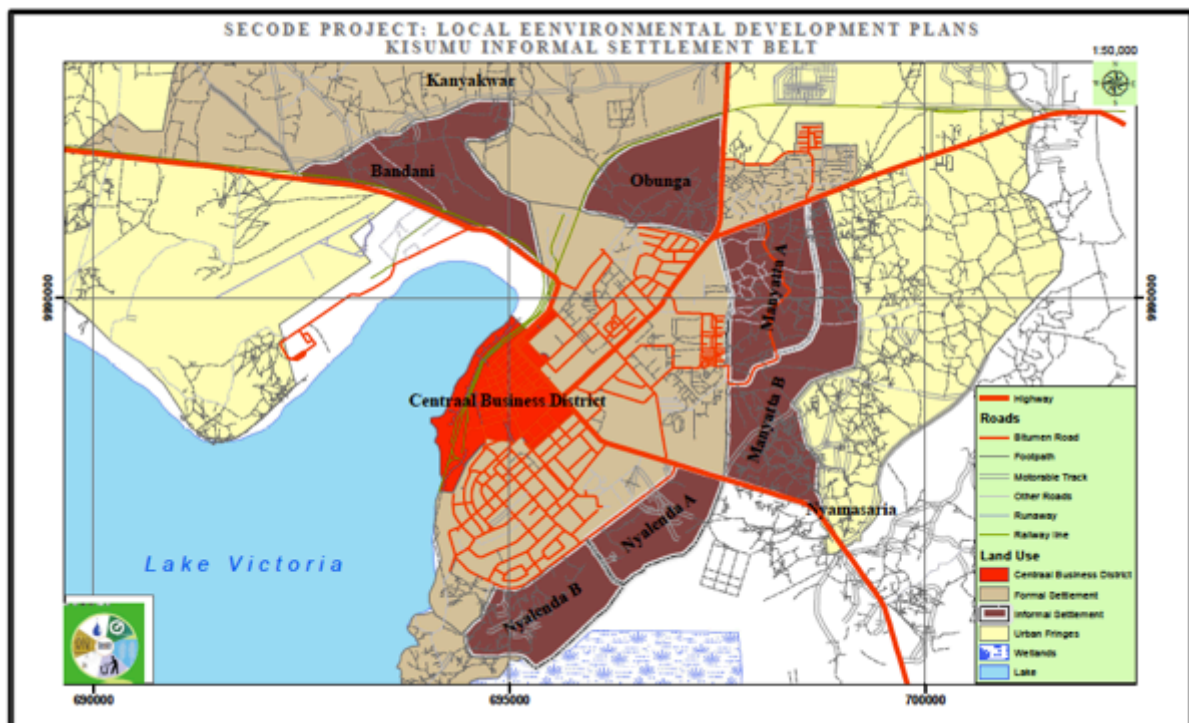
With regard to the formation of slums, the UN emphasizes that the external environment in a country, such as “[...] political, economic, socio-cultural and technological circumstances”, influences the evolution and growth of slums (UN-Habitat 2005: 7). To be more concrete, three major factors can be identified. First of all, “changes in urban land use patterns play a significant role”, leading to a transformation of the area into a place of “high value but cheap rents” (UN-Habitat 2005: 8). Secondly, there is a shortage of affordable housing. This problem becomes even worse through the fact that slums generally function as “entry areas” for those people who migrate from the rural to the urban areas. Therefore they can also be called “urban villages” (UN-Habitat 2005: 8), a term meaning that slums are a place for adjustment to the urban way of life. The third factor identified by the UN is that “[t]he psychological bias in favour of success through acculturation [which] is all the stronger as slum dwellers have easy access to the rest of the town” (UN-Habitat 2005: 8). It can be observed that all three factors exert their influence in Manyatta A.

To conclude, one can say that slums are a distinct form within the range of informal settlements. Owing to the fact that most of the inhabitants in Kisumu who live in the areas under discussion use the term *slum* instead of *informal settlement*, and in order to be consistent, the term *slum* has been used throughout in this paper.

4 THE HISTORICAL DEVELOPMENT OF THE SLUMS IN KISUMU

There are six main settlements in Kisumu that can be identified as slums according to the definitions above. These are Manyatta 'A', Manyatta 'B', Nyalenda 'A', Nyalenda 'B', Obunga and Bandani. As shown on the map these settlements form a semi-circle around the central business district and the affiliated old town.

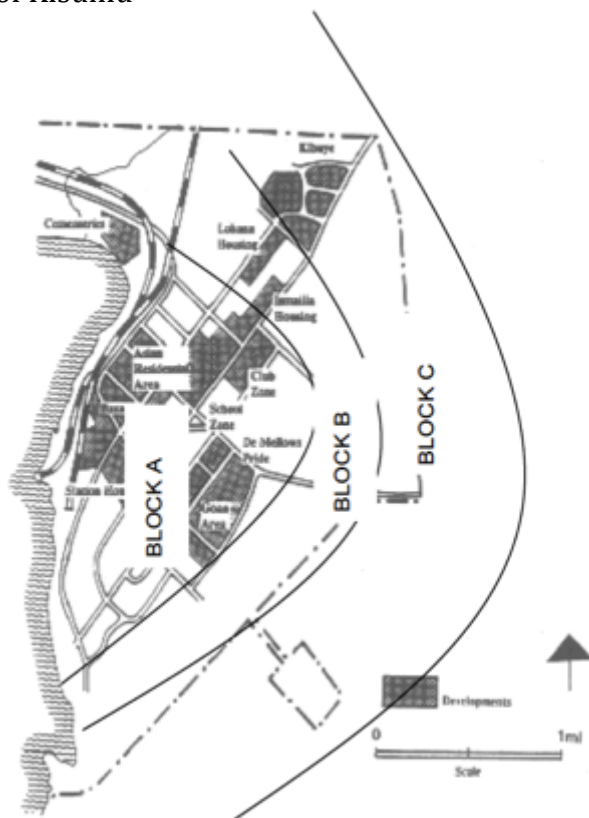
Figure 5: Location of the informal settlement belt in Kisumu



Source: Physical Planning Department, Ministry of Lands 2011

The location of the slums has historical reasons: during the colonial period the current, central business district (Block A in Figure 6) was reserved for the foreign population. It entailed the port, public buildings of the colonial government, as well as residences for the foreigners, mainly Europeans and Indians. Because of health concerns, the colonial government segregated the native African population by creating an official residential area for them, and constructed a buffer zone between the two areas (KENSUP 2005: 19). While the inner part of the town developed in a well-organized way, the African settlement areas, which were beyond Block C at the periphery, were completely neglected. In 1930 they were even excluded from the town. Over the years, the

Figure 6: Land segregation within the old town of Kisumu



Source: KENSUP 2005: 19

population in these settlements steadily grew through migration and the incorporation of neighbouring rural villages. This growth was characterized by the lack of any co-ordination or spatial planning of the on-going densification and continuous transition into a semi-urban area. When the geographical boundaries of the Municipality of Kisumu were expanded in the year 1972, those areas became part of Kisumu again and the authorities now had to face the challenges of those settlements which their colonial predecessors had ignored for decades (KENSUP 2005: 20).

Just like in other Kenyan cities that have experienced a rapid expansion both in the population and area, the appropriation of indigenous freehold land in Kisumu, to put it under urban jurisdiction, took place without the consent of the original inhabitants (Pamoja Trust 2011: 5). As a first step towards a better control of the developments in the settlements, the slum belt was continuously adjudicated. This key procedure provides an answer to the first research question (a.), which is about how the land in the slums of Kisumu became private land. The explanation follows in detail in the following chapter.

4.1 THE HISTORY OF LAND ADJUDICATION

Land adjudication is defined as “the process of ascertaining and recording rights and interests in land claimed by individuals and other entities” (Ministry of Lands 2009: 37). It has to be noticed that the slum settlements were all situated on what is called ‘community land’, ‘family land’ or ‘ancestral land’ before the adjudication process began. All these terms express that the land was under communal holding. This communal land tenure worked according to the traditions of the Luo, who are the predominant ethnic group in Kisumu. As already mentioned in Chapter 3, the traditional land tenure in

Kenya was quite different to that in Europe. The main difference is that “[a]mong the Luo, land is property of the community, usually the clan” (KENSUP 2005: 21). Through the adjudication process, land was individualized and devolved from a communal good into a privately owned good being subject to market transactions. Since the mid-1950s, land adjudication, or land titling, was on the agenda of the British administration. The initial adjudication process in Kenya was strongly motivated by the famous Swynnerton Report, which stated that land adjudication and registered titles would “put an end to boundary disputes”, promote title security and “introduce a safe, simple and cheap system of conveyancing” (Coldham 1979: 616). Especially the kind of title that should be introduced to intensify the economic outcome of land as a resource was under discussion (Coldham 1979: 615). A special committee, that investigated the different possibilities, arrived at the conclusion that the English model of title registration would be most suitable for Kenya (Coldham 1979: 615). Since then, adjudication has been practised throughout Kenya, and with even more vigour after Kenya became independent, in order to make the country more modern. The adjudication of land in the slum settlements in Kisumu started before the end of the 1970s. It was a complex and time-consuming task. Documents of the Department for Land Adjudication and Settlement of the Ministry of Lands in Kisumu show that the procedures took between four to six years on average. In Manyatta ‘A’ land adjudication started in 1978 and was completed in 1994 (Okonyo 2008: 38). At the end of the processes the demarcated, individual parcels of land were registered and Title Deeds for the plots were issued (Interview District Land Adjudication Officer: 23.11.2011).

4.2 THE ADJUDICATION PROCEDURE FROM A LEGAL PERSPECTIVE

The legal basis for this procedure can be found in the Land Consolidation Act (Cap 283), the Group Representatives Act (Cap 287) and the Land Adjudication Act (Cap 284). While the first has more significance in the rural areas, and the second is concerned with group ranches, the Land Adjudication Act is generally applicable for adjudication processes, and therefore applies to the urban areas as well. The shift of trust land and communal landholding under customary land to private land ownership has had a far-reaching effect on the existing land tenure system. The procedure is finalized by the registration of the private title in the Land Registry and the issuance of a Title Deed as

the proof of ownership. As far as the legal responsibilities are concerned, this process brings about a shift from the Trust Land Act (Cap 288) to the Registered Land Act (Cap 300). The detailed adjudication procedure is as follows:

Table 1: Description of the statutory land adjudication procedure

Step	Action
1	The Minister of Lands identifies the area that shall be adjudicated (section 3, Cap 284). This usually happens upon request of the County Council in whom the trust land is vested.
2	The Commissioner of Lands has to make sure that there is no public land within the specific area that is to be adjudicated, because it sometimes happens that enclaves of public land exist within trust land (Interview District Land Adjudication Officer: 23.11.2011).
3	The Minister of Lands appoints an Adjudication Officer for the adjudication area. The Land Adjudication Officer in turn appoints his team consisting of Demarcation Officers, Survey Officers and Recording Officers (section 4, Cap 284). The Adjudication Officer decides on the number of such public officers, he needs to carry out the relevant tasks.
4	When the team is complete, the adjudication sections are established (section 5, Cap 284). The adjudication area may either be subdivided into several adjudication sections or be one adjudication section as a whole. The identification of the areas and boundaries of the sections is carried out by using aerial and satellite photos (Interview District Land Adjudication Officer: 23.11.2011). Moreover, the Land Adjudication Officer has to publish a notice to inform the public with regard to the adjudication process, the area of the adjudication section and the time period within which persons can claim an interest in the land (section 5, Cap 284).
5	After consultation with the District Commissioner, the Adjudication Officer appoints a group of residents within the adjudication section to be the Adjudication Committee (section 6, Cap 284). These persons are usually the local elders of the area, who are supposed to be aware of the existing land rights under customary law (Interview District Land Adjudication Officer: 23.11.2011). The Provincial Commissioner appoints, upon the request of the

	<p>Adjudication Officer, a panel consisting of from six to twenty-five persons. This panel serves as a pool for the Arbitration Board, which consists of at least five persons, who are appointed from time to time to decide upon a particular question (section 7, Cap 284).</p>
6	<p>At least seven days after notice has been given to the persons who will be concerned, that an adjudication section will be demarcated and claims will be recorded, the Demarcation Officer begins to mark out the area by demarcating the boundaries with regard to the claims made (section 14f, Cap 284). This is in an attempt to consolidate plots, to avoid boundary disputes and to demarcate any right of way that may exist (sections 15 and 18, Cap 284).</p>
7	<p>The Survey Officer surveys each demarcated piece of land, draws a demarcation map of the adjudication section and issues numbers for every parcel of land that is shown on the map (section 16, Cap 284).</p>
8	<p>The Recording Officer prepares a form for every parcel of the demarcation map showing the person's claim to an interest in the land. If there is more than one claimant for a single parcel of land and a dispute arises, the matter will be taken up by the Adjudication Committee (section 19, Cap 284).</p>
9	<p>The Adjudication Committee decides upon open cases or disputes that have been referred by the Demarcation Officer or the Recording Officer. The basis for the Committee's decisions is the recognized customary law in the adjudication section (section 20, Cap 284). The aim is to find out who has exercised rights in or over land in the past that should be recognized as land ownership for the adjudicated parcel.</p>
10	<p>If the Adjudication Committee is unable to come to a decision, or if the person who is affected by the Committee's decision is dissatisfied, the case will be referred to the Arbitration Board (section 21f, Cap 284). The Board will then decide on such open cases.</p>
11	<p>After all the disputes are settled, the Recording Officer prepares the adjudication record, which is comprised of all the forms under section 19. Each of the forms has to contain a considerable amount of plot and owner-related information, such as the number of the parcel as shown on the demarcation map, the size of the plot, the name as well as a description of the owner, any legal encumbrance that may exist (such as a lease, the right of</p>

	occupation, charge, etc.) and the date on which the form is completed (section 23, Cap 284). If a group is on the record as the owner of the parcel, special provisions of the Group Representatives Act (Cap 287) have to be met. With the signature of the representatives of the Adjudication Committee and that of the owner of the parcel, ownership is settled (section 23, Cap 284).
12	After this process has been completed, public notice is given and the adjudication record and the demarcation map (together, they are referred to as the adjudication register) will be displayed for inspection to the public for a period of sixty days (section 25, Cap 284). Within this period of time all the landowners are then called upon to confirm the correctness of the information in the adjudication record (Interview District Land Adjudication Officer: 23.11.2011). If anything in the record is incorrect, or a person is dissatisfied, an objection to the Adjudication Officer may be filed within a given period of time (section 26, Cap 284).
13	The Adjudication Officer hears the cases in which an objection is made and passes judgement on the issue (section 26, Cap 284). This process may take more than a year before a satisfactory solution has been found (Interview District Land Adjudication Officer: 23.11.2011).
14	Those who are still dissatisfied with the Adjudication Officer's decision have the possibility to file an appeal to the Minister of Lands once again within a period of sixty days (section 29, Cap 284). The appeals to the Minister are normally heard by the respective District Commissioner on behalf of the Minister of Lands (Interview District Land Adjudication Officer: 23.11.2011). His decision is final.
15	After all the cases have been finalized, the Adjudication Officer sends the adjudication register to the Director of Land Adjudication, who forwards it to the Chief Land Registrar (section 27, Cap 284).
16	The Land Registrar then registers the land in the name of the plot owners and issues the Title Deeds. The legal basis for this is the Registered Land Act (Cap 300). This is the moment when the change in land tenure is finalized: the land that was formerly trust land has become private land (Interview District Land Adjudication Officer: 23.11.2011).

Source: Compiled by the author (Dec. 2011).

4.2.1 ANALYSIS OF THE LAND ADJUDICATION PROCEDURE

Now that the process of land adjudication is laid down in detail, it is time to mention a few interesting aspects about the process of land adjudication in Kisumu. First of all, it is remarkable that in comparison to many slum settlements in other areas of the world “[...] the survey of most land in the slum settlements [in Kisumu] is complete and most land owners possess title deeds” (KENSUP 2005: 8). The reason for this is that during the acquisition process the land owners were able to claim original acquisition of ownership through their ancestors and therefore their individual titles on land were under freehold tenure with only very limited intervention possibilities for the official authorities on account of the strong protection of private property in the Kenyan Constitution. Because of certain financial constraints, neither the Municipal Council of Kisumu nor the Central Government could afford to acquire land, to any extent worth mentioning, in the slum settlements for public purposes at that time. The result of this financial incapability is that the areas are almost exclusively privately owned and the settlements are characterized by a lack of public facilities and an appropriate infrastructure. This is the main reason why the infrastructure is poor and any upgrading process of the areas is very difficult.

Secondly, there was, and still is, a discrepancy between the intention of land adjudication and its realization. Coldham, who investigated the early attempts of adjudication processes in the late 1960s and early 1970s in Kenya, had serious doubts about the applicability and effectiveness of land adjudication. With reference to “the limits of the law”, it seemed very questionable to him that a change in the law would automatically lead to a change in the social behaviour of the people (Coldham 1979: 616). His main argument is that, as long as people see the formalized system only as a means to end boundary disputes, but continue, nonetheless, to transfer land according to the rules of the customary tenure system, the adjudication process will not lead to the desired success (Coldham 1979: 617). In addition to this, he mentions another obstacle to the proper functioning of the formal system and the accountability of the Land Registry: people who were the first registered owners of the plot continued to subdivide land among their offspring, mainly sons, according to customary procedures without complying with the statutory norms and without registering the sub-divisions in the Land Registry (Coldham 1979: 617). The discrepancy between the developments that actually happen and those that are officially registered may well undermine the positive

intentions of what the adjudication procedure should achieve. This discrepancy between the *de facto* conveyance processes and the *de jure* registered ownership structures mentioned by Coldham, applied, and still do apply, to the situation in Kisumu as well. The landowners, in whose names the land was first registered and to whom the Title Deeds were issued, are already long dead, but “their descendants have not transferred ownership” according to the statutory procedures (Pamoja Trust 2011: 5). The extent to which this still happens today will be discussed in Chapter 8 in more detail.

For the sake of completeness, it has to be mentioned that the process of land adjudication is not an attempt to extinguish trust land in general, as mentioned in different papers (e. g. Okonyo 2008: 39). This statement may apply to the urban areas in Kenya, but for the rural areas there are reasonable attempts to provide better protection of those areas of trust land that still exist. Especially the provisions for community land in the new Constitution should prevent the misuse of power by the local authorities who are in charge of trust land at the moment, but who will not be responsible for community land any more, as soon as the provisions for trust land are enforced (see Republic of Kenya 2010: Art. 63).

5 THE ADMINISTRATION OF LAND IN KISUMU

5.1 THE MINISTRY OF LANDS (CENTRAL GOVERNMENT OF THE REPUBLIC OF KENYA)

The Ministry of Lands, or 'Ardhi House', is the most important institution when it comes to the administration of land matters in the country. The Ministry has more than 50 offices countrywide, one of them in Kisumu (Ministry of Lands 2012). The Ministry of Lands in Kisumu consists of four different departments. The four heads of the departments are in charge of their superior authorities in Nairobi. Three different processes are central to land administration namely the "determining, recording and disseminating" of information on "ownership, value and use of land" (Ministry of Lands 2009: 36). Keeping records on land rights, the promotion of tenure security and guidance in land transactions, is what people expect from an efficient land administration (Ministry of Lands 2009: 36). In detail, land administration entails the: "ascertainment and registration of land rights, allocation and management of public land, facilitation of efficient transactions in land, maintenance of efficient and accurate land information system, mechanisms for [the] assessment of land resources for fiscal development and revenue collection, and efficient and accessible mechanisms for resolving land disputes" (Ministry of Lands 2009: 36). The four different departments who have to carry out these tasks are:

- The Lands Department
- The Department for Land Adjudication and Settlement
- The Survey Department
- The Department for Physical Planning

5.1.1 THE LANDS DEPARTMENT

This department is of prime importance because it is responsible for development control. "Development control is the power of the State to regulate property rights in urban and rural land, and is derived from the State's responsibility to ensure that the use of land promotes the public interest" (Ministry of Lands 2009: 14). The department itself is subdivided into three different divisions:

- The Land Administration Division
- The Land Registration Division
- The Land Valuation Division

The three responsible divisions are equal, the senior officer of the three divisions acts as the overall head of the Lands Department. In Kisumu this position is held by the District Land Officer (Interview District Land Valuer: 05.12.2011). The department as a whole is bound by instructions of the Commissioner of Lands, who is the Head of the Lands Department of the Central Government in Nairobi.

THE LAND ADMINISTRATION DIVISION

The Land Administration Division is headed by the District Land Officer. The legal basis for his work is the Government Lands Act (Cap 280) and the Trust Lands Act (Cap 288). The District Land Officer deals with the administration of urban residential and commercial land owned by the government, such as the extension of leases, transfers, charges and subdivisions of government land and the administration of private land under leasehold tenure (Interview District Land Officer: 25.11.2011). Moreover, he is responsible for the allocation of government land to private individuals and for public purposes (such as schools, health or recreation facilities) which is probably the most important task. In doing so he decides which government land may be allocated, and to whom it may be allocated. There is a set of conditions that have to be met by the leaseholder of government land. According to the District Land Officer, the most important condition to lease land to private persons is that the leaseholder agrees to develop the land. To make sure that the conditions have been met, the District Land Officer visits the plots and if everything is in order, he can verify this officially. (Interview District Land Officer: 25.11.2011). However, the District Land Officer mentioned that there was at a present a ban on the allocation of government land to private persons until the National Land Commission is implemented as foreseen by the new Constitution (Interview District Land Officer: 25.11.2011).

THE LAND REGISTRATION DIVISION

The District Land Registrar is the head of the Land Registration Division. He is responsible for the registration of documents under the Registered Land Act (Cap 300). This includes the issue of documents, such as the Transfer of Lease and the Transfer of Land forms, as well as the Certificates of Leases and Title Deeds. Moreover, he is in

charge of the Lands Registry, which is the most important archive for the documentation of land ownership (Interview District Land Registrar: 09.12.2011). The Land Registration Division is responsible for keeping a record of all the transactions in private, as well as government land. Another very important task is to resolve boundary disputes with the aid of adjudication maps or survey maps (Interview District Land Registrar: 09.12.2011). In order to carry out these tasks the Division has a large number of different registers because “data relating to title deeds, ownership and conveyancing are maintained” within the section on land registries (Institution of Surveyors of Kenya 2008: 13). Last but not least, the Division is responsible for the collection of government revenues and fees (Interview District Land Registrar: 09.12.2011). Therefore they keep records on the value of the different plots, and relevant details for the taxation of the same.

THE LAND VALUATION DIVISION

In general, all of the documents eligible for registration have to be stamped before they can be registered (Interview District Land Valuer: 05.12.2011). The legal basis for this is the Stamp Duty Act (Cap 480). In order to receive a stamp, the stamp duty has to be paid. The amount is calculated by the District Land Valuer on the basis of the value of the respective plot at the current market rate. Depending on the documents as well as the location of the plot, the people have to pay a certain percentage of the plot value, for instance, one per cent of the amount of a bank loan in case of assuming a mortgage. If somebody wants to transfer land under freehold tenure within the Municipality he is charged four per cent of the price to be paid for the land (Interview District Land Valuer: 05.12.2011). The taxation of registering transactions, assessments and the like is an important source of revenue. Moreover, the Land Valuation Division supports the municipality in “preparing and updating valuation rolls for land taxation purposes” (Institution of Surveyors of Kenya 2008: 13).

5.1.2 THE DEPARTMENT OF LAND ADJUDICATION AND SETTLEMENT

The District Land Adjudication Officer is responsible for the Department for Land Adjudication and Settlement. According to him, the most important Acts for the work in this department are the Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283) and the Land (Group Representatives) Act (Cap 287) (Interview District Land

Adjudication Officer: 23.11.2011). This department has two divisions: the Division for Land Adjudication, which is responsible for the adjudication and consolidation of land, as well as with the issue of group ranches, which, however, do not exist within the city of Kisumu and the Division for Settlement, which is concerned with the issues of settlement and landless people. One of its fields of activity is the acquisition of agriculturally viable land for poor, landless citizens. Although closely linked to the work of the Department of Land Adjudication, the “land adjudication and registration programme”, which defines the boundaries of plots, is not exercised by the Department of Land Adjudication and Settlement, but by the Survey Department.

5.1.3 THE SURVEY DEPARTMENT

The Survey Department is headed by the District Lands Surveyor, who is responsible for the carrying out of the activities on the legal basis of the Survey Act (Cap 299). In general, it has two fields of activities; namely, the process of land surveying and mapping. Mapping involves the provision and maintenance of all spatial data, such as title maps, topographical maps, parcel based maps, Registry Index Maps (R.I.M's) and Preliminary Index Diagrams (P.I.D's) (Institution of Surveyors of Kenya 2008: 12). One of the maps is the “Map of Kenya” on which the land ownership is registered and continuously updated. The Survey Department of the Ministry also delivers the maps to the municipality. In addition, it controls all the – formal – subdivisions that are carried out by private surveyors, authorizes them and keeps the records accordingly (Interview Provincial Surveyor: 08.02.2011). Most of these data are still in analogue form and not digitalized yet. At present, digitalization is in progress because this has been a major point of criticism for a long time already.

5.1.4 THE DEPARTMENT OF PHYSICAL PLANNING

This department deals with the issues of rural and urban planning. Urban planning is a major challenge in Kisumu. The planning activity contains the production of different development plans for Kisumu, such as the physical planning plans, the production of which is the “key role of the department” (Ministry of Lands 2012). In doing so, the District Physical Planning Officer works in close co-operation with the Municipality, especially the Town Planning Department of the Municipal Council of Kisumu. They

share the same goal and tasks, namely a controlled development of the land within the municipality. This contains, for instance, the subdivision of land, the change of land use and the building plans. In former times, the co-operation between the two authorities was characterized by a high degree of friction. The main reason was that the Physical Planning Act (Cap 286), which is the basis for the work of the Department of Physical Planning, and the Local Authorities Act (Cap 265), according to which the Municipality fulfils its duties, are contradictory, because these two Acts empower both of these authorities to carry out the same tasks, such as the approval of subdivisions of land under leasehold tenure. However, the Physical Planner of the Ministry of Lands asserted that in the meanwhile co-operation has reached a very efficient level (Interview District Physical Planner: 17.11.2011).

5.2 THE MUNICIPAL COUNCIL OF KISUMU

After this introduction of the different departments of the Ministry of Lands and their fields of activities, it is time to shed light on another player which has been mentioned above already and which also participates in matters concerned with land rights in Kisumu: the Municipal Council of Kisumu. Although the Municipality is not directly involved in private freehold land acquisition, it plays a major part when it comes to the acquisition of leasehold land and the administration of land in general. Therefore a short introduction is given as well. The Municipal Council of Kisumu is the main executive unit at the municipal level. The Municipality consists of eleven different departments, which are subdivided into several sections (KENSUP 2005: 49). On questions concerning land, the "Town Planning Department" is the one which is most important, as its director has very great influence on the future development of the town. This Department works in conjunction with the other Departments of the Municipality, for example, those responsible for housing, the environment, and for town engineering, as well as with the Departments of the Ministry of Lands (Municipal Council of Kisumu 2012). It was not always very easy to see how the different departments of the two main authorities coordinated their work. As the Central Government has greater and wider authority than the municipal authorities, it is, of course, much more influential on matters concerning land issues. The subordination of the Municipality becomes obvious in several cases. For example, the Council has to enforce the decisions of the Ministry of Lands, such as zoning and demarcation as defined by the Ministry of Lands. At the same time, the Municipality has to obtain the Ministry's consent before carrying out certain activities. If,

for instance, the town has plans to expand its areas, it is the Central Government which has to make the final decision and to give its consent. The Municipal Council has only the possibility to propose such an action. As already mentioned above, the different Departments of the Ministry provide the different Departments of the municipality with several kinds of maps and plans and support them in their work. Nevertheless, the co-operation between the two is still open to criticism, especially because of the poor exchange of data (Institution of Surveyors of Kenya 2008: 5).

5.3 INSTITUTIONAL CONSTRAINTS OF THE ADMINISTRATION OF LAND IN KISUMU

Besides the poor exchange of data between the two authorities there are several other institutional shortcomings in land administration that are addressed in the following text.

First and foremost, there is not only a “lack of systematic information/data storage and processing” in the Municipal Council of Kisumu (Institution of Surveyors of Kenya 2008: 5) but also in the Ministry of Lands, which is even more severe because the most important documents concerning land matters are stored there. In the Ministry of Lands all the land related documents, such as the Lands Registry, the maps, the transfer forms and the copies of the Title Deeds, are almost exclusively available in hardbound copies. Within the current system, the procedures are generally very laborious and time-consuming, which incurs high opportunity costs for those people who seek a document from the Ministry of Lands. Throughout the period in which the field research was carried out, the Ministry of Lands was always full of people who wanted to organize their land-related matters. People claimed that they had to make frequent visits to the Ministry of Lands in order to obtain the desired document. Moreover, some mentioned that bribery is necessary to accelerate the procedures, or even to make sure that the relevant document “is found”. What makes the completion of the services even more difficult is that the responsible public officers are not regularly in their offices, because they sometimes need to work in the field as well. During the field research the author made the experience that the responsible authorities do not tell their secretaries when they will be in attendance in their respective offices, which means that the people just come and wait for several hours in the hope the officer may show up, and are often

disappointed which means that they have to come again on another day and try again. It is interesting to note that the people seem to be so used to this situation already that they did not actually complain about the bad service.

However, the system is not only inefficient and inconvenient for the clients, it also poses a real threat to the security of land titles. The way that the data storage is carried out within the Ministry can be described as grossly negligent. All the land-related documents since the 1950s are stored within one room that is, quite definitely, not fireproof. One has to keep in mind that there are no copies of most of these documents and so, if they are somehow spoiled or lost, not only Kisumu, but the whole of Nyanza Province with its approximately five million inhabitants will be a tabula rasa with regard to land ownership. In addition, the officers sometimes need the files for their work, which means that they have to take them to their offices. With this information in mind it is not surprising that the people do complain about the great amount of time it takes before the procedures are completed, or even that the relevant documents have been lost somewhere in the Ministry of Lands.

Even the Commission of Inquiry into Illegal/Irregular Allocation of Public Land has taken up the issue of the “poor and chaotic record keeping system in the Ministry of Lands” (Republic of Kenya 2004: 188). The commission arrived at the conclusion that computerization and digitalization is the key to a more effective way to keep land records (Republic of Kenya 2004: 188). Digitalization may improve the efficiency of the system, accelerate procedures, help to keep the Lands Registry up-to-date and reduce the opportunity costs of the customers. In December 2011, some offices of the Ministry of Lands were already equipped with the cables for computers. According to the staff, they expect the computers within the next months. This would certainly be a real improvement of the land administration in the Ministry of Lands, and an important step towards the Ministry’s goal “to facilitate [the] improvement of livelihood of Kenyans through efficient administration, equitable access, secure tenure and sustainable management of the land resource” (Ministry of Lands 2012).

5.4 THE LAND CONTROL BOARD

When it comes to the purchase of a piece of land under freehold tenure within the slum settlements the consent of the buyer and seller alone is not sufficient to make this acquisition process legally valid. There is another party of major importance whose consent is mandatory: the Land Control Board. The consent of the Land Control Board is

required for the following transactions: “the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with agricultural land [...] within a land control area” as well as the subdivision of any such land (section 6, Cap 302). In order to understand the tasks and importance of the Land Control Board today it is necessary to take a look into the past and to find out how the system of land control has (not) developed over time.

5.4.1 HISTORY AND APPLICABILITY

While the colonial administration was convinced that land adjudication and the introduction of individual titles would be beneficial, there was great concern with regard to the consequences of allowing landowners to develop their land without any external control mechanisms. The unrestricted possibilities of the new landowners to decide on how they would develop their land were seen as a threat to the economic development of their plots and their own social development (Coldham 1978: 63). In order to prevent “[...] the emergence of a chronic state of indebtedness, the continued fragmentation of holdings and the unproductive accumulation and holding of land by a few individuals in circumstances of little alternative income-earning opportunity for those who have parted with their land” the East Africa Royal Commission recommended the introduction of a system of land control (cited in Coldham 1978: 63). The Land Control (Native Areas) Ordinance of 1959 introduced such a system, which empowered the Provincial Commissioner to set up Native Land Control Boards. These boards, which are the predecessors of the present day Land Control Boards, had the power to control every transaction of freehold land within the Board’s jurisdiction.

It is important to mention that the original Ordinance was designed for agricultural land and therefore the requirements that had to be met for attaining consent are tailored to the needs of agriculture. However, the Land Control Act of 1967 (Cap 302), which legally succeeded the Ordinance, took over these requirements and introduced the possibility to extend the applicability to non-agricultural areas as well. Now the Minister of Lands has the power to apply the Land Control Act (Cap 302) to any area that he considers to be expedient (section 3, Cap 302). After a division of the areas under land control into so-called land control areas has taken place, a Land Control Board is established for every area (section 5, Cap 302). The Municipality of Kisumu does not constitute a land control area on its own, but is part of the land control area Kisumu County (Interview

Secretary of the Land Control Board: 16.11.2011). All the private freehold land that falls under the jurisdiction of Kisumu County is subject to the control of the Land Control Board. This includes the slum areas that are part of the Municipality – although they are not agricultural land any more but characterized by urban features. This leads to the absurd situation that land control of the slums is managed by an Act that was designed for rural areas with the overall aim of promoting agriculture. The consequences of this point are discussed in more detail later.

5.4.2 THE COMPOSITION OF THE BOARD

The Land Control Boards perform their duties under the authority of the Central Government, which is manifested in their composition and the fact that their members are appointed and paid by the Ministry of Lands (Interview District Land Officer: 25.11.2011). With regard to the composition of the Boards, it is a mixture of government officials and local elders. These two categories of members have their own advantages and disadvantages, respectively. While the local elders are supposed to be aware of the family situations within their area and may enjoy a higher degree of legitimacy, having more or less the same roots as the local inhabitants, they might have some trouble to adapt themselves to carry out the task of executing statutory law (Coldham 1979: 67). In comparison, the government officials might have more expertise with regard to the legal situation and are most probably more independent when it comes to making decisions, but they might indeed be confronted with the resentment of the public (Coldham 1979: 67).

According to the Land Control Act, a Land Control Board shall consist of the following members (schedule section 1, Cap 302), which can be seen as a compromise between government officials and the local people: the District Commissioner, who is also the chairman of the board; not more than two other public officers; two persons nominated by the County Council, which has jurisdiction within the area and from three to seven residents living within the area of jurisdiction of the Board. In Kisumu, the Land Control Board consists of the District Commissioner, one public officer, two nominees of the County Council as well as seven residents who can be described as “elders” (Interview Secretary of the Land Control Board: 16.11.2011). The majority of the elders are retired civil servants, who have dealt with land matters throughout their professional lifetimes, and who are well aware of the legal situation. As residents of the different areas they have a special role within the board. They are closely linked to the area that they

represent and they are supposed to be aware of the personal and family situations of all the people who live within this area.

Now that the main parties involved in land administration are introduced it is time to focus on the two procedures for gaining a freehold interest in private land in Kisumu: the acquisition of land by purchasing it, and through inheritance.

6 THE STATUTORY PROCEDURE OF LAND PURCHASE

The first possibility to become a landowner in Kisumu that is to be analyzed is the purchase of freehold land. At the beginning of this chapter, the statutory procedure is described. This is followed by describing the author's observations made in participating at the Land Control Board meeting, which is presented in a case study; in particular, some shortcomings and their implications as well as its effectiveness will be shown. This chapter is concluded with some impressions regarding the efficiency of the Land Control Board meeting.

Table 2: Description of the statutory procedure of purchase of freehold land

Step	Action
1	The willing buyer and seller come to an agreement on the transaction to transfer freehold land.
2	Within six months of making the agreement on the transaction, either of the two parties has to apply for the consent of the Land Control Board to the transaction (section 8, Cap 302). It is, in fact, usually the seller who makes the application (Interview Secretary of the Land Control Board: 16.11.2011). All the applications are registered in the presentation book of the Ministry of Lands.
3	The application to attend the Land Control Board meeting has to be registered at least two weeks before the next meeting. Within this period the applicant has to submit the required documents to the Ministry of Lands. To make this application a copy of the ID-cards of all the transacting parties has to be submitted together with the completed form requesting the Application for Consent of the Land Control Board (i. e. Form 1, Cap 302) in triplicate. If an application for the transfer of land is made, the parties concerned must also submit the Certificate of Official Search (Form R.L.27, Cap 300), which confirms the identity and right of the registered owner of the plot that is to be sold. It is the buyer who applies for the official search (Interview Lands

	Department Officer: 17.11.2011). Only if the results of the search correspond to the information on the application form is it possible for the transaction to proceed. This procedure is necessary to prevent fraud, such as double sales.
4	On the actual day of the Land Control Board meeting, the seller has to appear before the Board together with his family. A hearing takes place, in which the Board handles the case and decides whether to grant or to refuse its consent to the land transaction (section 8, Cap 302). The legal basis for its decision is laid down in section 9 of the Land Control Act and is elaborated in more detail below.
5	If the Land Control Board does not give its consent, the applicant has the possibility to appeal to a Provincial Land Control Appeals Board (section 10, Cap 302). Should the Provincial Land Control Board also withhold its consent, the applicant has yet another option, which is to appeal to the Central Land Control Appeals Board (section 12, Cap 302). Both appeals have to be made within a period of thirty days after the initial refusal by the Land Control Board i. e. in the first instance. However, it is not possible to challenge the decision of one of the boards before a court. If the appeals have been to no avail, the initial agreement between the buyer and seller for the transaction becomes void (section 9, Cap 302).
6	If, however, the Land Control Board does give its consent at the first meeting, the Chairman immediately approves the Application for Consent of Land Control Board form by signing it.
7	On the next day, the Land Control Board issues the Letter of Consent (Form 2, Cap 302).
8	After the Land Control Board has given its consent to transfer the land, the two parties can make payment or negotiate over the price of the plot and then agree on how the payment is to be made. The payment is normally witnessed by a lawyer, the court or the Assistant-Chief (Interview Lands Department Officer: 17.11.2011).
9	The next step is the valuation of the plot. This is carried out by the District Land Valuer of the Ministry of Lands. He calculates the stamp duty, which is 4 % of the value of the plot at the current market rate within the Municipality. It is the buyer who has to pay the stamp duty.

10	After payment has been made, the Transfer of Land Form (Form R.L.1, Cap 300) can be filled out. It has to contain details concerning the new owner and the seller of the plot, as well as photographs and the signatures of both parties. Moreover, it includes the Tax PIN-numbers of the Kenyan Revenue Authority recording the payment of the price as well as the confirmation that the stamp duty has been paid. This document, that is colloquially called “the receipt”, has the official title Stamp Duty Declaration, Assessment and Pay-in-Slip (Interview District Land Valuer: 05.12.2011).
11	After the Transfer of Land form has been filled out, it needs to be attested by a lawyer. The attestation process is to confirm the identification of the two parties (Interview Lands Department Officer: 17.11.2011).
12	After this, the seller has to bring all the documents, as well as the old Title Deed, to the District Land Registrar in the Ministry of Lands.
13	Now the new Title Deed (second schedule, Cap 300) can, at last, be issued in the name of the new owner. In order to prove its validity, it will be sealed by the District Land Registrar (Interview District Land Registrar: 09.12.2011). The old Title Deed as well as all the other documents involved in the transfer process are filed in a parcel file (Interview Lands Department Officer: 17.11.2011).
14	As the last step of the transfer process, the buyer can come to the Ministry of Lands to sign his new Title Deed on the production of his original ID-card, so that misuse is prohibited (Interview Secretary of the Land Control Board: 16.11.2011).

Source: Compiled by the author (Dec. 2011).

6.1 CASE STUDY: LAND CONTROL BOARD MEETING

The author of this paper was able to attend the Land Control Board meeting in December 2011 at an office in Kisumu District, her observations and impressions are included in the following text. One criticism that is frequently to be heard with regard to the Land Control Board is that the system is not easy for the clients to use and/or understand, and that “high opportunity costs” for those who want to sell a piece of land are incurred because they repeatedly need to visit the Ministry of Lands to make an application to attend the Land Control Board, where they have to wait for hours on end (Kieyah 2011). On the many visits of the author to the Ministry of Land, during the

period in which the field work in Kisumu was carried out, this was confirmed and the criticism seemed to be justified. The waiting room was regularly full of people who applied for different forms or wanted to register for the next Land Control Board meeting. Moreover, the actual procedure on the day of the Land Control Board meeting seemed to be rather chaotic and did not seem to be very well organized at all for the people. All the people who have applied to attend the Land Control Board meeting have to be present in the morning of the meeting at around 8 a.m. together with their relatives. All the applications are then given out in order to register the presence of the persons.

Photo 4: Gathering in the morning for the Land Control Board meeting in Kisumu



Source: Anna Schinwald, December 2011.

Shortly before the beginning of the hearings, the applications are collected again according to the subject matter to be dealt with (subdivisions, transfers, bank charges and the rest). Although they are entered in chronological order and serialized in the presentation book, the applicants are not called out number-by-number, but according to the subject matter of their case, which makes it impossible for the people to know when it is their turn. This means that they need to spend the whole day there waiting for their turn if necessary. The disabled, pregnant or very old people are called out first by one of the members of the Board, and only then the other applicants, which leads to

much crowding in the corridors in order to hear what name is being called out. Those whose turn it is, have to appear with their relatives in front of the Land Control Board and must show their ID-card to prevent fraud. Which relatives have to attend depends on the request of the applicant, as well as the family situation. As a rule, one can say that the closest members of the family, i. e. the spouse and the children need to appear.

Photo 5: An applicant answers the question put by the Land Control Board in Kisumu



Source: Anna Schinwald, December 2011.

Then a short interrogation starts, which does not have a standardized procedure. It is mainly the District Commissioner, who asks questions about the family situation and the proposed sale of land. Questions on the marital status and the number of children are always part of the questioning. It was very interesting to see that the answers of the applicants were not checked and confirmed by any documents; for example, the number of children or the death of a close family member, whose consent would otherwise be needed if he were still alive. The questioning seems to be based on the Board's trust in the applicants to give honest answers and on the respect the latter have for the Land Control Board. Officially, the members of the Board are supposed to know all about the family status of the people who live within the Board's jurisdiction, but if one takes into consideration the enormous number of inhabitants in the slums, it is simply impossible for one person to know about all the family situations of an area, such as Manyatta 'A',

for instance. A Land Control Board member admitted that cheating is possible, but he insisted that there are “certain things that Africans do not cheat about”, such as the death of a spouse (Interview Land Control Board Member: 02.12.2011). In only a few cases, the applications were deferred because the situation was very unclear and the people were sent back to the Assistant-Chief of the respective area in order to get the official written confirmation that the family situation is just as the applicant has told the Board. The methods for finding out about the will of the relatives are somewhat unconventional but admittedly practical, as the following example shows. There was a case in which a woman wanted to sell a piece of land, and when she was asked about the number of her children she said there were six. However, there were only five children present, as one of her sons studied in Nairobi and was therefore absent. The women insisted that the son in Nairobi could neither attend this meeting nor one of the next meetings. In order to find out whether the son was satisfied with his mother’s decision to sell the plot, the District Commissioner asked for the son’s telephone number and called him. That was unfortunate for the woman as her son did not give his consent to the transfer, and therefore the case was deferred.

No record is kept on the number of applications that are granted or refused by the Land Control Board. A board member in Kisumu estimated that, on average, about 40 % of the applications are deferred at a meeting (Interview Secretary of the Land Control Board: 16.11.2011). A case may be “deferred” either because the consent of the Land Control Board was withheld, for instance, for social reasons, or because some of the stipulated requirements were not fulfilled at the time of the hearing, but may be fulfilled later. For example, in the latter case, maybe an essential document was not submitted or a member of the family, whose presence was required, was not able (or willing) to attend. After consent has been granted, the applicants are instructed that they must go to the Ministry of Lands four days later to receive the Letter of Consent.

6.2 ANALYSIS OF THE STATUTORY PROCEDURE OF LAND PURCHASE

Based on the impressions gained at the Land Control Board meetings, several conclusions can be drawn. First of all, there is often one major difference between what actually takes place and the statutory procedure described above. In theory, the payment of the price for the plot should be made after the Land Control Board has given

its consent but, according to a Land Control Board member, it is very common that the buyer pays the price beforehand. This can lead to severe conflicts over land, if the board refuses its consent afterwards. In order to prevent any such disputes, the Land Control Board tries to make the parties aware of the need to follow the correct procedure. “We try to sensitize the people: the first step is the consent of the Land Control Board, the second step is the payment and the third is the actual transfer” (Interview Secretary of the Land Control Board: 16.11.2011). One reason why people chose the other sequence may be that the seller needs money urgently and the buyer fears missing the chance to purchase because of various uncertainties more than to lose his money if the consent of the Land Control Board is withheld.

Secondly, it became obvious that the District Commissioner, who is the chairman of the Board, is the most influential person in this position because it is he, who, almost exclusively, questions the applicants. The other members on the Board contribute very little, if anything at all, to the questions that are put to the applicants, and they never object to the District Commissioner’s opinion. Their functions are primarily administrative, namely, to call out the applicants, to control their ID-cards and to tell them where to stand or sit, respectively. Sometimes it is also their task to ascertain that the information given by the applicant concerning his/her family is correct and valid. The overall impression was that the majority of the people who applied for the consent of the Board were rather intimidated by the Board members, which may be because they were confronted by an authority. It may as well be attributed to the rough way in which the District Commissioner, who seemed very impatient and partly choleric, more or less interrogated the applicants and attendants. The physical appearance of the applicants obviously influenced the District Commissioner in the way he questioned the applicants, which was often with great persistency. Once, the District Commissioner even went so far as to forcefully remove an applicant because he claimed that the applicant wanted to cheat. It was obvious that a lot of the applicants have little or no experience of such procedures and do not know how to behave and to react, or what further steps have to be taken after the meeting. Moreover, there were several cases in which people were at a hearing in order to inherit a piece of land, which is a transaction that requires a completely different procedure (cf. Chapter 7 on Succession).

Third and very important to notice, the Board has no valid legal criteria for its decision-making and therefore decides upon social criteria instead. As already mentioned, the legal criteria for the decision-making process of the Land Control Board that are given

by the Land Control Act are primarily agricultural. Section 9 of the Land Control Act lays down the legal basis by which consent is either granted or withheld: The Land Control Board shall “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 areas” (section 9, Cap 302). Moreover, it states that consent ought to be refused when “the person to whom the land is to be disposed of is unlikely to farm the land well or develop it adequately; or is unlikely to be able to use the land profitably for the intended purpose owing to its nature; or already has sufficient agricultural land” (section 9, Cap 302). Owing to the fact that the slum settlements under discussion are densely populated urban areas without any agricultural use of the plots there, these criteria must be regarded as invalid and therefore the Land Control Board cannot apply these criteria in the process of decision-making. As a consequence it seems at the first sight that the Board has ample scope within which it can come to a decision. However, the actual criteria for the decision-making are social ones, as a member of the Land Control Board told the author. The Board tries to find out whether the spouse and the children are adequately aware of what the seller, who is in most cases the man, is doing. Moreover, the Board tries to ascertain whether the spouse and the children are satisfied with the situation or not, and whether they can still afford to make a living without that piece of land (Interview Secretary of the Land Control Board: 16.11.2011), because a major goal is to prevent indebtedness through the lack of land. It is very interesting to see that by deciding upon these criteria, the Board applies more or less the same principles of assessment that the traditional authorities have applied during the time before the introduction of individual land titles. Closely linked to this very important insight is the observation that the property rights of the owners are heavily infringed by the procedure of the Land Control Board. The applicants have to rely on the decision of the Board members, and, first and foremost, this is influenced by the point of view of the members of the family, who have a say in the matter. The fact that, for instance, the dissatisfaction of a child can frustrate the owner’s ambition to sell a piece of land is a serious restriction of the owner’s individual property right, which should not be underestimated. In actual fact, it even seems that although the property right to be a landowner is designed as an individual right in theory, it is organized as a communal right of the closest family in practice. These two very important observations show that the Land Control Board implicitly applies traditional customary rules within the

statutory procedure of land purchase. This is inasmuch remarkable as it is against the initial intention of the land adjudication process and even against the intention of the introduction of the statutory system: As shown in Chapter 4.1 a major goal was to introduce a secure land market based on land titles held by individual owners, who are able to decide about their property without being subject to customary constraints like family interventions. It could not have been made clear if the Land Control Board makes this recourse deliberately. However, it seems reasonable to suppose that the actual procedure is at least partly an appropriate means against over-hasty land sales. In this respect, one can say that the project of having individual property owners has failed but at least the work of the Land Control Board seems to counteract a further impoverishment of the population.

Beside these personal observations of the author, the literature review revealed that there are several additional critical aspects about the Land Control Board and the statutory procedure of land purchase in general. One of the criticisms that Coldham makes is that the people who apply for the consent of the Land Control Board do not have the possibility to question the decision of the Board in the court (Coldham 1979: 66). It is indeed laid down that the Land Control Board's decision, as well as the decisions of the two Boards of Appeal "shall be final and conclusive and shall not be questioned in any court" (sections 8, 11 and 13, Cap 302). This fact increases the reservations about the restriction of the individual property rights of the landowner furthermore. Another target for criticism is the so-called Special Land Control Board, which is not a board in the true sense of the word as it consists of only one person, and that is the District Commissioner. According to the District Land Officer, people who did not have time or for other reasons could not appear in front of the committee went straight to the District Commissioner and asked for his consent (Interview: 25.11.2011). "This special Land Board has been abused too often", which is why these practices have been stopped until there is a new legal basis for it (Interview District Land Officer: 25.11.2011). Another critical point was the composition of the Boards. On the one hand, the appointment of the Board members was said to be prone to political manipulation, on the other hand, the under-representation of women "has compromised the protection of women['s] interest on land" (Kieyah 2011). The Land Control Board of Kisumu District consists of 11 members, three of whom are female.

Photo 6: The Land Control Board of Kisumu District at work



Source: Anna Schinwald, December 2011.

6.3 IMPRESSIONS WITH REGARD TO THE EFFICIENCY OF THE PROCEDURE

Another reason for criticism is that the meetings of the Land Control Board take place only once a month. During one of the periods in which the activities of the Land Control Board could be observed by the author, there were 272 applications in November and 414 in December 2011 for the Land Control Board meeting held in Kisumu County. Even if one takes into consideration that not all of the applicants eventually appear in front of the Board in order to be heard, this does indeed involve an enormous amount of paper, work and patience that has to be handled within just one day. This criticism is a good reason to consider the (cost-)effectiveness as well as the efficiency of the Land Control Board:

Dealing with approximately 400 applications per day requires an extremely high level of efficiency to carrying out the procedure effectively. However, the question of cost-effectiveness, calculated as the number of applications divided by the overall costs of the procedure, seem to be more interesting. An analysis of the overall costs reveals that there are three main cost factors within the procedure: (1) the costs incurred for the

employment of the Land Control Board members, (2) the costs of the time the applicants and their family members require to go through the procedure, which can be calculated as the loss of income (earning possibilities) plus transport costs and (3) administration costs. The assessment of (2) is very difficult to make, but it is clear that the difference between (1) and (2) is extremely high. This observation leads to the issue of the efficiency of the current procedure and furthermore raises the question whether more frequent Land Control Board meetings would lead to a better cost-benefit ratio of the procedure. The administration costs (3) of the procedure would remain the same no matter whether there were one or ten Land Control Board meetings per month. The employment costs of the Land Control Board members (1) would rise if the meetings took place more frequently but one has to consider that two out of eleven members (namely the District Commissioner and the Secretary of the Land Control Board) are regularly employed anyhow and the remaining nine members are given only a small daily allowance for their participation. This suggests that the costs for the applicants time that they lose (2) is the relevant variable. If the applicants and their relatives did not need to spend the whole day at the Land Control Board meeting, they would have the possibility to earn some money if they have some paid employment or other possibility to earn an income. It might also be possible that the applicants do not mind spending a whole day at the Land Control Board meeting and prefer waiting instead of spending more money for the procedure, either in the form of higher fees (on an individual basis) or in the form of higher taxes (at the social level). To summarize this idea, critics of the restriction that the meeting takes place only once a month should not forget that better-balanced procedures would cost more money in a world of great scarcity of resources. It is a question of priorities how individuals and, ultimately, a society allocates them.

7 THE STATUTORY PROCEDURE FOR SUCCESSION OF LAND

The second possibility to become the owner of a piece of land under freehold tenure is through inheritance. While carrying out field research in Manyatta 'A', the author realized that the statutory norms for the procedure differ greatly from the way inheritances are effected in actual fact. However, this will be described and analyzed in detail in Chapter 8. In this chapter the statutory procedure for the succession of land will be described right at the beginning. A short analysis of the procedure follows.

The Kenyan statutory procedure to inherit property seems to be more or less the same no matter whether one wants to inherit a piece of land or the kitchen furniture. The major distinction concerning succession is whether the deceased has left a valid – oral or written – will or if he/she died intestate. The procedures in these two cases are rather similar: if the deceased was testate (has made a testament before dying) an executor fulfils the function of the personal representative of the deceased, and if the deceased is intestate an administrator is appointed to allocate the property.

In the following case, a procedure was carried out that was typical of that for a person who died intestate. This is the most prevalent case in Kisumu, especially in families living in a slum (Interview Amondi: 01.12.2011). In general, the statutory process of an intestate case of succession can be divided into two periods. The first period is until the Grant of Letters of Administration is issued to the proposed administrator, and the second period follows until this grant has been confirmed and the final distribution can take place (Interview Amondi: 01.12.2011). The administrator plays the key role in the process of succession because he/she is the personal representative of the deceased person. His/her duty is, on the one hand, to manage the estate in the interest of the beneficiaries of the dead until the final distribution of the estate has been effected. This may, for instance, entail the duty to collect the rents of some rental units that the deceased may have possessed, or to guarantee that the children of the deceased are still adequately provided for. On the other hand, the administrator has to ensure that the ultimate distribution of the estate is effected in a way that satisfies and takes care of the interests of all the beneficiaries.

A person officially becomes an administrator as soon as he/she receives the so-called Grant of Letter of Administration. Until this happens the future administrator has the status of an applicant. According to section 56 of the Law of Succession Act, any adult who is of sound mind and is not bankrupt may apply for a Grant of Letter of Administration that makes him/her the legal administrator of the estate (Cap 160). Moreover, a maximum of four persons may be appointed for the same property (Cap 160). In reality the administrators normally are the members of the family who are closest to the deceased, for instance, the surviving spouse and one or two children (Interview Amondi: 01.12.2011). The group of beneficiaries chooses the administrators from among themselves. So it is they who decide who shall represent their interests (Interview Amondi: 01.12.2011).

Table 3: Description of the statutory procedure for succession of land

Step	Action
1	At the beginning of the process the necessary documents to apply for a Letter of Administration need to be collected. The requirements for making an application for the Letter of Administration are listed in section 51 of the Law of Succession Act. Documents, such as the Burial Permit and the Official Death Certificate are essential; they may be obtained from the local authorities, for example, from the office of the Assistant-Chief of the sub-location (ECWD 2005: 10). These documents include the personal data of the deceased, i. e. the person's name, date of birth, place of residence as well as the relationship between the applicant and the deceased. If the deceased was intestate the Assistant-Chief of the area also prepares a list that includes "[...] the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased [...]" (section 51, Cap 160). These people can be summarized as the beneficiaries. Moreover, the applicant lists all the assets and liabilities of the deceased. These requirements in the first step can be fulfilled within several days, depending mostly on the applicant's efforts.
2	The second step is the acquisition of a Search Certificate of the Ministry of Lands. In the assumed case that a piece of land is to be inherited, the applicant needs to produce the most recently issued Search Certificate in order to prove that the plot is registered in the deceased's name. The official Search

	<p>Certificate may be obtained at the Lands Registry at the Lands Department of the Ministry of Lands (Interview Amondi: 01.12.2011). The average time that one needs to wait until the search form has been completed is about 5 days (Interview Secretary of the Land Control Board: 16.11.2011).</p>
3	<p>At this stage the High Court comes in. The High Court is the public institution where the applicant needs to apply for the Letter of Administration because the ultimate decision on the administration of the estates lies in its jurisdiction (section 47, Cap 160). Until a decision is made, many steps have to be taken. To start the process the applicant has to submit all the necessary documents to the High Court, where he/she also obtains some other forms that have to be filled in.</p> <p>The following forms are required when the deceased was intestate:</p> <ul style="list-style-type: none"> - Form P&A 5 (Affidavit in Support of the Petition): This form supports the Petition of Form P&A 80 in which the applicant asks for the right of administration (ECWD 2005: 30). - Form P&A 11 (Affidavit of Justification of Proposed Sureties): In this form the applicant promises that he/she has not intentionally omitted persons who may also be allowed the status of beneficiaries. Otherwise the applicant commits himself/herself to pay compensation (ECWD 2005: 26). - Form P&A 12 (Affidavit of Means): With this form the applicant for the Letter of Administration promises that he/she is able to pay the necessary court fees. The required amount is approximately 5,000 KSh [100 €]¹, and its composition is itemized later (ECWD 2005: 26). - Form P&A 38 (Consent): With this form a potential beneficiary can renounce the claim to a part of the deceased's property. It is important to mention, that unlike all the other forms, this form is optional (ECWD 2005: 27). - Form P&A 57 (Estate of Personal Sureties): The compensation

¹ The exchange rate underlying this conversion is that for the year 2004 when the Kenyan Shilling was worth approximately double as much when exchanged for a Euro than in 2011. In the year 2004 the exchange rate amounted roughly to 1 EUR=50 KSh. In February 2011 the exchange rate was 1 EUR=105 KSh. The devaluation of the Kenyan Shilling within this period of time resulted because of the much higher rate of inflation in Kenya than in the Euro-Zone.

	<p>mentioned above in form P&A 11 becomes concrete in this form (ECWD 2005: 26).</p> <ul style="list-style-type: none"> - Form P&A 80 (Petition for Grant of Letters of Administration): With this form the applicant officially applies to become an administrator by receiving the Grant of Letters of Administration. The applicant has to sign this form in the presence of an advocate or two witnesses who are mentioned by name and with their address (ECWD 2005: 29).
4	<p>After all these forms are properly filled in, they are filed. Filing includes the issue of a case number and is at the same time the official beginning of the process of administering the deceased's property (Interview Amondi: 01.12.2011). The duration of the process of filing depends on the applicant's ability to fill in the forms correctly and to provide the necessary information. In general it is possible to complete this process within one or two days. The costs for filing in are about 2,000 KSh [40 €](ECWD 2005: 14).</p>
5	<p>Section 67 requires that no grant of representation may be given "[...] until there has been a published notice of the application for the grant, inviting objections [...]" (section 67, Cap 160). Therefore, the Registrar of the High Court publicizes the fact that the person has applied for the Grant of Letter of Administration in the <i>Kenya Gazette</i>, which is the official weekly Kenyan newspaper for legal announcements. Within 30 days everybody who feels that the administration of the estate by the applicant poses a threat to his/her right to receive a part of the deceased's property can make an objection at court.</p>
6	<p>If no objections are made within the time period of 30 days, the High Court issues the Grant of Letter of Administration. This administrative task takes about three weeks (Interview Amondi: 01.12.2011). With the receipt of the Grant of Letters of Administration the applicant has from now on the status of the official administrator of the deceased's property or personal representative of the deceased.</p>
7	<p>The issue of the Grant of Letters of Administration does not give the administrator the power to immediately start distributing the deceased's properties. After the letter is issued, another period of six months has to pass until the administrator may apply for the so-called Confirmation of the Grant</p>

	<p>of Letters of Administration. The provisions for the confirmation of the grant are put down in section 71 of the Law of Succession Act. Within these six months the administrator has time to prepare the future distribution. This preparation entails the design of a schedule and of the mode of distribution of the assets to the beneficiaries. After the six months have passed, this schedule has to be handed in together with the original file and a consent letter by the beneficiaries indicating the agreement with that mode of distribution (Interview Amondi: 01.12.2011). This step is called the application for Confirmation of the Grant of Letters of Administration. The time period of six months gives people again the possibility to express their disapproval with the administrator by issuing an Application to revoke the Grant.</p>
8	<p>After the administrator has applied for the Confirmation of the Grant of Letters of Administration, the case is fixed for a hearing at the High Court. It takes around a month from the date of filing until the hearing finally takes place, but it is of importance to note that it all depends on how busy the court diary is. At the court hearing, the administrator is questioned about his/her ideas of distribution and the court investigates whether the beneficiaries are satisfied with the administrator's ideas. In many cases the beneficiaries have signed the consent forms indicating that they are satisfied with the proposed way of distribution. If so, they do not have to attend at court, but the courts have adopted a trend where, if possible, all the beneficiaries should attend (Interview Amondi: 01.12.2011). However, participation is always mandatory in cases where the consent forms are missing (Interview Aroni: 13.12.2011). In the cases in which those beneficiaries who have not signed a consent form are absent, the administrator will be questioned and the hearing may also be adjourned. If all the necessary consent forms are present, the court hearing does not take much time and ends with the confirmation of the grant.</p>
9	<p>After the grant is confirmed, the administrator begins to distribute the assets in accordance with the schedule mentioned above. The plot can now finally be registered in the name of the new owner. The registration is carried out according to the usual procedure at the Lands Registry of the Ministry of Lands, where the new Title Deed is issued. The registration of the certificate of title is supposed to take around six weeks (Okonyo 2008: 49).</p>

Source: Compiled by the author (Dec. 2011).

7.1 ANALYSIS OF THE STATUTORY PROCEDURE FOR SUCCESSION

The procedure presented above is rather time consuming: from the death of the deceased until the registration of the plot in the new owner's name it is supposed to take around ten months. It has to be mentioned that this is already a very optimistic assessment. There are cases in which the completion of the case has taken more than a year after the initial application and, according to the interview partners, these are not at all exceptions. One can identify two main reasons why the procedure takes so long. The first reason is that there are several different parties involved, namely the relatives, the local authorities (Assistant-Chief), the Central Government (Ministry of Lands) and the High Court. Sometimes lawyers are included as well. This interplay of the different parties is very time-consuming. Moreover, especially the Ministry of Lands and the High Court are sources of delay owing to the large number of backlogs. Again it is question of costs and a question whether the population can or wants to afford a faster working administration and judicature. In addition, the two periods reserved for objections prolong the process. Especially the length of the second objection period – six months – is really quite a long time. One reason for the second period of objection is that many people do not regularly read the *Kenya Gazette* and therefore may not be aware in good time of the procedures of administration that are taking place. The *Kenya Gazette* is printed in Nairobi and sold there by the Government Printer. Although the District Information Offices provide copies for the public as well, only a very small percentage of the people regularly read the information in the *Kenya Gazette*. In order to guarantee that the people have the possibility to claim their rights even after the Grant of Letter of Administration is issued, the second period for objections is conceded. For the sake of completeness, it is important to mention that even after the Confirmation of the Grant of Letters of Administration has taken place, the grant “[...] may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion [...]” (section 76, Cap 160).

What also needs to be taken into consideration is that the statutory procedure to inherit land is very expensive. All in all, the applicant has to pay fees of approximately 5,149 KSh [roughly 103 €], which are itemized in the following way:

Table 4: Statement of charges for the succession of a plot of land

Item	Amount
Stamp Duty	110 KSh
Money paid to the Government Printers	2,735 KSh
Commission paid to the Post Office for processing the Money Order	174 KSh
Court filing fee	2,050 KSh
Seal	80 KSh
Total	5,149 KSh

Source: ECWD 2005: 14.

If one takes into consideration the average income in Kisumu's slum areas in relation to this fee it becomes clear that money is a major constraint to taking part in the formal system. According to a UN report on the living conditions in the slums in Kisumu, the majority of the people "work in the informal sector with monthly incomes ranging from 3000 [60 €] to 4000 [80 €] KSh" (UN-Habitat 2005: 21). The high costs may result in the inability to pay the required court fees, which means that those people who practise succession in an informal manner are not able to have the Title Deed transferred into their own names. This financial inability results in legal uncertainty and furthermore to a falsification of the entries in the Land Registry, which is a severe problem.

8 THE *DE FACTO* ACQUISITION PROCEDURES

Now that the statutory procedures of land purchase and succession of land as well as some shortcomings in applying it have been described, it is time to shed light on the procedures that actually take place. In December 2011 the interviews for the survey were carried out by the author in Gonda, which is one of six units within the Manyatta 'A' sub-location. This chapter begins with a survey of the research area, followed by the results of the research that was carried out, which are not only presented but also tentatively explained.

8.1 THE AREAS OF RESEARCH

8.1.1 MANYATTA 'A'

The research area Gonda is a part of the sub-location Manyatta 'A' which lies to the east of Kisumu city centre, and consists of six units, namely Flamingo, Gonda, Kona Mbuta, Kondele, Magadi and Meta Meta. The total area of Manyatta 'A' is 2.4 sq. km and accommodates 48,004 people (Kenya National Bureau of Statistics 2010: 109). To make a survey of the demographic situation in 2010, a group was formed consisting of several governmental and non-governmental organizations and institutions, namely Urban Matters, Millenium Cities Initiative, the Municipal Council of Kisumu and Pamoja Trust. This group carried out a census and an enumeration project in Manyatta 'A'. According to this Manyatta 'A' encompasses 6,424 households (Urban Matters et al 2011: 9). In the late 1970s Manyatta 'A' was the target area of an upgrading project initiated by the World Bank, the "Urban II Slum Upgrading Scheme" (Urban Matters et al 2011: 9). In the course of this project, land was bought to be able to develop and improve the public infrastructure and also to improve the living conditions of the inhabitants. Health centres, schools and markets were constructed and the road network was improved. Unlike any of the other slum settlements in Kisumu, Manyatta 'A' has roads, which are wide enough for public transport, especially the Matatus, to enter the settlement. During this project they were even upgraded to tarmac roads, which could not be maintained (see below). In general, the public infrastructure is better than in the other slum settlements. That is the reason why Manyatta 'A' is also called "the jewel of the slum belt" (KENSUP 2005: 37).

Photo 7: One of the main roads for entering Gonda, Kisumu



Source: Anna Schinwald, December 2011.

The improvements that were made in the course of the upgrading project changed the appearance of the area considerably. On the one hand, these improvements led to an enormous increase in land prices nominally to more than 500 % of the price before this initiative started (KENSUP 2005: 37) and on the other hand, to an influx of persons who were financially better-off. Many of the original owners subdivided their land and sold it to newcomers who had entered the area. Nowadays, the mixture of original owners and newcomers is a characteristic of the area. According to the Assistant-Chief of Manyatta 'A', approximately three quarters of the population are newcomers (Interview Assistant-Chief of Manyatta 'A' 06.12.2011) who have also brought about certain changes in the appearance of the settlements. Nonetheless, despite all of these improvements, Manyatta 'A' is still a slum settlement as the following facts show: 82 % of the residents live in houses made of mud and wattle; 90 % share pit latrines and 78 % rely on shallow wells or water vendors for their water supply, which is disproportionately expensive and often unsafe (Urban Matters et al 2011: 3). With regard to land tenure, the situation in Manyatta 'A' is, more or less, the same as in the other settlements in the slum belt: the land is almost exclusively under freehold tenure. As mentioned above, this limits the influence of the public authorities and makes upgrading initiatives extremely difficult. There are several plots, which have been acquired for public purposes in the course of the World Bank project, where some infrastructure has been implemented. However, the problem is that the infrastructure that has been installed can neither adequately supply the needs of the rapidly increasing population nor is it sufficiently maintained. A

very interesting fact is the following ratio of landowners to tenants: only 15 % of the residents in Manyatta 'A' are landowners, the remaining 85 % are tenants (Urban Matters et al 2011: 3). The rent for a single room of average size with communal facilities in Manyatta 'A' ranges from 500 to 1,000 KSh. (Urban Matters et al 2011: 8).

8.1.2 GONDA

According to the census and enumeration project carried out by the Pamoja Trust, the settlement of Gonda has an area which is between 500 and 600 acres and a population of 7,578 inhabitants who live in 1,263 households (Urban Matters et al 2011: 32). Although Gonda also experienced an influx of newcomers after the World Bank slum-upgrading project was completed, the Assistant-Chief of Manyatta 'A' said that a lot of original owners still live in Gonda who apply "original norms" (Interview Assistant-Chief of Manyatta 'A': 06.12.2011). The Assistant Planner of the Municipal Council of Kisumu also mentioned that Gonda is, to a great extent, influenced by the so-called neo-customary tradition of development (Interview Assistant Town Planner: 05.12.2011). This has some far-reaching consequences on the way an inheritance is effected, as well as for the sale of land, which are described and explained below. Apart from this, the neo-customary tradition of development also influences the land use and building structure. The following features characterize the appearance of Gonda:

- There are certain neo-customary rules for the development of ancestral land or family land which stipulate the way in which the plot may be used as a site for buildings. One of the principles, for instance, is that the firstborn son builds his house as far as possible from the house of his father, while the second-born son has to build his house at least a little closer (Interview Assistant Town Planner: 05.12.2011). If the firstborn considers moving away later, he will construct only a semi-permanent house, because if he does move away, his house will have to be demolished (Interview Assistant Town Planner: 05.12.2011). These rules lead to a characteristic distribution of the houses inside the compound.

- On the fringe of Gonda, where the population density is not that high, the area sometimes looks rather rural. It is quite common to find people keeping small livestock and one can imagine that the areas, which have been incorporated into the Municipality in 1972, were formally villages. In comparison, there are also areas where people built their houses very close next to each other and where density is extremely high.

Photo 8: Keeping livestock on the fringe of Gonda, Kisumu



Source: Anna Schinwald, December 2011.

- The influx of people after the World Bank project was completed created a mixture of people with different income levels and furthermore an interesting amalgam of old and new houses next to each other. While 58 % of the houses in Gonda are built with mud and wattle, 42 % are made of bricks (Urban Matters et al 2011: 33). Although the percentage of permanent houses is higher in Gonda than the percentage in Manyatta 'A', 62 % of all the people living in Gonda claim that they are not content with their housing status and have the wish to improve it (Urban Matters et al 2011: 33). This mix of old and new houses, built of different materials, is often described as a "planning nightmare" (KENSUP 2005: 8).

Photo 9: Different types of housing next to each other in Gonda, Kisumu



Source: Anna Schinwald, December 2011.

- While in the other units of Manyatta 'A' one can hardly find any cemented graves inside the settlements anymore (KENSUP 2005: 37), there are still plenty of them in Gonda. In order to show the deep ties there are between the people and the land, many of the original Gonda inhabitants still follow the custom of burying their dead inside the compound, very close to their houses. This is, of course, undesirable for health and hygienic reasons. However, as the Assistant Town Planner of the Municipal Council of Kisumu complains, it is very difficult to intervene because the land is under freehold tenure (Interview Assistant Town Planner: 05.12.2011).

Photo 10: A cemented grave in the middle of the compound in Gonda, Kisumu



Source: Anna Schinwald, December 2011.

- The public infrastructure in Gonda is very poor. There are only four water points and one (State-run) primary school. Moreover, the improvements brought about by the World Bank upgrading project are no longer as effective as they were originally. For example, because regular maintenance of the roads has been neglected, there is now hardly any tarmac to be found on them, and it is alone by the length and the width of the roads that one can only guess that it was a tarmac road in the past. For the same, or similar, reasons the other improvements that were made are, more or less, no longer serviceable.

Photo 11: One of the three water points in Gonda, Kisumu

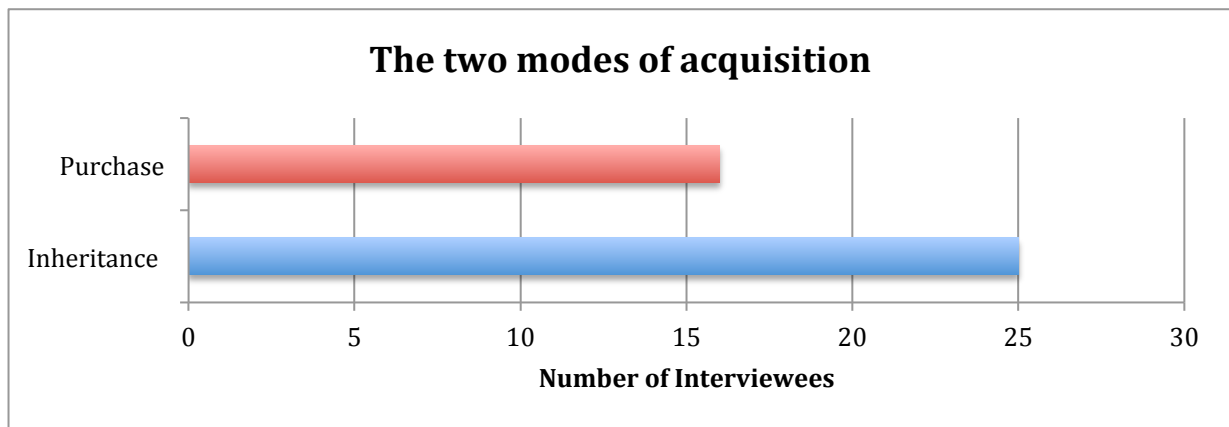


Source: Anna Schinwald, December 2011.

8.2 THE FIELD SURVEY

Of the 1,263 households (Urban Matters et al 2011: 32) 42 landowners, i. e. 3 % of the population, were asked by the author with the help of a questionnaire to comment on the procedures of land acquisition that they had gone through. However, when the questionnaire was put to the test, it turned out that the majority of the people who live in Gonda are tenants with no experience of the land acquisition procedure. So the questionnaire was redesigned and only landowners were asked about their mode of land acquisition. The sample for the survey was obtained by random selection throughout the research area. A map of the area can be found in Appendix 2. Of the 42 landowners, one person holds land under leasehold tenure and is therefore not included in the discussion. Of the remaining 41 landowners under freehold tenure 16 (i. e. 39 %) of them had purchased their plot and 25 (i. e. 61 %) of them had inherited their plot.

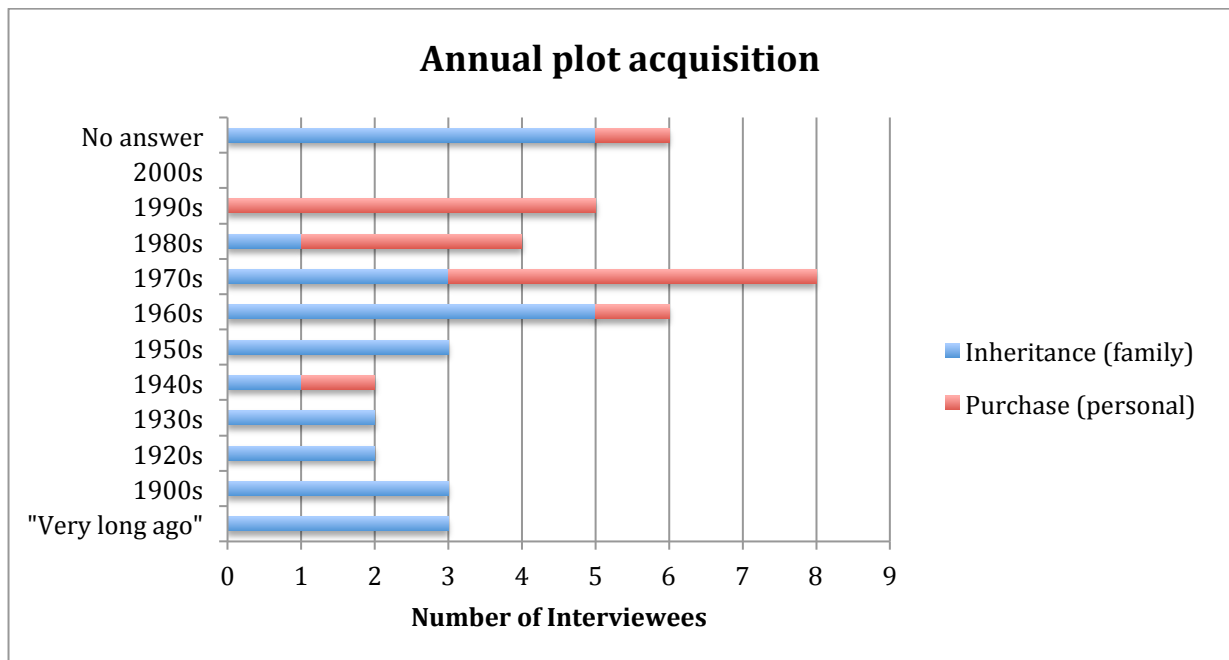
Figure 7: The two modes of land acquisition in Gonda, Kisumu



Source: Inquiry made by the author (Dec. 2011).

Most of the people who had inherited their land claim that it has been the property of their families for decades. Most of the people that had purchased their land were newcomers who had settled in Gonda in the 1970s or later. This pattern fits in very well with the information that there was a massive influx of people into Manyatta 'A' after the slum-upgrading project was completed in the 1970s.

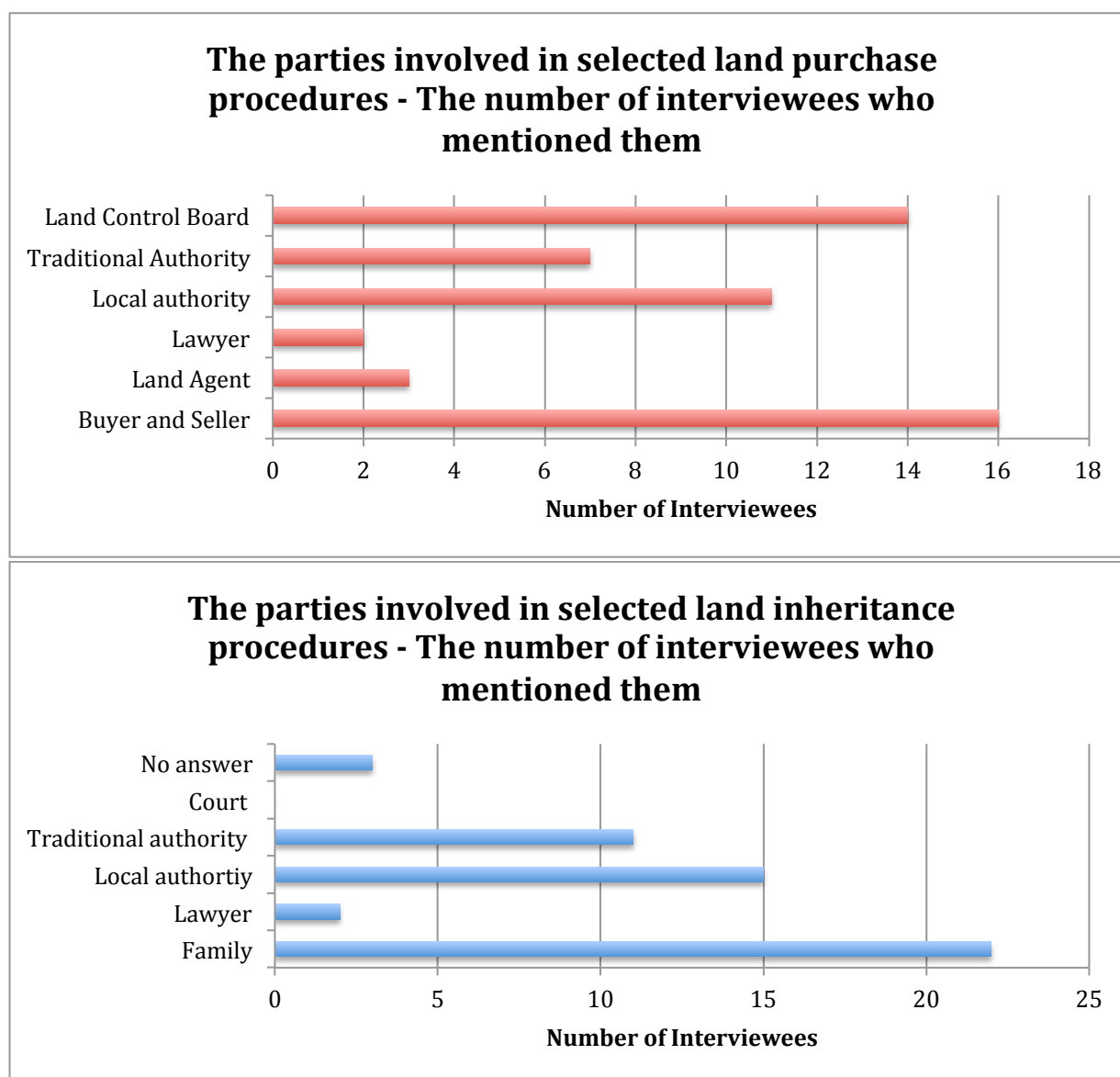
Figure 8: Annual plot acquisition in Gonda, Kisumu



Source: Inquiry made by the author (Dec. 2011).

Some aspects of the procedures of buying and inheriting land as revealed in the interviews are presented and discussed in the following:

Figure 9: The parties involved in the land acquisition procedure in Gonda, Kisumu



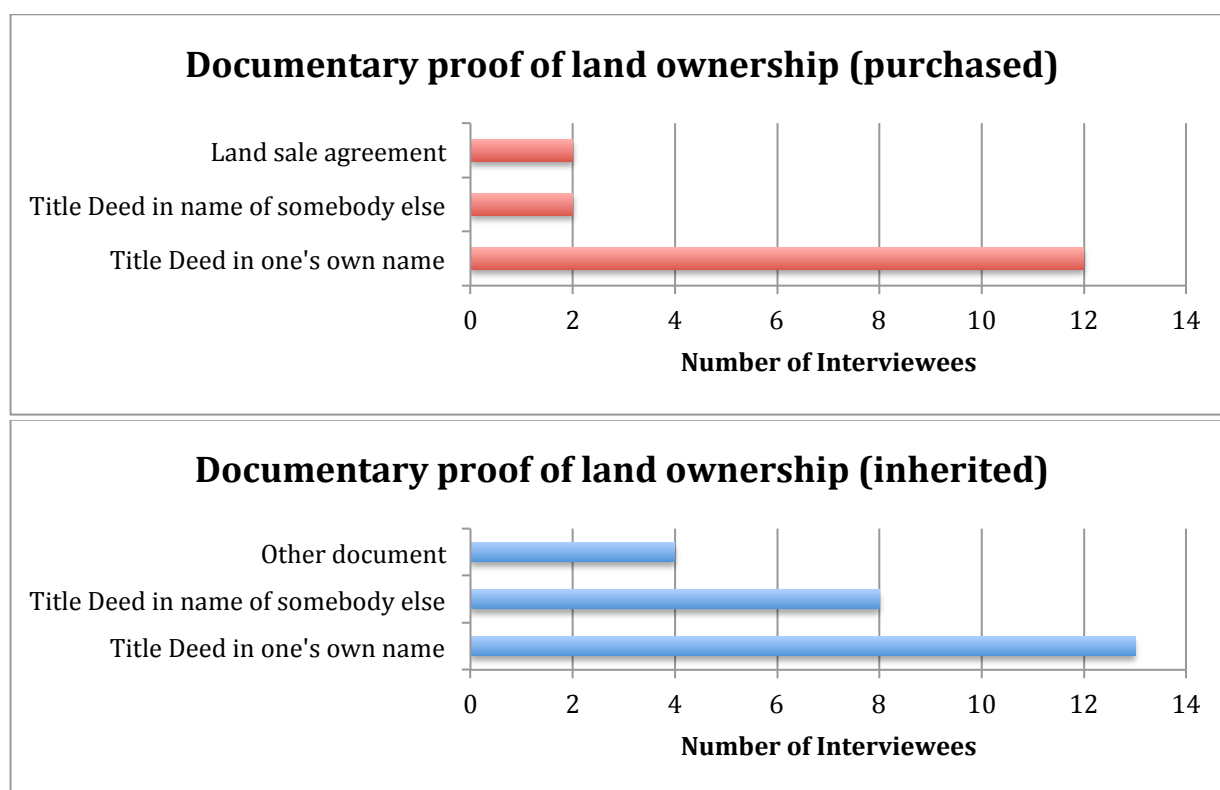
Source: Inquiry made by the author (Dec. 2011).

With regard to the parties, who were involved in the land acquisition procedure, there are three remarkable facts. First of all, the traditional authorities, namely the elders of the community, who are neither supposed to participate in the statutory procedure of purchasing land nor in the statutory procedure of succession, still play a very important role. Out of 41 cases, they were involved in 18 cases – that is almost every second case. Secondly, 14 of the 16 landowners who have purchased their plot of land have been to the Land Control Board. This means that in 87.5 % of the cases in which land is purchased, the procedure involved all the parties that have to take part in a proper statutory purchase. One can assume from this high percentage that the Board enjoys a very high level of acceptance among the people.

Thirdly: none of the 22 persons who inherited a piece of land has been to court. As stated above, the hearing at the court is mandatory for the statutory procedure and is supposed to be the precondition to receive a Title Deed in the new landowner's name. Nevertheless, most of these people claim that they have a Title Deed. This irregularity means that the interviewees either did not tell the truth, or that the District Land Registry in the Ministry of Lands issued the Title Deeds although essential requirements according to statutory law had not been met.

Another critical question is how the landowners can prove that the plot is theirs. Figure 9 shows that 12 out of 16 (i. e. 75 %) purchasers, but only 13 out of 25 (i. e. 52 %) of the heirs answered that they possess a Title Deed in their name. Another two out of 16 (i. e. 12.5 %) purchasers and eight out of 25 (i. e. 32 %) heirs declared to have a Title Deed in the name of somebody else. In the case of one with purchased land, the Title Deed was still in the name of the deceased husband. In another case, the Title Deed was in the name of the co-wife. Those eight heirs who declared to possess a Title Deed in the name of somebody else all claimed that the Title Deed is still in the name of a deceased relative.

Figure 10: Documentary proof of land ownership in Gonda, Kisumu

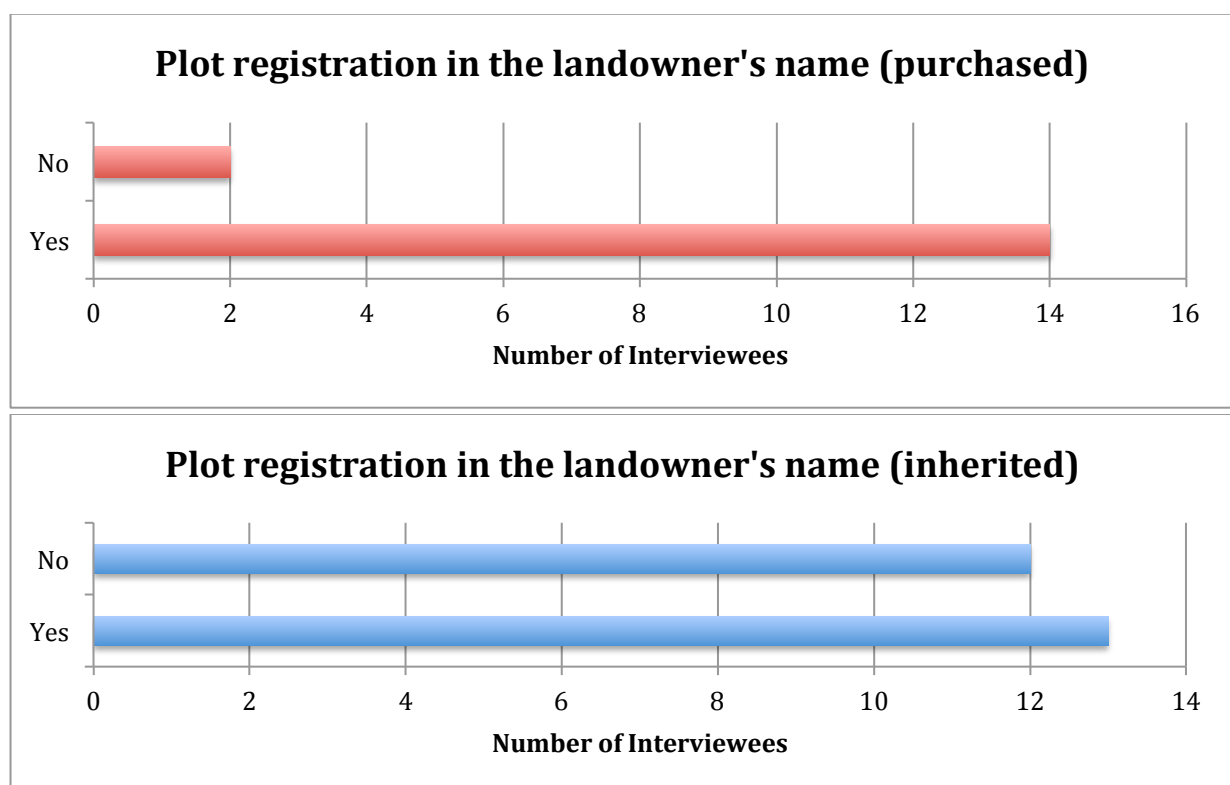


Source: Inquiry made by the author (Dec. 2011).

It is remarkable that although none of those who had inherited a piece of land answered that they had been to court, and yet more than half of them claimed they have a Title Deed in their own name. This information is contradictory because as stated above, the Land Registry may issue Title Deeds only after the court has approved the distribution of the deceased's assets. The author brought this issue to the notice of a Judge at the High Court of Kisumu, as well as to the District Land Registrar of the Ministry of Lands. Neither of the two could explain how it is possible that the people have a Title Deed although they have not been to court. Unfortunately, this issue could not be resolved during the period of research in Kisumu.

The corresponding question to that on the documentary proof of land ownership is that on the registration of the title in the landowner's name.

Figure 11: Plot registration in the landowner's name in Gonda, Kisumu



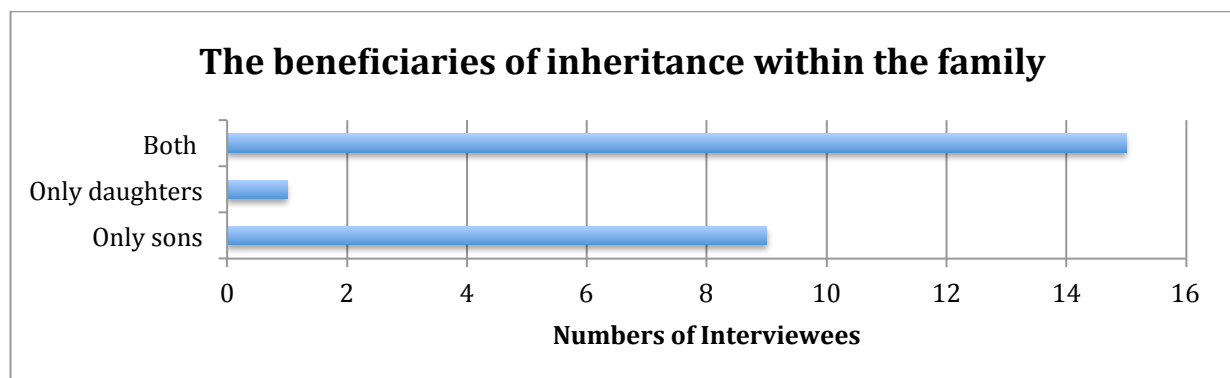
Source: Inquiry made by the author (Dec. 2011).

It becomes obvious that those who purchase land are more likely to be registered as owner than those who have inherited land, and indeed only a few owners of inherited land are registered. Those eight persons who inherited a piece of land and still hold a Title Deed in the name of the deceased, were asked to explain the reasons for not transferring the Title Deed into their own names, and for not registering in the land

registry. Four of them (i. e. 50 %) said that it is too expensive to change the Title Deed, two (i. e. 25 %) said that the whole family and not a single family member should benefit from the land, one (i. e. 12.5 %) claimed that he/she was expected to pay a bribe at the Ministry of Lands, and one landowner (i. e. 12.5 %) saw no necessity to transfer the Title Deed to his own name.

When research is carried out on land rights in Kenya, it is inevitable that the rights of women with regard to land ownership are called into question. A judge from the High Court in Kisumu said that the women are often left out of a testament, especially if they are married (Interview Aroni: 13.12.2011). This information is confirmed by the author's personal experiences gained while carrying out research on the subject. Of the 25 persons who had acquired their land through inheritance, nine persons (i. e. 36 %) claimed that only the sons are allowed to inherit a piece of land within their family. 15 interviewees (i. e. 60 %) said that both, their sons and daughters, are considered and one interviewee (i. e. 4 %) said that inheriting land is a female privilege within the family.

Figure 12: The beneficiaries of inheritance within families in Gonda, Kisumu



Source: Inquiry made by the author (Dec. 2011).

The reason for the preferential treatment of sons, and thus the discrimination of daughters, lies in the traditional way of carrying out succession within the Luo society, in which "[i]nheritance was paternal, in other words, from father to son" (Interview Amondi: 01.12.2011). Therefore, the right of women to own land is often curbed owing to the customary laws of the Luo community. "The woman is like a hawk", this sentence is quite common if one is talking about the relationship of a woman and her place of origin. Within the Luo tradition, it is the custom that the woman moves at the time of her

marriage to her husband's home. As the women are expected to leave the parents' household anyway, it does not make sense in this perspective to consider them in the process of succession. However, the new Constitution has remarkably improved the situation of women with regard to land rights. It explicitly expresses that "Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres" (Republic of Kenya 2010: Art. 27.3). In addition to this rather general formulation, Article 60 is more specific concerning women's rights to land: "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles [...] elimination of gender discrimination in law, customs and practices related to land and property in land" (Republic of Kenya 2010: Art. 60.1.f).

8.3 A TENTATIVE EXPLANATION OF THE EMPIRICAL RESULTS

It can be concluded from the empirical results out of the interviews above that the statutory system provides a higher degree of validity or acceptance for buying a piece of land than for inheriting it. The author identifies two main reasons for the very high acceptance of the statutory system with regard to the purchase of land: First of all, it may be asserted that those persons who buy a plot of land (14 of the 16 landowners identified themselves as newcomers in the area) feel the need for formal recognition of their rights as landowners because they are not traditionally rooted in the long-established local community. Secondly, the Land Control Board enjoys a very high level of acceptance by the people. This may be because of its longstanding history but also because of the involvement of the local elders on the Board.

There may be several reasons for the disregard of the statutory succession procedures: One reason may be that the costs are rather high in relation to the income of most of the applicants. A second reason may be that many people know next to nothing about the proper statutory procedures. Ten out of 25 (i. e. 40 %) persons who inherited land admitted that they knew very little about the legal procedure for succession.

A third reason may be that those people who are supposed to inherit a plot and thus consider themselves to be the successor, rely on the acceptance, by the other inhabitants in the area, of the neo-customary procedures. This recognition of rights is a safeguard against claims made by other people based on the consent of the traditional authorities. Indicative of this fact is that in 18 out of 41 (i. e. 44 %) of all the land acquisition

procedures that were scrutinized by the author, the traditional authorities were involved although their participation is neither mandatory in the inheritance procedure nor in the purchasing procedure. The high level of acceptance of the traditional authorities may also be an explanation why the acceptance of the Land Control Board is so high.

9 SUMMARY

In this summary the most important findings will be summarized and conclusions will be drawn. The author completes this chapter – and therefore this thesis – with an outlook concerning the future development of the private land acquisition procedures in Kisumu.

First of all, the land adjudication process was an important landmark during the history of land tenure in Kisumu and brought about notable changes in the land acquisition procedures. It *changed* the procedures that had existed already for several decades but it did not replace them altogether. In actual fact, it led to the development of a dualism of the customary – and nowadays neo-customary – land tenure and the statutory tenure systems. The situation that Coldham observed in Kenya, after the adjudication procedure began, still exists up to the present day. There are still many “limits of the law” (Coldham 1979: 30) in the way that a high percentage of individuals keep transacting their land according to the rules of the neo-customary tenure. In this thesis the author showed that the reason why not all individuals dealing with land tenure fully comply with the statutory system is not that they are simply unwilling to do so, the reasons are much more complex. Traditions may play a role, besides financial incapability as well as the long and complicated procedures of the statutory system.

With regard to the statutory system of land acquisition, several aspects are to be addressed. The biggest problem with the statutory system of land purchase seems to be that the legal basis for the Land Control Board’s decision is an Act that was designed to manage agricultural land with the aim of increasing agricultural yield. The application of this Act to the urban slum settlements is a serious problem because, as shown above, the criteria for the decision-making of the Land Control Board cannot be used for the *de facto* situation. The Board has ample scope for making its decision whereby social considerations are given priority. The inclusion of the purchaser’s closest family members in the selling procedure seems to be a good idea in theory, but in practice the Board pays too much attention to personal point(s) of view of the family members and therefore calls into question the purchaser’s right to own property. Out of these findings, two conclusions concerning the statutory procedure of land purchase may be drawn. First, the infringement of the individual property right of the landowner leads *de facto* to

a communal right of the closest family. Secondly, by deciding upon these criteria the Land Control Board implicitly applies traditional customary law. Both points reveal that the introduction of the statutory system of land purchase and the corresponding implementation of individual titles of land cannot be successful to the fullest extent in an environment with that scarce resources as in Kenya. It is because of this scarcity, thus poverty, that many member of a family may feel justified in making a claim to whatever land is available as it is in an existential necessity, and so they may refuse their consent to the sale of land. This is also why the authorities in the procedure tend to listen to the relatives when they are against the sale of land.

In connection with the statutory process of inheritance, the author came to the conclusion that it has the major drawback of being very time-consuming and expensive. While, in actual fact, the recognition of the statutory procedure of purchase is quite high, succession is still carried out in many cases according to the neo-customary tenure, as the results of the survey show. Out of this finding, it can be concluded that the reluctance of the individuals involved or their inability to go through the procedure of succession according to statutory law gives rise to legal uncertainty. Many of those individuals to whom a Title Deed had been issued in the course of an adjudication procedure are long dead. Their descendants continue to transfer land according to the neo-customary procedures but do not change the Title Deeds by formally establishing their names. In all such cases, the land registry is out of date and does not reflect the actual legal situation any more. Up until now, the elders of the areas, the traditional authorities, respectively, guarantee that land ownership is respected although it is not protected by the formal system.

However, the author makes the assumption that there will be changes in the society in the future, especially if, for example, there is again an increased influx of newcomers into the area. If this happens, there is the risk that the traditional authorities are undermined, and this could lead to severe distortions in the land tenure system. The public administration of land through the responsible authorities has to be improved if the statutory system is to be strengthened. Digitalization of the data may improve the efficiency of the system, accelerate the procedures, help to keep the Lands Registry up-to-date, reduce the opportunity costs of the customers and make the statutory system more attractive.

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10.2 LIST OF INTERVIEW PARTNERS

Institution	Position	Name	Date
Ministry of Lands			
Lands Department	District Land Officer	Onyino Mukobe	25.11.2011
	District Land Valuer	Joshua Mutua	05.12.2011
	District Land Registrar	George Gachichi	09.12.2011
	Lands Department Officer	Henry Muchenya	17.11.2011
	Secretary of the Land Control Board	Francis Ombonya	16.11.2011
Land Adjudication Department	District Land Adjudication Officer	George Ogutu	23.11.2011
Physical Planning Department	District Physical Planner	Mary Ngundo	17.11.2011
Survey Department	Provincial Surveyor	Peter Wanyamu	08.02.2011
Central Government	Assistant-Chief of Manyatta 'A'	George G.M. Ojowi	06.12.2011
	Land Control Board Member	N.N.	02.12.2012
Municipal Council of Kisumu	Assistant Town Planner	Oscar Ndede	05.12.2011
Kisumu High Court	Judge	Abida Ali. Aroni	13.12.2011
Advocate	Amondi & Company Advocates	Kenneth Amondi	01.12.2011

10.3 ACTS OF THE REPUBLIC OF KENYA

Cap 160: The Law of Succession Act.

Cap 265: The Local Government Act

Cap 280: The Government Lands Act

Cap 281: The Registration of Titles Act

Cap 282: The Land Titles Act

Cap 283: The Land Consolidation Act

Cap 284: The Land Adjudication Act

Cap 286: The Physical Planning Act

Cap 287: The Land (Group Representatives) Act

Cap 288: The Trust Land Act

Cap 299: The Survey Act

Cap 300: The Registered Land Act

Cap 302: The Land Control Act

Cap 480: The Stamp Duty Act

All these acts can be accessed under <http://www.kenyalaw.org/klr/index.php>

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10.5 LIST OF FIGURES

Figure 1: Slum population in African countries as share of the urban population 2005....	3
Figure 2: Kisumu in a map about Kenya's major land transportation links.....	11
Figure 3: The security of different land tenure forms expressed as percentage values ...	24
Figure 4: Kinds of settlement classified by the average level of material wealth per inhabitant and the degree private individuals' decisions on land use are restricted by public authorities through land use regulations	26
Figure 5: Location of the informal settlement belt in Kisumu.....	30
Figure 6: Land segregation within the old town of Kisumu	31
Figure 7: The two modes of land acquisition in Gonda, Kisumu	72
Figure 8: Annual plot acquisition in Gonda, Kisumu	72
Figure 9: The parties involved in the land acquisition procedure in Gonda, Kisumu	73
Figure 10: Documentary proof of land ownership in Gonda, Kisumu	74
Figure 11: Plot registration in the landowner's name in Gonda, Kisumu.....	75
Figure 12: The beneficiaries of inheritance within families in Gonda, Kisumu	76

10.6 LIST OF PHOTOS

Photo 1: Lake Victoria with water hyacinths, Kisumu	9
Photo 2: Kisumu railway station, Kisumu	10
Photo 3: Nyalenda street scene, Kisumu.....	12
Photo 4: Gathering in the morning for the Land Control Board meeting in Kisumu.....	51
Photo 5: An applicant answers the question put by the Land Control Board in Kisumu..	52
Photo 6: The Land Control Board of Kisumu District at work.....	57
Photo 7: One of the main roads for entering Gonda, Kisumu.....	67
Photo 8: Keeping livestock on the fringe of Gonda, Kisumu.....	69
Photo 9: Different types of housing next to each other in Gonda, Kisumu.....	69
Photo 10: A cemented grave in the middle of the compound in Gonda, Kisumu	70
Photo 11: One of the three water points in Gonda, Kisumu	71

10.7 LIST OF TABLES

Table 1: Description of the statutory land adjudication procedure.....	33
Table 2: Description of the statutory procedure of purchase of freehold land.....	48
Table 3: Description of the statutory procedure for succession of land	60
Table 4: Statement of charges for the succession of a plot of land	65

11 APPENDICES

11.1 APPENDIX 1: QUESTIONNAIRE FOR THE SURVEY

Dear participant

My name is Anna Schinwald. I am a student at the University of Vienna and I am currently doing research for my diploma thesis on landownership in Kisumu. Today I ask for your help for my study that deals with different aspects of the acquisition of land in Gonda.

I can assure you, that all the information you provide will be treated as confidential.

GENERAL INFORMATION

Number	Date	Time

1. Name :

2. Sex: ☐ Male ☐ Female

3. What is the size of the plot?

4. How many people live in this household?

5. For which purposes do you use the plot?

- ☐ Residential ☐ Commercial
☐ Mixed (residential/commercial) ☐ Other:

6. Is the plot under freehold or under leasehold tenure?

- ☐ freehold ☐ leasehold

SECTION FOR LANDOWNERS UNDER LEASEHOLD TENURE

7. Who is the lessor of this plot?

- ☐ the Government ☐ the Municipality

8. What documentary proof of your right as a leaseholder do you have?

- ☐ Certificate of lease ☐ Letter of Allotment
☐ No document ☐ Other:

9. What is the amount of the annual rate/rent that you pay?

SECTION FOR LANDOWNERS UNDER FREEHOLD TENURE

10. Would you name yourself an original owner or a newcomer in this area?

- ☐ Original owner ☐ Newcomer

11. How did you acquire this plot?

- ☐ purchase (continue with questions 12-17)
☐ inheritance (continue with questions 18-22)

PURCHASE

12. In which year did you acquire this plot?

13. How did you get to know that this plot was for sale?

- | | |
|--|--|
| <input type="checkbox"/> Friends | <input type="checkbox"/> Family/ relatives |
| <input type="checkbox"/> Former landowner | <input type="checkbox"/> Land agent |
| <input type="checkbox"/> Local authority (chief, assistant-chief) | |
| <input type="checkbox"/> Traditional authority (elders of the community) | |
| <input type="checkbox"/> Advertisement | <input type="checkbox"/> Other |

14. Which of the following actors were involved during the process of acquisition?

- | | |
|---|--|
| <input type="checkbox"/> Land agent | <input type="checkbox"/> Lawyer |
| <input type="checkbox"/> Local authority | <input type="checkbox"/> Traditional authority |
| <input type="checkbox"/> Buyer and seller | <input type="checkbox"/> Other |

15. Did you go for the consent of the land control board?

- | | |
|------------------------------|-----------------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
|------------------------------|-----------------------------|

If no, why not?

16. Is the plot registered in your name at the office of the land registrar?

- | | |
|------------------------------|-----------------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
|------------------------------|-----------------------------|

If no, why not?

17. Which documentary proof of your right as a landowner do you have?

- | | |
|--------------------------------------|--|
| <input type="checkbox"/> Title deed | <input type="checkbox"/> Land sale agreement |
| <input type="checkbox"/> No document | <input type="checkbox"/> Other: |

INHERITANCE

18. In which year did the family acquire this plot?

19. Which documentary proof of your right as a landowner do you have?

- | | |
|--------------------------------------|--|
| <input type="checkbox"/> Title deed | <input type="checkbox"/> Land sale agreement |
| <input type="checkbox"/> No document | <input type="checkbox"/> Other: |

20. Which of the following actors were involved during the process of succession?

- | | |
|--|--|
| <input type="checkbox"/> Court | <input type="checkbox"/> Lawyer |
| <input type="checkbox"/> Local authority | <input type="checkbox"/> Traditional authority |
| <input type="checkbox"/> Family | <input type="checkbox"/> Others: |

21. Do you think you are aware of the legal processes of succession?

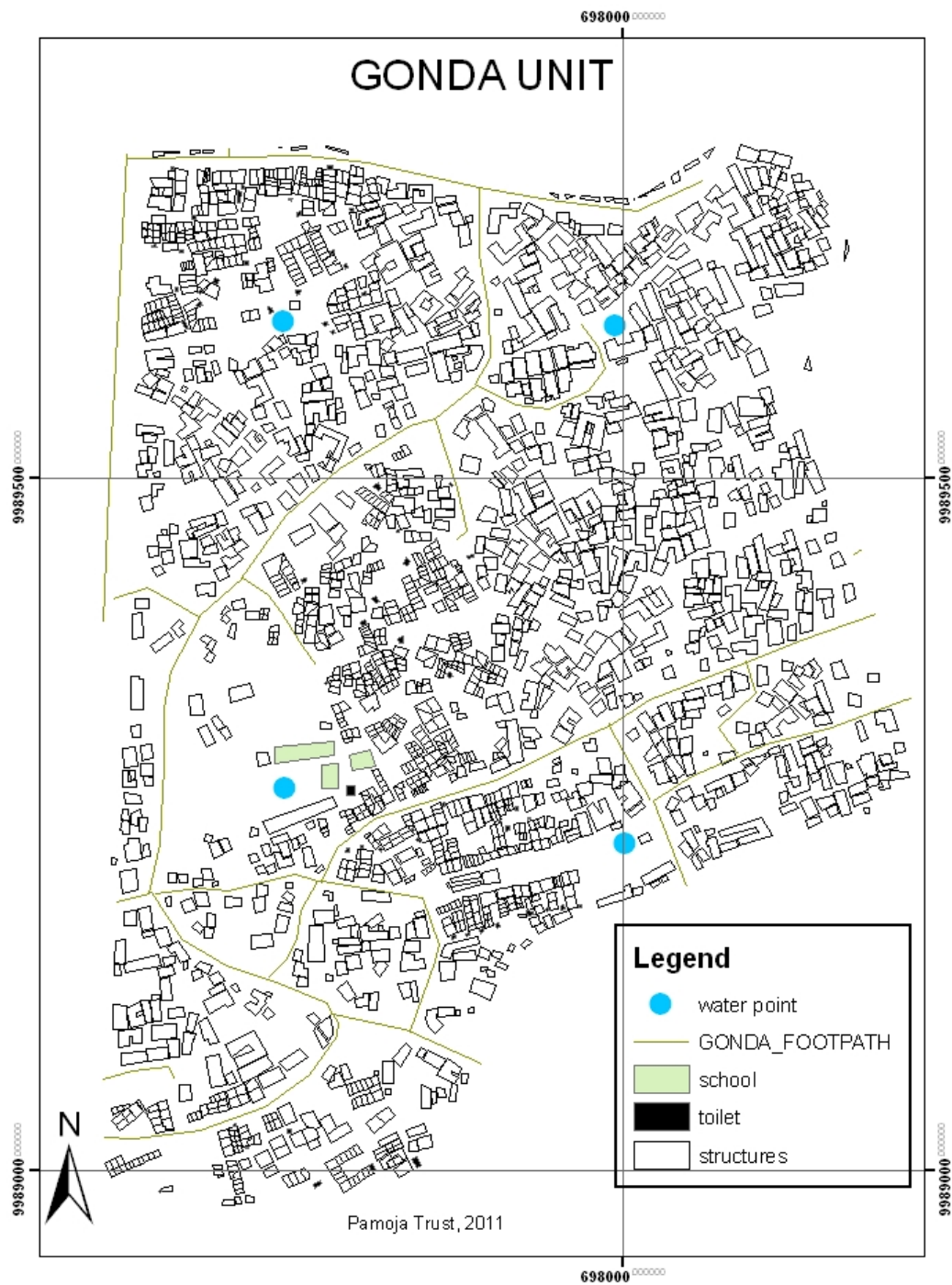
- | | |
|------------------------------|-----------------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
|------------------------------|-----------------------------|

22. Who is allowed to inherit land within your family?

- | | |
|-------------------------------|------------------------------------|
| <input type="checkbox"/> Sons | <input type="checkbox"/> Daughters |
| <input type="checkbox"/> Both | |


Thank you very much for your time and effort to participate in this study!

11.2 APPENDIX 2: A MAP OF GONDA



Source: Urban Matters et al. 2011: 32

11.3 APPENDIX 3: A TITLE DEED


REPUBLIC OF KENYA
THE REGISTERED LAND ACT
(Chapter 300)

Title Deed

Title Number KISUMU/KONYA/

Approximate Area (0.04) Ha

Registry Map Sheet No.

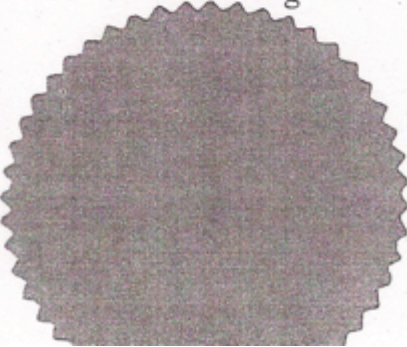

This is to certify that SAMUEL

ID/NO.

P.O. BOX

is (are) now registered as the absolute proprietor(s) of the land comprised in the above-mentioned title, subject to the entries in the register relating to the land and to such of the overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land.

GIVEN under my hand and the seal of the
KISUMU District Land Registry
this 9TH day of OCTOBER 20



Land Registrar

At the date stated on the front hereof, the following entries appeared in the register relating to the land:

EDITION: <u>1</u>		PART A—PROPERTY SECTION	
OPENED: <u>7.10.</u>			
REGISTRATION SECTION		EASEMENTS, ETC.	NATURE OF TITLE
<u>KISUMU/KONYA</u>			
PARCEL NUMBER			
APPROXIMATE AREA			ABSOLUTE
<u>0.04</u> Ha.			
REGISTRY MAP SHEET No.			

SUB-DIV OF PLOT NO. [REDACTED] PART B—PROPRIETORSHIP SECTION

[illegible]

[illegible]

Rel.



REPUBLIC OF KENYA

THE REGISTERED LAND ACT
(Chapter 300)

Title Deed

A IN^o **1000**

MLS/TD/02/A2/02

GPX (SP) 7621-50m-11/2008

ENGLISH ABSTRACT

This diploma thesis deals with private land acquisition in a selected part of slum settlements in Kisumu, Kenya. The author puts the focus on land purchase and succession as the two predominant forms of acquisition of land under freehold interest. Leasehold interests in land are not explicitly taken into account. On the one hand, statutory processes are examined, on the other hand the *de facto* processes that are carried out by the people inside the settlements are analyzed. Besides the literature review, the author focused mainly on an analysis of the relevant Kenyan Acts and collected primary data by carrying out a survey in Gonda, a unit of Manyatta 'A', which is one of Kisumu's biggest slum settlements.

The empirical results of the survey in Gonda show that there is still a dualism in the sense that a big number of individuals still acquire land according to the norms of the neo-customary system, which do not (fully) comply with the statutory norms. However, there are differences between land purchase and succession of land. With regard to purchase of land the author found out that the recognition of the statutory process was rather high: in 87.5 % of the 16 cases examined by interviews all parties that have to be involved in a proper statutory purchase were actually taking part in the procedure. Moreover, for 75 % of the purchasers a Title Deed was executed, which is the most important official proof of land ownership, in their name. In addition, 12.5 % of the interviewees declared to have a Title Deed in the name of somebody else. With regard to succession of land the statutory process is less established: All of the 25 landowners interviewed declared that they were not to court although this is mandatory within the statutory procedure for executing a Title Deed. However, 52 % of the interviewees declared that they have a Title Deed in their name. Unfortunately, the author could not elucidate this contradiction. 32 % of the heirs answered that they have a Title Deed in the name of a deceased relative. Moreover, the survey revealed that traditional perceptions of inheritance still infringe women's rights to land: 36 % of the interviewees who acquired their plot by inheritance declared that only the sons of the decedent are allowed to inherit land; 4 % said that it is a female privilege and 60 % answered that both sexes may become heirs of land. It was very interesting to notice that in 44 % of all land acquisition procedures examined the traditional authorities took part although their participation is neither necessary within the statutory procedure of purchase nor of succession of land.

Out of the empirical results the author draws the following conclusions: The land adjudication process and the introduction of individual land titles that came along with it was an important landmark in the history of land tenure in Kisumu. It changed the existing procedures of land acquisition but did not fully replace the previous system, which worked according to customary law of the different communities. In fact, up to the present day there is still a dualism of the statutory tenure system and the neo-customary tenure system, which is a further development of the customary tenure system. The norms of the statutory system were more often applied in cases of buying a piece of land than of inheriting one. The purchasers' effort for formal recognition of their rights as landowners may be considered as necessary because they are often not traditionally rooted within the local communities (87.5 % identify themselves as newcomers in the area). On the contrary, the heirs may disregard the statutory system of succession because they rely on the recognition of their rights because of the high acceptance of the neo-customary procedures within the community. Moreover, high costs and a lack of knowledge about the statutory procedures may be further reasons.

The analysis of the relevant laws as well as literature revealed that the statutory procedure of succession is very time-consuming as well as costly. The statutory procedure of purchase has a very remarkable feature: The Land Control Board, which normally decides *de facto* about the purchaser's intention to sell a piece of land, lacks a proper legal basis. The author attended a Land Control Board meeting and found out that the decision-making of the board heavily infringes the purchaser's property right and applies social instead of legal criteria. Out of this finding, it can be concluded that the infringement of the individual property right of the landowner leads so far as it is *de facto* practiced as a communal right of the closest family. In addition, the Land Control Board applies the same criteria for decision-making that the traditional authorities used to apply before the introduction of the statutory system.

The overall conclusion of the author is that the introduction of the statutory system of land purchase and inheritance did not fully succeed because many people still rely on neo-customary procedures and traditional authorities for the recognition of their rights. The responsible authorities need to be aware that the reluctance or inability of purchasers and heirs to go through the statutory procedures gives rise to legal uncertainty because many Title Deeds and the Lands Registry are out of date. A better administration of land titles and a digitalization of the data may improve the efficiency and acceptance of the statutory system.

GERMAN ABSTRACT / ZUSAMMENFASSUNG

Die vorliegende Diplomarbeit beschäftigt sich mit privatem Landerwerb in Slums in Kisumu, der drittgrößten Stadt Kenias. Die Autorin legt den Schwerpunkt dabei auf Kauf und Erbe als die beiden vorherrschenden Arten von privatem Landerwerb; Pachtverhältnisse werden nicht explizit behandelt. In der Arbeit wird einerseits untersucht, wie der Erwerb gemäß der kenianischen Rechtsnormen von statten gehen soll, gleichzeitig werden die tatsächlichen Erwerbsprozesse in einer Slum-Siedlung analysiert. Neben Literaturrecherche hat die Autorin einen Schwerpunkt auf die Analyse der kenianischen Gesetze gelegt sowie eine Primärdatenerhebung mittels Fragebogen in Gonda, einem Teil von Kisumus größtem Slum Manyatta 'A', durchgeführt.

Die empirischen Ergebnisse der Befragung in Gonda zeigen, dass eine große Anzahl an Personen Land nicht entsprechend der staatlichen Rechtsnormen erwirbt, sondern gewohnheitsrechtliche Normen anwendet. Der Grad der Anerkennung und Anwendung des staatlichen Systems ist in Fällen von Landerwerb durch Kauf (16 untersuchte Fälle) und Landerwerb durch Erbfall (25 untersuchte Fälle) unterschiedlich hoch. In 87,5 % der Erwerbsfälle durch Kauf waren alle Parteien beteiligt waren, die laut gesetzlicher Vorgabe im Erwerbsprozess partizipieren müssen. Darüber hinaus besitzen 75 % der Käufer eine Grundstückseigentumsurkunde in ihrem Namen, weitere 12,5 % eine Urkunde im Namen einer anderen Person. In den Erwerbsfällen durch Erben ist das staatliche Recht weit weniger stark verankert: von 25 interviewten Erben gab keine Person an, im Zuge des Erwerbsprozesses bei Gericht gewesen zu sein, obwohl dies für den Erwerb gemäß des staatlichen Rechts sowie für den Erhalt einer Grundstückseigentumsurkunde notwendig ist. Dennoch gaben 52 % dieser Personen an, eine Grundstückseigentumsurkunde in ihrem eigenen Namen zu besitzen – ein Widerspruch, der während des Forschungsaufenthalts nicht aufgelöst werden konnte. 32 % der Erben behaupteten zudem, eine Grundstückseigentumsurkunde zu besitzen, welche auf den verstorbenen Erblasser ausgestellt ist. Bemerkenswert ist die Tatsache, dass in 44 % aller Erwerbsfälle traditionelle Autoritäten Teil des Erwerbsprozesses waren, obwohl ihre Teilnahme weder bei Kauf noch Erbe im staatlichen Recht vorgesehen ist. Des Weiteren zeigte sich, dass der Landerwerb durch Erbfälle auf Grund von traditionellen Vorstellungen oftmals Männern vorbehalten ist. 36 % aller befragten Erben im Untersuchungsgebiet gaben an, dass nur Söhne innerhalb der Familie

erbberechtigt sind. 60 % gestehen beiden Geschlechtern ein Erbrecht zu, während in 4 % der Fälle das Recht, Land zu erben, Frauen vorbehalten ist.

Der stärkere Drang der Käufer nach formeller Anerkennung kann dadurch erklärt werden, dass diese sich in 87,5 % aller Fälle selbst als „Neuankömmlinge“ in dem Gebiet bezeichnen und daher nicht traditionell in der lokalen Gemeinschaft verankert sind. Im Gegensatz dazu können Erben eher auf staatliche Anerkennung ihres Rechte zu verzichten, da sie sich auf die Anerkennung ihres Anspruches durch ihre Verwurzelung innerhalb der Gemeinschaft verlassen können. Kaufprozesse entsprechend dem staatlichen Recht weisen eine Besonderheit auf. Die von der Regierung eingesetzten Land Control Boards können über die Verkaufsabsichten der Käufer innerhalb des untersuchten Gebietes entscheiden. In seiner Entscheidungsfindung berücksichtigt das Board in Kisumu sehr stark soziale Gesichtspunkte sowie die Interessen der engen Familienmitglieder des Verkäufers. Dies führt dazu, dass das an sich als individuelles Eigentumsrecht konzipierte Verfügungsrecht tatsächlich als kommunales Recht der Familie ausgeübt wird. Damit wendet das Board implizit jene – auch im Gewohnheitsrecht praktizierten – Kriterien an, welche eigentlich durch die Einführung des staatlichen Systems abgeschafft werden hätten sollen.

Die Autorin kommt zur Schlussfolgerung, dass die in Kisumu in den späten 1960er-Jahren begonnene und Mitte der 1990er-Jahre abgeschlossene Einführung von individuellen Eigentumstitel für Land sowie die damit einhergehende staatliche Erfassung und Aufzeichnung der Eigentumsverhältnisse zwar die bis dahin bestehenden (gewohnheitsrechtlichen) Prozesse des Landerwerbs veränderte, diese jedoch nicht zur Gänze ersetzen konnte. Tatsächlich führte sie zu einem bis heute bestehenden Dualismus des staatlichen Rechts und des Gewohnheitsrechts, da eine große Anzahl an Personen Land immer noch entsprechend der gewohnheitsrechtlichen Normen erwirbt bzw. auf die traditionellen Autoritäten vertraut. Die verantwortlichen staatlichen Behörden müssen sich der fehlenden Attraktivität des staatlichen Systems bewusst sein, da die Anwendung der gewohnheitsrechtlichen Prozesse zu einem veralteten Grundbuch sowie zu falschen Eigentumsurkunden und somit zu Rechtsunsicherheit führt. Eine verbesserte Administration der Eigentumstitel sowie günstigere formelle Prozesse könnten dazu beitragen, die Effektivität und Akzeptanz des staatlichen Systems zu erhöhen.

CURRICULUM VITAE IN GERMAN/LEBENS LAUF

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