



LAND POLICY BRIEF

DEBATING WOMEN'S LAND AND PROPERTY RIGHTS AGAINST THE BACKGROUND OF THE LAND REFORMS IN KENYA



FIDA - KENYA

Land is the foundation of all human activities both social and economic. This is particularly so in agrarian economies such as Kenya. In these economies women are central to economic production in agriculture and livestock sectors. In Kenya, where the mainstay of most communities is agriculture and livestock production, women contribute up to 80 % of the workforce. Nevertheless, women only hold 1% of registered land titles in their names and around 5-6 % of registered titles held in joint names. It is a pity that women who comprise over half of the Kenya's population, rarely own any reasonable forms of property, land included; do not have adequate access to the same and do not even make major decisions pertaining to allocation and use of such property. Agricultural services and education is still directed to male farmers and Women's paid and unpaid labour remains undervalued and invisible in the Gross Domestic Product (GDP). While the Kenyan Draft National Land Policy recognizes that land is crucial to the attainment of economic growth, poverty reduction and gender equity, gender specific policy interventions must be spelled out to ensure this situation is adequately redressed.

Women, Land and the Economy

Women's right to land is a critical factor in social status, economic well-being and empowerment. Land is a basic source of livelihood providing employment, the key agricultural input, and a major determinant of a farmer's access to other productive resources and services. Land is also a social asset, crucial for cultural identity, political power and participation in local decision - making process. Women's access to other natural resources, such as water, firewood, fish and forest products, crucial for food security and income, is dependent on their access to land.

In law and in practice, Kenyan women's rights to property are unequal to those of men. Their right to own, inherit, manage and dispose of property are under constant attack from customs, laws and individuals including government officials who believe that women cannot be trusted with or do not deserve property. The devastating effects of property rights violations including poverty, disease, violence and homelessness harm women, their children and Kenya's overall economy. Gender discrimination is one of the factors that constrain sustainable use of land in Kenya. In many Kenyan communities, women do not own land and therefore do not have the same user rights to improve sustainable use of the land.

While Kenya has no law prohibiting women from accessing credit facilities, women face a variety of bureaucratic hurdles from the formal sector. Financial institutions for instance, will require a form of collateral before they advance credit. Such collateral includes land, capital goods or savings, most of which are unavailable to a majority of women. A land title deed remains the major form of collateral security that banks require when considering request for credit. Yet most women do not have land registered in their names. Without the means to secure credit women are therefore left without the means to improve their socio economic status.

Women, Land and the Law in Kenya

Kenya has a complex legal framework regulating land ownership and access. There are over 75 laws governing land which taken together create an outdated, obscure and highly technical regime. Many of these laws are obsolete, while others conflict, supporting different land regimes within the same area. These problems are compounded by the poor state of land records.

The many abuses suffered by women with respect to land rights largely flow from this legal framework. Married women's lack of control over property, unequal division of property upon divorce or separation, harmful customary practices, limited inheritance from husbands and unequal inheritance from the parents are all buttressed by both the customary laws that govern property as well as the statutory acts enacted by parliament.

The Kenyan constitution equally does not recognize land as a social-economic resource key to the survival of most Kenyans but instead lumps it together with other aspects of property. Further, the Constitution of Kenya protects private property regardless of how it was acquired. Once a person registers his/her name in a title he/she becomes the absolute owner with absolute rights over any transactions concerning the property and has the constitutional protection. In most marriages, it is the man's name that appears in the title deed. Since customary marriages allow

for polygamy, women find themselves vulnerable to dispossession as they may be constrained from taking full control of the land and the initiating of long-term projects. Moreover, since women's interests are largely not recorded on title deeds, the land on which they have customary user rights and on which they may depend for livelihoods can be disposed off without their knowledge or consent.

Jacinta Wanjiku Kamau VS Isaac Kamau Mungai & Ndirangu Gitigi
Court of appeal Civil Appeal No. 59 of 2001 at Nairobi

In this case, Jacinta's husband sold their family land in Gatundu without her consent or the consent of their eight children. The family depended solely on the land for their cash and subsistence crops and had also built a house on the land in which they resided. The Land control board gave their consent to the said transaction. The purchaser of the land threatened to evict the family when Jacinta moved to court for protection. Jacinta argued that her husband held the land in trust for herself and their children and that he had no authority to sell the said land without their consent. After the sale, the husband bought another piece of land at Kinangop where he proceeded to marry another woman who now lives with him there. The court held that it has never been the practice nor a legal requirement that before the legal proprietor of a piece of land disposes of it he or she should consult any third party be it his/her husband or wife.

KEY POLICY CONCERNS

1. The Impact of HIV/AIDS on Women's Land Rights

Statistics in Kenya indicate that the impact of HIV/AIDS hits hardest on the poor and vulnerable of society thus those least able to cope with the burden of care, the loss of labour and income, and the cost of medicines and funerals. The Kenyan National AIDS Control Council, 2006 statistics show that the prevalence of HIV/AIDS among women in Kenya stands at 7.7% as opposed to 4% for men. Consequently, more women are likely to find themselves victims of discrimination on account of their HIV status.

Those living with HIV/AIDS, and especially the poor, are vulnerable and lack voice, power and representation in society which limits their opportunities to access, use and own land. Women and children face destitution after the death of their husbands; partners or parents, while poverty and economic dependence leave them exposed to increased sexual exploitation and violence.

2. Provisions for Succession and Matrimonial Property

Formal statute law in Kenya potentially gives married women property rights. The legal situation is an emerging one, and is still not entirely clear because it relies on common law principles. These principles imply that even in customary marriages, women have equal property rights in matrimonial property. Problems arise in dividing up matrimonial property on divorce or separation especially where the property is solely registered in the husband's name.

The Law of succession has discriminatory provisions such as the provision that a woman forfeits her interest in the husband's estate if she remarries whereas the reverse does not apply for a widower.

It is note worthy that the ability of a woman to claim property rights under either Married Women's Property Act or succession law depends on her ability to establish her married status. This is not easy since registration is not required of customary marriages.

3. Prohibitive Cost of Justice

A large number of women have no access to justice owing to illiteracy and poverty. The institutions managing land in Kenya are many, varied, but largely inaccessible to the poor. They are complex and their information systems often poor. Moreover, the current land regime does not allow for amiable and inexpensive dispute resolution mechanisms.

4. Definition of family land

That the concept of family land is not appreciated in our laws currently has been brought out clearly in the case of **Jacinta Wanjiku Kamau vs. Isaac Kamau Mungai & Ndirangu Gitigi** (earlier stated). Moreover, there is a conflict between constitutional and international provisions on gender equality on one hand and customary practices and legislations that discriminate against women in relation to land ownership and inheritance on the other hand. In particular, there is an urgent need for a policy that puts in place a mechanism to curb selling and mortgaging of family land without the involvement of the spouses and ensures gender equity as a whole.

POLICY RECOMMENDATIONS

A) Widows and HIV/AIDS

Because widows are especially vulnerable to dispossession, the wide prevalence of HIV/AIDS in Kenya poses serious challenges to women's property rights.

All policies, customs, practices, laws, rules and regulations governing land administration should be revised and strengthened to protect and promote the rights of women and children in the light of this epidemic.

There should be specific laws allowing acquisition, access and ownership of land by HIV/AIDS widows/widowers and orphans. The draft National land policy should clearly state wide land use options for both agricultural and non-farm activities to make them be more relevant particularly to people living with HIV. This could be done for instance by developing land rental markets and increasing access to water for gardening purposes.

HIV/AIDS status should not be used as a barrier to representation in the land administrative organs. Similarly, a good policy should ensure that age or gender is not a barrier to allocation of property especially today when many parents die leaving their children young and therefore with no legal standing to get their parents' properties transferred to their names. A good policy should promote the writing of wills and the enforcement of the same especially to bequeath and secure land and property for children. As a lesson from the current scenario where orphans have constantly been disinherited off their parents land and property, a good policy should provide statutory direction to set up trustees who can hold such land and property for the orphans until they attain the age of majority.

The recognition in the draft policy of the need to have land rights of children orphaned by the scourge of HIV/AIDS protected and the proposal for a review of legislation that hinders minors from having proprietary rights to own land, are very commendable steps.

B) Affirmative Action

Affirmative action should be enshrined in all the bodies carrying out land administration so as to provide for equality and equity in all representative and elective bodies. Affirmative action should be adopted to address gender imbalances in land tenure, administration and management. Even though the draft national land policy mentions that it shall ensure gender and equity principles are respected, it provides no indicators for the implementation of affirmative action in land administration bodies. The policy should provide a clear position on the affirmative action by requiring that at least 1/3 of the members of land administrative bodies are women. In other words, neither gender shall hold more than 2/3 of the seats in any land administrative body.

C) Co-ownership of land by spouses and the concept of Family Land.

Appropriate legal measures should be taken to ensure that men and women have equal rights in land before marriage (in cases of inheritance) during marriage and during its dissolution. This would ensure security of tenure for women and as a result lead to increased investment in land and improvement of land quality.

Matrimonial property should comprise all properties acquired, developed and investment made during the existence of a marriage with the same co-owned by the parties to the union.

Family land should include land that has ordinarily been occupied, shared, developed and from which the family earns its livelihood and is known as home for the family (couple and their children). There should be a specific provision that in any transactions involving family land, the family consent must be sought. Those whose names are registered as owners in instance of family land should hold the same in trust for the other family members. The draft national land policy (2006) has proposed enactment of a Kenyan legislation to replace The Married Women's Property Act of 1882(of England) which is currently in use in Kenya. This is a laudable proposal.

D) Registration of customary Marriages

In promoting the concept of co-ownership of matrimonial property, all customary marriages should be registered to ascertain who is entitled to a particular matrimonial property at time of divorce, separation and succession.

E) Awareness Creation on Women's Land Rights.

Government should conduct a sustained advocacy on land rights in an attempt to address the negative cultural practices and attitudes that marginalize women. This has been proposed in the draft national land policy.

F) Access to justice

The draft national policy appreciates that the government should by its policies and laws embrace alternative dispute resolution mechanisms, which would be a faster way of accessing justice for women who are largely poor and

illiterate. However, these mechanisms must be mainstreamed in the judicial system to ensure that decisions made within such structures are respected and enforceable by law and are recognized at all higher levels of the judicial system. Equally, the government should consider subsidizing the costs of legal redress for those who cannot afford.

G) Constitutional Reform

There is a great need for a constitution with broad principles on land recognizing land as a principal source of livelihood and material wealth and not merely another piece of property. The constitution should expressly state that the state shall define and keep under review a national policy to ensure that the principles of equitable access to land and associated resources, elimination of gender discrimination in regulations, customs and practices related to land are observed.

THE DRAFT NATIONAL LAND POLICY OF 2006

- ⊙ The Draft National Land Policy was drafted against the background of the constitutional review process. The policy underscores the need for a constitution with broad principles on land and thus the proposals under the policy may not be fully realized without a new constitutional order. For this reason, the land policy principles must be entrenched in the constitution in the immediate whether we undertake the minimum or maximum review on the constitution.
- ⊙ The draft policy proposes a redistribution of irregularly acquired public land and re-settlement schemes; there is however no clear mechanism for gender equity in the proposed redistribution and to land ownership by women in general. In this case we propose affirmative action that will ensure that women get equal share of the land as men through the resettlement programmes.
- ⊙ The draft policy also proposes participation of the vulnerable in decision making over land and land based resources. While it recognizes women as part of the vulnerable group, it does not entrench affirmative action at The National Land Commission, District Land Boards and the Community Lands Board. Affirmative action must be embraced in these institutions by requiring that at least no gender will hold more than 2/3 of the seats in any land administrative body.
- ⊙ The draft policy has left out the registration of customary marriages, which is paramount to the issue of co-ownership of property in marriage. These marriages need to be legally recognized and taken into account in the registration and safeguarding of women's land rights through joint titling of land held by married couples.
- ⊙ It is commendable that the draft policy proposes Alternative Dispute Resolution but emphasis should be laid on supporting only customary and informal institutions that are relatively democratic and channels should be provided for change in those that are not, in addition to entrenching them in the judicial system.

CONCLUSION

Land is a fundamental asset for the economic empowerment of the poor. Women's land rights should be treated as fundamental human rights. Women have been systematically marginalized from full participation in the development process despite their active participation in the production process alongside men. Consequently, efforts must be made to ensure that attempts at gender parity do not remain at mere paper rights but translate into concrete and enforceable entitlements.

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