LAW REFORM COMMISSION

Opinion Paper
« Mechanisms for Settlement of Land Disputes »

[LRC_R&P 127, September 2018]

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(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(g) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(h) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
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Executive Summary

Opinion Paper about « Mechanisms for Settlement of Land Disputes »
[LRC R&P 127, September 2018]

At the request of the Attorney General’s Office, the Commission has reviewed the mechanisms by which land disputes are dealt with under our law, as well as the law in other jurisdictions regarding “Land Tribunals” and “land courts”. The Commission has also considered cases of dispossession of land as highlighted in the Report of the Truth and Justice Commission (vol. 2). The Commission is favourable to the establishment of a Land Court in Mauritius, and considers a Special Fund can be set-up for research and legal assistance to persons who deposed before the Truth and Justice Commission regarding alleged cases of dispossession of land.
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INTRODUCTION

1. The Law Reform Commission has, at the request of the Attorney-General, reviewed from a comparative perspective the mechanisms by which land disputes are dealt with, and has explored the usefulness of setting up a dedicated Land Tribunal in Mauritius to deal with such disputes.

2. The Commission has also heard representatives of the Association Justice & Vérité who had deposed before the Truth and Justice Commission and who claimed that they had been unlawfully dispossessed of their lands.\(^1\) According to them, their cases are being heard before the courts for decades and they consider that the creation of a Land Court would be a way to prevent delaying tactics by those who have allegedly unlawfully taken possession of their lands.

3. Mauritius had established, under the French era, a *Tribunal Terrier* (Land Court), which was set up to specifically deal with disputes involving land and its use. The jurisdiction of the *Tribunal Terrier*, instituted by Ordinance of 25 September 1766\(^2\), was more fully defined by Edict\(^3\). The constitution and jurisdiction of the court were again dealt with by Decree of 3\(^{rd}\) Germinal Year XI\(^4\). By Ordinance No. 13 of 1832, the Land Court (*Tribunal Terrier*) was, however, abolished. All petitions and disputed cases which were of the competence of the Land Court were transferred to the Executive Council\(^5\); the judicial powers exercised by the Executive Council sitting as a Land Court were, however, later vested in the ordinary tribunals.\(^6\)

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\(^1\) Mr. Clency Harmon, Mr. Didier Kisonobo, and Mrs. Danielle Tancrel.
\(^2\) Code Delaleu No. 3.
\(^3\) Code Delaleu No. 96, Titre II.
\(^4\) Code Decaen No. 4.
\(^5\) Herchenroder & Koenig (1922), Vol. IV, at p. 2125.
\(^6\) Ordinance No. 4 of 1872: vide Herchenroder & Koenig (1922), Vol. IV, at pp. 2122-2127.
4. Since then, land disputes are heard by different Courts in Mauritius, which means that those disputes are not decided upon by specialized judges or magistrates and may take time to find a solution as they are heard along many other cases. The Commission has thus examined the opportunity of the creation of a Land Tribunal or a Land Court, which would facilitate the just, expeditious and accessible resolution of Land disputes.

(A) CURRENT LEGAL FRAMEWORK RELATING TO LAND DISPUTES

(1) Courts’ Jurisdictions

5. The Supreme Court, District Courts and Judge in Chambers have been given jurisdiction by statutes to resolve land-related conflicts.

The Supreme Court

6. According to Section 76 of the Constitution, the Supreme Court shall have unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law other than a disciplinary law and such jurisdiction and powers as may be conferred upon it by this Constitution or any other law.

7. Section 15 of the Landlord and Tenant Act provides that any person aggrieved by a determination of the Fair Rent Tribunal may, within 21 days of the date of the determination, appeal therefrom on a point of law to the Supreme Court.

8. Moreover, according to Section 10 of the Land Acquisition Act, any interested person who wishes to challenge the legality of the compulsory acquisition of any land may
appeal to the Supreme Court within such time and in such manner as may be provided by rules made by the Supreme Court for the purpose.

The District Courts

9. Under the 1945 Courts Act, the District Courts have exclusive jurisdiction in possessory actions concerning any land, premises, runs of water or other immovable property or any other rights arising out of immovable property irrespective of the value of the property or right. As it was rightly pointed out in Rohinun v Dookbujun (2015) SCJ 51: “Although the Supreme Court has under the Constitution, undoubted jurisdiction to hear and determine civil proceedings, it remains that in practice the exclusive jurisdiction to hear and determine possessory actions is vested in the District Court, pursuant to section 108 of the Courts Act, provided that the conditions as set out therein are met. This is the more so as section 111(2) of the Courts Act excludes possessory actions from the jurisdiction of the Intermediate Court.”

10. Moreover, according to Section 32 of the Landlord and Tenant Act, the District Court shall, notwithstanding any other enactment, have exclusive jurisdiction to hear and determine any matter arising out of, or brought under, Part IV of the Act, other than the fixing of a fair rent pursuant to section 30 (3) (b), and, in the exercise of that jurisdiction, shall exercise all the powers which the Court has in civil proceedings.

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7 According to Sec. 108 Courts Act:
“108. Possessory actions
(1) A District Court shall have jurisdiction in possessory actions concerning any land, premises, runs of water or other immovable property or any other rights arising out of immovable property including actions where the value of the property or right exceeds the prescribed amount if—
(a) the plaintiff claims to be maintained or restored to the quiet enjoyment and possession of the property or rights;
(b) the possessory action is entered within one year from the imputed trespass; and
(c) the plaintiff has been in quiet possession for at least one full year before the imputed trespass.
(2) In any possessory action, damages not exceeding the prescribed amount may also be claimed.
(3) Notwithstanding article 25 of the Code de Procédure Civile, where the value of the property or right in relation to which a possessory action is brought does not exceed the prescribed amount, the District Court may, if the issue of ownership is raised, adjudicate on it.”

8 Concerning possession of tenement and repairs.
11. **Section 71 of the Courts Act** provides for a list of matters to be disposed of by the judge in chambers.⁹ The list includes: applications for cancellation or reduction of mortgage inscriptions and applications for partitions of property, and applications to be let into possession of the unadministered property (*envoi en possession*). Concerning the latter, it in *Hosanee v Hosanee* (2006) SCJ 103, para. 495 of Dalloz, op. cit., Vo Succession was quoted: “la nécessité d’un *envoi en possession* est destinée à protéger la famille contre une prise de possession du successeur irrégulier, c’est à dire contre les comportements de fait de ce successeur, elle n’intéresse pas la situation du droit du successeur irrégulier, laquelle ne dépend que de la volonté manifestée par celui-ci; une *acceptation non-autorisée* de la succession peut donc cependant avoir de sa part acceptation.”

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⁹ See Sec. 71 of the Courts Act.

“(1) Subject to subsection (2), applications for or concerned with or in respect to any matter specified in this section and any matter connected therewith may, subject to the discretion of the Judge in any particular case to refer them to the Court, be finally disposed of at Chambers by a Judge’s order, which order shall be a sufficient authority to the Registrar to issue thereon a rule of Court de plano—

(a) applications to be let into possession of the unadministered property and rights of a party deceased or absent (*‘envoi en possession’*);

(b) applications for affirmative declaration;

(c) applications for cancellation or reduction of mortgage inscription;

(d) applications for removal of seizures;

(e) applications for the validity or nullity of attachments;

(f) applications for partitions of property;

(g) — —

(h) applications for admission of a relinquishment of immovable property;

(i) applications touching absent persons under article 115 of the Code Civil Mauricien;

(j) — —

(k) applications for homologations of compromises (“transactions”) under article 441 of the Code Civil Mauricien;

(l) applications for nomination of surveyors, appraisers, skilled witnesses (“experts”).

(2) In applications under subsection (1) (c), (d), (e) or (l), no order shall be made by a Judge in Chambers, where a party to the application objects.”
(2) Compulsory Acquisition

12. Section 8 and Section 10 of the 1973 Land Acquisition Act cater for compulsory land acquisition and challenge of compulsory acquisition respectively. As it was explicitly said in Compagnie Man Hin Bros Industries Ltd v The Honorable Minister of Housing and Lands & Ors (2014) SCJ 173: "It is therefore clear that the Act applies to compulsory acquisition of land where it is neither possible nor expedient to acquire the land by private agreement".

13. Compulsory acquisition is submitted to very precise rules, which have been thoroughly examined in Harel Freres Limited v The Minister of Housing and Lands, and Town and Country Planning (1986) PRV 58:

"The law relating to compulsory acquisition of land in Mauritius is strikingly different from that which their Lordships are familiar in England. In England different statutes empower different authorities to acquire land compulsorily for different specific purposes. But the normal statutory procedure which must be followed before a particular compulsory acquisition can be authorised ensures that a public inquiry will be held at which any landowner objecting to the acquisition may be heard and at which it will fall to the acquiring authority to make good its case in support of the acquisition by fully detailed evidence which can be tested, challenged and, if necessary, controverted. It is at this stage that the merits of the proposed acquisition are examined and assessed and it is normally on the basis of facts found and recorded in a report of such an inquiry that a Ministerial decision to give effect to the acquisition must rest. Such a decision is then open to review by the courts, analogous to that of a judicial review, that the compulsory acquisition authorised was ultra vires the enabling statute or that the landowner objecting to the acquisition was prejudiced by a failure to follow the prescribed procedures. By contrast the Mauritius Act gives the Minister a power of compulsory acquisition which is quite general in its ambit and which he can exercise by notice under section 8 of the Act if he is satisfied that the conditions of section 8(1) (a) and (b) of the Constitution are fulfilled. There is no provision in the Act for any inquiry into the merits of the proposed acquisition to be held or otherwise giving the landowner objecting to the acquisition any opportunity to be heard before the Minister makes his decision to acquire and issues his notice to give effect to it under section 8 of the Act. It is in section 8 of the Constitution alone that a safeguard for the interests of the landowner is provided."
(...). The rules made for the purpose of section 10 of the Act are the Land Acquisition (Appeal) Rules 1974. The Rules require the appellant to give notice of appeal indicating the grounds of appeal within a stipulated time. Other grounds may only be raised at the hearing with the leave of the court. The Minister is required to forward to the Registry of the Supreme Court "a certified copy of all documents relating to the compulsory acquisition of the land, subject matter of the appeal". Apart from these provisions the Rules are silent as to how the court is to conduct the proceedings on the hearing of an appeal. But the Rules are merely procedural. They cannot in any way circumscribe the challenge to the legality of the compulsory acquisition for which section 10 of the Act makes provision -and, if section 10 is construed, as it should be, as effective to satisfy the requirements of section 80(e)(ii) of the Constitution, then it is clear that any issue raised as to whether the requirements of section 80(a) and (b) of the Constitution are fulfilled must be for the court to determine and for that purpose the court must receive all relevant evidence, whether upon affidavit or orally, and in either case subject to cross-examination. Once the Minister's decision is challenged on appeal on grounds which raise issues as to whether the conditions of section 80(a) and (b) of the Constitution are fulfilled, it must be for the court, not the Minister, to be satisfied that the proposed compulsory acquisition is indeed necessary or expedient to enable the intended, development to be carried out and that there is reasonable justification for causing any hardship to the landowner which will result. If it were not so, the owner's right of access to the Supreme Court "for the determination of the legality of the ... acquisition of the property" would be valueless and compulsory expropriation, as the present case shows, would depend upon the unexamined ipse dixit of the minister. Hence, as the Solicitor-General very properly conceded before their Lordships, the Supreme Court fell into error in confining attention to such issues as could properly be raised upon an application for judicial review and in, not treating the appeal as a full scale appeal against the Minister's decision which required to be considered on its merits.

14. Where the government has decided to acquire any land compulsorily and this decision affects the interests of a person, that interested person who wishes to challenge the legality of such compulsory acquisition of land may appeal to the Supreme Court.

But to do so, the prescribed delay shall be respected. Thus, in Coothen v Ministry of Ministry of Housing and Lands & Ors (2005) SCJ 21, the Court said that: "It is common ground that before the compulsory acquisition was effected, the necessary notices had been served as well as the necessary publications as provided by law had been made in the Gazette and in two dailies. It is also
undisputed that the plaintiff did neither appeal against the compulsory acquisition nor challenge its constitutionality within the delay prescribed by law. Indeed section 10 of the Act provides that "an interested person who wishes to challenge the legality of a compulsory acquisition of any land may appeal to the Supreme Court within such time and in such manner as may be provided by the rules of the Supreme Court for the purpose." Furthermore regulation 3(1) of the Rules 1974 provides that "the appellant in the case of an appeal under section 10 of the Act, within 21 days from the second publication in the Gazette of the notice under subsection (1) of section 8, or within 21 days from the date of the publication in the Gazette of the notice under section 9." Learned counsel for the plaintiff did not deny that there was no challenge to the compulsory acquisition as provided by law. However, he argued that the absence of the plaintiff from the country was a valid reason for him to press the matter now. I do not share that view. The fact that the plaintiff was not in the country at the time of the compulsory acquisition is not a sufficient excuse to entitle him now to challenge the constitutionality of the compulsory acquisition. Since it was not to the knowledge of the authorized officer that the plaintiff was not in the country after the registered letter had been duly sent and unreturned to sender, he was amply justified to presume that the letter had been delivered to the addressee as provided by section 40 of the Interpretation and General Clauses Act. Besides the notice, there were publications in two dailies as well as in the Gazette."

15 As for compensation for compulsory acquisition, according to section 12 of the 1973 Land Acquisition Act, an aggrieved person may claim compensation. That compensation is assessed and determined by a special Board of Assessment established in the Ministry for that purpose only. Then, where a person disagrees with the compensation award delivered by the Board, the Supreme Court is the competent jurisdiction for an appeal as per section 24.
(3) Environment and Land Use Appeal Tribunal (ELAT)

16. Established under the 2012 Environment and Land Use Appeal Tribunal Act, the ELAT has jurisdiction under section 4 of the Act to hear appeals relating to matters that are directly or indirectly related to the environment and the manner in which land is made use of.

17. The Tribunal deals mainly with appeals against decisions of a public body about issuing or refusing Building and Land Use Permits, Outline Planning Permissions, morcellement permits, Environmental Impact Assessment licenses and Preliminary Environmental Report approvals under Acts of Parliament. Hence, it is seen that the ELAT acts most of the time as a Tribunal for appeal and the types of appeals it deals with concern mostly development of land, breach of an environmental law, or prohibition to issue license to develop a morcellement.

18. As has been said in District Council of Black River v Boulahya (2016) SCJ 203: "It is common ground that indeed, as provided in section 6 (1)(a) of the Environment and Land Use Appeal Tribunal Act 2012, an appeal from a final decision of the Tribunal to the Supreme Court lies only on the ground that the decision is 'erroneous in point of law'."
(B) REVIEW OF MECHANISMS FOR SETTLEMENT OF LAND DISPUTES

(I) Overview of Foreign experiences pertaining to land disputes

Hong Kong

19. In Hong Kong, the Lands Tribunal\textsuperscript{10} is established under the Lands Tribunal Ordinance, Cap. 17\textsuperscript{11}. The Tribunal has jurisdiction to hear and adjudicate the following main categories of cases:

\textit{I) Possession cases} - The Tribunal can determine applications by landlords for possession of premises under the Landlord and Tenant (Consolidation) Ordinance, Cap. 7 or under the Common Law. In such applications, apart from making orders for possession, the Tribunal also has power to make orders for the payment of rent, mesne profits, disposal of any property left in the premises by the tenant and payment of damages in respect of any breach of a condition of the tenancy or sub-tenancy.

\textit{II) Building management cases} - The Tribunal can determine building management disputes such as the interpretation and enforcement of the provisions of the Building Management Ordinance, Cap. 344 and deeds of mutual covenant, the appointment or dissolution of management committee, convening owners’ meeting and appointment of administrator.

\textit{III) Compensation cases} - The Tribunal can determine the amount of compensation payable by the Government to a person whose land has been compulsorily resumed or has suffered a reduction in value because of public developments pursuant to the relevant ordinances.

\textsuperscript{10} The Lands Tribunal is a tribunal in Hong Kong that deals with legal disputes over land. It was established by the Lands Tribunal Ordinance (Cap. 17).

\textsuperscript{11} It has four professional judges: a President who is a Judge of the Court of First Instance of the High Court and three Presiding Officers, who are District Judges. There are also two Members of the Tribunal who are qualified surveyors. The President and a Presiding Officer may either sit alone or together with a Member in hearing cases. A Member may also sit alone in hearing cases.
4) Compulsory sale cases - The Tribunal can determine applications made by majority owners of a land for the sale of the land for redevelopment purpose under the Land (Compulsory Sale for Redevelopment) Ordinance, Cap. 545.

5) Appeal cases - The Tribunal can determine appeals brought under the following ordinances:
   - Rating Ordinance, Cap.116
   - Government Rent (Assessment and Collection) Ordinance, Cap.515
   - Housing Ordinance, Cap.283

20. In the exercise of its jurisdiction, the Tribunal has the same powers to grant remedies and reliefs, legal or equitable, as the Court of First Instance of the High Court.

21. There are different types of compensation cases. They are governed by different ordinances, such as the Lands Resumption Ordinance, Cap. 124\(^{12}\), the Mass Transit Railway (Land Resumption and Related Provisions) Ordinance, Cap. 276\(^{13}\) and the Roads (Works, Use and Compensation) Ordinance, Cap. 370\(^{14}\). Parties bringing proceedings under these various ordinances should observe the respective rules laid down in these ordinances as well as the respective procedural requirements laid down in the Lands Tribunal Rules, Cap. 17.

22. A party may appear and be heard personally or by counsel or a solicitor or by any other person allowed by leave of the Tribunal to appear instead of that party. An application for leave may be made in writing before the hearing or orally at the hearing.

\(^{13}\) https://www.elegislation.gov.hk/hk/cap276/en
\(^{14}\) https://www.elegislation.gov.hk/hk/cap370/en
23. Generally, trials at the Tribunal are conducted in similar manners like those civil cases at the District Court or the High Court, but can be less formal. Without prejudice to the Tribunal’s impartiality, guidance may be given to parties who are not legally represented. At the hearing, parties may give oral evidence, produce documents in support and call witnesses. After hearing evidence and submissions from both parties, the Tribunal will then make its decision.

24. A party may apply to the Registrar of the Tribunal for a witness summons to be issued. The Registrar will decide whether a witness summons is to be issued or not. Witness summons can be issued to any person requiring him to attend at a time and place to be specified in the summons to give evidence before the Tribunal, or to produce to the Tribunal any documents (particulars of which shall be stated in the summons) in his possession or control.\(^{15}\)

25. Unless the Tribunal otherwise permits, an interlocutory application shall be made in writing by filing with the Registrar an application.\(^{16}\)

26. If a respondent is not satisfied with a court order made under rule 15 of the Lands Tribunal Rules, Cap. 17 for default judgment, where no notice of opposition has been filed, he may apply to set aside the court order by taking out an *inter-partes* summons as soon as possible. Filing of the said application requires payment of the prescribed fees. The application shall be determined by the Tribunal at the hearing of the inter-parte summons.

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\(^{15}\) In order to ensure that the witness summons is served on the witness before the hearing, application for witness summons should be made at least 10 working days before the hearing.

27. If an applicant or an appellant does not appear at the time and place fixed for the hearing, the proceedings may be dismissed by the Tribunal. The applicant or the appellant has to take out an *inter-partes* summons to reinstate the proceedings within 21 days after the dismissal. Filing of the application requires payment of the prescribed fees.

28. If a party is not satisfied with the Lands Tribunal's decision, he may apply for a review pursuant to section 11A of the Lands Tribunal Ordinance, Cap. 17. The Tribunal may, within one month from the date of any decision by it, decide to review that decision and may set aside, reverse, vary or confirm the decision on such grounds as it may think sufficient. The Tribunal may review a decision on the application of any party or on its own motion, and on notice to all other parties to the proceedings.\(^{17}\)

29. Any party to the proceedings before the Tribunal may appeal to the Court of Appeal against a judgment, order or decision of the Tribunal on the ground that such judgment, order or decision is erroneous in point of law. Thus, no appeal will be entertained if it concerns with factual issues only. A party wishing to lodge an appeal must apply to the Presiding Officer or Member of the Tribunal for leave to appeal first. If the appeal is in respect of an interlocutory judgment, order or decision, the application to the Tribunal for leave to appeal must be made within 14 days from the date of the interlocutory judgment, order or decision; otherwise, the application must be made within 28 days from the date of the judgment, order or decision in respect of which leave to appeal is sought. An

\(^{17}\) If the Tribunal decides to entertain the review, a hearing date will be fixed to hear the parties before the Tribunal exercises its power of review. All the parties concerned will then be notified by the Registrar to attend the hearing accordingly. If the Tribunal decides not to review its decision, the Registrar shall give written notice of the Tribunal’s decision to the parties accordingly. The Tribunal shall not exercise its power of review in respect of a decision if the decision has already been the subject of a review or the decision is a decision setting aside, reversing, varying or confirming another decision of the Tribunal under section 11A of the Lands Tribunal Ordinance, Cap. 17; or subsequent to the commencement of proceedings by any party with a view to questioning the decision, by way of appeal or otherwise, unless such proceedings have been abandoned. An application for review shall not operate as a stay of execution of a judgment, order or decision unless the Tribunal orders otherwise.
application for leave to appeal must be made *inter partes* if the proceedings to which the judgment, order or decision relates are *inter partes*.

Where the Tribunal refuses the application, a further application for leave to appeal may be made to the Court of Appeal within 14 days from the date of refusal. When leave to appeal is granted, a notice of appeal must be served on the Tribunal and all parties to the proceedings within 7 days from the date on which leave to appeal is granted. The appellant must also produce to the Registrar of the High Court a copy of the sealed judgment or order of the Tribunal and a copy of the reasoned decision (if any) as well as 2 copies of the notice of appeal within 7 days after service of the notice of appeal.\(^{18}\)

30. After a party has obtained from the Tribunal an order for possession, recovery of arrears of rent or costs and when the other party fails to comply with the order, the successful party may apply to the Tribunal for an appropriate writ of execution. He may request the bailiff to execute the writ in order to recover possession of the premises or debt from the judgment debtor.

Kenya

31. Before the alteration of the Constitution of Kenya in 2010\(^ {19}\), land disputes were usually resolved both by formal and informal institutions. The formal institutions were Land Dispute Tribunals established under the 1990 Land Dispute Tribunal (LDT) Act\(^ {20}\), the Magistrates Courts and the High Courts while informal institutions were

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\(^{18}\) The Tribunal or the Court of Appeal may, at any time, and notwithstanding that the time for an appeal or an application for leave to appeal may have already expired, extend the time for the appeal or for applying for leave to appeal. An application for leave to appeal or an appeal shall not operate as a stay of execution of a judgment, order or decision unless the Tribunal or the Court of Appeal orders otherwise.


\(^{20}\) The 1990 Land Dispute Tribunal Act established and gave jurisdiction to LDTs in several parts of Kenya. The Act has been repealed with the adoption of the Environment and Land Court Act in 2011.
alternative dispute resolution mechanism namely committees held by elderly persons in communities. In a survey\textsuperscript{21} conducted in 2005, more people have preferred to resort to informal institutions to resolve their land cases because such mechanism was cheaper, more effective and quicker in resolving matters than the LDTs according to the complainants.

32. The Land Dispute Tribunals of Kenya had jurisdiction under section 3 of the LDT Act\textsuperscript{22} to resolve only 3 types of land disputes namely:

- the division of, or the determination of boundaries to land, including land held in common;
- a claim to occupy or work land; or
- trespass to land.

33. Also, as per section 7 of the same Act, a panel of elders coming from the communities of each party to the case would preside over the tribunals.

34. Nevertheless, the Magistrates’ Courts and the High Courts were soon found to be clogged by land cases. This was also the case for LDTs which gradually became ineffective as a result of an accumulation of pending unresolved land cases waiting for arbitration or settlement at those Tribunals. Some reasons for such failure of the LDTs were found to be corruption, delays in granting awards and the increase in complexity of land transactions in Kenya thereby causing land cases to become more complex and more difficult to resolve.

\textsuperscript{21} For the period 2000-2005, 90% of complainants have resorted to informal institutions, only 25% resorted to formal institutions and 24% availed themselves of both.

\textsuperscript{22} http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/LandDisputesTribunalsCap303A.pdf
35. To cater for such lacunae in the land dispute resolution mechanism, the Constitution of Kenya was altered in August 2010\(^\text{23}\) and its section 162(2)(b) provides that the Parliament of Kenya can establish a court which will hear and determine disputes relating to the environment and the use and occupation of, and title to, land and which will have the status of the High Court\(^\text{24}\) (one of the superior courts in the hierarchy of the judiciary of Kenya). In line with the Constitution, the Environment and Land Court (ELC) Act was passed in 2011 which establishes the ELC and provides for its jurisdiction under section 13 of the Act\(^\text{25}\).

36. Hence, by comparing the LDT with the ELC, the ELC has a wider mandate and jurisdiction in relation to land disputes while the LDT had a much limited

\(^{23}\) http://www.kenyalaw.org/lex/actview.xql?actid=Const2010
\(^{24}\) Vide Constitution of Kenya (2010), section 162, at p.C35-78
\(^{25}\) 13. Jurisdiction of the Court
(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
(b) relating to compulsory acquisition of land;
(c) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
(d) any other dispute relating to environment and land.
(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
(a) interim or permanent preservation orders including injunctions;
(b) prerogative orders;
(c) award of damages;
(d) compensation;
(e) specific performance;
(g) restitution;
(h) declaration; or
(i) costs.
jurisdiction over land disputes. The ELC has original jurisdiction in many types of land disputes such as in matters of compulsory acquisition of land by the government, in relation to public, private or community land rights, land administration and management, land titles and any kind of dispute relating to land. The ELC is also seen to have a supervisory jurisdiction since it has the power to grant prerogative orders. The Court also has the power to give interim orders.

37. Nevertheless, the ELC Act of Kenya has not per se ousted the jurisdiction of other courts to deal with land cases. In a 2012 Gazette Notice by the Chief Justice of Kenya\(^{26}\), it was declared that the Magistrate Courts shall continue to hear and determine all cases relating to the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. In the same Notice, it was declared that all succession cases under the Law of Succession Act, Cap. 160 of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts having competent jurisdiction.

38. Moreover, the ELC has the power both under the Constitution of Kenya\(^{27}\) and the ELC Act\(^{28}\) to adjudicate on land cases using Alternative Dispute Resolution (ADR) mechanisms. It has indeed been found by a study that in certain instances the ELC has applied ADR mechanisms to resolve land dispute.\(^{29}\)

\(^{26}\) [Link: http://kenyalaw.org/lj/index.php?id=839

\(^{27}\) Ibid 10, section 139(2)(c)., at p. C35-77

\(^{28}\) Ibid 11, section 20 ., at p. E11-10

\(^{29}\) AN ASSESSMENT ON THE PERFORMANCE OF THE ENVIRONMENT AND LAND COURT (2013),p. 13
39. Scotland has both a Scottish Land Court and a Scottish Lands Tribunal which is established under the 1949 Lands Tribunal Act. Nevertheless, the types of land disputes that they will deal with are different.

40. According to section 1(6) of the Scottish Land Court Act, the Land Court has jurisdiction mainly under the Crofters (Scotland) Act and the Small Landholders (Scotland) Acts to deal with farming or agricultural land disputes. Land Court does not have universal jurisdiction to deal with all matters relating to land; its field of operation is mainly Scottish farming.

41. According to Section 1 of the Lands Tribunal Act which establishes and provides jurisdiction to the Lands Tribunal for Scotland, the jurisdiction of the Tribunal is actually catered by many Acts of Parliament. Section 1 is mainly setting out a list of some of those Acts of Parliament conferring jurisdictions upon the Tribunal. Below is a list jurisdiction conferred upon the Lands Tribunal and which is derived from the Lands Tribunal Act and other statutes:

- any other question of disputed compensation under the Lands Clauses Acts, where the claim is for the injurious affection of any land (that is, compensation for the compulsory acquisition of land by authority)

- the cases conferred on the Authority under Section 84 of the Law of Property Act 1925 (which relates to the discharge and modification of restrictive covenants) (e.g. respect of espaces verts, servitudes de passage)

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30 The Scottish Land Court derives its powers from the 1993 Scottish Land Court Act
33 https://www.legislation.gov.uk/ukpga/Geo6/12-13-14/42/contents
34 Ibid Lands Tribunal Act (1949), section 1(3)(b)
35 Ibid 33., section 1(4)
- Jurisdiction to deal with disputed compensation claims under the *Land Compensation (Scotland) Act*\(^{36}\) 1973 such as for compulsory purchase of land, or compensation for depreciation caused by public works (for example, a new by-pass may benefit the public but reduce the value of property near it).

- Jurisdiction under the *Title Conditions (Scotland) Act*\(^{37}\) 2003 to enforce title conditions such as real burdens or servitudes. It can also determine questions as to validity, applicability or enforceability of title conditions. (When you sell a land, you include certain conditions in the title deed which has to be respected; e.g. servitude).

42. The Tribunal has the statutory power to act as an arbitrator\(^{38}\) to deal with any kind of land dispute\(^{39}\) provided that parties mutually agree to refer the case to it.

43. Nevertheless, neither the Court nor the Tribunal has any jurisdiction to deal with the question of ownership and heritable title to land. Most issues concerning rights on land, heritable title to land such as issues of ownership and succession, are dealt with by the ordinary courts, that is, the Sheriff Courts and the Court of Session.\(^{40}\) The Sheriff Courts have jurisdictions on division of common property\(^{41}\) and actions relating to questions of heritable right or title\(^{42}\). The Court of Session on its part has the power for the restoration into possession of personal property\(^{43}\).

\(^{36}\) 1973 *Land Compensation (Scotland) Act*, section 14

\(^{37}\) *Title Conditions (Scotland) Act* (2003), section 90

\(^{38}\) *Ibid 33*, section 1(5)


\(^{40}\) *Ibid 38*

\(^{41}\) *Sheriff Courts (Scotland) Act* (1997), section 5(3)

\(^{42}\) *Ibid 40*, section 5(4)

\(^{43}\) *Court of session Act* (1988), section 45(a) which provides that: The Court may, on application by summary petition order the restoration of possession of any real or personal property of the possession of which the petitioner may have been violently or fraudulently deprived.
44. Tunisia currently has a Land Tribunal which is known locally as the *Tribunal immobilier de Tunisie*. It has jurisdiction in 3 types of land matters namely:

- *Immatriculation foncière avec ces deux branches: facultative par les requêtes des particuliers et obligatoire par le recensement cadastral sur toute l'étendue du territoire de la République* 

- *Mise à jour des titres fonciers*  

- *Demandes de révision et de rectification des jugements*  

- *Recours contre les décisions des commissions régionales de mise à jour des titres ou des décisions du conservateur de la propriété foncière*

45. The **major task of the Tribunal Immobilier de Tunisie is the one which concerns l'immatriculation**. By doing this, the Tribunal thereby declares land boundaries as well as establishes land ownership rights and titles. It also ensures that land titles are kept updated with respect to any modifications concerning land. Nevertheless, it has been found the tribunal has been slow in delivering judgments as a result of which there are **several pending land disputes** concerning most particularly l'immatriculation and mise à jour des titres gelés. This is because there is a lack of judges and personnel.

46. As for **other types of land disputes**, they are resolved by the local courts. Possessory actions are brought to the *Justices Cantonales* of Tunisia. These *Justices Cantonales* are courts located in several regions of Tunisia and since they hear civil cases of lesser

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46 *Ibid* 22, Annex mise a jour des titres fonciers, Article 2., p.145  
47 *Ibid* 22, Article 332  
48 *Ibid* 22, p.162  
49 *Ibid* 16, p.25  
50 *Ibid* 16, p.25  
51 *Ibid* 22, Article 307, p.92 and Article 39 of the *Code de procédure civile et commerciale Tunisien*
value\(^52\). The sale of immoveable property is proceeded with at the *Tribunaux de Première Instance* of Tunisia\(^53\) which come just after the *Justices Cantonales* in the judicial hierarchy of courts of Tunisia.

Queensland

47. The Queensland Land Court\(^54\) comprises a president and other members. Unlike judges, who have life tenure, members of the Land Court are appointed for 15 year terms. Judicial registrars may also be appointed as officers of the court to perform certain functions. Hearings in the Land Court are usually presided over by a single member sitting alone. The judicial registrar may also hear and decide certain matters, though he is responsible mainly for the court’s alternative dispute resolution (ADR) processes, including preliminary conferences and court supervised mediations.

48. The Land Court operates with as little formality as possible. The strict rules of evidence don’t apply and the Land Court acts according to equity, good conscience and the substantial merits of the case. It encourages ADR and provides these services free of cost. Land Court procedures are covered by the Land Court Act 2000, the Land Court Rules 2000 and various practice directions. The Uniform Civil Procedure Rules 1999 may also apply where the Land Court Rules don’t cover the field.

49. The Land Court of Queensland hears and determines matters relating to land and natural resources. The court:

- hears appeals against land valuations for rating and rental purposes

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\(^{53}\) Article 423 of the *Code de procédure civile et commerciale Tunisien*

\(^{54}\) The Land Court may sit anywhere in Queensland. Normally a case is heard in the district where the land that is the subject of the dispute is located. Sittings are held in Brisbane and, where appropriate, rural and regional areas of Queensland.
- determines claims for compensation for the resumption of land
- makes recommendations for the grant of mining tenures and environmental authorities for resource projects
- determines compensation for mining activities and land access
- hears appeals against local government rating categories
- deals with Indigenous land and cultural heritage issues, including the grant of injunctions and approval of cultural heritage management plans.

New South Wales (NSW)

50. NSW has a specialised court named as the Land and Environment Court which is established by the Land and Environment Court Act 1979. As such, the Court has equal standing with the Supreme Court of New South Wales in the judicial hierarchy of New South Wales.\textsuperscript{55}

51. The Land and Environment Court is one which has limited jurisdiction, that is, it only decides upon those types of disputes which are statutorily vested upon it by the 1979 Land and Environment Court Act and any other Act.\textsuperscript{56} The Act has divided the jurisdiction of the Court into 8 “classes” and the term “classes” refers to the types of dispute to be resolved by the Court.\textsuperscript{57} The 8 different “classes” are listed below:
- Class 1: Environmental planning and protection appeals\textsuperscript{58}
- Class 2: Local government and miscellaneous appeals and applications\textsuperscript{59}
- Class 3: Land tenure, valuation, rating and compensation matters\textsuperscript{60}

\textsuperscript{55} Justice Peter Biscoe, \textit{LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES JURISDICTION, STRUCTURE AND CIVIL PRACTICE AND PROCEDURE (2010)}, p.1
\textsuperscript{56} Ibid 19, p.2
\textsuperscript{57} Ibid 19, p.8
\textsuperscript{58} Section 17 of the Land and Environment Court Act 1979
\textsuperscript{59} Section 18 of the Land and Environment Court Act 1979
\textsuperscript{60} Section 19 of the Land and Environment Court Act 1979
Law Reform Commission of Mauritius [LRC]
Opinion Paper about “Mechanisms for Settlement of Land Disputes”
[LRC_R&P 127, September 2018]

- **Class 4**: Environmental planning and protection and development contract civil enforcement\(^{61}\)
- **Class 5**: environmental planning and protection summary enforcement\(^{62}\)
- **Class 6**: appeals from convictions relating to environmental offences\(^{63}\)
- **Class 7**: other appeals relating to environmental offences\(^{64}\)
- **Class 8**: mining matters\(^{65}\)

52. The Court has a civil and a criminal jurisdiction. Classes 1, 2, 3, 4 and 8 represent the civil jurisdiction while classes 5 to 7 comprise the criminal jurisdiction vested on the Court. We will briefly have a look at the types of disputes to be resolved by the Court in both civil and criminal jurisdictions.

53. The civil jurisdiction includes merits review, judicial review, civil enforcement and mining and trees matters. It is important to differentiate merits review with judicial review. Judicial Review is the process by which a court exercises its supervisory jurisdiction over the decision making process of inferior courts, tribunals and other bodies while in merits review the Court stands in the shoes of the original decision-makers and re-exercises the decision making functions of the original decision maker but the rules of evidence do not apply.\(^{66}\)

\(^{61}\) Section 20 of the Land and Environment Court Act 1979
\(^{62}\) Section 21 of the Land and Environment Court Act 1979
\(^{63}\) Section 21A of the Land and Environment Court Act 1979
\(^{64}\) Section 21B of the Land and Environment Court Act 1979
\(^{65}\) Section 21C of the Land and Environment Court Act 1979
\(^{66}\) Justice Peter Bisceo, LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES JURISDICTION, STRUCTURE AND CIVIL PRACTICE AND PROCEDURE (2010), p.2
54. Moreover, the Court has the jurisdiction to grant either absolutely or on such terms and conditions as the Court thinks just, all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim. The Court also has the power to make interlocutory orders, as the Court thinks appropriate. In addition, the Land and Environment Court has the jurisdiction to hear and dispose of a matter that is ancillary or incidental to a matter that statutorily falls within its jurisdiction under the Court Act or any other Act. The Court also has the power in relation to classes 5 to 8, to order the production of evidence by summoning witnesses and examine them on oath, affirmation or declaration.

South Africa

55. In the years 1650s a large number of South Africans were displaced to the benefit of white settlers. As a result, several South Africans were dispossessed of their historical lands under the racially discriminatory laws and practices of the apartheid state. Fortunately, the 1996 Constitution of South Africa remedied to this situation and its Section 25(7) provides that “A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

56. In line with this provision, a Land Claims Court has been established in South Africa in 1996 under the Restitution of Land Rights Act which also confers jurisdiction to the
Court. The Land Claims Court deals with disputes that arise out of laws that underpin South Africa's land reform initiative, namely, restitution of land, labour tenants, security of tenure.\textsuperscript{73} The primary focus of the Land Claims Court is nevertheless to deal with land restitution or land claims cases.

57. As per Section 22(1) of the 1994 Restitution of Land Rights Act, the Court has jurisdiction:

- to determine a legal right to restitution of any right in land
- to determine or approve compensation payable in respect of land owned by or in the possession of a private person upon expropriation or acquisition of such land
- to determine the person entitled to title to land
- at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 25(7) of the Constitution or to the Restitution of Land Rights Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;
- to determine whether compensation or any other consideration received by any person at the time of any dispossession of a right in land was just and equitable;
- to determine all other matters which require to be determined in terms of the Restitution of Land Rights Act.

58. A Commission on Restitution of Land Rights working in parallel with the Court has also been established.\textsuperscript{74} The role of this Commission is to receive land claims by a person or a community, to screen all these land claims so as to investigate their validity and to

\textsuperscript{73} Maano Ramutsindela et al., Diagnostic Report on Land Reform in South Africa Land Restitution (2016),p.10
\textsuperscript{74} Section 4(1) of the Restitution of Land Rights Act 22 of 1994
identify those that qualify in terms of the Constitution and the Restitution Act. The Commission also has the power and duty to take reasonable steps to ensure that claimants are assisted in the preparation and submission of claims, to verify the rights of the claimants and their relation to those dispossessed (their ancestors as the case may be), to advise claimants of the progress of their claims at regular intervals and to attempt, upon request, to solve these claims by administrative or mediation procedures. Those disputes that could not be resolved by the Commission are then referred to the Land Claims Court. Thus, the Court deals with restitution cases that are referred to it by the Commission, but it can also entertain claims coming directly from affected land owners individually or in groups.

59. There are three possible remedies available to the dispossessed land owners if they successfully adduce evidence to prove the genuineness of their claims. Firstly, the preferred remedy is **a restoration of the claimed land and land rights**. In cases where restoration is not feasible, the claimants are **entitled to an alternative equitable remedy which is either the provision of an alternative state-owned land** or the **compensation in cash**. Other remedies may consist of including the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land or to grant any alternative relief.

60. Moreover, in this process of restitution of land, the **claims lie against the state rather than against individuals or groups**. The State of South Africa is responsible for funding

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76 Section 6(1) of the Restitution of Land Rights Act 22 of 1994
77 Section 35(1)(a) of the Restitution of Land Rights Act 22 of 1994
78 Section 35(1)(b) of the Restitution of Land Rights Act 22 of 1994
79 Section 35(1)(c) of the Restitution of Land Rights Act 22 of 1994
80 Section 35(1)(d) and Section 35(1)(e) of the Restitution of Land Rights Act 22 of 1994
the entire restitution process that is, funding of the acquisition of the claimed land and the
compensation awards delivered. Since the land claims are based upon specific historic
discriminatory disposessions only, it is clear that the restitution is a limited process
aimed at rectifying a specific set of cases which refer to historic injustices, and not all
land related claims and problems in general.\footnote{Case of Alfred Sonny and others v. The Department of Land Affairs, in the Land Claims Court of South Africa (1999), p. 12}

61. When a decision of restoration of land has been reached, either by mediation agreement
at the Commission or from a decision of the Land Claims Court, the implementation of
such a decision will necessarily involve a land transfer and payment of
compensation. Land transfer implies that land is first compulsorily purchased/acquired
or expropriated by the State from the current owners (or occupiers) of the land and then
the land is transferred in the name of the claimant provided that the current owners are
compensated. This process can be said to be in line with provisions of Section 25 of the
Constitution of South Africa which enshrines the essence that no one may be deprived of
property except by way of application of the law, and that no law may permit arbitrary
deprivation of property.\footnote{Section 25 of the Constitution of South Africa:
Section 25(2): Property may be expropriated only in terms of law of general application
(a) for a public purpose or in the public interest; and
(b) subject to compensation, the amount of which and the time and manner of payment of which have either been
agreed to by those affected or decided or approved by a court.
Section 25(3): The amount of the compensation and the time and manner of payment must be just and equitable,
reflecting an equitable balance between the public interest and the interests of those affected, having regard to all
relevant circumstances, including
(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of
the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital
improvement of the property; and (e) the purpose of the expropriation.
Section 25(4): For the purposes of this section— (a) the public interest includes the nation’s commitment to land
reform, and to reforms to bring about equitable access to all South Africa’s natural resources.}
62. Decisions of the Land Claims Court are adjudicated by a President and judges.\(^83\)

The Land Claims Court has the same status as any High Court of South Africa. The Court also has the same power as a High Court in relation to matters falling within its jurisdiction in civil matters, including the powers of a High Court in relation to any contempt of the Court. Additionally, the Court has the jurisdiction to grant interlocutory orders and the jurisdiction to decide any issue which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.\(^84\) The Court also provides legal aid in cases where a party cannot afford to pay for its legal representation.\(^85\)

63. Appeals from a judgment or order of the Land Claims Court lie at the Supreme Court of Appeal of South Africa with prior leave of the Land Claims Court or, where such leave has been refused, with the leave of the Supreme Court of Appeal.\(^86\)

64. The Court also has the power to order, at any stage during the proceedings where it becomes evident that there is any issue which might be resolved through mediation and negotiation, order the parties to the case to attempt to settle the issue through mediation and negotiation. The proceedings of the Court will be stayed pending the conclusion of the ADR mechanisms.\(^87\) Furthermore, the Court also has the power to summon witnesses to give evidence.\(^88\)

65. Lastly, the Court also deals with the 1997 Extension of Security Tenure Act and the 1996 Land Reform (Labour Tenants) Act. These two acts were enacted by parliament to

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\(^83\) Section 22(3) and 22(4) of the Restitution of Land Rights Act 22 of 1994

\(^84\) Section 22(2) of the Restitution of Land Rights Act 22 of 1994

\(^85\) Section 29(4) of the Restitution of Land Rights Act 22 of 1994

\(^86\) Section 37 of the Restitution of Land Rights Act 22 of 1994

\(^87\) Section 35A of the Restitution of Land Rights Act 22 of 1994

\(^88\) Section 28C(6) of the Restitution of Land Rights Act 22 of 1994
protect farm workers from ill treatment and illegal evictions. A land owner may initiate proceedings at the Land Claims Court for the eviction or relocation of a labour tenant.\textsuperscript{69} The Court has the power to make an eviction order against a labour tenant provided that the order is just and equitable. The Court also has the power to arbitrate on applications by labour tenants for the acquisition of ownership or occupation and usage rights in the land they are occupying.\textsuperscript{69} Primarily, the court has to ensure that the rights of labour tenants are protected and that all evictions are done within the framework of the aforementioned legislation with appropriate compensations.

66. As of March 2011, a total of 10,274 rural claims were settled roughly with 45% of the remedies consisted of restoration of land, 45% in compensation in cash, and the rest mostly through public housing projects while around 4,000 cases were outstanding.\textsuperscript{91} The 2012 progress report of the Commission shows that since 1995 a total of 79 696 land claims were lodged by the end of year 2011, and a total of 76 506 restitution claims were already settled by then. During the restitution process, several lands compulsorily acquired have been transferred into the name of individual claimants, claimant communities, and into the name of the State due to community disputes.\textsuperscript{92}

67. Nevertheless, it has been noticed that the Land Claims Commissions has received more number of claims than it had the capacity to deal with. Other problems faced are that records were not properly kept, many staffs of the Commissions were inadequately trained, and as a result of corruption, there was an inconsistent prioritization of specific land claims while valid land claims had been held back.\textsuperscript{93} The Court and the Commission

\textsuperscript{69} Section 6 and Section 8 of the LAND REFORM (LABOUR TENANTS) ACT 1996
\textsuperscript{69} Section 16 to Section 22 of the LAND REFORM (LABOUR TENANTS) ACT 1996
\textsuperscript{91} Mercedes Stickler, \textit{Brief: Land Restitution in South Africa}
\textsuperscript{93} Sunday Times, \textit{Land restitution in SA could take 700 years} (2018)
have also been criticized for many reasons. For instance, some cases still remain unresolved for long periods of time thus creating uncertainty for both the claimants and current land owners (or occupiers), there has also been a tendency to grant an easy remedy, that is, to pay compensation rather than restoring land, many claims concerning high-value conservation or agriculture land are still pending because land acquisition may face political and fiscal challenges, and those claimants who have accepted cash settlements have not been adequately compensated them for their lost property.\textsuperscript{94}

Zambia

68. A Lands Tribunal was initially established in Zambia under the 1995 Lands Act\textsuperscript{95} and it was given jurisdiction to determine state land conflicts only\textsuperscript{96}. Nevertheless, in 2010 the Lands Tribunal Act was enacted to enlarge the jurisdiction of the Lands Tribunal in relation to the types of land disputes upon which it has the statutory competency to adjudicate. Therefrom, the Tribunal has been handling both state and customary land disputes.\textsuperscript{97}

69. The enlarged jurisdiction of the Lands Tribunal is provided under section 4 of the 2010 Lands Tribunal Act and the types of land disputes it caters for are as follows:

- To inquire into, and make awards and decisions in, any dispute relating to land under the Lands Act, the Lands and Deed Registry Act, the Housing (Statutory and Improvement Areas) Act or any other laws;

\textsuperscript{94} Mercedes Stickler, Brief: Land Restitution in South Africa
\textsuperscript{95} Ibid 44, section 20(1)
\textsuperscript{96} Ibid 44, section 22 of the Act is as follows: The Tribunal shall have jurisdiction to (a) inquire into and make awards and decisions in any dispute relating to land under this Act; (b) to inquire into, and make awards and decisions relating to any dispute of compensation to be paid under this Act; (c) generally to inquire and adjudicate upon any matter affecting the land rights and obligations, under this Act, of any person or the Government; and (d) to perform such acts and carry out such duties as may be prescribed under this Act or any other written law
\textsuperscript{97} Ibid 43, p. 17
- To inquire into, and make awards or decisions in, any dispute relating to land under customary tenure;

- To inquire into, and make awards or decisions relating to, any dispute of compensation to be paid in relation to land under the Lands Act, the Lands Acquisition Act or any other law;

- To inquire into, and adjudicate upon, any matter affecting the land rights and obligations, under the Lands Act, of any person or the Government;

- To hear and determine appeals against a direction or decision of a person in authority relating to land under the Lands Act, the Lands and Deeds Registry Act, the Housing (Statutory and Improvement Areas) Act or any other law;

- To make orders for the rectification of entries made in the Lands Register;

- To make orders for the cancellation of certificates of title that it considers to have been erroneously issued or to have been obtained fraudulently, or that it otherwise considers necessary to cancel;

- To make any declaration that it considers appropriate and issue any order for the implementation of the declaration;

- Subject to the State Proceedings Act, to grant injunctive relief or any other interlocutory relief that it considers appropriate; and

- To perform such acts and carry out such functions as may be prescribed under any other written law.

70. The Lands Tribunal have a wide jurisdiction with respect to the types of land disputes it can adjudicate upon. This includes issues permitted under Acts of Parliament such as private land rights either under statutory or customary tenure, compensation to be paid upon compulsory acquisition of land by the President, interim judgments, appeals against a land decision of a public Authority or any other land disputes that may be prescribed under other Acts of Parliament.
71. Another important issue the Lands Tribunal can resolve is to order the cancellation of title certificates that have been found to have been fraudulently obtained. In addition to that, the Lands Tribunal is frequently sought to deal with matters of illegal land occupation.\textsuperscript{98}

72. The types of land disputes that frequently occur in Zambia and those which the Tribunal is often called to adjudicate upon are: illegal occupation of state land reserved for government use only, invasion of land by people who prevent legal land owners from taking possession of their land, illegal allocation of state lands by some politicians, violent land grabbing, boundary conflicts between land owners such as encroachment of land, multiple allocation of the same piece of state land, eviction of squatters by private land owners,\textsuperscript{99} inheritance disputes, ownership conflicts due to lack of land registration.\textsuperscript{100}

73. Apart from the Lands Tribunal, ordinary courts of Zambia also have jurisdictions in certain land matters. For instance, the Subordinate Courts have jurisdiction to determine matters concerning title and ownership of land provided that parties consent to it\textsuperscript{101} and matters concerning recovery of land.\textsuperscript{102}

74. Moreover, there exists another quasi-judicial tribunal in Zambia namely the Town and Country Planning tribunal. It has jurisdiction in the preparation, approval and revocation of development plans, for the control of development and subdivision of land,

\textsuperscript{98} Ibid 43, p. 18
\textsuperscript{99} Ibid 43, p. 18 to p.20
\textsuperscript{101} REPUBLIC OF ZAMBIA THE SUBORDINATE COURTS ACT, section 23.
\textsuperscript{102} Ibid 53, section 20(1)(c)
for the assessment and payment of compensation in respect of planning decisions, for the preparation, approval and revocation or modification of regional plans; and for other connected matters. Thus, this tribunal only adjudicates upon matters that concern development of land by the government.

75. If a dispute arises over customary land, it will usually be resolved by a village chief with the help of a group of elders. This traditional method of dispute resolution also has a hierarchy. If disputes cannot be resolved at lower levels by local leaders, the matter will proceed to be considered by senior and paramount chiefs. It is only when these traditional mechanisms fail that the matter is referred to the Lands Tribunal. Such conflicts are mostly about acquisition or use of the land. Hence, in Zambia and in relation to land disputes concerning customary land tenure only, an informal arbitration mechanism is first sought and only if it is unsuccessful that the case will be referred to the Lands Tribunal.

(ii) Option of a Land Court

76. Land disputes in Mauritius are not catered for in one single legislation. There is also no dedicated court or institutions which have been given the exclusive jurisdiction to resolve land disputes. Rather, land disputes are adjudicated upon by different courts depending upon the subject matter of the disputes.

103 Town and Country Planning (Amendment) Act 1997, Cap 283
104 ibid 35, p. 16
105 ibid 45
77. As can be noted from the above comparative study, some countries have opted for a Land Tribunal (Hong Kong, Zambia) and others for a Land Court (Kenya, Tunisia, Queensland, New South Wales, South Africa), and one country having both (Scotland).

78. The Commission is thus of the view that it would be appropriate to establish a Land Court, which would be a court of record, and which would be more proper than the establishment of a Land Tribunal, given the Mauritian Judicial system. The purpose is to ensure that there is a specialised court separate from other courts in the Judiciary to deal specially with land disputes.

79. Moreover, a Land Tribunal would be more informal than a Land Court, as it has been seen for the Hong Kong Lands Tribunal. Some have argued that informality of proceedings at the hearing stage can constitute a trap for those bringing or defending their cases by conveying the false impression that the tribunal’s decision-making processes can be carried out with the same lack of formality and relaxation of rules as the hearing.\textsuperscript{106} A similar situation faces appellants in tribunals who have no representation or who come with an unskilled representative. The relative simplicity with which proceedings can be initiated, the physical appearance of hearings and the approach of the tribunal to the conduct of hearings can convey the misleading impression that decision-making processes are carried out in a rather relaxed and informal manner.\textsuperscript{107} Also, those who appear before tribunals without assistance may be disadvantaged because there is an imbalance of power between the parties, and this is even more so in matters concerning land disputes.


80. Also, Tribunals are often constituted and operate as part of the administration whose decisions are normally called into question before them, and may lack independence and impartiality. They enjoy extensive discretion without proper mechanisms for accountability, leading to great variations in decision making. For all these reasons, the Commission’s preference goes to the setting up of a Land Court instead of a Land Tribunal.

81. Advantages of having a special court to deal with land matters would thus be: greater consistency of decisions and greater efficiency by reason of a developed expertise of the judicial officer of the court in the complexities of land laws. Suitable resolution to land disputes will help in curtailing conflicts and tensions.

82. The Land Court would, among other things, be able to decide upon cases which have been heard by the Truth and Justice Commission, given that those cases do not involve land which have been the subject of acquisitive prescription, thus leaving open the avenue of an action en revendication.

83. The Land Court shall have exclusive and original jurisdiction over any matter concerning land disputes except for possessory actions where District Courts have exclusive jurisdiction and for matters which arise under the Landlord and Tenant Act, and for those which are dealt with by the Environment and Land Use Appeal Tribunal.

84. Thus, the Court shall have jurisdiction to hear and determine disputes relating to:
- land use planning, title, tenure, boundaries, rates, rents, valuations;

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103 As it was pointed out in Rohiman v Dookhuyen (2015) SCJ 51: “Although the Supreme Court has under the Constitution, undoubted jurisdiction to hear and determine civil proceedings, it remains that in practice the exclusive jurisdiction to hear and determine possessory actions is vested in the District Court, pursuant to section 108 of the Courts Act, provided that the conditions as set out therein are met. This is the more so as section 111(2) of the Courts Act excludes possessory actions from the jurisdiction of the Intermediate Court.”
- compulsory acquisition of land;\textsuperscript{109}
- land administration and management; and
- public and private land and contracts, choses in action or other instruments granting any enforceable interests in land.

85. The Court shall be constituted of two to three judicial officers, and shall sit in such place and at such time as the Chief Justice may direct.

86. As it is the case for the Queensland's Land Court,\textsuperscript{110} the Land Court should be able to summon a person as a witness and may require the person to produce documents in the person's possession or power, may examine the person and punish the person for not attending under the summons or for refusing to give evidence or for failing to produce the documents.

87. The language to be used in the Court shall be English, but any person may address the Court in French or Creole.

88. The Land Court should not be precluded from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms, just like it is provided for by Section 20 of the Kenya Environment and Land Court Act.\textsuperscript{111}

\textsuperscript{109} Like it is the case for the New South Wales Land and Environment Court.
\textsuperscript{110} See Section 8 of Queensland Land Court Act 2000.
\textsuperscript{111} The Environment and Land Court of Kenya is a Superior Court just like its counterpart, the Industrial Court. Both have the same status as the High Court. The court is established under section 4 of the Environment and Land Court Act No. 19 of 2011. It has jurisdiction to hear any other dispute relating to environment and land. The jurisdiction of the court is provided under section 13 of the Act. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of any other written law relating to environment and land. The court has powers to deal with disputes relating to land.
89. As it is the case for the Kenya Environment and Land Court, the Land Court shall be able to make regulations for the better carrying out of its functions.\(^{112}\)

90. A person would be in contempt of the Land Court if the person-
(a) without lawful excuse, fails to comply with an order of the court or an undertaking given to the court; or
(b) wilfully insults a member or other court officer during the person's sitting or attendance in court, or in going to or returning from the court; or
(c) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in court; or
(d) unlawfully obstructs or assaults someone in attendance in court; or
(e) without lawful excuse, disobeys a lawful order or direction of the court at the hearing of any proceeding; or
(f) commits any other contempt of the court.

91. The Land Court must take evidence on oath, affirmation, affidavit or declaration and must record the evidence.

92. No challenge shall be allowed against a Judicial Officer except on the ground of personal interest in any cause or matter brought before him or of his being related to one of the parties in the suit by blood or marriage.

\(^{112}\) See Section 27 of the Kenya Environment and Land Court Act.
93. Similar to the Zambia Lands Tribunal,\textsuperscript{113} the Land Court should be able to order the cancellation of title certificates that have been found to have been fraudulently obtained.

94. Every order or judgment of the Land Court shall be enforced as if it were an order or judgment of a District Court and a Magistrate may make any order as to costs that a District Magistrate may make.

95. The Judicial Officer shall explain to a person against whom judgment has been given that he has a right to appeal, and the conditions under which the right may be exercised. Any person may appeal against a final judgment of the Court subject to the same conditions as appeals from the decision of a District Magistrate.

(C) CASES OF ALLEGED DISPOSSESSION OF LAND

(i) Cases raised before the Truth and Justice Commission

96. The Truth and Justice Commission found that persons have lost their land due to their inability to establish their claim or prevent people from acquiring their land through prescription and illegal means.

97. The following types of cases were heard before the Truth and Justice Commission (which received 340 claims concerning land dispossession)\textsuperscript{114} and discussed in the Mandary

\textsuperscript{113} Anthony Mushinga, \textit{Assessment of the Lands Tribunal in Resolving State Land Conflicts in Zambia}, 2017, p. 18.
Report labelled “Land Research and Mediation Commission Interim Report”,¹¹⁵ and which should fall within the ambit of the would-be Land Court when they are not time-barred:

Fraudulent contracts or agreements

98. Whereby, for example, a notary would intentionally and fraudulently draw notarial deeds forming a civil partnership (société) so that heirs put their land as “apports” in those sociétés.¹¹⁶ The land would then be sold by those sociétés.¹¹⁷

99. Whereby, also, a signature is fraudulently imitated by a third party so as to make a false contract of sale of land.

100. The legal claim available here is to enter an action in Court asking that the notarial deed be declared void (action en nullité relative pour vice de consentement) and further pray for the restitution of property.¹¹⁸


¹¹⁶ See p. 301 of the Vol. 2 of the Report of TJC.

¹¹⁷ In a case, some claimants alleged they were requested by a notary to sign a document for the creation of a société. In exchange of their parts sociales in the société, the heirs brought as “apport” a plot of land belonging to their ancestor. It is alleged by the heirs that no one explained the contents and nature of the documents to them. In a second case, two notarial deeds were drawn up by the same notary who was involved in the first case. The notarial deeds stated that the claimants have created two sociétés and have brought as apports portions of land owned by their ancestors. Then, on a later date, another notarial deed drawn up by the same notary stipulated that one of the two sociétés created, sold part of the land to another company. It is then alleged by the claimants that they were not aware of the creation of any sociétés.

¹¹⁸ This action is prescribed for 5 years under Art 1304 of the Civ which start to run as from the date the claimants had knowledge of the vice de consentement. This is confirmed by CHATOORY O & ANOR v. CHATOORY H. (2005) SCJ 212, p.6-p.7, where the court stated that the prescriptive period imposed by Art 1304 should be read in
illegal sales of land

101. Whereby people are dispossessed of their lands through the illegal sale of the land by a third party having no legal title to the land. In some cases, after the lands have been illegally sold for the first time, multiple sales have continued to occur since then.

102. The difference between this type of dispossession and dispossession by illegal contracts or agreements, is that in the former, the applicant is not party to the illegal contract of sale while in the latter, the applicant has been fraudulently made party to the convention.\textsuperscript{119}

103. In this type of dispossession, the legal issue that arises is the fact that the seller entered into a contact of sale to sell immovable property not belonging to him. The legal remedy statutorily available is a Court case asking that the deed of sale be declared void (action en nullité de la vente de la chose d'autrui)\textsuperscript{120} and further pray for a restitution of property. But this action en nullité de la vente de la chose d'autrui is one which can only be entered by either parties to the contract and not the véritable propriétaire who can only avail himself of an action en revendication to claim his ownership rights.\textsuperscript{121}

\textsuperscript{119} In order to do the sale, it has been often been noticed that a third party having no legal title to the land will fraudulently draw up a false document (survey report or deed under private signatures) to declare that he is the owner of the land and sell the land afterwards. In some cases, it has been also been observed that false affidavits of succession have been drawn up by third parties to apprehend and dispossess people of their ancestors' land.

\textsuperscript{120} Article 1599 du Com: La vente de la chose d'autrui est nulle: elle peut donner lieu des dommages-intérêts lorsque l'acheteur a ignoré que la chose fût à autrui.

\textsuperscript{121} GHURBURREN PRABHAVATEE v GHURBURREN RENUKA & ORS 2007 SCJ 269, p.11: L'interdiction faite au contractant, dans tous les sens du mot, d' invoquer une nullité relative, ne laisse aucune espoir pour les tiers: à plus forte raison, cette faculté leur est-elle refusée. Pourtant, certains d'entre eux peuvent avoir un intérêt légitime à faire valoir. Il faut alors qu'ils empruntent une autre voie. Le cas le plus caractéristique, à cet égard, est celui du vrai propriétaire par rapport à la vente de la chose d'autrui. Il ne peut pas invoquer la nullité de l'article 1599 du
Acquisitive Prescription

104. According to the doctrine, "Le droit d’invoquer la prescription appartient au possesseur et à ses ayants cause à titre particulier et universel (Reg. 5 mai 1851, DP 1851, 1. 261). Toute personne, physique ou morale, de droit privé comme de droit public, peut opposer la prescription (C. civ., anc. art. 2227; Reg. 16 déc. 1910, DP 1912, 1. 214 : Reg. 18 nov. 1913, S. 1914, 1. 338). Dans l’hypothèse où le possesseur néglige de le faire, on reconnaît également aux créanciers (C. civ., art. 1166) ou à toute autre personne ayant intérêt à l’usucapion, le droit de la déclencher".\footnote{Benoit CRIMONPREZ, Prescription acquisitive, Répertoire de droit civil, Dalloz, Juin 2016, no. 144.}

105. In cases heard before the Truth and Justice Commission, the whole or part of the land owned by claimants’ ancestors have been prescribed by third parties some of whom eventually sold or intend to sell the land. In other cases, it has been seen that land has been prescribed, sold, and prescribed again for multiple times as a result of which there is an overlapping of title deeds.

106. On one hand there can be third parties (or illegal occupiers) who acquire ownership of land through prescription acquisitive trentenaire. On the other hand, the purchasers of the land (irrespective of whether the land was prescribed beforehand or whether there has been a fraudulent sale of the land) may as well benefit from an acquisitive prescription of 10 or 20 years provided that they fulfill all the prerequisites of Article 2229 of the Ccm. The title of these possesseurs will usually be an affidavit of prescription duly transcribed.\footnote{Given that « Toutefois, bien que l’usucapion confère un titre juridique au possesseur, elle ne lui offre pas de titre matériel. Il n’a toujours pas d’instrumentum et l’acquisition de la propriété n’est pas enregistrée à la publicité}
107. The first requirement is that the conditions of Art 2229 of the Ccm\textsuperscript{124} should be fulfilled, that is the possession should be one which is continue et non interrompue, paisible, publique, non-équivoque, et à titre de propriétaire. Such possession must also show “un caractère apparent, manifesté par les signes matériels extérieurs tels qu’une construction, un mur bâti servant de clôture, des plantations”. The second and the most important requirement is the expiration of a certain period of time. Such a time period is 30 years when the possesseur (or occupier) is of bad faith\textsuperscript{125} (Article 2261 of the Ccm). The time period is 10 or 20 years when the possesseur is of good faith and has acquired the land through a “juste titre” (Article 2263 of the Ccm)\textsuperscript{126}.

108. When there has been “prescription acquisitive trentenaire”, the claimant may not enter an action en revendication,\textsuperscript{127} which is a type of action réelle. According to article 2269 of the Civil Code: “Les dispositions de l’article 2268 ne s’appliquent pas à l’action en revendication intentée par le propriétaire dépossédé de son immeuble. Cette action peut être exercée tant que le défendeur ne justifie pas être lui-même devenu propriétaire de l’immeuble revendiqué par l’effet de la prescription acquisitive.” Thus, if the défendeur has already prescribed, the action en revendication is no more opened to the

\textsuperscript{124} Article 2229 of the Ccm: « Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire. Pour prescrire en matière immobilière, la possession doit, en outre, présenter un caractère apparent, manifesté par des signes matériels extérieurs, tels qu’une construction, un mur bâti servant de clôture, des plantations. »

\textsuperscript{125} As “la loi ne réclame pas, pour usurper, la bonne foi du possesseur” (Benoît GRIMONPREZ, op. cit. no. 11).

\textsuperscript{126} Article 2263 of the Ccm: « Celui qui acquiert de bonne foi et par juste titre un immeuble, en prescrit la propriété par dix ans, si le véritable propriétaire habite à Maurice et par vingt ans, s’il est domicilié hors de Maurice. »

\textsuperscript{127} « L’action en revendication (Rei vindicata, réclamation de la chose) protège le droit de propriété : c’est l’action en justice qui permet au propriétaire de faire reconnaître et sanctionner son droit » (CARBONNIER, t. 3, 16e éd., 1995, no 206).
claimant, as it has been rightly pointed out in NANETTE J.M. F. & ORS v MRS N. D. MUTHOORA [1997 SCJ 305], where it was said that “Plaintiff argued that the Respondent had taken a long time to vindicate her rights. This is certainly immaterial, for an action en revendication of immoveable property is, in virtue of article 2269 of the Civil Code, imprescriptible. The only hurdle which the owner by title may encounter is that the land had been prescribed with all the requisites of article 2229 of the Civil Code”.

109. When it is said that the action en revendication is imprescriptible, what is meant is that «dans la mesure où la revendication sanctionne le droit de propriété qui est perpétuel, elle ne peut être que perpétuelle, imprescriptible (...). La propriété ne s’étêignant pas par le non-usage, l’action en revendication n’est pas susceptible de prescription extinctive. Ainsi, le propriétaire victime d’un empiètement sur sa propriété peut exercer l’action en suppression de l’ouvrage trente ans après sa construction ». But « L’action en revendication n’est efficace que lorsqu’elle est exercée avant l’accomplissement de la prescription acquisitive au profit du possesseur, c’est-à-dire, avant le délai de dix ou vingt ans si ce dernier est de bonne foi, ou de trente ans s’il est de mauvaise foi. Après l’écoulement de ces délais, l’action en revendication ne peut triompher de l’usucapion, et le propriétaire aura perdu son droit. »128

False affidavit of prescription

110. Whereby dispossession by acquisitive prescription is also done through the swearing of false affidavits of prescription by people.129 That is, some people, without fulfilling all the requisites of acquisitive prescription, swear and cause to transcribe false affidavits of prescription and thus end up having a legal title to a plot of land.

128 Jamel DJOUDI, Revendication, Répertoire de droit civil, Dalloz, avril 2015, nos 24 et 25.
111. The civil claim that is provided by the Code Civil Mauricien is an action en revendication. This type of action « s’avère naturellement une action pétitoire : elle porte sur le fond du droit et n’appartient qu’au titulaire du droit de propriété. Elle se distingue ainsi des actions possessoires dont l’objet est de protéger le possesseur de bonne ou de mauvaise foi contre les troubles apportés à sa possession. Ces actions ne permettent pas la reconnaissance ou la sanction d’un droit de propriété, mais tout simplement de faire cesser les troubles, en somme, de protéger une simple situation juridique de fait et non pas le droit lui-même ».  

112. The action en revendication « n’a d’intérêt que lorsque le bien réclamé est entre les mains d’un possesseur de bonne ou de mauvaise foi. Elle est intentée par le véritable propriétaire, venus dominus, contre un possesseur pour obtenir la restitution du bien en faisant tomber la présomption de propriété tirée de la possession. »  

113. The action en revendication is here possible because the defendant would not have fulfilled all the conditions to be able to acquire the land by prescription.

Illegal occupation of Land

1. The Truth and Justice Commission also found out that dispossession has also taken place by way of illegal occupation of land by third parties with no legal title and sometimes with false title. These illegal squatters are planters, families, and sugar estates. In some

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110 Jamel DJOUDI, op. cit., no. 11.
111 Jamel DJOUDI, op. cit., no. 22.
cases of illegal occupation by sugar estates, it has been noticed that there is confusion as to the location of the land in dispute.\textsuperscript{132}

114. The other cases which were heard before the Truth and Justice Commission concerned, \textit{inter alia}, encroachment of Land\textsuperscript{133} and exclusive use of undivided land by one or more co-owners.\textsuperscript{134}

115. Here again, an \textit{action en revendication} would be possible, as such an action is "imprescriptible".

(ii) Proposal for Setting up of a Special Fund

116. The Commission is of the opinion that a "Special Fund" could be set up which would be dedicated to assist those who claim to have been dispossessed of their land and who have deponed before the Truth and Justice Commission (and where an \textit{action en revendication} would still be possible given that no \textit{prescription acquisitive} has taken place, as provided for by article 2269, al. 2 of the CCM) allowing them to make the necessary research and retain services of law practitioners to help them in that task and to plead in court on their behalf, including up to the Privy Council if need be.

117. The administration and control of the affairs of the Special Fund shall be governed in accordance with \textbf{Section 9 of the Finance and Audit Act}.\textsuperscript{135}

\textsuperscript{132} In practice, the legal remedy that is usually sought against illegal occupiers is a \textit{Writ Habere Facias Possessionem} application before the judge in chambers asking the illegal occupiers to quit leave and vacate the land. An \textit{action en revendication} can also be sought against illegal occupiers as it was done in JOYE BHAYE CHAND v JEETUN GHUNSYAM (2010) SCI 305. In this case, the Court mentioned that the owner of the land (in this case it was an owner by prescription) is not precluded from entering an \textit{action en revendication} against illegal occupiers and that in such an action, it is the plaintiff who bears the burden of proving his ownership.

\textsuperscript{133} See pp. 204-206 of Vol. 2 of the Report of the Truth and Justice Commission.

CONCLUSION & RECOMMENDATIONS

118. Land dispossession takes place mostly through fraudulent contracts or agreements, illegal sales of lands, false affidavits of succession, illegal occupation of land by third parties.

119. The clogging of cases in our courts is a persistent problem and land disputes cases are no exceptions. The Master and Registrar of the Supreme Court of Mauritius has stated that our judiciary welcomes the idea of setting up a dedicated land tribunal dealing with land disputes including cases of compulsory acquisition of land by the government in order to avoid clogging of our Courts.\(^\text{136}\) As has been said, the Commission is of the opinion that a Land Court might be more appropriate than a Land Tribunal. Land disputes are distinctive in that they comprise both technical matters and complex issues in the management and administration of land.

120. This is why the Law Reform Commission recommends the establishment of a Land Court which would exclusively hear cases of land disputes, to the exception of possessory actions heard by District Courts and matters which arise under the Landlord and Tenant Act, and those that fall under the Environment and Land Use Appeal Tribunal, just like the Environment and Land Court of Kenya has not \textit{per se} ousted the

\(^\text{133}\) "9. Special Funds
(1) No proposal for the creation of a new Special Fund shall be made save in exceptional circumstances and with the prior approval of the Minister.
(1A) Every Special Fund shall, if it is so provided, be administered in the manner specified in the enactment or the instrument creating it.
(2) (a) Where there is no such provision in the enactment or instrument creating a Special Fund, the Minister may provide for its administration.
(b) Except where such provision is contained in an enactment, the Minister may, if in his opinion further and better provision should be made for the administration of a Special Fund, provide for the better administration of the Fund.
(3) (a) Subject to this section and to any other enactment, money standing to the credit of a Special Fund may, with the Minister’s approval, be invested with a bank, financial institution, fund, or in such securities, as may be approved by the Minister.
(b) Any interest or dividend received in respect of a Special Fund shall accrue to the Fund.”

\(^\text{134}\) Sixth National Assembly Parliamentary Debates (Hansard) (unrevised) First Session (21 November 2017), p.83

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jurisdiction of other courts to deal with land cases.\textsuperscript{137} Furthermore, the Commission is in favour of setting up a "Special fund" in order to assist those who claim to have been dispossessed of their land and who have been heard by the Truth and Justice Commission. We also recommend that those who have been dispossessed of their Land and that such has been recognized by the Land Court shall not pay the taxes which have been incurred on the said Land since the dispossession.

\section*{SUMMARY OF RECOMMENDATIONS}

121. The main recommendations may be summarized as follows:

(i) That could be established a Land Court that should have original jurisdiction to hear all disputes regarding Land except those conferred to the District Court concerning possessory actions\textsuperscript{138} and matters falling under the Landlord and Tenant Act, as well as matters which are of the resort of the ELAT;\textsuperscript{139}

(ii) That could be established a "Special Fund" which would be dedicated to helping those who claim to be have been unlawfully dispossessed of their lands and who have deponed before the Truth and Justice Commission.

\begin{flushleft}
\textsuperscript{137} In a 2012 Gazette Notice by the Chief Justice of Kenya (http://kenyalaw.org/kl/index.php?id=839), it was declared that the Magistrate Courts shall continue to hear and determine all cases relating to the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. In the same Notice, it was declared that all succession cases under the Law of Succession Act, Cap. 160 of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts having competent jurisdiction.

\textsuperscript{138} In Tunisia also, the dedicated Land Court, known as the \textit{Tribunal Immobiler de Tunisie}, does not have competence to hear possessory actions. Indeed, Possessory actions are brought to the \textit{Justices Cantonales} of Tunisia. These \textit{Justices Cantonales} are courts located in several regions of Tunisia and they hear civil cases of lesser value.

\textsuperscript{139} See Section 32 of the Landlord and Tenant Act.
\end{flushleft}
ANNEX

KENYA ENVIRONMENT AND LAND COURT ACT

NO. 19 OF 2011
Revised Edition 2015 [2012]
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[Rev. 2015]
Environment and Land Court
No. 19 of 2011
E11 - 3 [Issue 3]

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ENVIRONMENT AND LAND COURT ACT
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Environment and Land Court
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NO. 19 OF 2011
ENVIRONMENT AND LAND COURT ACT
[Date of assent: 27th August, 2011.]
[Date of commencement: 30th August, 2011.]
An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes
PART I – PRELIMINARY
1. Short title
This Act may be cited as the Environment and Land Court Act, 2011.
2. Interpretation
In this Act, unless the context otherwise requires—
“Chief Justice” means the Chief Justice appointed under Article 166 of the Constitution;
“Chief Registrar” means the person holding the office of Chief Registrar established under Article 161(2) of the Constitution;
“Court” means the Environment and Land Court established under section
pursuant to Article 162(2)(b);

“environment” shall have the meaning assigned to it under the Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999);

“Judge” means a person appointed in accordance with the provisions of Article 166(1)(b) of the Constitution;

“land” has the same meaning assigned to it by Article 260 of the Constitution;

“natural resources” has the same meaning assigned to it under Article 260 of the Constitution;

“Principal Judge” Deleted by Act No. 12 of 2012, Sch.;

“Register” means the register where all pleadings and supporting documents and all orders and decisions of the Court are kept;

“Registrar” means the Registrar of the Environment and Land Court appointed under section 9;

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“rules” means the rules made under section 24.

[Act No. 12 of 2012, Sch.]

3. **Overriding objective**

(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.

(2) The Court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).

(3) The parties and their duly authorised representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.
PART II – ESTABLISHMENT AND CONSTITUTION OF THE COURT

4. Establishment of the Court

(1) There is established the Environment and Land Court.

(2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya.

[Act No. 12 of 2012, Sch.]

5. Composition of the Court

The Court shall consist of the Presiding Judge and such number of Judges as may be determined by the Judicial Service Commission from time to time.

[Act No. 12 of 2012, Sch.]

6. Presiding Judge

(1) The Presiding Judge shall be elected in accordance with Article 165(2) of the Constitution.

(2) The Presiding Judge shall hold office for a non-renewable term of five years.

(3) The Presiding Judge shall have supervisory powers over the Court and shall report to the Chief Justice.

(4) In the absence of the Presiding Judge or in the event of a vacancy in the office of the Presiding Judge, the judges of the Court may elect any other Judge of the Court to exercise the functions of the Presiding Judge.

[Act No. 12 of 2012, Sch.]

7. Qualifications of and appointment of Judges of the Court

(1) A person shall be qualified for appointment as Judge of the Court if the person—
   (a) possesses the qualifications specified under Article 166(2) of the Constitution; and
   (b) has at least ten years’ experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.

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(2) Deleted by Act No. 12 of 2012, Sch.

(3) The Chief Justice may, on recommendation of the Judicial Service Commission, transfer a judge who meets the qualifications set out at sub-section

(1) to serve in the court.

[Act No. 12 of 2012, Sch, Act No. 25 of 2015, Sch.]

8. Tenure of office of Judge of the Court

A Judge of the Court shall hold office until the Judge—

(a) retires from office in accordance with Article 167(1) of the Constitution;
(b) resigns from office in accordance with Article 167(5) of the Constitution; or
(c) is removed from office in accordance with Article 168 of the Constitution.
(d) is transferred from the Court to the High Court or other court with the status of the High Court.

9. Registrar of the Court

(1) There shall be a Registrar of the Court appointed by the Judicial Service Commission under section 20 of the Judicial Service Act, 2011.

(2) Any administrative function of the Registrar may in the Registrar’s absence, be performed by any member of staff of the Court authorized by the Judicial Service Commission.

[Act No. 12 of 2012, Sch.]

10. Qualification for appointment of the Registrar of the Court

A person shall not be qualified for appointment as Registrar unless such person —

(a) is an advocate of the High Court of Kenya, and has, since qualification —
(i) become eligible for appointment as a Judge of the High Court;
(ii) served for at least ten years as a professionally qualified magistrate; or
(iii) attained at least ten years’ experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
(iv) held the qualifications specified in paragraphs (i) to (iii) for a period amounting, in the aggregate, to ten years; and
(b) has demonstrated competence in the performance of administrative duties for not less than three years.
[Act No. 12 of 2012, Sch.]

11. Functions of the Registrar of the Court

(1) The Registrar shall perform the duties assigned to the Registrar under this Act and such other duties as the Chief Registrar may direct, and in particular be responsible for—
(a) the establishment and maintenance of the Registry of the Court;

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(b) the acceptance, transmission, service and custody of documents in accordance with the Rules;
(c) facilitating the enforcement of decisions of the Court;
(d) certifying that any order, direction or decision is an order, direction or decision of the Court, the Chief justice or a Judge, as the case may be;
(e) the maintenance of the Register of the Court;
(f) causing to be kept records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct;
(g) managing and supervising the staff of the Court;
(h) the day to day administration of the Court;
(i) managing the library of the Court;
(j) facilitating access to judgments and records of the Court;
(k) undertaking any other duties assigned by Chief Registrar.

(2) In relation to the proceedings before the Court, the Registrar may consider and dispose of procedural or administrative matters in accordance with the Rules or on the direction of the Presiding Judge in charge.

[Act No. 12 of 2012, Sch.]

12. Review of the Registrar’s decision

(1) Any person aggrieved by a decision of the Registrar on matters relating to judicial functions of the Court may apply for review by a Judge of the Court in accordance with the Rules.

(2) The Judge may confirm, modify or reverse the decision of the Registrar referred to in subsection (1).

PART III – JURISDICTION OF THE COURT

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

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(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

[Act No. 12 of 2012, Sch.]

14. Enforcement of Court Orders

A judgment, award, order or decree of the Court shall be enforceable in accordance with the Civil Procedure Rules.

[Act No. 12 of 2012, Sch.]
15. The seal of the Court

The seal of the Court shall be such device as may be determined by the Court and shall be kept in the custody of the Chief Registrar.

[Act No. 12 of 2012, Sch.]

16. Appeals

Appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.

16A. Appeals from subordinate

(1) All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

[Act. No. 25 of 2015, Sch.]

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PART IV − PROCEEDINGS OF THE COURT

17. Deleted by Act No. 12 of 2012, Sch.

18. Guiding principles

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—
(a) the principles of sustainable development, including—
(i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
(ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
(iii) the principle of international co-operation in the management of environmental resources shared by two or more states;
(iv) the principles of intergenerational and intragenerational equity;
(v) the polluter-pays principle; and
(vi) the pre-cautionary principle;
(b) the principles of land policy under Article 60(1) of the Constitution;
(c) the principles of judicial authority under Article 159 of the Constitution;
(d) the national values and principles of governance under Article 10(2) of the Constitution; and
(e) the values and principles of public service under Article 232(1) of the Constitution.

19. Procedure and powers of the Court
(1) In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.
(2) The Court shall be bound by the procedure laid down by the Civil Procedure Act.
(3) *Deleted by Act No. 12 of 2012, Sch.*
(4) *Deleted by Act No. 12 of 2012, Sch.*

20. Alternative dispute resolution
(1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties,
any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

(2) Where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

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21. Quorum of the Court
(1) The Court shall be properly constituted for the purposes of its proceedings under this Act by a single judge.

(2) Notwithstanding subsection (1), any matter certified by the Court as raising a substantial question of law
(a) under Article 165(3)(b) or (d) of the Constitution; or
(b) concerning impact on the environment and land,
shall be heard by an uneven number of judges, as determined by the Chief Justice.

[Act No. 12 of 2012, Sch.]

22. Representation before the Court
A party to the proceedings may act in person or be represented by a duly authorised representative.

23. Language of the Court
(1) The language of the Court shall be English.

(2) In all appropriate cases, the Court shall facilitate the use by parties of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.
(3) Where it is expedient and appropriate to do so, the Court may direct that proceeding be conducted and appearances be made through electronic means of communication, including tele-conferencing, video-conferences or other modes of electronic communication.

[Act No. 12 of 2012, Sch.]

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

(a) under Article 165(3)(b) or (d) of the Constitution; or

(b) concerning impact on the environment and land.

24. Rules

(1) The Chief Justice shall make rules to regulate the practice and procedure of the Court.

(2) The Chief Justice shall make rules to regulate the practice and procedure, in tribunals and subordinate courts, on matters relating to land and environment.

(3) The Chief Justice shall in consultation with the Court make rules for the determination of admissibility by the Court of proceedings pending before any court or local tribunal.

(4) Deleted by Act No. 12 of 2012, Sch.

[Act No. 12 of 2012, Sch.]

PART V – MISCELLANEOUS PROVISIONS


26. Sitting of the Court

(1) The Court shall ensure reasonable and equitable access to its services in all Counties.

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(2) A sitting of the Court may be held at such places and at such times, as the Court may
decem necessary for the expedient and proper discharge of its functions under this Act.
(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside
over cases involving environment and land matters of any area of the country.
(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-
section (3) shall have jurisdiction and power to handle ----
(a) disputes relating to offences defined in any Act of Parliament dealing with
environment and land; and
(b) matters of civil nature involving occupation, title to land, provided that the value of
the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' 
Courts Act.
[Act No. 12 of 2012, Sch, Act No. 25 of 2015, Sch.]
(4) Appeals on matters from the designated magistrate’s courts shall lie with the
Environment and Land Court.
[Act No. 12 of 2012, Sch, Act No. 25 of 2015, Sch, Act No. 26 of 2015, s. 25.]
27. Regulations
The Court may make regulations for the better carrying out of its functions under this
Act.
29. Offences
Any person who refuses, fails or neglects to obey an order or direction of the Court given
under this Act, commits an offence, and shall, on conviction, be liable to a fine not
exceeding twenty million shillings or to imprisonment for a term not exceeding two
years, or to both.
[Act No. 12 of 2012, Sch.]
30. Transitional provisions
(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

31. Repeal
The Land Disputes Tribunal Act (No.18 of 1990) is repealed.