

**A STUDY ON THE EFFECT OF KENYA'S LAND POLICIES ON
THE LAND RIGHTS OF KENYAN WOMEN**

By

Mutinda Adelaide Kamanthe

THESIS

Submitted to

KDI School of Public Policy and Management

in partial fulfillment of requirements

for the degree of

MASTER OF PUBLIC POLICY

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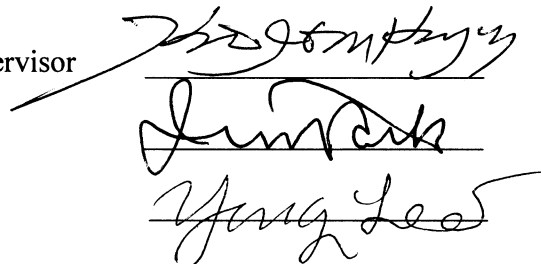
MASTER OF PUBLIC POLICY

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ABSTRACT

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By

Mutinda Adelide Kamanthe

Historically, women in Kenya have been denied their land rights through discriminative land policies and laws which as a result have made them worse off and structurally dependent upon Kenyan men. The need to address this gender disparity in land ownership grows from the recognition that past land policies have systemically marginalized women from access to and control over land. This denial of equal property rights has put Kenyan women at a greater vulnerability to poverty, disease, violence, and homelessness compared to Kenyan men. This research paper argues that this situation is a direct consequence of discriminatory laws and practices. In 2010, Kenyans adopted a new constitution which is laudable in its efforts to address most, if not all, of the issues that have perturbed Kenyan women over the years. The new laws have instilled faith in the forlorn process of political, social and economic change in Kenya. Nonetheless making laws and implementing laws are entirely different processes and the real test lies with the latter. Based on findings and analysis, this research paper identifies those challenges and hurdles that stand in the way of true change in terms of implementation and provides policy recommendations on how to combat those challenges.

DEDICATION

To my family

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First and foremost, I would like to thank Professor Kim Joon Kyung who has been the ideal thesis supervisor. His judicious counsel, shrewd criticisms, and attention aided the writing of this study in innumerable ways. I also sincerely appreciate Professor Jin Park's expertise and cooperation.

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Last but not least, I wish to thank my family whom this thesis is dedicated to: my dear mother who has always taught me to believe in myself enabling me to undertake this course of study and my dear brother and sister who have the utmost confidence in me. I am also eternally grateful to my Heavenly Father without whom none of this would have been possible.

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Section I. Introduction

Land plays a critical role as a source of livelihood for billions of people around the world. Thus, land distribution, access, management and use are crucial to the form that economic development takes and in the early stages of development, many countries have undertaken land reforms in order to boost economic development through the transfer of the concentration of wealth from the hands of a few wealthy land owners to a land-deprived majority. In yesteryears, the governments of South Korea, Taiwan and Japan undertook successful land reforms which have been much echoed as devices of poverty and landlessness alleviation, assisting industrialization by shifting privately held land to tenant farmers without breaking up productive holdings through land consolidation.

In its simplest definition, land reform may be considered as a redistribution of land or land rights for the benefit of the landless, tenants and farm laborers. In essence, land reform is envisaged as a policy tool by which to redistribute income and wealth, on the one hand, and stimulate capital formation and agricultural productivity on the other. However, land reform is an arduous and costly venture and success stories have been few and far between.

In Kenya, which is the focus on this study, the majority of people sustain their livelihood directly from agriculture, and, therefore, land ownership, access and use have always been sensitive and highly controversial issues. In fact, this has been an ongoing issue ever since the 1950's when the government launched an ongoing land reform which at the time was mainly concerned with the transfer of land in the hands of white settlers to the African populace.

Today, among the controversy surrounding land reform is the equity of land distribution on two fronts. On one hand, the reform has resulted in a highly skewed distribution with a minority, 20 percent, of the populace owning about half of Kenya's arable land while the remaining 80

percent live off one acre or less in arid and semi-arid areas. While the efficacy, or inefficacy, of Kenya's land reform in the context of socioeconomic and ethnic inequality has been debated extensively, curiously enough, little research has been done in the context of gender inequality. This is worrisome because on the other hand, this already grim picture of Kenya's uneven land distribution is even grimmer in the context of Kenyan women. In a curious blend of traditional practices, customs and customary laws, women's rights to land over the years had remained ancillary as they stemmed from their membership in households and only secured through marriage. As a result, Kenyan women had been relegated to the status of second-class citizens who must rely on men as the sources of their rights. Previous land reforms, by largely ignoring their right to own land, let Kenyan women fall between the cracks. Since Kenya's independence in 1963, the right of women to own land in their own right has remained a vexing issue. From the early 1980s, feminist work on land rights for Kenyan women has no doubt, increased, yet such writings continued to be ignored or simply delineated as 'side' issues. In fact, the main thrust of land reform efforts had been largely aimed at correcting socioeconomic and ethnic inequalities which indeed make up part of Kenya's intractable land issues. While a full analysis of the question of ethnicity in the context of land is beyond the scope of this study, it is crucial to simply underscore here that the roots of Kenya's ethnic woes within and without the land issue are far more complex and multifaceted than simple tribal tension. A thorough understanding of Kenya's ethnic conflict necessitates scholars, observers and politicians alike to delve more deeply into the nuances of the ethnic discords and avoid the template of thinking solely in terms of ethnic differences.

Not only does the land question in Kenya concern livelihoods, but it also bears political and symbolic importance as it touches on sensitive issues such as traditional customs and modernity

and communal versus individual rights. Complicated as these issues are in a general sense, they become even more complex when viewed from the perspective of gender discrimination. In order to understand the depth of this controversy one only needs to question the importance of women's independent rights to own land. Are land rights for men any different from those for women? Land rights accord the man and the woman similarly, not only property and social rights, but also a certain sense of self assuredness and security. Moreover, having been denied proper land rights for years, secure land right rights for women also impact on their status within the household, in the community, in the marketplace and with the state.

Methodological Approach

Land in Kenya is primarily used for agricultural and livestock production, and some land is also used for industrial production. This study assumes that land is critical as a factor of production both for agricultural purposes and for alternative development such as housing, industrialization, and for social amenities. The key hypothesis is that security of tenure has an impact on a proxy for economic welfare such as poverty incidence among Kenyan women.

It is widely accepted that there are many benefits to women having access and control of productive resources. While societies understand the value and contribution of women in sustaining livelihoods in most of Africa, this has not been translated into actions that make it possible for women to access and control the resources they need to improve their own lives and the lives of their families and society as a whole. Ownership of titled land is an important factor that may explain poverty outcomes but this has received limited attention in empirical literature on household and individual welfare in Kenya. Given the lack of information in regard to women and land, this study is therefore largely based on publicly available documents. This study is therefore illustrative rather than comprehensive. The focus of the study is the broad scope of the

negative effects of discriminative land laws on Kenyan women rather than a detailed narrative of the underlying factors that affect women's ability to empower themselves socio-economically.

This research study was, therefore, guided by the following three hypotheses:

1. That poor access to land is disadvantageous to Kenyan women and the society in general.
2. That discriminatory traditions and customary beliefs enhance the discrimination of women in land issues.
3. That ignorance of the legal framework impedes the capacity of women to secure their interests in land.

The objectives of the study are four-fold:

1. To establish the impact of Kenya's land policies on Kenyan women.
2. To establish the major factors affecting access to and control of land by Kenyan women.
3. To identify existing policy and legal framework governing access to land in Kenya.
4. To suggest intervention strategies for improving access to and ownership of land women in Kenya.

In line with these objectives, Section II seeks to establish the importance of land rights for women and how these are linked to Kenya's economic and social development. Section III provides the issue background by tracing the historical legacy of past discriminative land laws. Section IV turns to Kenya's new constitution and highlights some of the provisions that stand to specifically benefit Kenyan women. On the basis of the findings and analysis, Section V identifies some of the existing impediments and challenges that face the implementation phase of the new constitution in Kenya today and provides policy recommendations that are not only pertinent to the issue of women's secure rights to land and its use, but are also relevant to women's active participation and contribution to the holistic process of development.

Section 1I. Importance of land rights for women in Kenya

Kenyan women are the country's chief agricultural producers and food providers (Georgetown University 2009). Owing to their high labor participation rate in the agricultural sector, Kenyan women are the bedrock of subsistence farming and food security, playing an integral role in the household and the economy as a whole. Basically, Kenyan women feed the Kenyan population, and with secure property rights they can provide better nutrition for households, increase income and economic growth, increase food security, and have improved bargaining power and improved status within the household and community.

In Kenya, where agriculture is the mainstay of the economy, ownership of land is directly associated with power. When women are denied equal property rights, their social, economic, and political status is diminished. By contrast, land rights increase women's power by boosting their capacity to negotiate within the household, in the marketplace and on a state level.

That land access can conspicuously reduce a household's risk of poverty is congruous. However whom land is bestowed upon has implications on its use and management as land exclusively owned by men does not necessarily guarantee female wellbeing as male earners do not necessarily share their income with the women in the household instead hoarding much of their proceedings to spend on their own pleasures. In contrast, direct land transfers to women are likely to benefit not just themselves but also their children as well. Evidence shows that women, especially in poor households, spend most of the earnings they control on basic household needs, while men spend a significant part of theirs on personal goods, such as alcohol, tobacco, etc (Agarwal 2003). This, in turn, affects child welfare. Children in rural Kenya are more likely to attend school and receive medical attention if the mother has more assets. In addition, women with assets such as land have expanded bargaining power, which can lead to more equitable

appropriation of benefits. In a nutshell, women's and children's risk of poverty would be diminished and their welfare enhanced if women had secure individual rights to land, and not just access intermediated through male relatives.

Furthermore, women who lack land rights are highly vulnerable to poverty and destitution in cases of divorce, widowhood or polygamy. Relatives, including sons and brothers, often do not provide the anticipated economic security to women who are widowed or divorced leaving them as easy prey to economic, physical and psychological hardships. Driven from their matrimonial homes with no reparations, divorced, separated or widowed women lose everything and are subjected to a life of abject poverty not only for themselves but also for their children, for whom they usually bear primary caretaking responsibilities. Ultimately, such women relocate to slums or engage in survival or transactional sex to support themselves and their children which significantly escalates their risk of contracting sexually transmitted diseases such as HIV/AIDS. Moreover, without secure land rights, it is difficult for women to leave abusive and violent unions. At the same time, a lack of land rights means that women can be forcibly evicted from their homes and lands on the whim of an incensed spouse or male relative which invariably leads them to homelessness, landlessness and destitution, exposing them to further destitution.

Land can provide women both direct and indirect benefits. Direct advantages can stem from growing crops, trees, or grass for cattle. Indirect advantages arise in various ways: owned land can serve as collateral for credit or as a mortgageable or saleable asset during a crisis (Agarwal 2003). Discrimination against women in land ownership in Kenya has a direct and negative impact on their right to adequate financing sources. Because women often do not have land titles which constitute conventional collateral for loans, they cannot access credit and loans. This de facto exclusion violates women's right to equal access to credit, which is both necessary for their

economic empowerment and development, and is canonized in international human rights law (Agarwal 2003). Conversely, secure land rights for women would profit Kenyan women by augmenting their access to credit.

Land, whether owned or controlled by women, also increases the probability of women finding additional wage employment, and serves as an important asset base for rural nonfarm ventures (Agarwal 2003). For instance, similar studies in India prove that those with land are found to generate much higher rural nonfarm earnings from self-employment than the totally landless (Agarwal 2003). In sum, women's right to land, no matter how small, can be an indispensable component in contributing to a variegated source of livelihood, and can substantially improve not only her welfare but that of her family as well.

While welfare arguments for women's land rights have received some policy attention, there is yet little recognition of the potential positive effects on efficiency (Agarwal 2003). As a matter of fact, some pundits believe that land transfers to women will have an unfavorable efficiency effect, in that such transfers will decrease output by reducing farm size and increasing fragmentation. Nevertheless, researches from some parts of the world suggest that women might use land more efficiently than men in certain contexts (Agarwal 2003). In Burkina Faso, for instance, due to their choice of cropping patterns, women achieved much higher values of output per hectare on their own plots than their husbands did on theirs (Agarwal 2003). A literature review of the effect of gender on agricultural productivity in several countries of Africa and Asia also concludes that output could be increased notably if women farmers had the same access to inputs and education as male farmers (Agarwal 2003). Land in Kenya remains under-exploited for agricultural production with only 7.25 million acres under crop production out of total land acreage of 144 million acres (Republic of Kenya 2007). Better gender-balanced land rights could

arguably boost productivity and efficiency in Kenya's agricultural sector. First, there is an incentive effect. Notwithstanding the fact that security of tenure can be a crucial incentive for those who use land to make investments that raise productivity on those lands, the need for similar incentives within the family has been largely ignored and assuming females to be rational individuals, such incentives could indeed prove vital within families. Secure land rights and especially land titles can empower women to vindicate themselves better at various levels within the community.

To add, equality in land rights is critical to the economic empowerment of women. To define what empowerment means this study borrows from Agarwal's definition and defines empowerment "as a process that enhances the ability of disadvantaged ('powerless') individuals or groups to challenge and change (in their favor) existing power relationships that place them in subordinate economic, social and political positions" (1994, 39). The sense of self assuredness that comes with secure land rights for women also improves their capability to assert themselves and their rights within the home, in the community, and with the state. Clearly, secure land rights can serve multiple functions in women's lives which are not easily reproduced through other avenues. This is important to keep in mind since the present thrust of Kenya's poverty reduction strategies has not been in the area of land rights but on micro-finance programs which are being championed as a panacea, especially (but not only) for poor rural women. Although lack of credit is clearly an important concern for poor women, the privileging of this one form of support above all others obscures the fact that at the heart of the plight of the Kenyan woman is her lack of land rights.

In Kenya, ownership and control of land elevates one's social and economic status and in turn it is land and property owners—predominantly men—who are decision makers within the

household and in the community (UN Habitat 1999). Within the household this means men control how household resources and earnings are utilized. Within the community this means that women are poorly represented in administrative and policy making processes. This omission of women from decision making processes and bodies inherently means that men's experiences are accepted as the experiences of the entire community and ultimately it is male interests, needs and concerns that are espoused and the individual or group interests of women are suppressed.

Clearly, the protection of women rights to land and in all spheres is a vital component of economic growth and as such it has also been entrenched as part of Kenya's policy agenda for the Vision 2030, the country's development blueprint which seeks to accelerate transformation of Kenya into a rapidly industrializing middle-income nation by the year 2030. Until Kenyan women have power and control in the processes that confer economic power, they will continue to be subservient to men. If half of Kenya's population cannot break free from the vicious cycle of poverty, Kenya's economic prospects, now and in the future, appear bleak. The next section provides a historical analysis of the gender inequities characteristic of land ownership in Kenya.

Section III. Historical Inequities of Land Ownership for Kenyan Women

A. Pre Independence

Long before the Englishman's arrival, property in Kenya was controlled and owned at the clan level by male clan leaders. A woman's access to land was through her male relatives. Although women's property rights were limited, social structures protected both men and women against exclusion from land (Walsh et al. 2003). Unmarried women could inherit land from their fathers although not on equal basis with their brothers. A married woman did not inherit land from her father as it was expected that her husband would provide for her. Upon divorce (which was highly frowned upon and therefore rare), a woman left her husband's house and went back to her father's house who continued to take care of her.

When the British arrived in Kenya, the colonial government viewed African customary land tenure as an obstacle to greater agricultural productivity and proper land use practices and proposed replacing the traditional customary system with an English style titling system based on individual land rights. Moreover, the British ruthlessly sequestered land, uprooted indigenous Africans from their ancestral lands and pushed them into "native reserves" (Walsh et al. 2003), leading to further erosion of the clan based property system. In the face of a flourishing cash crop economy and a growing demand for land, men, through the recognition of their land rights through the titling system, could now individually sell land which they could not before. Land, formerly communal property, now became a scarce commodity. Women's rights to land received no such legal recognition and they were virtually excluded from such market based transaction.

In the early 1950s, sparked by a sequence of events which included the inability of the colonial government to meet domestic food demand and the famous Mau Mau uprising¹, the colonial government faced mounting pressure to initiate land reforms. In the wake of the revolt, an appointed Royal Commission published the East Africa Royal Commission Report 1953-1955, which became the blueprint for subsequent land reform policy (Kieyah and Nyaga 2009). At the same time, the colonial government published the Swynnerton Plan, an ambitious project aimed to develop and modernize African agriculture (Kieyah and Nyaga 2009). Both reports recommended the replacement of customary land tenure with a system of private titling as a means of increasing agricultural productivity and redistributing land to efficient farmers (Kiamba 1989, 126). From the onset of efforts to redress the land issues in Kenya, women did not feature much if at all in any of the processes. The Swynnerton Plan which was hailed in some quarters as visionary in its attempts to empower efficient African farmers identified the efficient farmer as a young and able bodied male.

Upon the recommendations of the two reports, the colonial government embarked on a major social engineering agenda to facilitate formalization of African land tenure and institute a land title registration framework in the native reserves (Kieyah and Nyaga 2009). However the colonial government had not fully enacted all its plans when Kenya gained her independence in 1963.

¹ The Mau Mau uprising was an insurgence against the British army by Kenyan rebels that took place in 1952-1960 and largely set the stage for Kenya's independence in 1963.

B. Post –independence land reforms

"Our greatest asset in Kenya is our land. This is the heritage we received from our forefathers. In land lies our salvation and survival"

- Jomo Kenyatta, Kenya's first president –

Upon independence, Kenya inherited land laws that were a hybrid of English and customary law. In order to structure the inherited land tenure reform, the newly elected government enacted the Registered Land Act and reclassified land into three categories (Kieyah and Nyaga 2009): government land, private land, and trust land. Government land comprised two sub-categories, un-alienated (unleased or unallocated land) and alienated (land leased to a private individual or corporate body, or reserved for the use of a government department or corporation or institution, or set aside for other public purposes). Trust land was held by county councils on behalf of local communities, groups, families and individuals in accordance with applicable African Customary Law until it was registered under any land registration statutes, following which it was transformed into private land and became the sole property of the individual or group in favor of whom it was registered. Finally, private land was land which was registered in accordance with laws that provide for registration of title, and was registered in the name of an individual or a company, and could be created from either government land or trust land through registration after all legal procedures had been strictly followed (Ndungu 2004, 44-45). It is important to note here that how land in Kenya was vested and governed under different laws had negative implications for women's rights to its own, access and use.

The struggle for and attainment of independence had provided a potent impetus for renewed efforts at land redistribution. The bloody independence struggle had been waged mainly on widespread discontent among the African populace about colonial occupation on their land. Thus,

the new government embarked on settling its citizens who had been displaced from their ancestral land through discriminatory colonial policies of land alienation through land settlement schemes (Kieyah and Nyaga 2009). Despite subsequent reforms in varying forms and degrees, a highly skewed land distribution remains persistent in Kenya to date.

As earlier mentioned, Kenya inherited a heady mixture of English and customary laws and continued to recognize both. Kenya's land laws were developed against a customary law system (which was unwritten but largely influential and coexisted in tandem with formal statutes of law). Then the process of land adjudication, consolidation, and registration further crystallized men's absolute ownership and control of land to the peril of women.

Kenya had about 75 land laws, which created a confusing and anachronistic legal framework that failed to recognize women's land rights (FIDA-Kenya and Georgetown University 2008). While numerous land laws existed which actually gave women rights to own land, they invoked customary law, which was in accordance with the Kenyan constitution, which automatically conferred land ownership to men. Women only had customary rights to access and cultivate land, and even those rights were dependent on men (Georgetown University 2009). Simply put, despite the legal provisions that provided for women's rights to land, women were prevented by a fusion of discriminatory traditional laws and customs, ignorance and ineffective institutions from owning land and having any say about its use.

In Kenya, customary law governed trust land, on which a majority of the Kenyan population lives therefore women were excluded from accessing rights to trust land. While the previous Kenyan constitution guaranteed every Kenyan their right to own property, it also explicitly stated that trust land was governed by customary law. Customary law also determined who should be compensated when trust land was set apart for public use (Georgetown University 2009). Given

the patriarchal nature of the Kenyan society, this inherently meant that only men controlled trust land. Some of the trust land rules, which required residents of the trust land areas to obtain licenses to occupy or farm the land, reinforced women's exclusion from trust land by using gender-specific words like "son of" on the license application form (Georgetown University 2009).

The Married Women's Property Act (MWPA) of 1882, an antiquated 118 year old British legislative Act, contained the only technical clause available for courts to regulate property distribution between spouses (Georgetown University 2009). Established in 1971 by a Kenyan court, the MWPA applied in Kenya as a statute of general application and accorded spouses equal property ownership rights. Straight forward as the principle might seem; it was much more complicated in practice. If property was jointly owned then it should be equally divided. Complications arose when property was owned –as was often the case –solely by the husband. According to the MWPA, for a wife to claim any interest, she had to prove that she contributed to the purchase of the property (FIDA-Kenya and Georgetown University, 2008). While it might be easy to prove financial contributions, non financial contributions –which is mostly how the majority of women contributed through provision of labor –were much harder to prove or calculate.

Under formal statute of law, a woman had clearly outlined rights to inherit her husband's property in the event of his death. The Law of Succession Act of 1981 gave women and children some inheritance rights on the death of a husband. While the law was envisaged as a means of improving women's inheritance rights, it contained several discriminatory provisions such as termination of any land rights to the widow if she remarried but no similar provision when a man remarried. In addition, the ability of a woman to claim her deceased husbands' property under

the Law of Succession Act depended on her ability to prove her marital status. Upon death of a spouse, divorce or separation, a woman's assertion of her rights to property was established through her marital status. Establishing of marital status was also not easy because while the Kenyan government recognized six forms of marriage: three of these, including customary marriage, did not require registration. To add, the registration process was fragmented, repetitive and itself in desperate need of reform.

A considerable amount of unregistered land is owned by the Kenyan government at both the local and national levels (Waiganjo and Ngugi 2001). The Government Lands Act which allowed for the disposal of government unregulated land had been the main avenue through which public land has been converted to individual ownership (Waiganjo and Ngugi 2001). However owing to the highly political and corrupt land allocation practices coupled with the patriarchal nature of the Kenyan society, women have rarely, if at all, reaped the benefits of such allocations.

Private land in Kenya was held under the freehold tenure which confers the greatest interest in land called absolute right of ownership or possession of land for an indefinite period of time, or in perpetuity (Waiganjo and Ngugi 2001). Freehold land was governed by the Registered Land Act (RLA). The Act provides that the registration of a person as the proprietor of the land vests in that person the absolute ownership of that land together with all rights, privileges relating thereto (Waiganjo and Ngugi 2001). The established absolute ownership land regime, validated by the Registered Land Act destroyed a married woman's ability to claim and protect her interests or rights to matrimonial property (Georgetown University 2009). Since women's interests were largely not recorded on title deeds, the land on which they depended on for their livelihoods could be abdicated without their knowledge or consent. Thus, married women were unable to exercise any control over the transfer, sale, or subdivision of matrimonial property. The

large majority of women in Kenya leave their father's land to go reside with their husband on property that he may have previously purchased or inherited under the assumption that her husband will provide for her. The inability to establish an interest in this land that had subsequently become matrimonial property left women landless and dependent on their husbands for stability. Since property is usually registered in the husband's name, many women contribute to the property but because their names were not registered they had no claim to it. Because the Registered Land Act removed all other claims to the land that might have existed, it further extinguished women's rights to land. In addition, because the land statutes did not recognize the rights of women to access land, owing to their exclusion from title deeds, women's rights were largely ignored in land allocation, compensation, and other transactions. Although women's rights to land access and use were de facto recognized in some instances, women could not seek legal redress if men encroached upon their rights because such rights were neither registrable nor protected as overriding interests under the Registered Land Act (Georgetown University 2009). Under customary land tenure, for example, land was allocated to a wife for life and could not be reallocated but under registered land tenure, however, the registered owners could reallocate land for sale, gift, or lease. Under previous land laws, Kenyan women who may have tilled, farmed, or lived on a plot of land their entire lives but did not have any secure rights to land, lacked legal security of tenure.

Further compounding the fragility of women's rights to land was the issue of polygamy, where at the death of a man, more than one wife claimed property rights. While polygamy under Christian, Hindu and civil marriages was a crime (which was rarely persecuted), polygamy was condoned by law and in practice under customary and Muslim law. Due to the legal non recognition of polygamous marriages, women in polygamous marriages lacked even the most

minimal protection of their property rights in marriage and upon divorce that those in monogamous marriages enjoyed. Polygamous unions are inherently unequal and further degrade women's rights to matrimonial property. Women in polygamous unions are often hard-pressed to prove the validity of their marital status, without which they cannot claim any rights in the marriage or upon divorce or death of the husband. Polygamy also serves to complicate an already complex situation as women are forced to share hard-earned matrimonial property with multiple co-wives and children, resulting in an even smaller share of resources (Georgetown University 2009). The rights to equality and dignity infringed by polygamous marriages are essential and they should not be repudiated by culture, tradition, custom, or religion. Through intimidation, coercion, and physical violence, women have been silenced and their rights violated as matrimonial property has been used to advance the interests of a polygamous husband (Georgetown University 2009). Since the husband retained control over matrimonial property, the wife was incapable of ensuring that her contributions would not be used for the benefit of other wives and their families. Revenues from agricultural work performed by the wife would also be lost to a husband seeking another wife, as he used the profits to make dowry payments. Further, women had been limited from bettering themselves because they were forced to support an extended family that they did not consent to (Georgetown University 2009).. Although polygamy has been declining in the Kenyan society on a general level, in some regions such as the North Eastern Province, the proportion of women in polygamous marriages is as high as 34 percent (FIDA-Kenya and Georgetown University, 2008).

While Kenyan women faced formidable obstacles during marriage, their burden became insurmountable upon divorce. While married women may have been able to depend on their husbands for land to cultivate and a roof over their heads, once divorced, those assurances were

terminated, leaving the woman with little if anything. A woman whose marriage was governed by customary law received no share of family property- her contribution to its purchase or development notwithstanding. A recent nationwide survey carried out in Kenya showed that most married couples are in a customary marriage with only 26 per cent wedded in church and 16 per cent joined together through civil weddings (Nation 2010). The irony is palpable. Even when spouses resorted to the courts, under the previous system, women still left with very little if anything, and in addition had to take care of the children, often without any contribution from the father. The lack of equal property rights and the fact that many women became the sole caretakers of their children in the event of the husband's death, or in separation or divorce, often drove them into poverty. This precarious economic position of women rendered them more vulnerable to domestic violence, and undermined their ability to leave abusive relationships or to negotiate safe sex. As a result, women and their children faced serious physical and psychological health harms, including an increased risk of contracting HIV/AIDS.

Kenyan women have over the years suffered under these discriminative circumstances and borne the burden of poverty, disease and violence disproportionately. However with the new constitution adopted in August 2010, the stage has been set for change and these discriminative laws and policies could soon be a thing of the past for Kenyan women. The next section turns to the new laws of 2010 and provides an in-depth evaluation of specific benefits the new laws accord to Kenyan women in particular.

Section IV. The Constitutional Reform of 2010; Evaluation of Women's

gains under new provisions

In August 2010, Kenyans voted overwhelmingly in favor of a new constitution which is meant to jumpstart much needed shifts across the board. The new laws are envisioned as an end to an oppressive post-independence era that was characterized by highly concentrated political power which has fostered ethnic inequalities and rife, gross corruption, poor government performance, and a disappointing economic growth record. While the pivotal passing of a new constitution in Kenya has infused a reinvigorated faith in the political process, the development and acceptance of a new constitution is just but the conception; a means to an end and by no means an end in itself. A full assessment of its impact will need to be done at a later date, perhaps several years later.

The new constitution has made very bold steps towards effectuating women's rights. Indeed the new constitution has accommodated most of the issues that have perturbed Kenyan women over the years and with proper execution it can become the tool with which the government can right past wrongs. The recognition and protection of the equal rights of women and men as expressed in the new constitution in the areas of citizenship, governance, violence, property ownership including land, and prohibition of sexual discrimination are just a few among the many benefits that women stand to gain in the implementation of the new constitution.

These new constitutional provisions provide for a much needed overhaul of land policy in Kenya, and it is hoped that the government will use these new mechanisms to responsibly correct past and existing injustices and inequalities especially against women as previously discussed. First, and of significant importance to this study, the constitution regards as null and void customary or religious laws that are in contradiction with its provisions. The sovereignty of the

Kenyan citizens and the supremacy of the constitution is guaranteed thereby giving it overall authority over other laws like customary laws which usually discriminate against women (Mutuma 2010). This is important to women because previous laws sanctioned the subjection of women as they espoused legal inclusiveness which incorporated customary laws that were discriminatory to women. The new constitution has sought to reverse this in the following article²:

Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any of the omission in contravention of this Constitution is invalid.

Secondly, the new constitution recognizes equity and non- discrimination as part of the value systems and principles of social justice in the Kenyan society as stated in the following article³:

The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

In any constitution, the Bill of Rights section is cardinal as it outlines essential entitlement for a country's citizens conforming to the 1948 Universal Declaration of Human Rights. Chapter IV of the constitution which is the Bill of rights guarantees social, economic and cultural rights while recognition of the cultural practices that are harmful to women as being unlawful is an especially

² The Constitution of Kenya, Chapter 1,Article 2(4)

³ The Constitution of Kenya, Chapter 11,Article 10(2)

big gain for women. In the new constitution, the women of Kenya stand to benefit immensely from the following provision in the Bill of Rights⁴:

All state organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities

The new constitution accords women the right to acquire and own property. This is fundamental especially in the context of this research paper as it will go a long way to improving the livelihoods of many women and protecting them from poverty, diseases and violence. This is stated in the following article⁵:

Every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

To add, under the new Bill of Rights all marriages shall be registered under an Act of Parliament: the importance of which cannot be emphasized enough. In essence, this means that even customary law marriages will be certified, protecting women's interests in disputes between a widow or a divorcee and her in-laws over property. Women will also be protected from claims by other women who turn up following a man's death, claiming to have been married to the same man under customary law and demanding a share of his estate, which is a common occurrence.

⁴ The Constitution of Kenya, Chapter 4, Article 21(3)

⁵ The Constitution of Kenya, Chapter , Article 40 (1)

The constitution recognizes equality in marriage for all parties involved in whatever form of marriage as stated in the following article⁶:

The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

(4) Parliament shall enact legislation that recognizes—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or system.

Additionally, the new constitution has sought to correct past discriminatory land laws as stated in the following article⁷:

Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—

(f) elimination of gender discrimination in law, customs and practices related to land and property in land;

Kenyan women's lack of rights in access to and control over land and other property has been one of the underlying impediments to women's empowerment. Their disadvantaged position has created a structural dependence on men for access to resources which, in turn, subjects women to insecurity and subordination. This is particularly detrimental to women in today's privatization-driven economy where economic assets and resources are increasingly determinants of power

⁶ The Constitution of Kenya, Chapter 4, Article 21(3)

⁷ The Constitution of Kenya, Chapter 5, Article 60 (1)

and independence. It is therefore timely and essential to emphasize the importance of effective and independent land rights for women in Kenya. In reiteration, the genuine test of the capability of the Kenyan government is now contingent upon the successful implementation of the new laws through the creation of an upright and functional legislative mechanism. The government must prove that it is capable of not only endorsing the constitution but more importantly acting on behalf of its people to protect their interests despite the many existing challenges which are addressed in the next section.

Section V. Political and Administrative Challenges and Policy Recommendations

Two recent developments have had enormous impact on Kenya and set the stage for change socially, politically and economically. The first is the 2007-2008 post election violence, the worst wave of violence to ever engulf the once most peaceful country in the region, and the second is the new constitution enacted in August, 2010. The unfolding reconciliation process in the aftermath of the post election violence coupled with the new constitution mean that Kenya is at a critical stage of reconciliation and reform politically, socially and economically. The protection of women's rights to land and property is an indispensable aspect of this reform and reconciliation process as the majority of displaced persons in the aftermath of the post-election violence are women and children, and their property rights will be essential to resettlement efforts. In addition, the male prejudices in land ownership and transfers that have been observed in the past are in danger of being reproduced in new land reform initiatives and property rights formulations if the Kenyan government continues to ignore the plight of Kenyan women and does not firmly oversee the implementation of the recently acquired constitution.

The Kenyan government and people should not stop at merely enshrining laws; there is need to ensure that the constitutional provisions inform not only law but more importantly, practice. It needs to be underscored here that the provisions in the new constitution, while no doubt progressive, should be treated as a minimum. The challenge is to ensure that these progressive provisions are implemented to fully benefit Kenyan women. The values elucidated in the new constitution touch on women's lives due to the nature of violations that women face hence the urgent need for women to fully fathom these rights. There is a high risk of women missing out on the benefits of these provisions. It is one thing to declare policy in law; it is another thing to have it implemented faithfully. Innovative approaches to women land rights are abundant in

many African countries but success stories are lacking. An example is the Tanzania's Land Act of 1999, where land occupied by both spouses is presumed to be co-registered unless otherwise indicated by the spouses. However, in practice, these provisions are widely misunderstood and misused: cases of brothers or fathers and sons registering land jointly are widespread, defeating the purpose for which such provisions are formulated. Persistent cultural norms and lack of clarity about implementation of such provisions go hand in hand to prevent the implementation of such laws.

The new constitution outlines how the old order will usher in the new. Many of the new legal clauses come into effect immediately but some such as the executive and the legislature will not do so until the next general elections slotted for 2012. Meanwhile, a program of extensive legislative and administrative changes has already begun. Two institutions have been created to guide and drive the process of implementation: the Constitutional Implementation Oversight Committee (the "Committee") and the Commission for the Implementation of the Constitution (the "Commission"). The Committee, which is composed of Members of Parliament, is responsible for general oversight over the implementation schedule. The Commission is a nine member team which is composed of persons with experience in public administration, human rights and government. It is charged with the primary responsibility of facilitating the development of legislative and administrative procedures necessary to implement the New Constitution (Waki & Gituro 2010). Moreover, time is treated to be of critical importance in the implementation process. To enforce the laid out timeframes, the constitution has created a mechanism with the aim of ensuring that all the necessary laws will be tabled and passed in a timely manner. Firstly, an obligation is placed on the Attorney General and the Commission for the Implementation, to ensure that the draft laws are prepared "as soon as is reasonable practicable to enable Parliament to enact the legislation within the period specified". Secondly, if Parliament fails to enact any particular legislation within the period specified, then any person may petition the High Court on the matter. The High Court

may then issue an order directing Parliament and the Attorney General to take steps to ensure that the laws are enacted within a specified time frame. A third step applies if Parliament still fails to enact a law within the timeframes given in the court order. In such a scenario the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament. After dissolution, once a new Parliament has been elected and assumes office, it will be required to pass the outstanding legislation within the timeframes laid out in schedule 5. However, time in this instance will begin to run from the date that the new Parliament commences its term. This will be construed as the Effective Date. If this new Parliament in turn fails to enact the new laws, then the steps outlined above will apply to it and it may also be dissolved. Additionally, although the Attorney General's office's roles have not been specifically laid out in the New Constitution, the office will play a great role in the drafting of the new laws. Some provisions however, require an Act of Parliament to bring them into effect, for example the legislation on dual citizenship. If history is any guide, reforms are likely to face many impediments in the political and administrative process. In this section this study identifies these administrative and political challenges which pose threats to the implementation process and thus deserve to be addressed.

First, national politics are a threat to the realization of advancement of rights and freedoms laid out in the new constitution. Kenyan politicians, bureaucrats and economic entrepreneurs who might be expected to favor constitutionalism, seek the favors of the state, which is the central begetter of wealth and power, and yield to the predatory state. These forces will not relent easily and a formidable struggle must be waged by pro- reformers. Since the new constitutions endeavors to defend public resources from pillage, the question is whether those who are committed to reform will be able to impose the discipline of the constitution on these direct beneficiaries of the state. An essential ingredient for the effective implementation of laws lies in a genuine political commitment of the country's leadership and the administrative capacity to see

the process through. Scarce administrative capacity is a valid problem in Kenya. A large, widely-deployed cadre of well-trained field staff is required in order to inform people of their entitlements and to facilitate the legal processes of land acquisition and distribution. One way to deal with this issue would be to establish a tripartite partnership between government, NGOs and grass root community organizations that seek to incorporate the locals that would not only provide a wide pool of field staff but also lower transaction costs because even quasi-market measures have high transaction costs.

It is equally important to point out that administration of laws can also occasion the subordination of women to men. Juridical power has been singled out as a formidable obstacle to women's rights. Indeed one of the greatest problems for Kenyan women has been the quest to effect legal rights that do not de jure discriminate against them (Kenya Land Alliance 2006). The socio-economic realities in Kenya and the patriarchal ideology permeating the society hinder swift and effective translation of abstract rights into real substantive rights. So far, women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men (Kenya Land Alliance 2006). Even where women's legal rights have been provided for (as was the case even under the previous constitution), ignorance of such rights exacerbated by illiteracy ensure that they do not benefit from such provisions. The mere denunciation of customary laws and practices that are based on the superiority or inferiority of one gender will not eliminate the laws and practices which are within the very fabric of society. The resilience of social traditions, ideologies, and institutions is a real obstacle to progressive social reform and change. The expectation here is that when called upon to determine issues involving conflicts between the bill of rights and these

other provisions where rights of women to land are concerned, courts will uphold the equality and non-discrimination provisions in the Bill of Rights (Kenya Land Alliance 2006).

In addition, the fact that statutory law continues to compete with embedded traditions and customs whose hallmark is the dominance of Kenyan men points to a contestation in the way of meaningful realization of constitutional rights by women. In this regard, it is clear that the work is only just beginning. As the country moves forward with political reconciliation and economic renewal, it is imperative that half of the population's rights are recognized and protected within the framework of the new constitution. This requires broad-based campaigns to educate society on the benefits of gender equality and to diffuse tensions between the genders as well as legal education on the substance of the rights and procedure to enforce the same (Kenya Land Alliance 2006). For legislation to be effective there must be a public awareness of the plight of women especially within Kenya's leadership and in the general society, and of the need to bring about changes as a result. Some of the viable solutions should include social- engineering and education. This is because law does not operate in a vacuum, rather it operates within a social, economic and political setting and that setting in Kenya, has not been very supportive of gender equality and equity (Kenya Land Alliance 2006). Certain norms of customary law are so ingrained in people's minds that to deal with them obligates a robust strategy. It is therefore important to adopt an approach that is sensitive to the cultural realities that Kenyan women face, and to provide legal literacy on the laws that have been recently put in place so that women understand their rights. What is implied here is that elevating women from the cycle of poverty is not simply granting them land rights. Comprehensive gender equality cannot be achieved simply by changes in laws and procedures or increasing women's access to land. Expansive reforms

which entail redistribution of socio-economic roles and responsibilities are required in order to boost women's ability to administer and gain from land and other resources.

Furthermore, a system of engaging women in thinking and strategizing on how they can make positive changes in their lives and their communities is critical in addressing the status of women and furthering the commitments on provisional justice mechanisms and the reform agenda. This process of bringing women to share and exchange information on their experiences would not only expose their encounters with customs, norms and practices but would also help improve the information that is available on the situation of women in Kenya. This would be especially helpful in mobilizing local and international allies such as pro reformers, workers' unions, business associations and the media who can help build pressure for change, as well as garnering wider public support and dispelling inevitable fears of change among citizens. In the long run, this process would help break down stubborn social attitudes and mindsets, while enabling policy-makers to tailor their strategies to the specific issues that the Kenyan society faces. Encouraging greater openness can also help tackle the prejudice and distrust that underpin persistent discrimination. If obstinate social mentalities and practices arguably pose the biggest challenge to gender equality in the Kenyan society then any process which will serve to attenuate these obstacles will provide an invaluable contribution to the process gender equality.

Furthermore, in order to wage a successful war against gender inequality, the process must encompass men as well. This is important because many reforms tend to solely focus on women's needs, disregarding the reality that societies based on persistent discrimination, like the Kenyan society, produce certain benefits for men which they cannot easily cede. Engaging men in reform and providing incentives are essential components of the process. Women's campaign where land and land rights are concerned remains a very brittle one with many men perceiving

women's rights to land as an infringement into their personal and political space. Land rights are embedded into the patriarchal structures that are the fabric of the Kenyan society and changing them remains an immense challenge. To expect that Kenyan men will jettison their cultural beliefs, norms and practices overnight, new constitution notwithstanding, is both capricious and gullible. Law reform through constitutional provisions is only the genesis of a much longer journey towards gender equity in land and other matters.

Additionally the new law reforms regarding gender equality need to be more explicitly integrated into all sectors. Policy mandates directed at gender equality often dwindle as they trickle down to lower levels of action because of the gender bigotry in institutions, the lack of influence and say of women within organizations, a lack of accountability, and a lack of patronage of top leadership.

Kenya should view its cultures as dynamic aspects of the country's life and social fabric and as subject, therefore, to change. Indeed progress has been made in bringing about more gender equality, especially in the last two decades, but more needs to be done. While the Kenyan parliament has already begun passing legislation to give practical strength to the new constitution, to expect immediate results would be imprudent. The full implementation of the new constitution will be spread over a period of five years, at the very least. During this period, it is the alertness and vigilance of the Kenyan citizenry that will determine to what extent substantial gains will be made within the new constitution. Having a new constitution does not automatically mean it will be implemented; it is the individual and collective responsibility of the Kenyan citizens to ensure this. Kenyans can draw valuable lessons from two countries: Thailand and South Africa. In 1997, Thailand adopted a constitution that was not different from Kenya's new one. The president, Thaksin Shinawatra, undermined it through extreme corruption by ignoring the provisions on the

appointment of an independent judiciary and ignored various procedures that would have strengthened institutions created under the constitution. President Shinwatie mobilized support through condescension and factional politics, impairing the citizen's vigilance and incapacitating the implementation of what had been a sound constitution. The South African constitution was also as equally robust as Kenya's new one. However, unlike Thailand, South Africa had a vigorous implementation strategy resulting in a relative success story. Some competent representatives were selected to pioneer implementation in key areas such as land, housing and water; the South African government picked top notch lawyers for the constitutional court through a transparent system; the judges were picked from outside the existing judiciary and they turned the courts into a respected and legitimate forum and Nelson Mandela's exemplary leadership enhanced the integrity of the institutions of the constitution. There are many lessons that Kenya can and should learn from her African counterpart.

VI. Conclusion

The protection of women's land rights in the context of resettlement and land reform is especially critical given women's overwhelming contribution to agriculture and the contrasting gender disparity in land ownership in Kenya. The new constitution which has been hailed as one of the Kenya's major achievements since independence in 1963 can be a powerful tool to revolutionize the country's economic, social and political arenas. This study has focused on the new 2010 laws in light of past discriminative policies and laws, and how they stand to benefit Kenyan women greatly. Yet significant challenges persist and the current paper has identified some of the areas that still need work. Constitutional provisions may remain an illusion for women unless real efforts are made to fully implement them.

The effectiveness of the new laws necessitates to a certain degree a conscious and revitalized process aimed at transforming the mind-sets of the Kenyan people. Until Kenyans became guardians of their constitution and rights, hold politicians and bureaucrats accountable and fathom their entitlement to a dignified life, they will continue to be yoked by norms and practices of an obsolete order. Real change can only happen when the people themselves assume responsibility for their own livelihoods and truly desire change. Laws can only be truly effective when the people are organized and participative. What is required is a commitment at the top, and also at the bottom for true reform to occur. For the majority of countries, the extremely difficult nature of successful reforms lies in their need for both dedicated political leadership and a well-developed grassroots organization, which in most cases is a rare combination to find.

Without secure land rights, the Kenyan society must understand that it is impossible to wage a successful battle against poverty because Kenyan women who make up majority of rural folk remain cut off from access to productive resources. The Kenyan government must view the equal

provision of rights to its citizens regardless of gender as the starting point for any alternative track of development.

There is both elation and anxiety over what the future may hold, but one thing is certain: the design for systemic change has been successfully laid out. A new constitution is not just a new set of laws, but a paradigm shift to a new dispensation that more accurately reflects the needs and aspirations of the people. It fortifies the power of the people to make consolidated concessions and can be used as a basis for further democratic demands.

While the road to a new constitution in Kenya has been long and winding filled with hardship and heartache, it is unfortunate that Kenyan women cannot say categorically that they are out of the woods. The endeavor for inclusivity still remains a major challenge. Both the rulers and the ruled will need to honor, not just the letter of the new constitution, but more importantly, its spirit as best enshrined in its Bill of Rights: the right to defend the interests of the minority, the will to right past wrongs and injustices, the courage to uphold the freedoms of the press, speech and worship, and the right to own property, reside and prosper anywhere.

The fight for gender equality may not be an affable task, but it is a viable and fundamental one. With coherent, sensitive and inclusive strategies, the kind of extravagant discrimination that denies women their rights and blights the development potential of Kenya and many other developing countries can hopefully in the future become a thing of the past. There is still a lengthy process towards full activation of the new constitution, but for now Kenyans can enjoy the fruits of a long and arduous struggle in which the will of the people has finally triumphed over the valiant efforts of an obstructionist old order that must now be swept away.

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