

LAND CONTROL LAW

1 Prefatory

1. 1 In Chapter 12.8 we discussed the need for control when unsophisticated communities are introduced to easy and simple methods of land dealing. The purpose of this control is the protection of the landowners. In Chapter 13.6 we discussed the control needed for the protection of the land, itself from dealing which could adversely affect its use. As an example of the kind of legislation that is required to provide control of dealing for both purposes we set out below the Malawi Local Land Boards Act 1967. Like the Malawi Adjudication of Title Act 1971 it is. Largely self-explanatory and little comment is necessary. It provides for the setting up of Local Land Boards composed of persons resident in the locality, but under official chairmanship, and no dealing is allowed without the consent of the Board. The procedure contained in the Act is administrative and is not subject to appeal to the courts.

1.2 Provision for the administrative control of land dealing for the purpose of protecting indigenous landowners was made in the Sudan by the Natives Disposition of Land Restriction (No. 1) Ordinance 1918, which replaced a Proclamation promulgated in 1905 for the same purpose. This ordinance (comprising only five sections) provided that no disposition of land should be made by a native of the Sudan without the consent of the Governor of the Province in which the land was situated. Any disposition made without this consent was null and void, and any consideration paid in respect of it as irrecoverable at law. No other penalty was provided. The Natives Disposition of Land Restriction (No. 2) Ordinance 1923 allowed the Governor to delegate to certain administrative officers and native authorities the power to give consent, subject to appeal to the Governor if consent was refused..

1.3 In Kenya an ordinance entitled the Land Control (Native Land) Ordinance was enacted in 1959 at the same time as the Native Land Restriction Ordinance (later called the Land Registration (Special Areas) Ordinance), which introduced into the customary area all the facilities of registered title. In fact the bills for both these Acts were drafted by the Working Party on African Land Tenure 1957-1958 and were printed in its report; but, though the general features of this Land Control Ordinance were derived from the Sudan legislation, control of land dealing was no novelty in Kenya since a Land Control Ordinance enacted in 1943 had introduced it in respect of dealings in the large-scale farms then owned by Europeans in the Highlands. We need not pursue these two control ordinances through the various changes which first turned them into regulations and then brought them together in one enactment entitled the Land Control (Transitional Provisions) Regulations 1963, but in 1967 a new Act, the Land Control Act 1967, was enacted in order, according to its long title, "to provide for controlling transactions in agricultural land". This Act comprises twenty-seven sections (in ten Parts) and we shall draw attention to the main particulars in which it differs from the Local Land Boards Act 1967 which was enacted in Malawi at the same time as the Registered Land Act and the Customary Land (Development) Act. The text of the Malawi Act (with section numbers flagged) is printed in larger type to distinguish it from the commentary.

2 Malawi Local Land Control Boards Act 1967 and commentary

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An Act to provide for the Establishment and powers of Local Land Boards, and for matters incidental thereto and connected therewith

ENACTED by the Parliament of Malawi

PART I - PRELIMINARY

Short title.

8 1. This Act may be cited as the Local Land Boards Act, 1967.

Interpretation.

8 2. In this Act unless the context otherwise requires—

"Board" means a Local Land Board appointed by the Minister under section 4;

"Division" means a Land Control Division declared by the Minister in accordance with the provision of section 3;

"family land" means land of which the proprietor is registered as family representative under the provision of section 4 of the Registered, Land Act, 1967;

"interest in land" means a right or interest in or over land which is capable of being registered under the provisions of the Registered Land Act, 1967;

"land" includes land covered with water, all things growing on land, and buildings and other things permanently fixed to land;

"Registrar" means the Land Registrar or Assistant Registrar in charge of the Registry established under the Registered Land Act, 1967, for the registration district in which the Land Control Division is situated.

Application.

83. The Minister may, by order, declare that a land registration district constituted under the provisions of the Registered Land Act, 1967, shall be a Land Control Division for the purposes of this Act.

Local Land Boards.

8 4. (1) There shall be established for each Division a Local Land Board which shall consist of—

- (a) the District Commissioner in whose district the Division is situated, who shall be Chairman;
- (b) not more than two public officers pointed by Native Authorities or by office by the Minister;
- (c) two persons appointed by the Native Authorities established under the provisions of section 3 of the Native Authority Ordinance for the Division; and
- (d) such number of persons, being not less than five nor more than nine, as the Minister shall appoint, from residents within the Division.

(2) The Registrar shall be the executive officer of the Board, who shall attend and may speak at any meeting of the Committee, but shall not vote.

The composition of the Kenya Board is similar is a nice blend of central government officials (to provide expert advice) local government representatives, and local landowners or notables. The fact that the Registrar is the executive officer of the Board enables him to organize and expedite the giving of consent (which is prerequisite to registration and so closely concerns him in any case).

Board procedure.

8 5. The Chairman shall preside at all meetings of a Board at which he is present and, if he is absent, the members of the Board present at a meeting shall elect one of themselves to preside at that meeting.

(2) (a): The quorum of a Board, where the total number of members of the Board is an even number, shall be one-half of that number and, where the total number of members is an uneven number, shall be one-half of the even number that is greater than that number by one.

(b) In the event of an equality of votes the Chairman or other member presiding shall have a casting as well as an original vote.

(3) If a member of the Board has an interest, direct or indirect, in any matter before the Board, and is present at a meeting of the Board at which the matter is under consideration, he shall, at the meeting, as soon as practicable after its commencement, disclose the fact and shall not take part in the consideration or discussion of, or vote on any question with respect to, the determination of that matter.

(4) The Board may require the attendance of any party to, or any person interested in or affected by, any matter before the Board and may demand the production of any document or other evidence relating to the matter.

(5) Where any person whose presence is required is not present, or any document, the production of which has been demanded, is not produced, the Board~ may postpone hearing the matter to give a reasonable opportunity for the appearance of such person or the production of such document.

The following two procedural sections from the Kenya Land Control Act 1967 could with advantage perhaps be included in this Act:

Tenure of office of members of boards

“14. An appointed member of a board shall hold office for such period as may be prescribed or, where no period is prescribed, for such period as may be specified in his appointment:

“Provided that a member's appointment may be terminated at any time by the Minister, and a member may resign at any time by notice in writing to the Minister.”

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"Powers to inspect land.

“18. Any member of a board and any person authorized in writing by a board may, at any reasonable time after giving at least forty-eight hours notice, and on production of his authority any person reasonably requiring it, enter upon and inspect any land for the purpose of carrying out the functions of the board under this Act.”

PART II - CONSENT TO TRANSACTIONS

Restriction on land transactions

8 6.—(1) No person shall, in respect of land situate in a Division, except with the consent of the Board, or by virtue of a general consent given by the Minister in accordance with the provisions of section 7—

(a) sell, lease, charge, exchange, partition, subdivide or in any way dispose of or deal with any such land or any interest in such land; or

(b) acquire any such land or any interest in such land (otherwise than by prescription) on behalf of himself, or on behalf of any other person:

Provided that nothing in this subsection shall apply to—

(i) a transmission (within the meaning of the Registered, Land Act, 1967) of any such land or of an interest in any such land on the death of the owner, unless such transmission involves a subdivision of the land;

(ii) any transaction made by or in favour of the Government.

(2) Any agreement for sale, lease, charge; exchange, partition or subdivision or for any other transaction to which subsection (1) of this section applies, shall be unenforceable—

(a) subject to the provisions of subsection (3), if the Board has refused its consent thereto, as from the date of such refusal, or,

(b) if the application to the Board for its consent thereto has not been made within a period of thirty days from the date of the making of such agreement, as from the expiry of such period,

and if any money or other valuable consideration has been paid under any agreement which becomes unenforceable as aforesaid, such money or consideration shall be a civil debt recoverable from the person to whom it has been paid by the person who paid the same.

(3) Notwithstanding the provisions of subsection (2), when the consent of a Board to any dealing has been refused and such refusal is reversed by Order of the Minister upon review under the provisions of section 13, then any agreement which has become unenforceable by reason of subsection (2), shall, subject to any conditions in the Order, be enforceable.

It should be noted that these provisions enable the Board to operate as much in the interest of protecting the land as of protecting the landowner.

This Act contains no rules or directions for the guidance of the Boards in the exercise of their powers, but if consent is refused the reasons for the refusal must be set out on the application form to which it relates and the decision may be reviewed by the Minister. Thus a practical system can be built up based on actual decisions as reviewed at a higher level. The Kenya Land Control Act 1967, however, sets out instructions for the Board in a long section derived, in part, from the Land Control Ordinance of 1943 which, as we have already mentioned, provided for the control of dealing in the Highlands. It reads as follows:

Granting or refusal of consent

"9. (1) In deciding whether to grant or refuse consent in respect of a controlled transaction, a land control board shall—

"(a) have regard to the effect which the grant or refusal of consent is likely to have on the economic development of the land concerned or on the maintenance or improvement of Standards of good husbandry within the land control area;

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

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

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

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

"(c) already has sufficient agricultural land; or

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

"(a) already has sufficient shares in a private company or cooperative society owning agricultural land; or

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

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

"(iv) in the case of the division of land into two or more parcels, the division would be likely to reduce the productivity of the land;

refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not—

(i) a citizen of Kenya; or

(ii) a private company or cooperative society all of whose members are citizens of Kenya,

(2) Where an application for consent in respect of a controlled transaction is made to a land control board, and the board does not determine the application within a period of three months after the application is made, the application shall be deemed to have been refused at the expiry of that period."

General consent and no consent

8 7.—(1) The Minister may, by order—

(a) give general consent with respect of all transactions or of any specified class of transaction in a Division or, part of a Division:

(b) direct the Board that consent shall not be given to any transactions in a part of a Division or to any class of transaction in the Division or part of a Division.

(2) A copy of every order under subsection (1) shall be sent to the Registrar and to the District Commissioner of the district in which the land to which it relates is situated.

(3) An order under this section need not be published in the Gazette but shall be published in the Division or part of the Division to which it relates in such manner as the District Commissioner considers will bring it to the knowledge of the persons likely to be affected by the order.

Under this section the Minister can give a 'general consent', for example, to all charges in favour of an Agricultural Bank and such charges would not then have to go before the Board, or he might give a 'general consent' to all transactions in a particular area, for instance a town, and so the restriction can be wholly lifted in places where it is no longer necessary. On the other hand, the provision for 'no consent' could be used to totally forbid some particular transaction, e.g. subdivision below a certain limit. Similar provision is made, perhaps more neatly, in the Kenya Land Control Act which permits the President by notice in the Gazette to prohibit any transaction or class of transaction (s23) and to exempt from the prohibition (a) any land or class of land; or (b) any transaction or class of transaction; or (c) any person (s24)

Submission and disposal of applications

8 8.—(1) Every application for consent under this Act shall be made in duplicate in the prescribed form, shall be signed by the applicant or by a person lawfully authorized to act on his behalf and shall be submitted to the appropriate Board through the Registrar.

(2) Every decision of a Board shall be noted on the application to which it relates together with—

(a) the reasons for refusal where consent has been refused; or,

(b) any conditions which may have been imposed where consent has been granted.

(3) One copy shall be returned to the applicant and the other shall be sent to the Registrar.

Consent upon condition

89. A Board may, in granting consent, impose such conditions not inconsistent with the provisions of the Registered Land Act, 1967, as the Board thinks fit.

PART III - FAMILY LAND MATTERS

The Local Land Board is, in composition, very similar to the 'Land Committee' by which land is adjudicated under the Customary Land Development Act (which we discussed in the last chapter). Thus there is ready to hand, as it were, a suitable body for the resolution of what are basically customary land problems. In Malawi these problems have been kept alive by the registration of family ownership, and this Part makes provision to do, when the time comes, what in Kenya was done at the time of the initial adjudication. This provision, however, has not yet been tested in practice.

Partition of family land

8 10.—(1) When an application made under section 101 of the Registered Land Act, 1967, for the partition of family land has been referred to the Board by the Registrar, the Board shall first ascertain the names of the members of the family entitled to a share of the land and the size of each such share, and then shall effect the partition of the land with the agreement of the members or in the absence of agreement in such manner as the Board may order having due regard to the rules of customary law affecting the land.

(2) The provisions of sections 98, 99 and 100 of the Registered Land Act, 1967 (which relate to the partition of land owned in common, when the Registrar may order sale and the procedure where a share is small) shall apply with necessary modifications and the Board shall perform the duties and exercise the powers of the Registrar provided for in those sections as if the members of the family entitled to a share of the land were proprietors in common.

(3) The partition agreement or order when completed shall be forwarded to the Registrar.

Replacement of family representative

8 11.—(1) Where the Registrar has made reference to a Board under the provisions of section 122 of the Registered Land Act, 1967, for the replacement of a family representative, then, on proof to the satisfaction of the Board—

(a) of the death of the family representative;

(b) that the family representative is unable to act by reason of mental or physical incapacity, absence from Malawi, imprisonment or detention; or

(c) that the family representative is no longer acceptable to the majority of the members of the family, the Board shall nominate a new family representative.

(2) In nominating a new family representative the Board shall have due regard to the wishes of the members of the family and any custom affecting the land.

(3) The nomination of a new family representative shall be reported by the Board to the Registrar in writing.

PART IV - OTHER POWERS OF BOARD

Part VI of the Malawi Land Act gives the Minister extensive powers to regulate, manage and control the user of land including the method of cultivation, the keeping of livestock, and the conservation of the soil. The intention of this Part is to make use of the Board for these matters and so associate the local people with the development and conservation of their own countryside. However, this also has not yet been tried in practice.

Land use

8 12.—The Board shall perform such functions in relation to the powers of control of user of land vested in the Minister by Part XI of the Malawi Land Act, 1965, as may be conferred upon the Board by regulations, directions or instructions issued by the Minister made in such Part.

PART V - MISCELLANEOUS

Review

8 13.—(1) Any person whose application for consent to any transaction has been refused by a Board, or who considers himself adversely affected by a condition imposed by a Board in granting consent or by a decision of the Board given under section 10 or section 11, may, within fifteen days of such refusal, by notice in writing to the Board to refer the matter for review by the Minister.

(2) Upon receipt of such notice, or of a notice by the Minister that the Minister intends to review a decision of the Board, the Board shall forthwith refer the matter for review by the Minister, who shall review the matter and make such order therein as he thinks fit.

(3) The provisions of subsections (4) and (5) of section 5 shall with any necessary modifications, apply to a review under this section, as they apply to the hearing of an application or other proceeding before the Board.

The 'review' provided for in this section should be contrasted with the chain of appeal in Kenya. The Kenya Land Control Act 1967 establishes provincial land control boards to which appeals may be made from decisions of land control boards, and it also establishes a central land control board (under the chairmanship of the Minister, and including four other Ministers and the Attorney-General) to hear appeals from decisions of the provincial land control boards.

Offences

8 14.—(1) Any person who takes part or attempts to take part in a transaction which is unenforceable under the provisions of section 6 or aids or abets such transaction or who contravenes a condition imposed by a Board or the Minister shall be guilty of an offence and shall be liable to a fine not exceeding £100 or to imprisonment for a term not exceeding one year, or to both such fine and such imprisonment.

(2) A court which convicts a person under the provisions of subsection (1), shall have the power to order the eviction of such person from any land occupied by him in pursuance of an unenforceable transaction or as a result of a contravention of a condition imposed by a Board or the Minister.

(3) Any person who is required to attend before the Board or the Minister, or produce any document or other evidence, and who fails to attend or produce such document or other evidence, shall be guilty of an offence and shall be liable to a

fine not exceeding £20 or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

It is questionable if it is necessary to impose a penalty other than to make void any transaction which does not comply with the requirements of the Ordinance, but subsection (2) confers a very necessary power and furthermore, by implication, makes it clear that conviction by a court is necessary before administrative action can be taken to evict for contravention of the Act.

Regulations

8 15. The Minister may make regulations for better carrying out the provisions of this Act.