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A COMPARATIVE ANALYSIS ON CONSTITUTIONAL SUPREMACY VIS-A-VIS THE PROTECTION OF PROPERTY RIGHTS BETWEEN KENYA and TANZANIA

By

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Abstract

Protection of property rights is a cornerstone of a country's economic development, social stability and bedrock of rule of law. In the contemporary world, property rights have expanded meaning beyond tangible assets to include intangible objects such as intellectual property and environmental resources. A country's effective legal system should be able to foster innovation, investment, and economic growth by providing individuals and businesses with security that ensure proper utilization of the property in the resources. Technological advancements, including block chain and artificial intelligence offers an inventive mechanisms for enhancing transparency and trust in property rights protection. Therefore countries have enshrined protection of their properties in their grand norm as to provide strong protection as no law that can contravenes with the constitution.

A constitution is the supreme law in any liberal democratic state, it plays a vital role in the protection of property rights of citizens. In Kenya and Tanzania, the constitution serves as a bedrock and foundation through which all legal formalities and frameworks that safeguard and protect property rights and ownership adhere to. This paper seeks to explores the interplay that exist between the constitutional supremacy and property rights protection in both two countries in the East African block, analyzing how the respective constitution protects individual property rights and how supreme the constitutions are in protecting the property rights.

This paper analyzes the effectiveness of both two Countries constitutional supremacy in protecting property rights, it highlights constitutional provisions, land mark cases and the dispute between individuals' ownership and the government. Both countries offer constitutional guarantees, however both having differences in the models of protection in both land, citizenship and intellectual properties in relation to compensation and impact of government policies on such properties.

Key Words: *Constitution,Constitutional Supremacy, Rights to property, property rights and protection of property Rights*

Introduction

This paper underscores the importance of constitutional protection of property rights in Tanzania in relation to how the constitution of Kenya protects citizens properties. Therefore, this paper discusses various concepts including; Constitution, Constitutional supremacy, Rights to property, property Rights and Protection of property rights. The principle of constitutional supremacy is a pivotal role in shaping the legal land scope of property rights in Tanzania. However, the manner in which the rights of property are protected and safeguarded and enforced is influenced by the principle of constitutional supremacy. The ideology the constitutional ids the supreme law of any democratic state and other law and action of the government must not contravene with the constitution.

In Kenya and Tanzania, the doctrine of constitutional supremacy is a pivotal role in shaping the legal regime and landscape of property rights. While each country surrounding this study recognizes the concept of property rights, their legal regime and constitutional framework exhibits a notable

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difference in their protection of property rights are influenced by the whole issue of constitutional supremacy over the ownership of property. This discussion compares how the principles of constitutional supremacy influence the protection of property rights in the two East African countries and thus examining the scope of legal protections, the role of judiciary and the challenges faced in ensuring that the right to property are upheld in the midst broader states interests such as Constitutional reforms, land reforms and public interests.

A Snapshot of the keys words in constitutional supremacy on protection of property rights

CONSTITUTION

A constitution is a foundational legal document with established principle, rules and the framework of government outlining the powers and responsibilities of various branches, and protects the rights and freedoms of citizens.[1] The constitution of United Republic of Tanzania of 1977 serves as the grand norm governing both main land and Zanzibar.[2]It defines the structures of government, the distribution of power among its organs, and the rights and responsibilities of citizens in the state. However, the Tanzania constitution has undergone various amendments that have accommodated the changing political and social landscape in the country in aligning with the Community of nation in the globe. Comparing this framework between Kenya and Tanzania the constitutional provisions theoretically guarantee property rights, challenges arise in practice. In land matters there are various issues emanating from government such as forced eviction or deprivation, weak enforcement of land laws and government policies in all property matters. The states power of eminent domain, though constitutionally backed up is contagious especially in property ownership.[3]Therefore, the study examines the supremacy of the constitution in the protection of property rights in Tanzania and Kenya.

CONSTITUTIONAL SUPREMACY

According to the doctrine of the supremacy of the constitution, a liberal democratic state's constitution is the highest governing body that has the final say over legal matters in a particular state[4]. A key tenet of democracy in many nations, the notion of the supremacy of the constitution ensures that the government operates within the bounds set forth in the document and acts as a check on its power. However, it can also be deduced that the theory of constitutional supremacy is frequently created and ingrained in the structure of a liberal democratic state in order to protect the integrity and importance of preserving the constitution.[5]

In this regard taking a case study of Republic of Kenyan Constitution states that it is the supreme law of the land which binds all persons and state organs at all levels of the government.[6]But the Kenyan Constitution goes on to highlight its supremacy, stating that any law including customary law that conflicts with the constitution is null and void to the extent of the disagreement and that any act or omission that violates the constitution is unconstitutional.[7] In this stance, it connotes that if there's a conflict between the constitution and any other law the constitution shall prevail and the other law or action must yield to it. Supremacy of the constitution is clearly established under article 64(5) which states that any law that is inconsistent with the constitution shall be deemed void. According to the doctrine of supremacy of the constitution, it connotates that any law, policy, or action by the government which contravenes with the constitution they are null and void and thus supremacy of the constitution ensures that the legislature, executive and judiciary operates within the framework established within the constitution hence making the constitution supreme

RIGHTS TO PROPERTIES

This simply connotes the legal entitlement and protections that individuals or an entity have over the property and these properties can either are tangible or intangible. These rights are very essential for an individual security.[8] Economic activity, and societal stability since they make a citizen or citizens to own, use, and dispose properties. Property rights are very significant and have various characteristics that distinguishes ownership as the right to ownership is distinguished by the right to use the property as one wish to.[9] Right to enjoy the benefits such as an income resulting from such property, transfer right or right to dispose the property through sale, gift, and inheritance or by lease. The right to exclude all others and thus preventing others from interfering with the property without the permission of the owner. Right to property is very vital as they ensure economic prosperity, social security and individual freedoms. Rights to ownership of property are the pillars and cornerstone for a functioning society that enables citizens and growth of businesses, innovation and thriving while maintaining a sense of stability and security to the properties.

PROPERTY RIGHTS

Property refers an assortment of rights that the government guarantees and defends. It encompasses not just ownership

[1]*ALDER J., General Principles of Constitutional Law and Administrative Law, 4th Edn, Palgrave Macmillan, New York, 2002 p. 8*

[2]*PALMER J, and PALMER S, Constitutional Rights of Prisoners, 7thEdtnPrinceton University Press, 2010, p. 20*

[3] *Shivji, Issa G., et al., (eds.) Constutional and Legal System of Tanzania: A civics Source Book, Mkuki na Nyota Publishers, Dar es Salaam, 2004, P. 21*

[4]*ARKS H., Beyond the Constitution, Princeton University Press., 3rd Edn.1990 p. 4*

[5] *ALDER J., General Principles of Constitutional Law and Administrative Law, 4th Edn, Palgrave Macmillan, New York, 2002 p. 8*

[6] *Article 2 (1) Kenyan Constitution of 2010*

[7] *Article 2 (4)Kenyan Constitution of 2010*

[8]*Gregory S., Ed., Community and Property. New York: New York, Oxford University Pres, 2010 p.26*

[9] *Op.Cit*

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and possession but also the ability to use and enjoy property for legitimate purposes.[10] According to John Locke Property is anything of value[11].Due to the globalization and development of science and technology a property is a system ofthe relationship not a thing per see.[12]Property rights are the legal recognized relationship that individuals have with each other in respect of things or objects.[13]

Property right deals with ownership of things or objects and its scope-contend that property right is the relationship which exists between individuals in relation to thing or an object.[14]The foundation of property law and property rights has been contributed to by a number of academics. A property is a natural right, which means that a property is the foundation of individual freedom and security on earth, according to John Lock, who is regarded as the originator of property rights. These rights are intrinsic to every human being and are not obtained from the government or any one person. Rather, they are derived from God and are therefore natural.[15] According to Locke, God gave all people the abundant nature of the planet and that each individual is a property in themselves as well as in the labor of their own bodies and hands.

PROTECTION OF PROPERTY RIGHTS

Protection of property rights in any liberal democratic state refers to the legal mechanisms, policies, and systems that ensure individual entities have control over their property and can enjoy their property with exclusive of all others. Property rights very fundamental to economic and social systems as they act as a cornerstone for an economy, investment, trade and individual security. There are two categories of property which include the tangible properties like Land and intangible properties such as intellectual properties. For the proper protection of property rights there are fundamental elements that are very vital for the well being of ownership of such properties such as legal framework, enforcement, private ownership, government role, intellectual property and Economic importance. All these elements correlate in the whole concept of protection of property rights in any democratic state.

Legal frameworks are established by the government to define ownership, shows the process of transfer and use of property. These laws make it possible for owners to use, sell, and lease their property in a more legal manner. But however, for the property rights to be meaningful there must be an established mechanism for effective enforcement in protecting individual properties of citizens. In this sense, courts, government agencies

play a vital role in resolving any disputes arising in property rights and defining how private individual rights to ownership of property is guaranteed and protected.[16]

The government has a role in protecting property rights of its citizens and ensuring their rights are secured through a strong protection. However, the government has an authority to limit property rights through zoning of its laws, taxation and taking of property rights for public interest or purpose. Property rights protection is of paramount importance ad property are used to secure money for economic development such as investment, innovation and efficient resource use as citizens are very confident of not losing their assets in an arbitrary manner.[17] Therefore, countries with stronger protection for property rights eventually attracts more investors as their investments will experience more economic growth compared to those of weaker property protection.

COMPARATIVE ANALYSIS OF THE PROTECTION OF PROPERTY RIGHTS BETWEEN KENYA AND TANZANIA

PROPERTY RIGHTS IN TANZANIA

In Tanzania, property rights have a lengthy history dating back to their inception and evolution. Long before nations or states were formed, they evolved from customs and traditions. Property rights developed in a society when the benefits of owning them outweigh the costs of obtaining them; in other words, property rights emerged in response to new benefit-cost possibilities as resource valuations changed.[18]Everyone felt compelled to acquire resources solely. Conversely, property rights in Tanzania were first formally recognized in 1984 when the United Republic of Tanzania's Constitution included a bill of rights, thereby incorporating these rights into local legislations. The Constitution guarantees the right to possess property.[19]

PROTECTION OF PROPERTY RIGHTS INTANZANIA

a. Land

The Constitution of United Republic of Tanzania under Article 24 provides that every person is entitled to own property and has a right to the protection of his property held in accordance with the law. As per this constitution provision

[10] *Black's Law dictionary, 8th Edn.,*

[11] *Gregory S., Ed., Community and Property. New York: New York, Oxford University Pres, 2010 p.26*

[12] *Kevin, G., Conveyancing, Principle and Practice, University of Nairobi Press, 2008, p 6.*

[13] *Alisonet., Property Law, Commentaries and Materials, Cambridge University, 1999 p.50*

[14] *Kennedy, G., Property relationship between spouses in Tanzania, Oriental Journal of Law and Social Science (2007), Vol. IV, Issue 2.*

[15] *Gregory S., Ed., Community and Property. New York: New York, Oxford University Pres, 2010 p.26*

[16] *Gregory S., Ed., Community and Property. New York: New York, Oxford University Pres, 2010 p.26*

[17] *Kennedy, G., Property relationship between spouses in Tanzania, Oriental Journal of Law and Social Science (2007), Vol. IV, Issue 2.*

[18] *James, E.K. Evolutionary Theory and the Origin of Property Right. Oxford University Press,2001*

[19] *Article 24 of the Constitution of the United Republic of Tanzania, 1977*

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the protection of the property right is neither absolute nor express as to which properties and thus it is conditional guarantee of ownership.[20] This controversial nature of ownership provision under the constitution was held in the case of **Attorney General Vs LohayAkonay and Josephy Lohay,**[21] In this case it was held that no individual or group of people can hold land absolutely in the United Republic of Tanzania other than the government itself. But also, in the case of **Julius Ishengoma Francis Ndynabo vs. AG**[22] in this case the court of appeal held that it is very vital to uphold constitutional principles relating to land ownership rights and thus due process and fair treatment should be observed hence upholding article 24 of the constitution. Despite the right to ownership of property is recognized in Tanzania's Constitution, it does not provide absolute ownership of land in Tanzanian citizens whatsoever.[23]The Constitution does not Guarantee Land to be a Constitutional Category. This is perpetuated due to the leasehold system of landownership in Tanzania that only give the right to use land which is usuafractually. As in accordance to article 4 of the Land Act[24] provides that all land is public land vested to the president as the custodian.

The constitution also does not protect those people who possess land or those with the interest in land such as lease, sublease and easement. Therefore, due to the above fact the constitution said to be weak by not including other important provision on protection of land and other thing as explained above.

b. Citizenship

The constitution[25] under article 5 provides the general provisions on citizenship. However, the same grand norm does not extensively provide a detailed aspect in citizenship as a property owed to be owned by a person. However, citizenship has only been detailed under the Tanzania Citizenship Act[26] that is the primary legal framework that details specific conditions for acquiring, losing and protecting citizenship in Tanzania.[27]The Tanzania constitution does not recognize the protections of citizenship as fundamental human right property. However, it does not state clearly on which property or kind of property a person can own. The Constitution basically does not provide direct for the protection of property rights on the basis that the protection of citizenship is not absolute regardless and thus posits weaker protection.

c. Intellectual Properties

The Constitution of United Republic[28] does not expressly or directly provides for the protection of intellectual property. Instead, the protection of intellectual property in Tanzania is primarily protected by specific acts of parliament such as; The Copyright and Neighboring Right Act 1999, The Patent (Registration) Act 1987, Trade and Service Mark Act 1986 and The Industrial Designs Act (2003). In this regard the Constitution under article 24 simply provides for the protection of property rights in general which can however be broadly interpreted to include the intellectual property. But the direct and stronger protection and enforcement mechanism for intellectual are governed by other legislations. In the case of **British American Tobacco Tanzania vs. Haroub Othman and Others**[29]It was argued that that British American Tobacco intellectual properties specifically its trade mark were being infringed and sought judicial protection. It was held that the trade mark was a form of property that should be a constitutional category.

PROTECTION OF PROPERTY RIGHTS IN KENYA

a. Land

The Kenyan Constitution[30]recognizes the protection of property right. Article 40 (1) of Kenyan constitution provides that every person has a right, either individually or in association with, to acquire and own property of any description and in any part of Kenya. Therefore, the article is very equivocal on the protection land as a property that ensures a person has a right to own and acquire property. However, the constitution states equivocally that the parliament not to enact any law that allows the state or any other person to take another person's land and thus that amounts to unconstitutionality.[31] The Constitution of Kenya provides that whenever there is deprivation of land by the government it has to be done in accordance with the law without infringing the constitutionality of land ownership of land and thus the constitution provides for the promptness and just compensation in case of deprivation of such land.[32] The Kenyan Constitution further stipulates that in ownership of land as a property no discrimination in terms of gender, tribe or ethnicity in terms of ownership and acquisition of land.[33]In the case of **Kenya Pipeline Company vs. Makana Investment Ltd,**[34]it was argued that the government through Kenya pipeline Company had acquired land unlawfully but the Kenyan High court ruled that the acquisition was lawful and the compensation which was given was just and fair as in the accordance to the report of the Government land valuer and thus in compliance with the constitution of Kenya 2010.

[20] *https://www.academia.edu/41027768/Justiciability_of_Economic_Social_and_Cultural_Rights_in_Tanzania,Mbuya, A.P. Justiciability of Economic, Social and Cultural Rights in Tanzania*
[21] *(1995) TLR 80*
[22] *[2001] TLR 485*
[23] *ibid*
[24] *Cap 113 R.E 2019*
[25] *Cap 2 of 1977*
[26] *Cap 357 R.E 2019*
[27] *Section 4, 5, 9 of Cap 357 R.E 2019*
[28] *Cap 2 of 1977*
[29] *[TLR]310*
[30] *Article 40(1) of the Kenyan Constitution of 2010*
[31] *Article 40(2) of the Kenyan Constitution of 2010.*
[32] *Article 40(3) of the Kenyan Constitution of 2010.*
[33] *Article 40(5) of the Kenyan Constitution 2010*
[34] *Kenya Pipeline Company vs. Makana Investment Ltd (2015)*

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Therefore, the Kenyan Constitution of 2010 ensures that citizens properties are protected constitutionally and deprivation of their property in land is against their grand norm but however the constitution gives the state the authority to acquire land for public purposes but the deprivation by the state should be enshrined by the principles of fairness and prompt compensation and thus this acts as an integral safeguard of the property to land owners and hence avoids the illegal land acquisition in Kenya.

b. Citizenship

The Kenyan constitution under article 40(1) provides that every person has a right, either individually or in association with, to acquire and own property of any description and in any part of Kenya. The constitution provides for protection citizenship as a property showing that the right to citizenship cannot be taken away by any circumstances.[35]. The entire chapter 3 of the Kenyan Constitution of 2010 from article 12 up to article 18 addresses the fundamental protections of citizenship as a property that cannot be revoked in whatsoever manner thus was providing a strong protection of citizenship as a constitutional category. In the land mark case of **Miguna Miguna vs. The Cabinet Secretary for Interior and Co-ordination of National Government & 6 Others,**[36]The brief facts of the case were that government alleged that Miguna Miguna had lost his citizenship through the acquisition of dual citizenship Canadian Citizenship and when the claimant obtained Canadian citizenship in 1980s Kenya was not allowing dual citizenship and thus Miguna Miguna lost Kenyan citizenship when he acquired Canadian citizesnship. However, Miguna claimed that he was born in Kenya and hence a citizen of Kenya by birth. The High court at Mlimani in Nairobi held that; deportation of Miguna Miguna was unconstitutional and it stated that Miguna was a Kenyan Citizen by birth and the government of Kenya had violated his fundamental right of citizenship by revoking his citizenship and thus the court ordered to be given his passport to return to his country of birth as a citizen of the Republic of Kenya.

In the case of **Ndiku Mutinda vs. The Minister of Immigration and Registration of Persons & 2 Others,**[37] the claimant in this case was a Kenyan citizen and had been denied a passport by the ministry responsible where the ministry alleged that the claimant was not a Kenyan citizen as he had allegedly acquired Tanzanian citizenship. He challenged the ministry that he was a Kenyan since he was born in Kenya and he had never renounced his citizenship. The High court held that the claimant of citizenship was legal as he was born in Kenya under article 14 of the Constitution of Kenya 2010 and had a birth certificate of Kenya and denying him a passport was unconstitutional. The High court reiterated that a person born in Kenya cannot lose his/her citizenship unless renounce the citizenship status and the court ordered to be given his passport.

The Kenyan Constitution provides for the retention of citizenship by Kenyans who acquire citizenship in another country hence Kenya protects citizenship as the property right that cannot be taken away unless under certain circumstances such as renouncing the Kenyan citizenship.

c. Intellectual property

The Kenyan Constitution provides expressly that every person has a right property to own property of any description and this connotes that intellectual properties are a constitutionally protected and any violations is subject to a constitutional violation and thus needs a constitutional remedy.[38]But however, the Constitution of Kenya provides the scope of protection the intellectual property to only those properties acquired legally.[39] Therefore, the strong protection of the intellectual properties protect the rights of the owners hence the right to own intellectual property is a constitutional matter. In the case of **Peter Makau Musyoka vs. Kenya Copyright Board and 3 Others,**[40]In this case, the claimant filed a constitution petition against the defendant alleging that the board had infringed his intellectual property rights. He alleged that seizing his copyrighted materials without following the due process of the law is unconstitutional and against the fundamental rights of ownership of property. The High court held that intellectual property is a constitutional category and any action to deprive a person of his intellectual property right is unconstitutional as per article 40 of the Kenyan Constitution of 2010 hence ruled in favor of the claimant.

But also, in the case of Kenya Broadcasting Corporation vs. Multi-choice Kenya Limited 2019,[41] in this case the claimant being the broadcasting corporation sued for the use of unauthorized of copyrighted intellectual properties as protected under article 40 of the Kenyan constitution. The court held that the use of copyrighted contents of KBC is a constitutional violation hence it was unconstitutional hence the case ruled in favor of the claimant.

NARROW PROTECTION OF PROPERTY RIGHTS IN TANZANIA

a. Land

In Tanzania the protection of property rights to citizens is narrowly protected to the scope and nature of the constitutional stipulation in regard to protection of property and the kind of properties protected. The Constitution recognizes the right to own property, but however it posits several thresholds, limitations and restrictions on the protections of property rights. Some aspects that portray the hurdles and limitations on the protection of property rights in Tanzania includes;

i. The limited scope on Constitutional protection of property rights

The Tanzania constitution under article 24 provides the fundamental guarantees to ownership of property rights to

[35] *Article 12(1)(a) of Kenyan's constitution of 2010*
[36] *[KLR] 2018*
[37] *[KLR] 2013*
[38] *Article 40 of the Kenyan Constitution 2010*
[39] *Article 40 6 of the Kenyan Constitution 2010*
[40] *Unreported*
[41] *unreported*

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every citizen but however the protection is indeed weak and narrow as in Tanzania there is compulsory land acquisition by the state for public use. The compulsory land acquisition is done in return to compensation but however the great hurdle in question is on lack of clarity to what amounts to fair compensation and there is no time frame on compensation after acquisition of land as a property of an individual and however there have been always land dispute in regard to compensation arising from compulsory land acquisition.For instance, in the case of **Rev Christopher Mtikila vs. Attorney General,**[42]in this case Mtikila challenged certain provisions of the Tanzanian laws in regard to the restriction on property ownership on foreigner's land use and the Land Acquisition Act that empowers the government to acquire private land for public use. He argued that the law infringes the constitutional right to own property as stipulated under article 24 of the Tanzania constitution. In this case the High Court of Tanzania upheld the right of the government to restrict property ownership and land use more specifically for public use or to matters of national interest. Therefore, the court found that the Land Acquisition Act which allowed the government to take private land land for public purpose was constitutionally valid and thus article 24 of the constitution was subject to limitation since there is no absolute land ownership in Tanzania. Hence the government has huge power on land regulation and management. Therefore, Rev. Mtikila case is significant in regard to the limited scope of constitutional protection of property rights in land in the United Republic of Tanzania.

ii. Customary land expropriationin Tanzania

The Tanzania constitution of 1977 does not protect expressly provide for the protection customary land rights of the natives of Tanzania who are commonly people from rural areas where traditional land tenure systems exist. Its arguably noted that a big percentage of people in Tanzania hold land through customary rights that have been seen vulnerable to state expropriation for public interest. The customary land is protected under the Village Land Act[43]and Land Act [44] but their protection is absolutely weaker since customary land right has not been statutorily and constitutionally provided for. In the land mark case of **AG vs. Lohay Akonaay and Joseph Lohay**,[45] in this case the Court of Appeal of Tanzania held and recognized that customary land rights are property as stipulated in the constitution under article 24. Therefore, non – express constitutional recognition of customary land rights in Tanzania posits a lacuna of weaker protection hence many customary land owners are vulnerable to evictions from their customary land such as the Maasai of Ngorongoro who are evicted from their ancestral land.

iii. State control of Land Management in Tanzania.

In Tanzania, the Land Act under section 4 explicitly state that all land is public under the president who is the trustee. The stipulation for land being the public land posit the significant powers to control and allocation of all lands and this gives citizens a mare right of occupancy and not considered as absolute land ownership in Tanzania and thus giving the state broad discretion in managing all the land matters and does not give citizens for private ownership of land like other countries like Kenya. Therefore, this signifies that people are given the rights of occupancy and the right of occupancy can be denied or restricted by the government at any time for public purposes such as investment etc.

iv. Weaker safeguard against Government expropriation

The Tanzania legal and institutional mechanism often delays the issues of compensation in cases there are expropriation and thereby the constitutional promises for fair compensation for expropriated properties is always in lengthy, costly and inaccessible for property owners especially those in rural areas. The compensation cases with the government often takes years to resolves and often some property owners do not receive adequate, fair and full compensation thus posits the narrowness of protection of the property rights in Tanzania.

i. Gender inequalities in Protection of property Rights.

The Constitution of United Republic of Tanzania 1977 has a narrow scope on women property rights protection. However, the Constitution recognizes the principle of equality[46], customary laws that govern customary land ownership, but customary law denies women equal rights to own and inherit property in Tanzania. But if the ownership of land by women could be a constitutional provision it could be a matter of a constitutional protection and posing a strong protection but currently it is vice versa. Hence non-recognition of women by the constitution as having right to own property in land posit a weaker protection of rights to property in women.

Therefore, the narrow protection of property rights in the Tanzania constitutional structure is a result emanating from the state huge powers on land expropriation, absence of express express protection of customary land rights and the aspect of prioritizing public interest instead of prioritizing citizens interests. In this regard, this creates the vulnerabilities of property owners more specifically to the customary land owners. But there is need for a clear definition and procedural safeguards in the state expropriation in Tanzania that adheres to the international human rights law and respect of human dignity.

b. Citizenship

The Tanzania constitution 1977 does not expressly provides for citizenship as a property right. But it offers provisions on citizenship under article 5 and 6 that offers the criteria for

[42] *[2013] TZCA 10 (CA)*
[43] *Cap 114 [R.E 2002]*
[44] *Cap 113 [R.E 2019]*
[45] *[1995] TLR 80*

[46] *Article 13(1) of the Constitution of United Republic of Tanzania 1977*

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citizenship in Tanzania and ways of losing citizesnship. The utmost and big challenge under the constitution does not recognize citizenship as a tangible property that can be owned and transferred from generation to generation i.e from parents to children. Despite citizenship being a fundamental right under the constitution it does not hold the same protection like other property like land ownership as provided under article 24 of the Constitution that provides that every person has right to own property.

Therefore, in Tanzania citizenship is not inherently recognized as a property that can be owned but a legal status that a person has a privilege to it. Philosophically citizenship is a subset of property right under which a person has a right to social, political and economic phenomenon under which the deprivation and revocation of a person's citizenship is a violation of a fundamental entitlements. In the case of **AG vs. Lesinoi Ndeinai & others**[47] **,** this is a case on citizenship rights and how revocation of those rights affects an individual's ability to enjoy certain rights. The High court held that citizenship gives a person socio-economic benefits such as right to work and own property. But majorly it did not provide nor categorize citizenship as a property that needs to be protected connotationally.

Therefore, in Tanzania, citizesnship gives a person a right to access and exercise of social and economic rights such as a right to own property but not citizenship as a property that can be owned, inherited and transferred hence not classified as a property. In this matter thereof, citizenship in Tanzania remains a matter of public law.

In the case of **Ndynabo vs. Attorney General,**[48]the High court of Tanzania deeply analyzed the constitutional interpretation of rights to citizenship but distinctly emphasized that protection of property and citizenship are protected in a different way. Stating that right to property is under-article 24 while showcasing that citizenship is governed by statutory law without it being classified as a property protected under article 24 of the Tanzania constitution[49].

c. Intellectual property

The constitution of Tanzania has relatively weak protection of intellectual property, despite the constitutional protection of property rights under article24, the constitution does not expressly address the issue on the intellectual property. In absentia of explicit constitutional provision underscores the gap of weak protection thus leaving a gap for the governance by other statutes as main stipulation for Intellectual Property as properties.Thus, this creates a lacuna under the constitution in which under the Tanzania intellectual property infringement cannot be a constitutional violation. But vigorously there are numerous reasons why Intellectual property has weaker protection;

i. Lack of Explicit Constitutional safeguard.

Article 24 of the Tanzania constitution does not include Intellectual property as a category of property. The absentia of constitutional recognition posits a weak protection and it does not have the same foundational protections as other fundamental rights and hence one cannot claim under a constitutional petition for violation thereto.Thus, the intellectual property relies on other laws for protection. Such laws include the Copyright and Neighboring Act 199, The Patent Act 1987, The Trade Mark Service Act 1986 and the hence the protection of intellectual property under these laws posit a weaker protection unlike if they were a constitutional category.

ii. Judicial interpretation and enforcement

In Tanzania, since there is no constitutional back up on the protection of the intellectual property the court hesitate and lacks a source to ascertain intellectual property as a fundamental right that can me owned as a property. However, due to lack of constitutional basis it remains a night mare for a strong and recognition and thus leads to weaker judicial protection and hence less assertive enforcement of intellectual property laws in the Tanzania legal regime.

iii. Local Enforcement and Global Commitments

In the international realm of international laws and norms, Tanzania has ratified different convention continentally and in the global sphere, being a member of World Intellectual Property Organization (WIPO), Trips Agreement and the World Trade Organization, all these however obligates Tanzania to enforce international standards of Intellectual Property thus the local enforcement due to lack of strong constitutional framework.

Therefore, by strengthening the Constitutional protection on the intellectual property creates a robust enforcement mechanism that will ensure there is a realization of socio-economic rights that are protected and thus ensuring observance of human rights in the country.

STRENGTHS ON CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS IN THE KENYAN CONSITUTION OF 2010

a. Land

Kenyans under the current constitution of 2010 provides a robust protection of citizens land rights as a property that can be owned. Hence the constitutional protection in Kenya reflects the importance of land to citizens s a states social, economic, and political gain. However, the constitution of Kenya highlights Kenya's historical land injustice by the British, thus promotes equitable access to land, and it establishes mechanisms for land dispute resolution. There are various strengths that land as a property has achieved;

i. Constitutional Recognition of Land as a fundamental Resource

[47] *[1980] TLR 214 (HC)*
[48] *[2001] 485 (CA)*
[49] *Cap 2 of 1977*

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The Kenyan Constitution[50] has expressly recognized land as a critical resource that must be managed and utilized sustainably for the current and future generation of the country. The Constitution under article 60 has outlined the major principles of land Policy and emphasizing equitable access to land, security, sustainable use, transparent land administration in land ownership and control hence these principles ensure proper and fair land use and administration for future generation and as major resource of the country. In Kenya land is categorized into three major classes; community land, public land and private land.[51] This land categorization however ensures there is clear legal framework for managing and administration of land ownership and usage appropriately.

ii. Gender Equality in Land Ownership

The Kenyan constitution promotes gender equality over land as a property, addressing long standing cultural and legal discrimination against women in land matters. The protection of women in land ownership is very vital as it ensures women who have long standing marginalization have a constitutional right to land ownership in Kenya.

Their grand norm explicitly demands the elimination of gender discrimination in law, customs, and practices related to land ownership and management.[52] This is a great milestone in prohibition of discrimination of women in land ownership and thus provides a strong protection from their grand norm.Therefore, in regard to this, women have right to own land inherit and manage land hence promotes gender equality and equity in access to land. However, their grand norm guarantees equality before the law and strictly prohibits discrimination on any sort of ground.[53]

iii. Public participation in Land Governance

The Kenyan constitution provides for public participation in any decision-making process related to land governance and thus ensuring communities and citizens are heard and involved in land management and utilization. Their Constitution-requires public participation as a core value in governance.[54] Public participation in this stance ensures decisions in land allocation, management, and policies citizens are involved in their insights and decisions. In Kenya there is an aspect of devolved Land governance in which certain land related functions are devolved to the county government, bringing decision making and more decentralizing to the communities to greater control on matters of land and thus bringing local accountability.[55]

iv. Security of Land Tenure

The Kenyan constitution expressly protects the land right tenure which is indeed vert crucial for both individual and communities.[56] Through the protection and securing of their tenure it ensures the property owners utilize their land without fear of contradiction and arbitrary dispossession or eviction from their land. Therefore, the constitution protects the right to own property and thus prohibits arbitrary deprivation and in case of deprivation for the purpose of public interest, the grand norm guarantees property owners to prompt and adequate compensation[57]

The Constitution of Kenya of 2010 provides a comprehensive protection for property rights, however very significantly in land it addresses historical injustices from the colonial era and thus through constitutional protection it provides equitable justice and access to land, gender equality and the safeguard to the environment through sustainable land use. Therefore, the constitutional stipulations provide a stronger protection and thus gives a constitutional claim over unlawful deprivation or eviction of land.

Conclusion

Tanzania's Constitution is very limited on its obligations in the application and protection of property rights in general. Given the fact that Tanzania's Constitution is the supreme law of the land its scope on protection is very minimal on the recognition and protection of land, intellectual properties and citizenship are not absolutely recognized and protected and thus providing a weak protection as the government seems to be superior powers over citizens only seen as only having right to use and not right to own land while other properties are not even protected such as citizenship as a property that ca be owned, inherited and pass it to generation. But also, intellectual property id not directly recognized as a property compared to the constitution of Kenya and thus providing weak protection to property owners in Tanzania.The constitution would provide an avenue for measuring legislative and executive actions to ensure that they conform to human rights standards. Even though the Constitution being supreme still there are limitation on the issue of protection and ownership of property right thus in Tanzania Constitution is not supreme over other organs of the state.

RECOMMENDATIONS ON THE PROPER PROTECTION OF PROPERTY RIGHTS IN TANZANIA

Tanzania Constitution of 1977 has several lacunae that weaken the protection of property rights in the country. Several reforms can be introduced within the current constitution in order to provide a strong protection. Properties are essential in any economic umbrella as it foster development in a socio-economic level, social stability, personal security in an economy.

[50] *Kenyan Constitution of 2010*
[51] *Article 61 of the Kenyan Constitution 2010*
[52] *Article 60(f) of the Kenyan Constitution of 2010*
[53] *Article 27 of the Kenyan Constitution of 2010*
[54] *Article 10 of the Kenyan Constitution of 2010*
[55] *Article 10 (b) of the Kenyan Constitution of 2010*
[56] *Article 40 of the Kenyan Constitution of 2010*
[57] *Article 40 of the Kenyan Constitution of 2010*

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Various reforms are vital for proper and strong protection of property right within the Tanzania legal framework some of the fundamental reforms towards achieving a strong protection of property rights in Tanzania includes;

i. Clear Composition and Definition of Property in the Constitution of United Republic of Tanzania.

The constitution of United Republic of Tanzania 1977[58] have no clear and comprehensive meaning of property in regard to land, citizenship and intellectual property. Clarity is very significant as it avoids ambiguities in property related matters. Clear Constitutional definition will enhance and strengthen right to own property. Therefore, the constitution of Tanzania should provide an express guarantee of rights to own, use and dispose properties hence avoids arbitrary government intervention and interference. Clearer definition will ensure non-misinterpretation and ensure that all forms of properties are strongly protected under the constitution.

ii. Stronger Safeguard Against Expropriation

The current constitution should include a provision that safeguards property in land to ensure that property cannot be compulsorily acquired by the state without due process of the law and without fair, adequate and timely compensation. The ground for expropriation should be a constitutional stipulation and provides for compensation to the parties owning the specific land. The constitution should provide for timely and just compensation as a cornerstone for justice and strong protection of land. The current provisions allow the government to compulsorily expropriate land and compensation process are low hence that will enhance and strengthen property rights and avoid the risk of abuse of expropriation.

iii. Stipulation of Equal Property Rights to all, including women and Marginalized Groups.

The Constitution of United Republic of Tanzania 1977 does not have an express provision that simply states for the equality of all men and women and thus as a supreme law of the land does not conform to the International human rights standard such as Convention on the Elimination of All Forms of Discrimination Against women to which Tanzania is a signatory and member state. Therefore, this reform could build a bedrock on article 24 of the Constitution of United Republic of Tanzania which guarantees every person a right to own property. Hence this will enhance and set a foundation on gender equality and thus an amendment would be a great milestone as it underscores the constitutional stipulation on Gender equality and thus property ownership to all persons will have a strong constitutional foundation.

iv. Creation of Anti – Corruption and Good Governance Reforms.

The Tanzania constitution should create an oversight body that monitor land transactions and prevent corruption in land administration that act as a barrier in the ministry of land. The body created should have authority to audit, investigate and sanction public officials in corruption of land matters in the entire Republic of Tanzania. The body created for oversight should always provide a public participation involving acquisition of community land. Public consultation should be utilized by involving people in a transparent manner for the decision-making process and hence will reduce illegal land grabbing by cartels in the state and thus protecting the ancestral or community land.

[58] *Cap 2 of 1977*

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