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**Good practices and lessons learned in the realization of  
women's rights to land as a productive resource: a focus on Kenya**

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\* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

**General background:**  
**Land and Natural Resource Issues in Africa –a focus on Kenya**

Africa has enormous land resources, but much is of poor quality for human activities such as agriculture. More than half of the continent is arid and semi-arid lands (ASAL), of which one-third is actually uninhabitable. Sadly, more than half of African countries now suffer from desertification and persistent drought<sup>2</sup>. Despite these limitations, agriculture accounts for an average of 20-30 per cent of the gross domestic product (GDP) of African countries. As populations continue to grow at alarming rates and problems like desertification affect more of Africa's land, hunger continues to intensify.

There are three dominant tenure arrangements for land and land-based resources in Africa. These tenure arrangements define how rights to land (and land-based resources) are allocated and enjoyed. Dominant Land tenure regimes differ in different countries. But the main ones which are also found in Kenya are:

Public/state land:

This is land often held and managed by a public body that also assigns property rights in relation to such land. In Kenya, public schools, roads, forest lands, etc. may fall under the mandate of the state. The state then can either use such lands for the benefit of the public, or assign user rights through leasing (often on a limited time basis). This tenure also governs most common property resources (CPR), including water bodies, fisheries, forests, mines, minerals, and wildlife. This arrangement is common also in countries where land is fully nationalised such as Ethiopia, and Mozambique. In such cases, the government takes the responsibility of allocating user rights for the land, depending on the needs under set criteria.

In Kenya, women face various limitations in accessing and using land in this tenure category:

- Women lack the economic wherewithal to pay rates to the government for the leased land, or to utilise the common property resources.
- With illiteracy reigning high among land-dependent women, the process of leasing land under this tenure system is inaccessible to women. This is in large part, because the terms set are rigorous, time-consuming, and expensive. Such terms may include elaborate land use plan for anyone proposing to lease the land.
- The land acquisition process under this tenure system is of legal nature. Women often lack legal documents like identity card to prove citizenship and engage in such processes. Nonetheless, the Kenyan women are at a better position than their counterparts in countries such as Lesotho where women are still not fully recognised as full citizens; in fact, women are considered minors, except for married women, to whom a reprieve has been achieved under the Legal Capacity of Married Persons Act of 2006). Unmarried women still lack the legal recognition to enter into lease agreements in their own rights.

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<sup>2</sup> P.F. Reich, S.T. Numbem, R.A. Almaraz and H. Eswaran. 2001. Land resource stresses and desertification in Africa. In: Bridges, E.M., I.D. Hannam, L.R. Oldeman, F.W.T. Pening de Vries, S.J. Scherr, and S. Sompatpanit (eds.). Responses to Land Degradation. Proc. 2nd. International Conference on Land Degradation and Desertification, Khon Kaen, Thailand. Oxford Press, New Delhi, India.

### Communal:

Most often, this is a tenure arrangement where a defined group of people has a right to communal land, where each member has a right to use it independently. The group can be a family, clan, tribe, and etc. For example, members of a pastoral community in Kenya may have the right to graze cattle on a common pasture. The management of land held communally is by local structures, often non-statutory (e.g. clan elders in some countries, but in Kenya, communal lands are held by statutory Local Government in the form of county Councils in trust for the community – i.e. Trust Land). This tenure arrangement is the most common in rural Kenya. Often, the rights accrued under this tenure arrangement do not translate into full legal protection, making them most tenuous. This is because the trust land was established as a transitional mechanism towards registration of all land in private ownership.

Women face multiple challenges under this category of tenure:

- This tenure arrangement has proved to be the most insecure for all those who rely on it, men and women alike. In the era of individualisation and market-based policies, this tenure has been argued to be most anti-market, and most neo-liberal policies are geared towards eliminating it. Yet, most women are reliant on it, placing them on a double jeopardy as marginalised members of rural communities.
- Most local structures are dominated by men and driven by a patriarchal agenda. Women's place in the management institutions for this category of land is often resisted on the argument of customs and traditions that have been reinterpreted to exclude women's roles. As such, women's interests fall through the cracks and are marginally considered, if considered at all<sup>3</sup>.
- The use of these lands is governed by the customs and traditional practices of the community in question. While traditional societies were governed in the interest of protecting all members of the community, the traditions have been re-interpreted to marginalise women and women's interests<sup>4</sup>.

### Private:

This is an *exclusive* tenure arrangement where the rights to a private party are assigned to either an individual, a married couple, a group of people, or a corporate body, such as a commercial entity or non-profit organisation – with full proprietary rights to the exclusion of others.

This tenure arrangement has been taunted as the most secure by neo-liberal policies, but has been responsible for the massive dispossession of rural communities by the elites who manipulate individual title-holders into selling off their land. Given the predominance of economic policies recommended by the IMF and World Bank in Africa, it is not surprising that it is the official tenure objective of most governments – i.e. to register all lands in private ownership.

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<sup>3</sup> Justice for the poor, 2010: Women's Access to Land in Kenya. <http://www.mokoro.co.uk/other-resources/east-africa/kenya>

<sup>4</sup> Kenya Land Alliance, 2008: impact of HIV / AIDS on women's land rights in Siaya district. Kenya Land Alliance, Nakuru, Kenya.

Although taunted as most secure, women face a myriad of challenges under this tenure arrangement:

- Patriarchal practices dominate land administration even in this tenure regime. Land registration initiatives especially in rural areas targeting rural families consider men as the heads of households, thus registering land solely in the names of men. It is only in the recent past that joint titling for married couples is gaining momentum, but even in countries where such policies exist like Uganda, two challenges emerge: 1) such joint registration is only possible if the ‘owners’ of the land accept to enjoin their spouses as joint owners; and, 2) very few rural women are aware of such provisions to even urge their husbands to enjoin them.
- The nature of this tenure is that the ‘owner’ of the land has absolute control over it. The results have been that women within families have been dispossessed on the stroke of a pen by the men in their families such as fathers, and husbands, through mortgages, sale, transfers, attachments for loans, resulting in auctions for defaulted payments, and etc.

On the whole, the denial of equal property rights puts Kenyan women at a greater risk of poverty, disease, violence, and homelessness. Some of the major challenges faced by women in Kenya and in other parts of the world in their efforts to secure their rights to land are the backlash, social stigmas, gender bias and social pressures. Legal pluralistic framework remains central to understanding the overlapping of various legal domains, including existing and potential divergences and convergences of statutory regimes with customary domains. Laws governing land resources are all developed against the backdrop of customary law and practice that places women on a lower pedestal to men. Yet, most of the Kenya’s land is managed under the customary regime. Recent initiatives to address land issues in Africa include new land laws and titling projects in a number of countries and the African Union Framework and Guidelines on Land Policy in Africa.

### **Land sector reforms in Kenya**

A demand for egalitarian land reform has been identified at different levels as a key to ensuring social justice, equitable economic development, and food security among other goals. Several countries in Africa, including Kenya, have been undertaking land policy reform initiatives that are aimed at redressing social, political, and economic inequalities in addition to ensuring sustainable land resource use and management.

The land reforms in Kenya have been driven by different actors, with differing points of interest. These range from the donor community, intergovernmental processes and actors, national and regional civil society constituency, religious groups, and community level demands for change. An important aspect of these reforms, and an area where a lot of attention has been paid, is the gendered nature of people’s relations to land. A segment of the reform stakeholders, especially from the civil society and community organisations, have often called for policy process to not be a technical exercise, but a socio-economic and political process, that challenges and aims to transform the unequal power relations between the genders, and their eventual realization of

rights to land. In fact, attitudinal change is a fundamental principle in such reforms. This is informed by the fact that the re-interpretation of customary and statutory laws, norms and practices in the favour of men and that ultimately disadvantage and disenfranchise women. Another challenge is the implementation of laws in ways that discriminate, violate or ignore women's rights and needs, often because of lack of political will, resources and awareness, existing biases, skewed power relations and women's exclusion from key decision-making statutory and customary institutions.

Indeed, as the Land Development and Governance Institute (LDGI)<sup>5</sup> notes, the need for land reforms in Kenya arose from a long history of inefficient and ineffective land administration and governance system. Over the years, Kenya's land sector has faced various challenges that arose from a highly centralised and inefficient institutional framework, a complex and outdated legal framework and the lack of a coherent land policy framework. These challenges led to insecurity of tenure, excessive fragmentation and degradation, skewed land distribution, historical disposessions that are not resolved to date, environmental degradation, proliferation of urban informal settlements and landlessness among others.

The road to land reform in Kenya started with the fight for Independence in the 1950s, but the current reform process can be traced to the political struggles in the 1990s. The land administration and governance system had deteriorated to the level that majority of Kenyans were turning destitute at the blink of an eye. The political influence and authority over land allocation, acquisition and distribution had led to there being no sense of security in any of the three dominant tenure regimes- private, public (government as it was known then) or communal. In essence, land was used for political patronage. Two regimes were particularly at risk – the government (land held by government in trust for the public) and the communal (land governed by local authorities on behalf of resident communities). This constitutes over 80 per cent of Kenya's land mass. Important conservation and fragile ecosystems were allocated to individuals for uses that led to their degradation. Communal land, being vested in the local government, was not spared. This was harnessed by a conflicting legislative framework, with over 70 pieces of legislation governing land, and the absence of a codified land policy.

### Constitutional and land policy reform processes

A politically instigated constitutional reform process started in early 1990s. In the 20 years that followed, two important processes were undertaken: a constitutional review, and a consultative process on the National Land Policy.

The process to draft a new constitution; replacing the original constitution which was politically negotiated at independence; with a people's constitution which was written through a lengthy and deeply consultative process started in 1991. After a protracted struggle and resistance from the political powers of the day, efforts were eventually made to ensure that all members of public were informed of the process, gave their inputs, and endorsed the final document, starting with the establishment of a constitutional Commission in 2000. Such efforts included holding public forums at the grassroots, disseminating information in local languages and through accessible

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<sup>5</sup> Land development and governance Institute, 2011: Land reforms in Kenya: gains & challenges one year into implementation. The fourth score card report on the implementation of land reforms in Kenya

media and even the use of illustrative materials to reach those with literacy challenges<sup>6</sup>, majority of whom are women<sup>7</sup>. However, when the first draft of the constitution was drawn from a constituency assembly in 2005, the government tried to alter important clauses, including those relating to land governance, which led to the constitution being rejected by the voters through a referendum. A new constitution was adopted in a referendum in 2010 and was promulgated in the same year<sup>8</sup>.

Another equally important and consultative process was the National Land Policy (NLP) formulation. Started in 2003, this was a consultative and inclusive process that brought together government agencies, private sector, community representatives, civil society organisations and religious groups to, for the first time since independence, formulate a land policy to guide the definition and determination of issues relating to: 1) **insecure land tenure** for women, the urban and the rural poor, HIV/AIDS-affected households, pastoralists among other vulnerable groups; 2) **poor land administration** characterised by limited access to land information due to poor

**Box 1: National Land policy 2009**

223. To protect the rights of women, the Government shall:

- (a) Enact appropriate legislation to ensure effective protection of women's rights to land and related resources;
- (b) Repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;
- (c) Enforce existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;
- (d) Make provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure;
- (e) Secure inheritance rights of unmarried daughters;
- (f) Facilitate public awareness campaigns on the need to write wills to protect dependants;
- (g) Carry out public education campaigns to encourage the abandonment of cultural practices that bar women from inheriting family land; and
- (h) Ensure proportionate representation of women in institutions dealing with land at all levels.

quality records, extended technical processes, lack of transparency and user friendliness; 3) **weak and/or ineffective mechanisms** for fair, timely, affordable, transparent and accessible resolution of land disputes; 4) **land fragmentation**; and 5) **poor governance** in land administration, management and dispute resolution; and disharmony in **land tenure regimes**<sup>9</sup>. Gender sensitivity was stated as one of the key values of the NLP formulation process. The NLP was adopted in 2009, and entered into force when the new constitution was promulgated in 2010.

One of the objectives of the NLP<sup>10</sup> is to provide all citizens with the opportunity to access and beneficially occupy and use land. It also recognises secure land rights and gender sensitivity as a key principle for land policy. Similarly, one of the key questions it seeks to address is the

<sup>6</sup> Kituo cha Katiba: Eastern African Centre for Constitutional Development 2007: Moving the Kenya Constitution Review Process Forward: A Report of the Fact-finding Mission to Kenya. Fountain publishers Kampala.

<sup>7</sup> Kenya Institute for Public Policy Research and Analysis, 2001. Average literacy rate in 1990's 85.94 percent compared to 66.07 percent for females

<sup>8</sup> See TakingITGlobal, 2005: Kenya Referendum (Nov 2005): The Verdict on the Draft Constitution:

<http://www.tigweb.org/youth-media/panorama/article.html?ContentID=6637>

<sup>9</sup> MINISTRY OF LANDS AND SETTLEMENT, 2004. National Land Policy Formulation Process Concept Paper. Nairobi, Kenya

<sup>10</sup> Government of Kenya, 2009. Sessional Paper No. 3 of 2009 on National Land Policy. Government Printers, Nairobi

disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions, and elaborates these provisions in section 233 (see Box 1 below).

In addition, the current constitution of Kenya<sup>11</sup> protects the right to property as a right of every Kenyan. It also carries a 'Land and Environment' chapter which provides a set of principles for the use and management of land in Kenya, among which two are crucial for women's rights to land: *'(f) elimination of gender discrimination in law, customs and practices related to land and property in land; and (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.* It has been found that more often, women reach out to traditional institutions for redress in matters related to land as they are more accessible, cost effective, and flexible. The recognition of such dispute resolution mechanism is important for women, yet, the requirement to be consistent with the constitution also safeguards women from re-interpretation of culture to the detriment of women's rights.

The constitution also requires the parliament to *enact a law to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land.* Widows have suffered dispossession in the hands of their in-laws especially in the wake of the HIV pandemic as they are blamed for the malady<sup>12</sup>. Another important provision of the constitution relates to the governance of communal land on which a majority of rural communities, including women, depend. The constitution (Article 63:4) states that *community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.*

Section 67 provides for the establishment of the National Land Commission while Section 250 provides a rigorous process for the appointment of the chairpersons and members of any constitutional commission. For this commission, the process entails; first recruitment through a panel of stakeholders in the land sector; approval by the National Assembly; before they are appointed by the president. This rigorous process eliminates the executive's power/allegiance over the commissioners and ensures independence in their operation. The constitution also provides that the chairperson and vice-chairperson of a commission shall not be of the same gender, enforcing women's representation in the helm of the commission. Under the Bill of Rights, Section 27:8 also provides that State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

### Legislative review

Following the adoption of the new Constitution and the NLP, the country embarked on the review and harmonization of a myriad of land laws. Three important laws that have now been adopted are: a) Act No. 5 of 2012 –National Land Commission Act; b) Act No. 6 of 2012 –Land Act; and c) Act No. 3 of 2012: Land Registration Act

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<sup>11</sup>Government of Kenya, 2010. The Constitution of Kenya, 2010. Government Printers, Nairobi

<sup>12</sup> Kenya Land Alliance, 2008: impact of HIV / AIDS on women's land rights in Siaya district. Kenya Land Alliance, Nakuru, Kenya.

#### Act No. 5 of 2012- National Land Commission Act:

This act aims to give effect to the constitutional provisions for the establishment of a National Land Commission (NLC) for the management of land in Kenya. It is intended to elaborate on the functions and powers of the NLC, qualifications and procedures for appointments to the Commission; to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes. The NLC takes over the management of land on behalf of the national and county governments, thus removing the discriminatory cultural practices under which communal land is currently managed.

#### Act No. 6 of 2012 - Land Act:

This Act aims to give effect to Article 68 of the constitution to revise, consolidate and rationalise land laws; to provide for sustainable administration and management of land and land-based resources and for the connected purposes.

It is important to note that this Act requires the NLC to be guided by the following values and principles among others:

- Ensure equitable access to land;
- Security of land rights; this is important especially in the advent of large scale commoditization of land resources;
- Elimination of gender discrimination in law, customs and practices related to land and property in land; and
- Alternative dispute resolution mechanisms in land dispute handling and management. These mechanisms are more accessible, cost effective and less elitist for women.

#### Act No. 3 of 2012: Land registration Act

An important provision in this Act relates to co-ownership of land between spouses (see Box 2). The act also provides that in Settlement programmes, land shall be allocated to households in accordance with national values and principles of governance, which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised.



**Box 2: Land registration Act**

93. (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—

(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless—

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) the Registrar shall register the spouses as joint tenants.

(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b),

**Key lessons****1. Community participation:**

An effective land sector reform process must provide for the participation of those most affected by the land issue. To facilitate this participation, the designers of the process must take into account:

- a. **Community level of literacy:** Be innovative in modes of communication to reach people with different levels of formal literacy.
- b. **Cost of community education and awareness:** The cost of reaching out to remotely located communities, and involving them meaningfully should not be underestimated. A partnership between government and non-state actors is important to leverage resources and technical support for this outreach.

## **2. Lengthy policy processes**

The land sector reform process in Kenya has taken over 30 years to date, and is still on-going. It is important for governments to have adequate budgetary allocation, and plan in the long term for such processes, not to compromise on the integrity of the process, or the rigour of the stakeholder participation. In Kenya, the land policy formulation process was largely donor dependent, and the withdrawal of one main donor in 2007 led to the stalling of the process for two years. The length of reform processes if solely donor dependent can lead to donor apathy. Unfortunately too, most CSOs in Africa are donor dependent.

## **3. Information, communication and transparency**

The stakeholder participation in a reform process requires that they are provided with adequate and timely information on the process. Otherwise, stakeholders can get frustrated and withdraw or disrupt the process. This has been seen in Kenya- in 2003/4 when the government unilaterally selected the stakeholder representatives to the land policy process to the chagrin of many; and Malawi when the government failed to release the draft land policy since 2002.

## **4. Women's participation:**

Efforts to include women in policy reforms, as well as their issues, must be very deliberate and resourced adequately. Women are often the excluded, resource poor, time-constrained and suffer literacy challenges more often than men do.

**5. Legal pluralism** in Africa is a reality that will remain for a long time to come. Therefore, policies must inform each other, and be harmonised with other related frameworks – e.g. marriage, property regimes, and inheritance. For example, in Lesotho, women were regarded as minors until Legal Capacity of Married Persons Act was passed in 2006, and in Uganda, the consent clause requiring spousal consent for any family land transactions requires registration of marriages to be effective.

**6. Implementation:** Policy on paper is worthless if it does not translate into the reform of the gendered relations to land. Recognising this in policy and enforcing the same through institutional set up and programme development is vital to tilt the gender imbalance in access to and control over land and related natural resources.