

LAND LEGISLATION AND WOMEN IN KENYA

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Abstract

This study interrogates the issue of women and land ownership in Kenya within the context of the current land legislative framework. Both obstacles and opportunities in existing land legislation are highlighted as they pertain to Kenya's gendered property rights. Kenya's women provide over 70% of the labor in cash crop production and over 90% of the labor in subsistence farming, yet they hold only 1% of registered land titles. Only 5% of registered titles are held jointly by both women and men. The existing dual system of jurisdiction over property rights with its numerous contradictions perpetuates the status quo. Multiple statutes governing land matters present incompatible and contradictory legal regimes which affect the implementation of current land law. Illustrations of this confusing legal landscape are presented along with other impediments that further prevent the realization of women's property rights and continue to perpetuate this gendered land ownership scenario.

Keywords: land laws, women's property rights, customary land tenure

Introduction

Land provides the principal source of livelihood for citizens in Kenya and represents not just economic capital, but also carries significant political and social capital. Land holds significant social value, providing a location wherever people live, a place wherever they belong and a place where they can return time and again. Land is a symbol that represents people's identity (Toulmin, 2005). Land has a spiritual connection by providing a place for burials, other

rituals and sacred groves. Land provides a continuum involving the dead, the living and the yet-to-be-born. In Kenya like in most African societies, the living are tasked with the responsibility of custodianship for family land for future generations.

As an economic resource, land is the primary source of wealth. Like in most of Sub-Saharan Africa, the vast majority of people (over 70%) live in the countryside and are directly dependent on agriculture for their livelihood. Land enables household members to put their labor into productive use. Land is an inheritable asset forming the basis for wealth and security for future generations (Quan, 2000) and it can be mortgaged, rented, leased, sold or loaned out during times of financial hardship (Smith 2003).

The study

In Kenya's predominantly agricultural economy, the vast majority of the labor is provided by women. Over 70% of the labor force in commercial agriculture is women while they make up 90% of the labor in subsistence agriculture. Women are essentially land users. The ownership scenario of the said agricultural land is completely different. Less than 1% of registered land titles in Kenya are held by women. Less than 5% of the registered titles are in held jointly both by women and men (Federation of Women Lawyers, Kenya. (FWLK), undated). Essentially, land ownership is a gendered matter and women are not land owners. This has economic and social implications. Concerns about improvements in agricultural productivity and in poverty reduction are constrained by this gendered property rights especially given that access to traditional forms of credit is still largely tied to registered titles which in the case of Kenya are largely held by non-users. There are also larger implications on future food security.

Land ownership matters in Kenya have historically been administered under multiple statutes. Until recently, there were as many as 75 different laws governing land which presented a legal framework ripe with redundancies, contradictions and incompatibilities. This remains a confusing legal environment for most people to navigate and many of the statutes enforce the status quo with few women as land owners and in possession of registered land titles. The statutes relegate exclusive ownership rights of registered land to men. Several laws outright discriminate against women. Most statutes make reference to customary law which bestows exclusive control of land to men. It is therefore not surprising that the lack of awareness about statutory provisions and rights is widespread among decision makers and among land users and owners.

In the second decade of the 21st century, significant milestones have been reached towards streamlining the legal framework governing land. Kenya's first National Land Policy emerged in 2009 after more than 5 years of vibrant national dialogue. The policy provided a unified, coherent and comprehensive framework that addressed the legal regimes and presented opportunity for reform in land administration that was hoped to improve the lives of ordinary citizens (Republic of Kenya, 2009). Shortly afterwards another significant milestone was reached with the completion of the revised constitution in 2010.

Under the revised constitution (Republic of Kenya, 2010) there are three categories of land; public land, community land and private land. This study focuses entirely on private land. The constitution defines private land as registered land held under either freehold, leasehold or as designated by an act of parliament. Among other provisions, the constitution explicitly provides for the revision, consolidation and rationalization of existing land laws to the extent that these laws recognize and protect matrimonial property and especially the matrimonial home during

and on the termination of marriage. There are also provisions that protect dependents of deceased persons with interests in land including the interests of spouses in actual land occupied.

The first truly comprehensive land law in Kenya (the Land Act No. 6) was produced in 2012 (Republic of Kenya, 2012). The law explicitly contains the rights and provisions that govern the three categories of land but this study closely examines provisions relating to private land (part 5 of the law). The law spells out that law suits contesting sale of land and attempting to regain possession of such land can only be brought forward to the courts if the sale contract was in writing and all parties with interests to the said land signed the sale contract and included witnesses. Many land transactions in Kenya are carried out without written sale contracts. This provision of the Land Act effectively excludes many contentious attempts at repossession of land. This particularly disadvantages women who are often stripped of their matrimonial property when their husbands or sons transfer land without a written contract and without the women's consent. This law does not give any recourse or protection to the long-time land users (women). Part 5 of the law also outlines modalities of transfers of private land ownership and the transmission of rights when landowners are deceased.

The 2010 constitution decentralized land administration and created multiple levels of management, effectively replacing the highly centralized system under the Office of the Commissioner of Lands (Republic of Kenya, 2010). The constitution provided for the creation of the several authorities that anchored land administration and that would focus efforts on streamlining land legislation. The National Land Commission was created through the National Land Commission Act (Republic of Kenya, 2012b) with significant autonomy and a well-diversified membership. The commission consists of 8 members and a chairperson who hold office for a 6 year terms without reappointment. Of the 9 commissioners, 3 are women (National

Land Commission (NLC), 2016). The Commission's membership reflects gender and ethnic diversity. The commission established county-level land management boards across the 47 counties. Each of these land management boards comprise of 3 - 9 members each serving 5 year terms and are also expected to reflect gender and ethnic diversity as exists in individual counties.

The County Governments Act (Republic of Kenya, 2012c) includes provisions for the role of the county governments to participate in land administration through County Level Land Management Boards. Several other developments have added to the milestones towards streamlining land administration in the country. The Agricultural and Food Authority was created through an instrumental piece of legislation in 2013 (the Agricultural and Food Authority Act) (Republic of Kenya, 2013). The Food Authority is charged with matters of food security and safety and the central issues that revolve around land administration. The Environment and Land Court Act (Republic of Kenya, 2011) is another central statute that touches on land matters. The principle that a certificate of title is the conclusive evidence of land ownership is enshrined in the Land Registration Act (No. 3 of 2012) (Republic of Kenya, 2012d). This Registration Act is perhaps the most visible land statute and provides for some intervening interests in such proprietary land rights. These include spousal rights over matrimonial property.

In addition to the numerous statutes governing land, customary laws are in effect. Customary land tenure following the various customary practices of most communities in Kenya is still the most recognized and referenced form of land ownership. Most land users and land owners are familiar with their respective customary laws and practices. Decision makers and local leaders are familiar with customary tenure practices and often fall back on to them when in doubt about the statutory tenure practices.

Since we do not have the statutes or written laws, we usually invoke customs because that is what we know. Local government officials often apply customary law when they are unfamiliar with the written laws.

Assistant Chief from the Meru. International Women's Human Rights Clinic (IWHRC, 2009)

This is not surprising given the numerous laws in existence. Most land users and/or land owners are not familiar with provisions contained in these laws. As described above, the statutory framework is in transition and there have been lots of changes made to the land laws in the past five years. It is unrealistic to expect that the general public is conversant with these land laws unless there has been a campaign to increase public awareness on these provisions of these land laws. The average citizen is familiar with the provisions in the constitution owing to the huge public awareness effort implementing during the constitutional reform process.

The majority of customary laws and practices have significant gender bias. Among many communities, there is the perception that women cannot own land and that women are unable to make decisions on land allocations and transfers. Consequently most communities give women user rights to land but not management rights and or rights to transfer land. This has resulted in women having limited rights to land and not the full suite of ownership rights. Thus women are land users but not land owners. The registered land titles represent the full suite of ownership rights particularly the rights to transfer land to others. Subsequently, women in Kenya have been excluded from land ownership as reflected in the less than 1% of registered titles that are held by women.

During pre-colonial times, customary tenure catered to the needs of families and was specific to the locations where the land was. Both women and men had full ownership rights to land. Most customary laws prohibited the sale of land. Women's rights were protected even after their spouse had died. Customary systems of land tenure are dynamic and location specific.

After the introduction of western land laws, there emerged a significant gender bias as customary laws evolved. In post-colonial times, customary laws have shifted away from protecting women's rights to land to instead discriminating against women's rights to land. This raises the issue of whether western laws can be supplanted wholesale in African jurisdictions. Western values that inspired the western laws are not necessarily mirrored in Kenya. Statutes reflecting western aspirations appear discriminatory in the context of Kenyan cultural values. The gender bias is perpetuated in several land laws. Examples of three of the most notable ones included the Marriage Act, the Divorce Act and the Succession Act (IWHRC, 2009).

The Law of Succession (Republic of Kenya, 1972) defines dependents in article 29 as either a wife (or wives) and children, or other family member including parents, step children, step parents, siblings and half siblings. This law assumes that the only males can have dependents. This law stipulates that the dependent is entitled to personal and household effects of the deceased as well as life interest in the residue of net estate. In the case of immovable property, exercise of power is left to the consent of the court. The courts also have complete discretion in determining the disputes arising over succession. This language (and to a large extent the spirit) of the statute implies that only men can have dependents which is discriminatory. The deference of matters to the courts leaves a lot of room for judges and other decision-makers to revert to what they are most familiar with; the customary laws. Article 32 of the Succession Act provides for intestacy involving agricultural land, crops and livestock on the said land. The article lists the following places where the provisions cannot be applied: - West Pokot, Turkana, Marsabit, Mandera, Wajir, Garissa, Tana River, Narok, Samburu, Isiolo, Lamu and Kajiado (Republic of Kenya, 1972). In this specified locations, only customary laws apply to intestacy. Women in the listed communities are not protected by Kenya's law on succession.

There are inadequate procedural safeguards for land disputes. It appears that customary law is for the most part insulated from appeal and judicial scrutiny. Women are left to the mercy of their surviving relatives when their spouses die and their marital possessions are dispersed among the husband's relatives according to customary practices. Increasingly women are left destitute after their husband's death and the land laws do not provide any protection to such women. Yet if the women's names are included on the registered land titles, such loss of property would not occur since the law recognizes persons named on the title as rightful owners of the property even if one spouse is deceased.

Other impediments for women's land rights in Kenya revolve around the fact that there is a general lack of awareness in the general public and particularly among women of what rights they are entitled to and what the various laws stipulate. This has resulted in the numerous heartbreaking sagas around the country where women are left destitute because they did not know that their names should have been included in the registered titles of matrimonial land and property or that they had a right not to consent to matrimonial property sales. So despite that fact that they women may have worked on the land their whole lives, they are vulnerable to being thrown off the land if new landowners choose to do so. Contestations of user land rights in the courts or in local land tribunals are likely to reflect the current interpretations of customary laws and practices because this are the reference points for judges and other decision-makers.

The constitution provides that women must be represented in all levels of leadership with at least one-third of the positions held by women. Institutions dealing with land matters do not have adequate representation by women despite this one-third rule. Local land tribunals that hear land disputes rarely have women represented yet this is where the majority of land disputes are heard. It is also the most likely place a Kenyan woman is likely to turn if she lost her land

rights. The circumstances are slowly starting to change however. At the national level, the National Land Commission had at least one third of its commissioners as women. Some counties around the country have started to reflect this principle, but in many remote parts of the country things have yet to change. It is anticipated that all 47 counties will have at least one third of the persons constituting the County Land Management Boards as women.

Conclusion

Although progress has been made in streamlining the land laws to reflect realities of the 21st Kenya communities, a lot remains to be done to protect the land rights of Kenyan women. A general awareness campaign about land rights and provisions in various new land laws would go a long way in correcting the gender bias in the land ownership landscape that exists. A lot would be accomplished with the introduction of a single statute that advocates and protects the rights of women particularly on land that they have worked on for long periods. There is still room for improvement in the protection of women's land rights in other areas like marriage laws, divorce laws and succession laws.

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