Contested Ownership: Land, Religion and Ethnicity: The Coastal Kenya's Experience, 1915 - 1931

by

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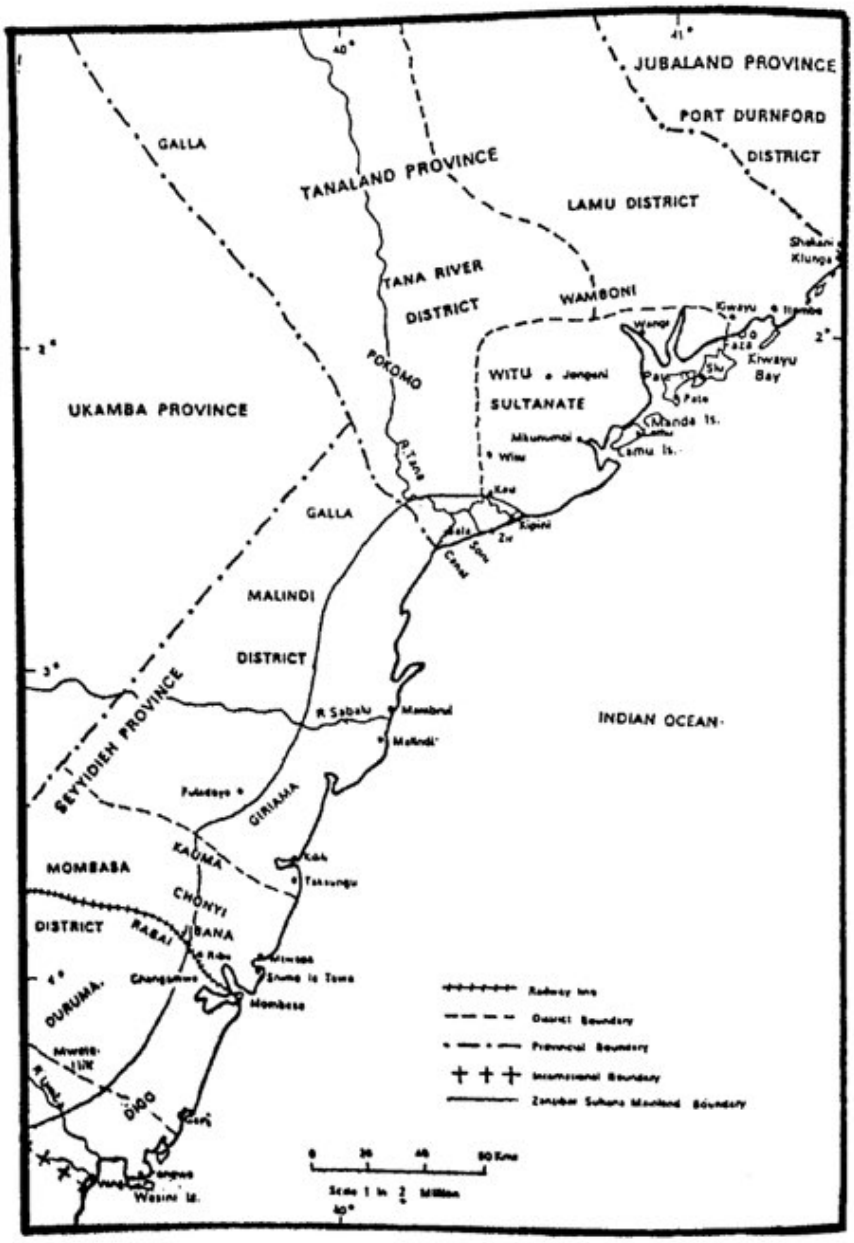
INTRODUCTION

Prior to the introduction of the Land Titles Ordinance of 1908[1] (L.T.O.), three distinct but overlapping, systems of land law were practiced in different parts of the Kenyan coastal region. Islam dominated the major coastal townships such as Mombasa, Malindi and Lamu, and in these places *Shari'a* law[2] was accepted. In the countryside outside the townships, communal ownership was the norm. The law, which governed land disputes in the Swahili[3] areas, was known as *mila*[4]. Under *mila*, land could be owned individually and bought and sold; but transactions could not take place without the consent of the elders of the community that cultivated the area. Further inland, and in areas less influenced by Islam and by Swahili communities, land was held communally under African customary law.

Map 1: East Africa Protectorate, administrative boundaries, 1912.



Source: A.I. Salim, Speaking Peoples of Kenya's Coast (East African Publishing House, Nairobi, 1973).

Islam had been practiced at the coast since the ninth century, but it was only in the nineteenth century that the religion spread beyond the walls of the larger coastal towns and into the countryside.[5] This was stimulated by the increasing prosperity and economic growth that came with the rise of plantation agriculture, supported by slave labour. Increasing trade between the coast and the hinterland began before the middle of the nineteenth century, and was furthered by European commercial penetration from 1880s onwards.[6] This expanding economic sphere brought many African communities into closer contact with Islam. David Sperling argues that the conversion to Islam among Mijikenda[7] groups such as the Digo, for example, only intensified from the 1890s. With the spread of Islam came new values, and the practice of *Shari'a* law. By the time of the proclamation of the British Protectorate over East Africa in 1895, Islamic values and laws were already being taken up by Muslim converts among Mijikenda. Over the next twenty years the spread of Islam would be very dramatic.[8]

JanMohamed[9], Salim[10], and Willis[11] argue that the colonial policies and discourses relating to the classification of people as 'Native' and 'Non-Native' made ethnicity and identities more ambiguous during the colonial period. Salim highlights the aggravated dichotomy and division created by colonialism among Arab and Swahili as they responded to this distinction created by the colonial government. The higher social status, and the synonymous association of 'Non-Native' with being 'more civilized', made some groups within coastal society constantly define and redefine their identity and ethnicity to be recognized as such. The success of some groups in claiming that status stimulated rifts within coastal society; other groups were regarded as inferior, less civilized, and were ultimately marginalised.[12]

With these issues in mind, this article attempts to examine the response of local inhabitants to the introduction of colonial legislation relating to ethnicity as this was associated with land ownership at the coast. Using this approach, we will explore the extent to which definitions of 'Native' and 'Non-Native' affected access to land during the colonial period. The question that arises is: who benefited or manipulated rigid colonial definition of ethnicity for their own advantage in order to accumulate land? To what extend did the L.T.O. created a situation where ethnic inspired individual claims over land ownership and what was the response of the colonial government on the issues.

A study of the introduction of colonial land law along the Kenyan coast reveals that economic factors did not entirely dominate the reasons for such legislation. Problems caused by the vagaries of the legal system practiced by coastal communities were apparent prior to colonialism.[13] Often these laws were so intertwined with religious belief that it is impossible to critically examine the issue of land at the coast without also examining religion. In fact, when resolving land claims, either customary law or *Shari'a* law was used to govern some type of land in certain areas of the coast.[14]

The discussions relating to *Shari'a* law and customary law in this article will be examined from an external perspective, stressing the response of colonial discourse, legislation and policies towards these two bodies of law. Along the Kenyan coast, as happened elsewhere in Muslim communities throughout the world, the actual application of *Shari'a* law was modified according to local custom.[15] Trimingham's *Islam in East Africa* admits that the questions related to customary law and *Shari'a* law are very complicated, and argues that the degree to which customary law was practiced within the Muslim communities depended on the influence of Islam in the area.[16] Pouwels argues that within the Muslim community itself, the boundaries between customary law and *Shari'a* law were ambiguous. This is echoed by Meek, who observes that in most cases, the admission of certain customary law practices by Muslim communities as part of *Shari'a* law was entirely dependent on the decision of the local *'Ulama* (religious scholar).[17]

Colonialism not only undermined the practice of *Shari'a* law in areas occupied by Muslims, but also cut across local customs regarding land.[18] Meek observes, for example, that the inquiries made by colonial officials among Muslims in Northern Nigeria were influenced by the statement of a local *'Ulama* who stressed the practice of *Shari'a* law for land rather than the actual practice of local inhabitants which mainly used customary law. Consequently, the inquiries resulted in a perception that the customary law contradicted the *Shari'a* law, and therefore, had no future under the colonial land legislation.[19] In regard to the Kenyan coast, conversion to Islam among the local inhabitants, namely the Mijikenda, added yet another complication when dealing with land issues. Colonial officials argued that the application of *Shari'a* law among Muslim Mijikenda would undermine 'traditional' Mijikenda society and 'customary law'.[20] More likely the admission of claims by Muslim Mijikenda under *Shari'a* law would jeopardize the newly introduced land legislation, namely the L.T.O.

The failure to recognise customary law practices among Muslim communities not only undermined various local land tenure but also denied the assimilation of Islamic law and customary law that occurred with the spread of Islam.[21]

One of the most extensive studies on the application of *Shari'a* law in Africa is Anderson's *Islamic Law in Africa*. Regarding the coast of Kenya, Anderson comments that despite the fact that *Shari'a* law was the main ('fundamental') law of the region, its application among Muslims was limited to personal matters such as inheritance, marriage and divorce. However, in regard to the Land Titles Ordinance, Anderson failed to examine the connection between Section 17(1 and 2)[22] of the Ordinance and Proclamation no. 13 of 1898[23], when both forms of law were used by colonial government to set a period of time in which to bar any claim on land.[24]

L.T.O. IN ACTION:

It was the intention of the colonial government that the introduction of the Land Titles Ordinance (L.T.O.)in 1908 would regularize the position of land title at the coast and bring to an end the confusing situation where land transactions might take place under *Shari'a* law, through *mila* settlements, or customary law. The L.T.O. was designed to protect the perceived interests of government. In those areas where legal boundaries were formerly established under the Ordinance, government control was to some extent achieved. However the failure to impose the terms of the L.T.O. over the entire region ultimately contributed to further complexity: instead of replacing other land laws, the L.T.O. came to be yet another alternative in local struggles to gain control of and access to increasingly scarce resources in land. The Wassini Inquiry in 1931, vividly illustrates the ambiguities created by the L.T.O. in local struggles over land.

SHARI'A VS CUSTOMARY LAW

This rapid growth of Islam among the Mijikenda at first went virtually unnoticed by Protectorate officials. When one of the colonial officials, namely, A.C. Hollis, conducted his studies of land ownership among the coastal inhabitants in 1907, he had nothing to say on the issue of Islamic land law among the Muslim Mijikenda.[25] This is not to suggest that Hollis was ignorant of the

extent of Islamic influence in this area. The official description of Vanga district stated that there were nearly 4,000 Muslims in the area south of Mombasa. However, official reports at this time mostly viewed Muslim Mijikenda as being 'Swahili',[26] without taking into consideration on the principle that a change in religion did not imply a change of ethnicity.

The earliest official remark on the impact of Islam on the social life of the Muslim Mijikenda - in this case the Digo - was made in 1908, by Reddie, an officer sent to report upon the creation of Reserves in the area south of Mombasa. Reddie noted that Islamic values were increasingly accepted among Digo. At the same time, Reddie acknowledged that the majority of the Digo still retained what he termed "tribal constitution". Specifically in relation to land, he observed that most Digo still "view the land as communal and not the property of Individual". However, he also reported that some Digo had acquired land as individual owners, but he assured Government these lands lay "outside the tribal limit" and therefore would not affect the creation of a Native Reserve.[27]

It is evident that Reddie's observations indicate that by 1908, Muslim Mijikenda in the southern part of the coastal area were claiming to hold land under the terms of *Shari'a* law. In fact, by this time many Muslim Mijikenda had already adopted individual ownership of property in regard to farm lands as well as houses on the coast, and, in common with their fellow coastal Muslims (Arabs and Swahilis), many had taken out legal mortgages on their properties.[28]

By 1909, two years after Hollis's original report, the colonial government had come to realize that individual land ownership among Mijikenda posed a problem to the implementation of both the L.T.O and the Native Reserves policy. But what worried the government most was that the validity of claims on land granted to Europeans in the southern part of the coast. Counter-claims from Muslim Digo would jeopardize European claims and deter further investors. Hollis, now acutely alert to the problem, pointed out that difficulties could be anticipated in areas such as Tiwi, Waa and Cheteni, where Muslim Digo were then beginning to lodge claims to individual ownership. His proposed solution was to deny the legitimacy of these Islamic-based claims, and simply insist that all Mijikenda could only hold lands under customary terms. The neat legal categories that colonialism was seeking to create did not conform to the complexity of African reality. "I do not think", wrote Hollis, "that the right of the natives [Muslim Mijikenda] to sell land would hold good in a Court of Law as

this is not the custom of the tribe, and the custom of the tribe can hardly be changed by a change of religion."[29] Once again, colonial officials were seen to stumble over the relationship between religion and ethnicity, but it was crucial to the success of colonial policy that a distinction be maintained between those areas to be administered under the L.T.O. and those to classified as Native Reserves.

Later in the same year, O.F. Watkins (then Acting District Commissioner, Rabai) submitted a further report on the issue of land ownership among the Muslim Mijikenda. Watkins argued that the spread of Islam, and especially the practice of individual land ownership among the Muslim Mijikenda, had already created a situation where local people had committed themselves to what were, in terms of British colonial jurisdiction, "illegal land sales". According to Watkins, the problem arose because there was no geographical boundary for the limitation of the sphere of influence between *Shari'a* law and customary law in the coastal areas: one simply blurred into the other. Nor was there yet any legally defined limit to the communal lands that Mijikenda could claim for themselves. Both these problems Watkins saw as "a fruitful source of litigation" in the area south of Mombasa in coming years. Like Hollis, Watkins saw the only solution to be containing all Mijikenda claims to land within the realm of African customary law. To allow *Shari'a* law any credibility in these areas seriously undermined the principles governing British rule.[30]

It was easy enough for the colonial government to come to the decision to prevent individual claims within the area of the Native Reserves once these had been demarcated - this was a spatially defined zone where customary law must prevail. It was more problematical, however, to rule that no person defined as Mijikenda could legitimately hold land as an individual outside that Native Reserve. But, as early as 1906, this was the line adopted by government. In effect, any land transaction entered into by any individual Muslim Mijikenda was treated as illegal. When a Muslim Mijikenda named Mwenyi Haji bin Juma sold a piece of land in Makupa to an Indian, Abdulrasul bin Alidina Visram, the government contested the transaction and had it nullified in the courts.[31] Similarly, in 1914, Mahomed bin Omari (a Muslim Duruma) was judged to have acted illegally in selling land in the Duruma area to Indians.[32] In the eyes of government, Muslim Mijikenda conducting land transactions of this kind were seen as taking advantage of their Muslim status and manipulating the practice of *Shari'a* law to alienate communal lands from their non-Muslim fellows.

Most colonial officials saw it as their duty to protect the majority from the activities of these 'predators', who were stigmatized as mimicking the practices of other Muslims elsewhere on the coast to gain financial benefits and in the process exploiting their own communities.[33]

There was also the difficult question of European land grants to be considered. In the area south of Mombasa, 350,000 acres had been alienated to a European-controlled company named East African Estates in 1910. This concession covered a vast area over which numerous rival claims were eventually lodged. The recognition of any individual ownership in this area among the Muslim Digo would obviously create a major legal barrier to the concession made to East African Estates.[34] To solve the problem, government decided to create Native Reserves for the Digo and to move all Digo, whether Muslim or non-Muslim into those reserved areas, clearing the remaining lands of claimants and opening the way to development. The L.T.O. was the tool with which this policy could be implemented, in combination with the demarcation of the Native Reserves.

Before the implementation of the L.T.O. to the south and west of Mombasa Island at the end of 1913, Watkins was again called upon to report on the situation. What Watkins described this time was a society undergoing rapid social change. "Evidence can in fact be accumulated", he stated, "to show that the whole social structure is according to the locality in different stages of transition from the Nyika communal to the Mohamedan individual state."[35] He noted a generational difference among his informants. While Digo elders strongly supported the notion of communal lands to be administered under customary law, Watkins acknowledged that these same men stood to benefit from the maintenance of this system. Many of the younger generations, on the other hand, were keen to advance individual rights under *Shari'a*. In the very near future, Watkins warned, ideas regarding communal tenure might not be accepted by a majority of the community. Under the rapidly growing influence of Islam, "the Digo law of today is not likely to be the law of tomorrow." That said, Watkins echoed the view of Hollis that to allow individual ownership to blossom in this way would be to the longer-term detriment of the wider community. He therefore recommended that the government seek ways to maintain and protect communal lands, as this would be the best means "to secure" land for the future use of the community and to "offer a fair chance of preventing land grabbing."[36] Watkins recommended that Native Reserves should be created in

conjunction with the implementation of the L.T.O. in areas outside the reserved areas. This was accepted by senior officials in Nairobi.[37]

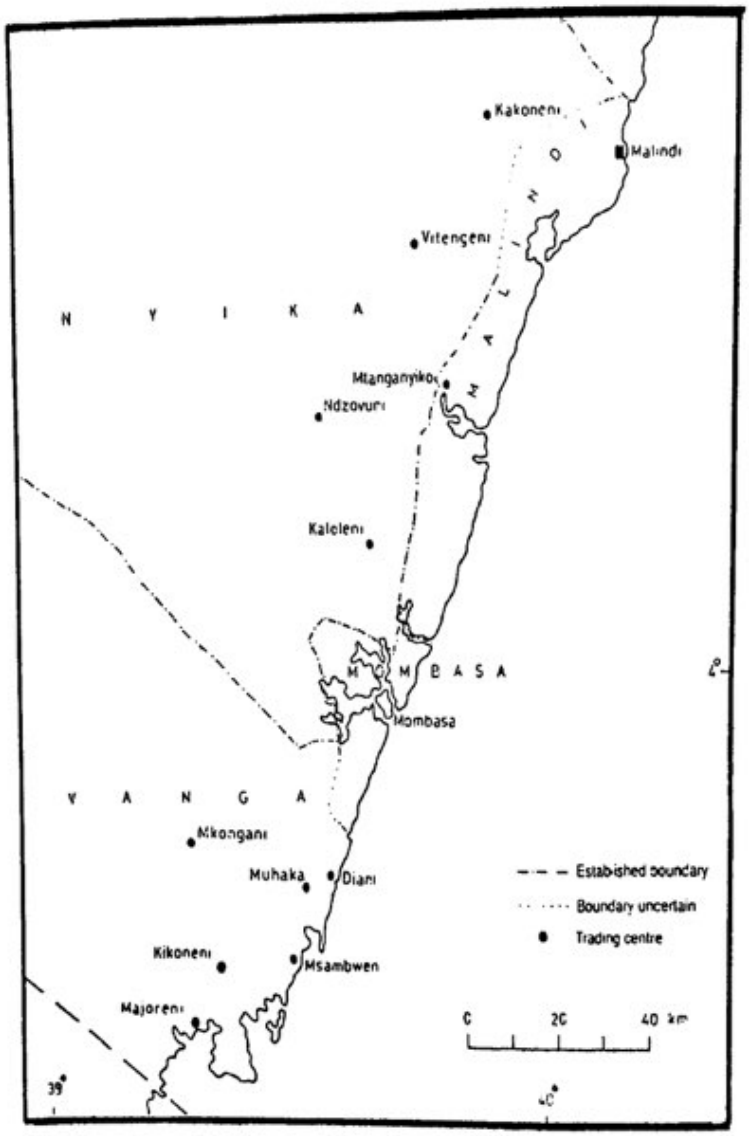
The full extent to which Islam had already influenced land law in the areas to the south and west of Mombasa became apparent when the L.T.O. was implemented in November 1914. Between Likoni and Tiwi alone, some 700 to 800 individual claims were submitted by Muslim Digo. This development was just what the government had hoped to avoid,[38] and Provincial Commissioner Hobley again strongly advocated that all such claims should be dismissed in favour of communal ownership for all Mijikenda. The government was given a breathing space to consider matters by the suspension of the L.T.O. with the outbreak of the First World War, and local officials were again asked to explore the matter to see what solution might be proposed.[39]

This time the responsibility fell upon the District Commissioner of Mombasa, C.C. Dundas. In the latter part of June 1915, Dundas visited Cheteni, Mtongwe, Likoni, Pongwe, Tiwi, Magogoni, Waa, Matugas and Ngombeni. In each area he addressed *barazas* of elders, discussing the land position with both Muslims and non-Muslims. Dundas found widespread support for the maintenance of Mijikenda custom,[40] and concluded that Islam was not yet deeply rooted in Mijikenda culture. Few Mijikenda Muslims seemed to practice Islam thoroughly, and fewer still had any liking for the idea that *Shari'a* law should be imposed upon them fully. With no support for the wholesale application of Islamic practice, Dundas did not see why a few individuals should be allowed to select one aspect of *Shari'a* law which suited a particular purpose whilst ignoring the rest. His findings were unequivocal:

> "The people are in no way ready for a departure from their own customs and laws, and on the other hand the retention of a system of law common and acceptable to the whole tribe will much facilitate its administration. In view of that and the fact that Mohamedans themselves ask that they should retain Digo law and custom, I would ask that it should be recognised for the future that Mohamedan law does not obtain among the Mdigo."[41]

In his discussions with the Digo communities Dundas appears to have succeeded in persuading Muslim Digo that their rights would be maintained within the Native Reserves. As a consequence of his visit, in July all Muslim claims were withdrawn and the government refunded the application fee (Rs.1) to each

Map 2: District boundaries and trade centers, 1920.



Source: J. Willis, *Swahli, Mombasa and the Making of Mijikenda*, Oxford: Clarendon University Press, 1995.

person.[42] In January 1916, the Land Department issued a circular and the policy defined for south Mombasa was subsequently extended to all the Mijikenda areas of the coast.

INDIVIDUAL VS COMMUNAL OWNERSHIP OF LAND

While this prevented Muslim Mijikenda from owning land individually in the name of maintaining 'custom' and 'tradition', the government was positively encouraging other sections of the coastal population to move toward individual title as a means of fostering economic development. Nowhere was this 'dual policy' more apparent than on the island of Mombasa and its immediate hinterland. On the island itself, and in Likoni, Changamwe and Mtwapa, land value had soared at the end of the nineteenth century as Europeans and Indians scrambled to obtain lands close to the port city. The construction of the railway into the hinterland acted as a further stimulus to land speculation in the early years of the Protectorate, and this extended as commercial activities developed in British East Africa, bringing greater quantities of goods through the port of Mombasa.[43]

Long before the proclamation of the Protectorate in 1895, land in the vicinity of Mombasa island had been held communally, regulated by *mila*. After 1900, the leaders of the Twelve Tribes claimed that they retained authority to alienate land in Mombasa, and that any land transaction needed their consent and had to be carried out under the principles of *mila*.[44] With the proclamation of the Protectorate the British had assumed all responsibility for the legal dispersement of lands, and they were not prepared to sacrifice commercially important lands so easily. On Mombasa Island the British government held the view that land was owned individually, a view which was supported by the many Arab landowners on the island who claimed individual tenure under *Shari'a* law. The implementation of the L.T.O. allowed such individual claims to be confirmed, and worked to undermine the communal claims of the Twelve Tribes. By 1915, the Provincial Commissioner felt confident enough to dismiss the claims of the Twelve Tribes:

> "With regard to the numerous irregular land sales which have taken place during the last few years, no case has come to my [PC] knowledge where the Tissa Taifa, who claim the land as a tribe, have sold as a tribe; all land sales have, as far as I know, been made by individuals and without the approval of any tribal council or anybody representative of the tribe and having authority to sell, further it is believed that in all cases the proceeds have accrued to private individuals."[45]

However, it was misleading to assert that the elders of Twelve Tribes had never complained about these land sales. In July 1912, for example, several elders of the Nine Tribes complained to the Provincial Commissioner that individuals had sold land at Mjungombe and Panganyika, without the permission of the Elders, to a European named Midway and an Indian named Esaji.[46] In these two cases, the Provincial Commissioner had avoided possible political entanglement by declaring that he was "not in a position to interfere" as such claims would be properly adjudicated under the L.T.O.[47] Colonial officers in fact suspected that these claims had a "sinister appearance" - the elders being accussed of only making such claims in order to benefit financially from the transactions.[48]

With the implementation of the L.T.O. on Mombasa Island and the area to the north of Mombasa, the issue of communal claims quickly emerged as a major obstacle to government policy. In both these areas the Twelve Tribes submitted numerous claims which severely delayed the work of the C.L.S. and placed barriers in the way of European investment.[49] The Three Tribes lodged a succession of claims between 1913 and May 1915, and the Nine Tribes made claims to two substantial areas, one running north from Kipevu to the Mtwapa Creek, the second for all of the land between Mtwapa Creek and the southern boundary of the Mazrui Reserve in the north. These Nine Tribes claims amounted to an area of 260 sq. miles in total.[50] In sum, the Twelve Tribes claimed the majority of land in Mombasa island, the area south of Mombasa down southward to Likoni and northwards up to the boundary of the southern part of Mazrui Reserve in Takaungu. In their application, the representatives of the Nine Tribes formally asserted that they obtained the ownership of the land "by possession and occupation according to Mohamedan law and tribal customs". The Twelve Tribes wanted to establish clear control of an area of land on a basis equivalent to that granted to the Mazruis' in Takaungu.[51] In the wake of these

huge claims, one rather frustrated government official described the Twelve Tribes as "the most serious enemy the Government has to meet"[52] in its work at the coast.

Despite it being "generally admitted" that the Twelve Tribes did have legitimate historic communal claims, the government in effect decided to ignore the fact.[53] In these areas where the government's main aim was to foster commercial development, individual tenure was preferred against communal claims of any kind. Efforts were made to negotiate a settlement with the representatives of the Twelve Tribes, the colonial government relying upon the good offices of its own allies among the coastal community. Among the wealthier Arab and Swahili families were many individuals who themselves saw the potential advantages to be gleaned from imposing the L.T.O., and who wished to distance themselves from the communal claims of the Twelve Tribes. With prominent members of the coastal communities divided among themselves, the government found it easier to undermine the communal claims. Among those taking up the cause of individual rights were Ali bin Salim, and his brother Seff bin Salim, who gave evidence on behalf of the colonial government against the claims of the Three Tribes. They argued that the communal claims were not compatible with *Shari'a* law and so had no legitimacy in an Islamic area.[54] This ignored the principles of *mila*, upon which all the claims of the Twelve Tribes were based. The claims made by the Three Tribes were accordingly dismissed in 1913, on the grounds that the elders did not in fact have power to alienate land. The government ruled that the recognition of the Three Tribes by the Sultan of Zanzibar did not provide evidence of their authority over land matters.[55]

The mechanisms of the L.T.O. provided other means by which government could resist the unwanted communal claims of the Nine Tribes. The Recorder of Titles used his powers under the Ordinance to insist that a fee of 2 percent of the value of the Nine Tribes' claims be lodged prior to adjudication. This fee was calculated at £3,500, and would be forfeited should the claims fail. Unable to raise such a large sum, the elders of the Nine Tribes withdrew their claims,[56] whilst at the same time asserting their desire to contest the claims again should anyone else make rival claims in the same areas.[57] The attempt by the Nine Tribes to have their claims treated as equivalent to the Mazruis' had failed, for reasons that the Provincial Commissioner made plain:

> "... as far as my investigations go, it is not in any sense a correct comparison, for the Mazrui are remnants of a dominant tribe of invaders which were for a long time paramount on the coast and on one occasion ceded the coast lands to the British Government, the decision was however not ratified as it conflicted with the claims of the seyyids of Oman and Muscat. No such pretensions can be set up by the Tissa Taifa [Nine tribes]."[58]

This surely reflected a very 'particular' reading of coastal history, but the conclusion suited wider British purposes and that was what mattered. By the end of 1915, the government had successfully dismissed the communal claims made by the Twelve Tribes and had pushed forward the implementation of the L.T.O. in those areas of the coast where future commercial development was thought most desirable.

Elsewhere along the coast, where economic development was less advanced and where European capital had hardly penetrated, the local inhabitants made strenuous efforts to retain communal land ownership, often under *mila*. Along the northern Kenyan coast the nineteenth century pattern of land tenure hardly changed at all in the early years of the twentieth century. Despite the emergence of plantation slavery during the nineteenth century, ideas of communal rights based upon *mila* remained strong at the end of the century in these areas, by which time the plantation system was in decline and many areas formerly cultivated had been left unoccupied.[59] By the time of the implementation of the L.T.O. on the northern Kenya coast around Lamu, Siyu, Pate and Faza, the vast majority of cultivable land was still held communally. The practice of the local peoples of the islands of Lamu and Pate, and within the Sultanate of Witu, to own land communally on the mainland was recognised by colonial officials.[60] In these areas shifting cultivation was the norm and the clearing of land gave rights of use, but not of outright ownership. When the implementation of the L.T.O. to Witu was first under discussion in 1910, the Provincial Commissioner of Tanaland argued in favour of maintaining the communal system:

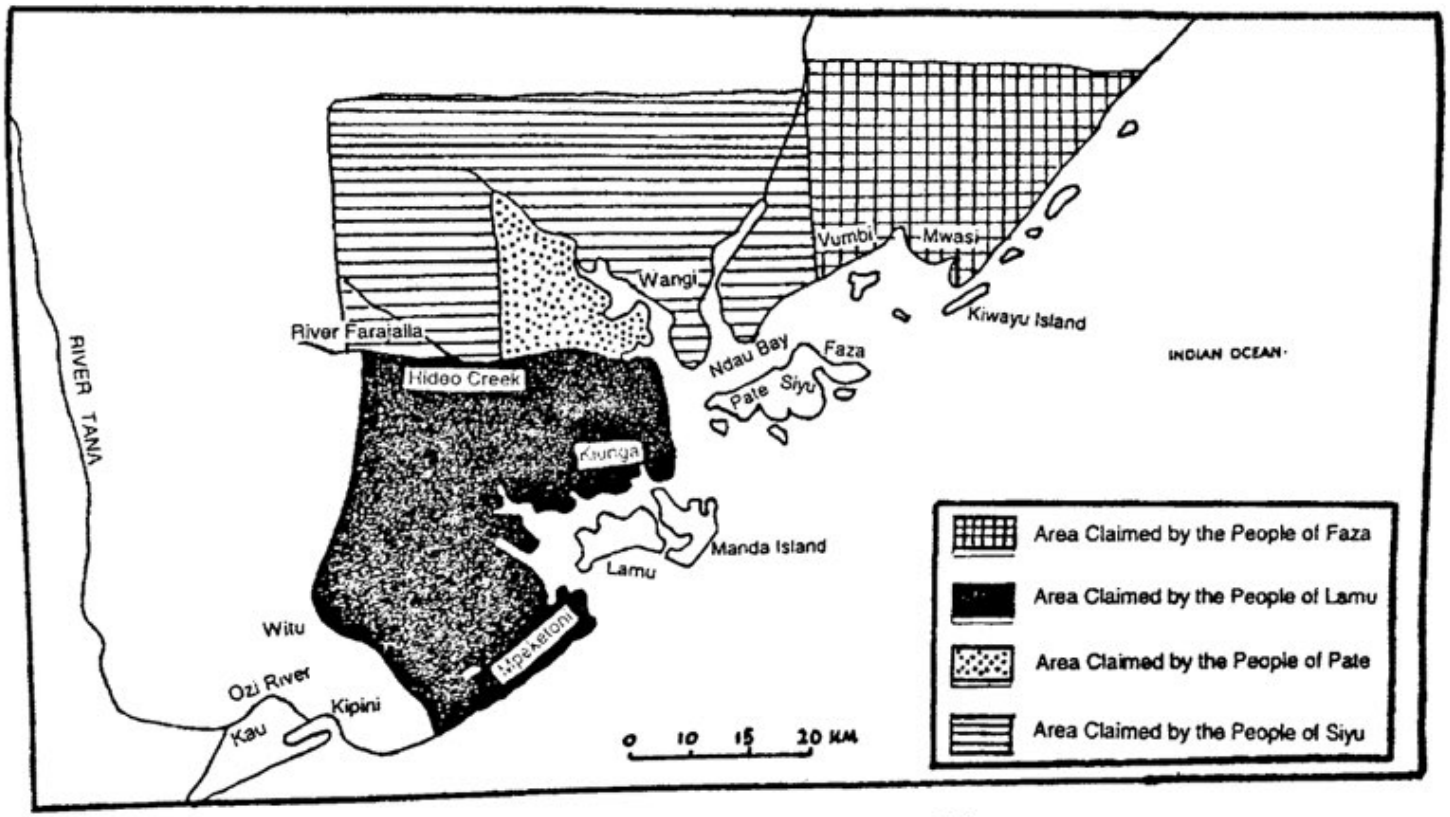
> "I would suggest that, in order to allow these people to carry out this custom [shifting cultivation on communally owned land] certain areas ... be set apart for native use. If titles are granted to individual cultivators for actual land each has under cultivation at the particular time when it is decided to grant titles, great injustice will result."[61]

Similarly, the implementation of the L.T.O. on the island of Lamu in 1919, and over the rest of Lamu District in 1921, indeed worked toward the reinstatement of communal landholding.[62] In response to the L.T.O., communal claims were lodged all along the northern coast. The Nine Tribes of Siyu claimed lands from Taka on the east to Mtono Kwa Knombo Mate in the west, and Mongoni in the north to the Magoba in the south. The area claimed was estimated at 483,840 acres.[63] The Seven Tribes of Pate claimed an area from Magogoni to Wangeh River and from Ngeni to Mkondo Farjalla, which covered an area estimated to 34,000 acres.[64] The Fifteen Tribes of Faza claimed an area from Matanuni to Taka and from Missi Mabibo to Mikoma, an area of 363,640 acres.[65] In 1919, the Arabs of Lamu claimed lands from Shaka to Pangani, and southward to the west of Hindi. Although some individual claims were submitted, these were mostly in the more developed lands on the islands or in the main towns.[66] Even up to 1926, only 20 individual claims had been submitted in Lamu District relating to the areas that were accepted as being held communally.[67] This lack of conflict and contestation over ownership stood in marked contrast to Mombasa and other areas to the south.

The initial reaction of the colonial government to these claims was hostile. One of the purposes of the L.T.O. was to identify residual lands that could be declared Crown property and opened up to investment and development. Communal claims of this huge extent left little land for the Crown to take up. Whilst it was undeniable that many of the lands claimed had been cultivated under plantation slavery in the nineteenth century, government took the view that the demise of the plantations had left such lands as 'waste and unoccupied'.[68]

Officials branded these communal claims as "absurd", contesting that local communities could prove "no legal or moral right over" the lands claimed.[69] It was suspected that local community leaders were merely exploiting the terms of the L.T.O. to exert as large a claim as possible, either as a form of speculation (generated by acquisitive elders), or as a hedge against others raising rival claims that might block future access. The failure to clearly indicate the boundaries of the communal claims strengthened government suspicions. Some officials pointed out that the claimants seldom had any clear knowledge of the areas concerned, other than by asserting the time it took to walk to the boundary of the claim.[70]

Map 3: Areas Claimed under communal claims in the District of Lamu.



Source: PCLO (Msa), File no. M/496.

These objections all had some degree of substance, but the most significant reasons for government opposition to the communal claims were practical and economic. The cost of survey of the extensive areas claimed would be exorbitantly high, and was anyway described by the Survey Department as an impossible task.[71] Reluctant to adjudicate these claims, and without the pressure of other interests, government procrastinated. When a date was finally set to hear the claims before the L.R.C. in 1919, the hearing had to be cancelled when the Land officer fell ill and could not attend. The issue had still not been resolved in 1922 when the work of the C.L.S. was halted.[72] Pending adjudication, local people in the mainland of Lamu district carried on as before with communal landholding. The government did not in fact try to tackle this problem on the northern coast until the 1930s, and even then it sparked considerable controversy among the local population.

However, on Lamu island itself the process and the outcome were more complicated. While the people of Pate, Siyu and Faza on the mainland of the district were united in their claim for communal landholding, matters were more contested on Lamu Island. The first claims submitted under the L.T.O. in 1915 only registered the three leading families of Lamu Town, who claimed title to all the lands in and around the town. These families were the Famao, Yumbe and Kinamti, each representing between 150 to 300 people.[73] Their claims were subsequently disputed by a group of Arabs from Shella, who claimed title to lands in both Shella and Lamu. Then, in 1919, a further claim was lodged representing a far wider group of families from Lamu, more representative of the island as a whole.[74] In addition to these communal claims, there were many claims submitted by individuals from Lamu relating the lands and properties that were also part of the communal claims. Many of these individual claims came from leading Arab families, such as Al-Mawia, Al Jahadhamy and Ba-Alwi.[75] To the intense irritation of British officials, these families were also among the most prominent advocates of the communal claims![76]

Although government never allowed the Lamu communal claims to go before the L.R.C., repeated petitioning by the claimants did result in 1924 in 5,000 acres at Mpeketoni being granted to the people of Lamu as a 'communal area'.[77] This was intended to recognize the needs of the Lamu people for cultivable land,[78] but it did not satisfy their claim and the land in question was never opened up by them for cultivation, fearing that by doing so they would lessen the legitimacy of their claim to a wider area.[79] When the Kenya Land

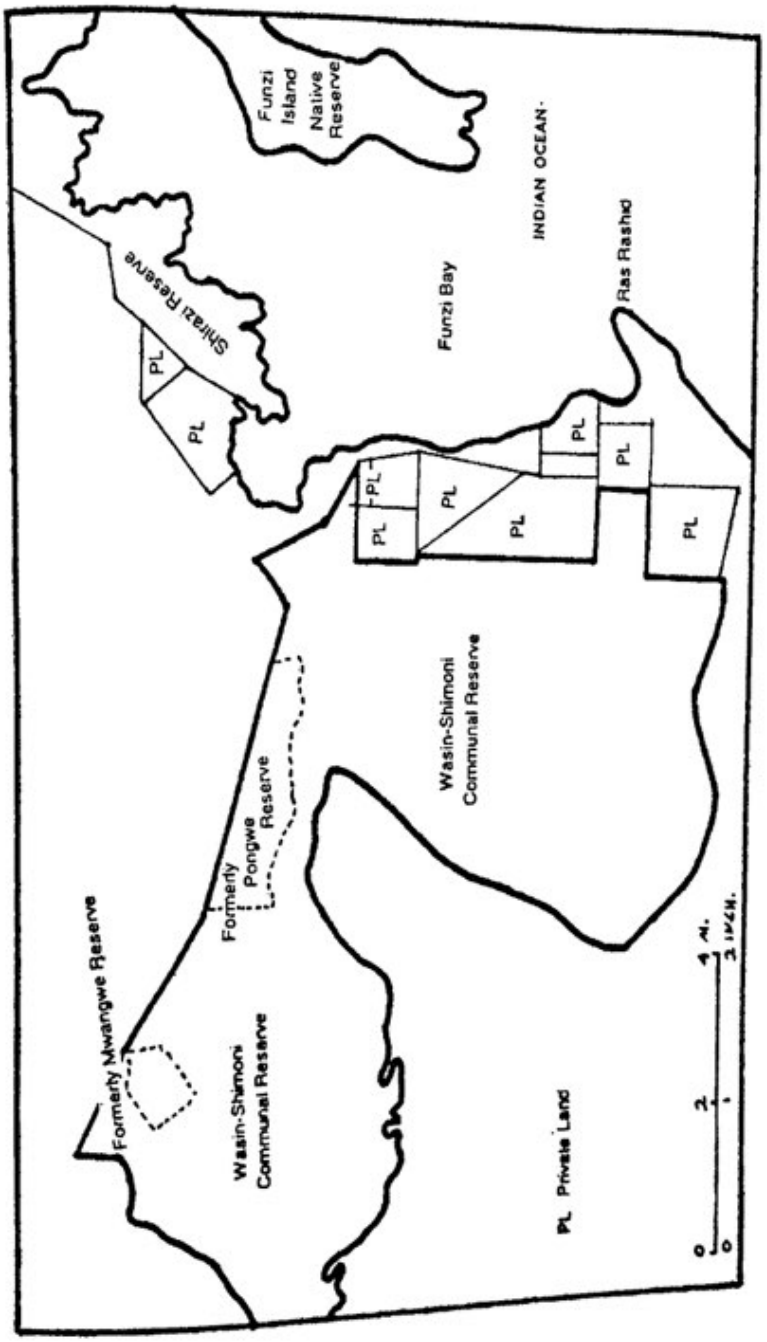
Commission sat in the 1930s, the Lamu communal claims remained an unresolved issue.

The varied procedures carried out in conjunction with the L.T.O. in different parts of the coast indicate that government had a very clear view of the outcome that was most desired. In practice, the L.T.O. was used to draw a distinction between lands where African customary law would continue to operate and lands where individual tenure would be encouraged. *Shari'a* law could be helpful in promoting individual ownership, but only in areas that were not designated as Native Reserves. *Mila*, on the other hand, had no place in the new structure, as settlements under this Swahili system allowed the hybrid forms of ownership that the L.T.O. was designed to eliminate from the coastal region. However, the failure to implement the L.T.O. over the full extent of the coastal region, or to create Native Reserves in those areas not affected by the L.T.O., left large tracts of land where *mila* settlements continued as the basis of local landholding.

ETHNICITY AND LAND RIGHTS

The extent to which the L.T.O. provided a solution to competing land claims along the coast was put to the test in the area south of Mombasa in the Wassini enquiry of 1931. The area of land concerned is known as the Shimoni Peninsula, situated well within what colonial officials termed 'the Mohamedan zone' - the 10-mile coastal strip that had been recognized as the domain of the Sultan of Zanzibar - with its southern portion bordering with Tanganyika. The population of the area was by the 1930s made up of Segeju,[80] the majority of whom were Muslim, Swahili, and Arabs from Wassini Island.

When the L.T.O. was applied in this area in 1919, 31 individual claims were lodged.[81] But, as in Lamu and Mombasa, communal claims were also submitted. One of these was lodged by the "*watu wa Wassini*" (people of Wassini) - on behalf of the Arab community of Wassini Island. Subsequently, the 31 individual claims initially recorded were incorporated within this Wassini communal claim. The District Commissioner, acting in his capacity as Deputy Recorder of Titles, at first rejected the Wassini communal claim on the grounds that the land claimed also covered areas occupied and cultivated by Segeju. Later, a revised communal claim - labeled by officials the 'omnibus claim' - was



Map 4: Wassini - Shimoni Communal Reserves, 1931.

Source: KNA (Nbi), CA/10/49.

put forward under the name of Alawi family, who were reputed to be the original Arab rulers of the island.[82]

Administrative delays meant that this claim was only adjudicated in 1926. The majority of the lands claimed by the Wassini Arabs were in fact occupied by Segeju. Over the entire area local officials admitted that Segeju and Arabs were intermingled, and appeared to have been neighbours for generations, cultivating adjacent plots, and intermarriage was common.[83] The potential for conflict was all too clear. "The Wasegeju have become exceedingly apprehensive", wrote the local District Commissioner, "at the thought of the Arabs being granted title to lands which have been in their joint occupation for generations".[84]

When the Arab claims were adjudicated in the L.R.C. in 1926, Segeju not surprisingly objected.[85] As a compromise solution, local officials suggested that a 'Communal Reserve' be created, with lands secured for the benefit of both the Arab and Segeju communities. To this end, Provincial Commissioner Montgomery held *barazas* at Shimoni (in July), Kwale (in August), and Pongwe (in October) to convince Arab leaders to withdraw their 'omnibus claims'. At Pongwe, with agreement close after many months of persuasion, Montgomery was reinforced by a powerful retinue of officials - Marchant, the district commissioner, L.C. Wright, the Assistant Land Officer, and Sheikh Mbarak bin Said, the *Liwali* of Vanga. After this meeting all parties agreed to accept the idea of a 'Communal Reserve'.[86] This left only a few of the individual claims, which lay outside the area proposed for the 'Communal Reserve', to be adjudicated by government.

Before the 'Communal Reserve' could be created, approval was sought from the Chief Native Commissioner and from the Colonial Office in London. Minor amendments to the Crown Land Ordinance were also required, these being approved in September 1927, and the 'Communal Reserve' gazetted by Government Notice in December 1929.[87] Problems only emerged when the government tried to form a 'Communal Council' to administer the reserve. While Segeju agreed to the formation of the council, the Arabs refused. At a *baraza* held to resolve the issue, in September 1930, several Arab families disputed the disposal of their previous individual claims. Their spokesman, Mohamed bin Nasir, now claimed that when their applications had been withdrawn in 1926, this was done without "their own free will and accord". In short, they alleged that colonial officials, especially Montgomery, had forced them to withdraw their claims and to accept the formation of the 'Communal

Reserve'.[88] At a further *baraza*, in March 1931 at Shimoni, Mohamed bin Nassir restated his accusations and again put forward their claims.[89]

The issue attracted the attention of the senior officials in Nairobi, not least the Governor himself, when it was raised by the Arab representative in the Legislative Council in July 1931. Governor Byrne instructed the Attorney General to investigate the matter, especially in relation to the circumstances of the withdrawal of claim.[90] One month later a judicial enquiry was begun under Mr. Justice Dickinson, to investigate "the circumstances in which in October, 1926, certain Arabs of Wasin surrendered their individual claims to certain areas of land on the Shimoni Peninsula in the Digo District."[91]

Judge Dickinson heard evidence on the case in the Supreme Court, Mombasa, on 23, 24, 25 and 27 November 1931.[92] The Arab claimants were represented by Mr. Ross, a Mombasa-based Advocate, who called twelve witnesses to give evidence. Eleven of these were claimants, the twelfth being Sheriff Abdulla bin Salim, the coastal representative in the Legislative Council. Eight witnesses presented evidence on behalf of the government, including Field Jones, Davenport (District Commissioner Kwale), and O.F. Watkins. Montgomery had returned to Europe on leave, and so submitted a written statement to the enquiry, as did Marchant, who was prevented from attending due to illness.[93] The majority of those persons who had withdrawn individual claims in 1926 were present in the courtroom to hear the proceedings.

In their evidence before Judge Dickinson, nearly all of the Arabs witnesses stated that they had withdrawn their individual claims because of threats made by Montgomery. Mohamed bin Nasir said that Montgomery yelled at them, asking to know why they had disobeyed government instructions:

> "He [Montgomery] said if you do not withdraw your claims the government will stop you coming here, you will be deprived of your food and water. You will be taken to the Island [Wassini] and would not be allowed to leave it so you would starve."

The accusation of coercion was repeated by Sheriff Suleiman bin Abdullah, who claimed that:

> "When I signed the document I did not sign it willingly. It was not translated to me. I signed it because I was frightened by the order of Mr. Montgomery."

Kassim bin Mohamed recalled that Marchant had put the proposition of a 'Communal Reserve', and that Montgomery had reacted aggressively when they rejected the idea:

> "I remember what Mr. Marchant said. He said withdraw your claims and make it a reserve. The Arabs would not agree. Mr. Montgomery was angry when we refused. He told Sheriff Muhamad bin Nassir [claimant no.1] "If you do not agree to withdraw your claims I shall drive you out to the island so far away you will not get food or water there what will you do then?""[94]

Only two of the witnesses called by Ross gave a different version of events. Mohamed bin Juma had attended the *baraza* but did not sign the withdrawal of the claims at that point, only adding his signature when the forms were later brought to him by Mohamed bin Nassir. Mohamed bin Ahmed had signed the withdrawal of the claims in 1926 on behalf of his uncle, Ahmed bin Ali. He explained that pressure from the Segeju neighbours of the Wassini Arabs had contributed to the decision to withdraw the claims: "The Wasegeju and WaSharisu [Arabs] made the noise. I did not hear Mr. Montgomery make noise."[95]

Marchant's written statement gave a very different picture of what had happened. Marchant boldly asserted that the Arab's spokesman, Mohamed bin Nassir, had simply lied to the enquiry. In his evidence, Mohamed bin Nassir claimed that he not seen Montgomery before the Pongwe *baraza* in October, but Marchant pointed out that he had also attended the *baraza* at Kwale in August. He also questioned the truth of the Arab allegations against the Provincial Commissioner:

> "[...]my recollection of the Pongwe Baraza is that I did all the talking, and far from being angry and fierce, I hardly think Mr. Montgomery spoke to the people."

Marchant further disputed other statements made by Ross's witnesses. Sheriff Suleiman bin Abdulla claimed that none of the relevant documents regarding his claim were translated to him, for example, but according to Mr. Marchant the document was read over to all the signatories. In Marchant's view, Mohamed

bin Nassir was only pushing the claims of the Alawi family and it was to be doubted that he represented the wider interests of other Arab families of the area.[96]

Evidence given by the seven Segeju brought before the court contradicted the bulk of the evidence from the Arab spokesmen. They saw no threat in the behaviour of Mr Montgomery. Suleiman bin Omar in his evidence state that:

> "I am a Msegeju. Mohamedan. Born so. I was at this Baraza [at Pongwe]. I heard no threat uttered against the Arabs before they signed the document."

Myinyi Sheh bin Mzai echoed this opinion:

> "There was no disturbance. Everything went quietly. I heard no noise. Mr. Montgomery did not raise his voice or get angry with the Arabs."[97]

The judge had great difficulty in ascertaining the truth in any of these matters. Justice Dickinson also sensed that he was perhaps the victim of a deeper politics. "It is clear to me", he wrote:

> "[...] that there are Arabs with closer attachment to the Wasegeju than to their own people, and vice versa, and that on this subject there is little if any reliance to be placed on the evidence of any these people, as if an arranged story was to be told they would naturally have practiced the telling before the matter came before me."[98]

In Dickinson's view, it was safer therefore to dismiss all of this evidence and deal only with the evidence submitted by the European officials. In this regard, he placed greatest reliance upon the evidence of Marchant, who after all had been a key player in the whole episode:

> "Mr. Marchant's evidence is that the whole story of the alleged threat is pure invention. I prefer to accept Mr. Marchant's statement, and I cannot believe that Mr. Montgomery ever used a threat of the nature alleged."[99]

While Dickinson conceded in his report that it was apparent that the Provincial Commissioner and the District Commissioner were both "strongly opposed" to

the 'omnibus claims' of the Wassini Arabs, the dismissal of the claim was undoubtedly to be viewed as in the best interest of the both parties:

> "I do not doubt that their [P.C. and D.C.] opposition was well founded on their local knowledge, and that they were considering the effect of the granting of such claims in the interest of the claimants themselves as well as the effect on the Wasegeju people and the odd native settlers."[100]

Dickinson made two suggestions that were accepted by government and went some way to ameliorating the hostility that the case created. He first suggested that initial claims submitted in 1926 should be re-lodged and adjudicated, arguing that there would be "no injury[...]to the Arab's neighbour" if the government decided to adjudicate those claims and later delineate them from the 'Communal Reserve'. Secondly, Dickinson suggested that government should dismiss the omnibus claims made by the Alawi family.[101]

Beyond the immediate concerns of the case, the Wassini enquiry serves to highlight many of the issues and difficulties raised by the implementation of the L.T.O. Firstly, there was the issue of the different rights invoked under the L.T.O. The Muslim Mijikenda and other Africans were hampered from owning land individually, while their fellow Muslims, namely the Arabs and Swahilis, were given the privilege to do so. Where such people lived in close proximity, the operation of the L.T.O. inevitably undermined the reciprocal relationships between them and could be a source of conflict. Despite sharing the same religion of Islam, and despite intermarriage and close social linkages, the Segeju and the Wassini Arabs were to be treated separately in regard to land ownership under the L.T.O. The Segeju could not accept that such a differentiation had any practical meaning. As one Segeju witness put it:

> "Mohamed bin Abubakar said the land belongs to me as an Arab of Chichambara. I said no it does not to you, it belongs to me. Mohamed bin Nassir and Mkulu bin Nasir and Alaui bin Nasir are my sons. They are the children of my grand-father."[102]

Land ownership at the coast was closely related to colonial perceptions of 'Native' and 'Non-Native'. The Wassini Inquiry reveals how the L.T.O. opened the way to the manipulation of these distinctions for the gain of one group against another. It is apparent that as soon as the Wassini Arabs realised the creation of