

Women's Access to Land in Kenya

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■ Andrew Harrington*

Introduction

The 2008 global report by the Commission on Legal Empowerment for the Poor highlighted insecure access to land as a key cause of recurrent poverty and an impediment to development.¹ Though land title does not ensure secure access, Kenyan women hold an exceptionally small proportion of registered titles.² The impacts of being denied access to land are disproportionately felt by Kenyan women, denying them not only access to economic sustenance but also leaving them socially ostracized.

Generally speaking, there can be said to be two main schools of thought on how to address women's land insecurity. The first school advocates increased attention to formal law, legal mechanisms and entrenched rights. The second school supports local systems and community approaches, either despite or within formal law. Proponents of the formal school downplay local norms and practices as they are seen to undermine women's fundamental rights. Conversely, supporters of community practices laud them for their accessibility, application of local knowledge, low cost and speed.

The majority of programming on women's access to land in Kenya has focused on formal legal approaches³; however, there has been an increasing interest in the potential benefits of engaging informal systems in support of women's access to land. This latter interest includes the advent of certain hybrid Kenyan land institutions which incorporate local norms and practices.

The World Bank's *Justice for the Poor* program in Kenya recently partnered with the Legal Resources Foundation Trust (LRF) to conduct an exploratory study on women's access to land in Kenyan agricultural communities, the results of which are summarized here.⁴ The goal of this research was to begin developing an understanding of how formal and informal justice systems govern women's access to land in agricultural communities and how women navigate such systems in search of their rights. Results of this study strongly suggest



Interview with widowed female land owner, Western Province.

that access to land for women should not be framed as a 'formal vs. informal law' issue. The same local power dynamics underpin, control and ultimately undermine access for women in both arenas. These findings will be used to inform future initiatives on women's access to land.

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¹ "Making the Law Work for Everyone" Commission on Legal Empowerment of the Poor (2008).

² "Voices of Women Entrepreneurs in Kenya" IFC Gender Entrepreneurship Markets & Foreign Investment Advisory Service IFC & World Bank (2006); "Land: Better Access and Secure Rights for Poor People" DFID (2007).

³ See generally: Harrington, A. "Women's Access to Land: A Review of the Literature." *Justice for the Poor/Kenya*, World Bank (July 2008).

⁴ A fuller exploration of the findings will be released in a forthcoming research report. Qualitative research was carried out in September and October, 2008 in Central Province (Nyeri North and Nyeri South Districts), Rift Valley (Nakuru, Koibatek, Eldama Ravine and Baringo Districts) and Western Province (Mumias, Butere, Emuhaya, Kakamega and Vihiga Districts).

Inheritance: A Key Way Women Access Land

Past formal titling initiatives have led to men holding almost all land titles in Kenya. These past initiatives permitted some informal practices, such as the patrilineal holding of land, to be extended and entrenched. Inheritance systems based on these patrilineal kinship structures remain strong and now operate supported by the formal system. Since women seldom purchase land, inheritance from men remains the principal manner in which women access land.

The two key groups of women inheriting are widows and daughters. Though widows may not inherit land in the absolute sense under most patrilineal systems, they are often permitted to remain on their husbands' lands and retain a 'life interest'—in essence holding land in trust for any sons who will continue the patrilineage. Widows are known to suffer land grabbing at the hands of brothers in law.

Daughters are nearly universally denied access to land through inheritance because, under patrilineal systems, they are perceived as transients who will eventually marry away; they cannot inherit land because if they do it will be incorporated into their husbands' patrilineage. Thus, brothers almost always seek to exclude their sisters from a father's inheritance—even if the father explicitly listed them in his will.⁵ For example, one paralegal interviewed recounted how her father willed her and her sister the entirety of his land holdings. However, her neighbours and relatives intervened immediately after his death seeking to appropriate the land. Only after a lengthy and bitter court battle did she finally succeed in securing her inheritance.

Usually, such land grabbing is not acceptable following local practices and usually runs against them. "Custom" is falsely invoked as an excuse. Despite some instances linked to informal practices, the overarching motivations are self-serving. Some grab lands for economic reasons (as a commodity) while others do it for cultural reasons (a cultural commodity insofar as it increases the size of land holdings for inheritance by their sons). In-laws and brothers 'forum shop' and use whatever means available which best support efforts to attain their goals. They may engage community systems which they persuade to support denying a woman land. They may choose to engage formal land mechanisms at the local level which exclude women and likewise have the propensity to rule against women. In



Focus group interview with local family and elders, Central Province.

some cases, land-grabbers may engage the formal legal system and rush to court to file an official succession claim and exclude female beneficiaries.

Local Mechanisms: "Custom", Power Dynamics & Lack of Engagement

When women suffer such land disputes, research indicated they follow a rough hierarchy of steps in their efforts to resolve them, usually working through local authorities, informal and formal institutions. At each step, significant barriers exist to women's seeking justice. Cultural practices alone may be strong enough to deter a woman from pursuing her case and lead her to abandon a claim entirely. Otherwise, dominant parties make false claims to 'custom' in usurping women's lands, but since they are inevitably connected with local power structures (if not part of them), such claims are accepted by the community at a woman's expense. Bringing a land dispute to her family and community may also result in hostilities. Such women are considered disruptive and may be denied family support mechanisms.

Should a woman approach the provincial administration, redress is unlikely. Provincial administration officials, mainly chiefs or assistant chiefs, are 'gatekeepers' between the informal and formal systems. Instead of challenging local power dynamics which are stacked against women, they feel obliged to uphold them to retain their legitimacy in the eyes of the community and maintain peace within it. They are thus swayed by false justifications of "custom". They may also be bribed by more powerful parties, or simply refer cases back to the family level. In the worst cases, chiefs themselves are directly responsible for land rights violations. One interviewee recounted how her chief had stolen her land deed and tried to appropriate her lands; upon attempting to fight back against this injustice, the chief went about destroying her and her family's reputation causing her to lose her job.

⁵ Research indicated an apparent trend whereby daughters with good knowledge of formal legal rights are more likely to successfully demand and receive lands through inheritance as well as receive land as a gift from their fathers. The finding indicates this may be an area where further research ought to be considered.

Community-level land institutions also handle certain land issues and safeguard women's access to land. Land Control Boards (LCBs) were implemented to regulate transactions involving agricultural lands with an eye toward protecting against unscrupulous and unfair sales.⁶ Land Disputes Tribunals⁷ (LDTs) were established *inter alia* to handle land disputes over agricultural lands. While perhaps tooled for different purposes (regulating land sales and presiding over land disputes respectively), both institutions are governed by, and reliant upon, the same local power dynamics which disadvantage women. The propensity to reflect local power structures and reproduce negative practices by both institutions mean women are disadvantaged in proceedings and frequently excluded entirely. This is of concern since the Draft National Land Policy aims to replace both institutions with a singular more inclusive mechanism, albeit still based on local power structures and practices.⁸

Formal Justice System: Community Pariah Status and Systemic Barriers

The few women who opt to approach the formal system experience their own set of problems. Courts are seen by many to undermine local power structures and breed community discord. Those interviewed as part of the study stated that their communities were infuriated when someone went to court—unless the claimant was part of the power structure themselves or followed the hierarchy. Women who persevere and pursue their case may become social pariahs—regardless of whether they win or lose—and are frequently cut off from family and community support mechanisms. They are also liable to face threats and actual physical violence, possibly even murder for their 'audacity'.

Even if successful in engaging formal courts, the laws do not always favor women's rights. Under the Law of



Focus group interview with local assistant chief, elder and research group, Rift Valley Province.

Succession Act⁹, an intestate husband's widow only receives a life interest in his estate; by contrast, a widower has no such limitation. Daughters are not explicitly included in the law as potential beneficiaries in the case that their father dies intestate. This lack of explicit reference is interpreted by local officials in a cultural manner which excludes girls.

Filing a succession claim over land in court is a daunting affair. The actual claim process includes a dizzying seventeen different legal steps to complete, thirteen forms to be filled out, numerous affidavits to be signed, and takes between seven months to one year to complete. Costs are also high. The minimum possible cost of fully completing a succession claim is approximately Ksh 8985 (USD\$117)—an exceptional amount considering the low household incomes typical of agricultural areas. Lawyers can facilitate and speed up succession proceedings, however, engaging their services can cost up to Ksh 60,000 (app. USD\$780)—not including filing fees. Magistrates' courts are far more numerous than high courts, but are often barred from hearing succession claims; a cost cap on claims within their jurisdiction precludes most succession claims. Cases therefore must progress directly to high courts which are fewer, more distant and in which proceedings are expensive and more complicated.



Research team meeting with community paralegal, Central Province.

⁶ Land Control Act 1967 (Cap 302).

⁷ Land Disputes Tribunal Act (Act No. 18, 1990).

⁸ Draft National Land Policy for Kenya, Ministry of Lands, National Land Policy Secretariat (May 2007), Section 4.3.4 Land Disputes Tribunals.

⁹ The Law of Succession Act (Cap. 160).

Conclusion

This preliminary study strongly indicates that the lack of access to land for women in Kenya's agricultural communities cannot be framed as a failing of formal or informal systems, but rather as issues with both.

Even the creation of fused or hybrid mechanisms, such as the LCBs and LDTs, has not increased access to justice. Underlying power dynamics and the use of such systems by self-serving individuals undercut gender equity efforts. The findings strongly suggest that the key to increasing access to justice at both the community formal and informal levels is to address power dynamics and understand further how they operate to the detriment of women. This would be aided if concurrent formal reform addressed barriers such as overly complicated procedures and unrealistic costs which further prevent women from realizing their rights. With land issues currently receiving a significant amount of attention following 2007–8 post-election violence, now is an opportune time to bring greater attention to the problems and issues regarding women's access to land in Kenya.



Focus group interview with member of local Land Disputes Tribunal and community paralegal, Central Province.

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