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# Arguing Traditions

*Denying Kenya's Women Access to Land Rights*

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## Abstract

Two major approaches on how to address women's land security can be identified: reforming the formal legal sector and embracing informal community practices. However, through research conducted among Kenya's agricultural communities, the authors find that these systems—formal, informal, or hybrid—are underpinned (and undermined) by the same local power dynamics that control and ultimately prevent women from obtaining land, leaving all of these systems inadequate in ensuring women's access to land. Community leaders play a key role not only as local power brokers, decision makers, and protectors of local practices, but also as gatekeepers to the formal system. Thus, their decisions to support local power dynamics and limit access to the formal system—essentially supporting “traditions” in lieu of rights—can effectively deny women access to their land rights. Based on these findings, the authors argue that the policy debate must shift away from pitting formal legislative approaches against support for “customary” systems. With economic and political contexts influencing individuals, the debate must look at the social context within communities, whose members must be pressed to reject attempts to “hijack” custom and legitimize abusive, self-serving behavior. This problem needs to be tackled using the same avenues that currently promote the marginalization of women, that is, the sociocultural value systems that determine which behavior, arguments, and actions are legitimate in a community. By working with existing positive values, the justice system used—formal or informal—becomes less important and a lasting, positive change on women's access to land rights might be achieved.

## Introduction

Many women in Kenyan society find themselves in a difficult position should they attempt to use or own land. Widows are chased from their land by in-laws and daughters are denied family land inheritance by their brothers. Some women lose family support and all land access, which cuts them off from their livelihood<sup>1</sup> and stigmatizes them socially.<sup>2</sup> Past community practices that formed safety nets and protected women from poverty have eroded and formal state institutions have yet to bridge the resulting gap. Donors and government usually approach this shortcoming by passing additional legislation, mandating formal equality and attempting to make the formal system more accessible to the population. However, research data from this preliminary study of Kenyan agricultural communities shows that despite variations in informal practice in areas studied, all justice institutions (formal or informal) may equally be abused to favor those in power. Formal laws provide women with as little access to justice as customary processes.

Policy debates in Africa aimed at tackling women's difficulties in accessing land usually focus on whether to strengthen the formal justice system or integrate "customary" land tenure and inheritance systems (Cousins and Claassens 2006, UNDP 2006, Kenya Land Alliance 2008). However, research data gathered in the course of this preliminary study of Kenyan agricultural communities indicates that women have difficulties accessing land under either system. Technically, they can seek redress through multiple avenues, including formal and informal institutions and those that integrate elements of both. However, this preliminary study shows that in practice, all avenues are easily undermined by more powerful in-laws or brothers and can in fact act to deny women access to land instead of upholding their rights.

There are technical flaws and discriminatory features in both the formal and informal systems that deny women access to land. An additional, often overlooked factor, however, is the underlying power dynamics at the community level and a community's readiness to accept the self-serving behavior of individuals seeking to acquire land at the expense of women. Such power dynamics enable in-laws and relatives to use and abuse multiple systems and institutions to their own advantage. The intersection of these

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<sup>1</sup> Ensuring access to land for women is an important step in empowering them with economic rights and security. However necessary that access may be in ensuring such rights, it is not necessarily sufficient on its own. For example, guaranteeing access to inheritance and subdividing land already subdivided repeatedly among daughters as well as sons may be more formalistically equitable, but may ultimately harm all parties' interests instead of helping them. The findings of this report should not be taken as complete stand-alone solutions, but rather as caveats and supplements for ongoing programming and other efforts to find approaches to enhance women's human rights and ability to contribute to economic development.

<sup>2</sup> Inheritance was found to be the primary vehicle through which Kenyan women have access to land and therefore face attempts to deny them their rights. However it is not the only manner through which they might access land. Inequalities in marital arrangements and the division of marital properties are also problematic. The Federation of Women Lawyers (FIDA Kenya) is pursuing a number of bills in parliament dealing with these issues, namely a Marriage Bill, Matrimonial Property Bill, and Family Protection Bill, all of which will help clarify women's formal access to land in these circumstances.

systems, rather than formal land regimes replacing informal systems as intended, has opened a space where in-laws or agnates can grab land from widows or sisters using formal land titles in men's names. Such actions are justified by the argument that "traditionally" land cannot be passed outside the patrilineage and must remain in the hands of men (Whitehead and Tsikata 2003, Akech 2001, Ik Dahl et al. 2005, MacKenzie 1986, Cotula 2002, Musembi 2007, Pottier 2005, Yngstrom 2002). "Traditional" social structure delivers justification for such behavior, since women are often considered "just a person to pour water on the crops," "passengers" at worst, and "managers" at best, but not confirmed members of a patrilineage.<sup>3</sup>

Clearly, the terms of the debate must shift from focusing solely on the question of whether to integrate or exclude "customary" systems. Instead, there must be greater focus on the political, economic, and sociocultural issues and dynamics that lead communities to tolerate land usurpation. The drivers of such behavior—and communal acceptance thereof—need to be understood. "Positive" community values and concepts that promote the protection of women must be identified and, if appropriate, strengthened and used to counter the legitimacy of arguing "traditions" when the aim is to undermine women's rights. While major issues such as legal reform of discriminatory land-rights practices, fighting corruption, and increasing state responsibility for social security need to be promoted, values and behavior at the community level equally require attention to prevent women from being pushed into extreme poverty. This is particularly the case in Kenya, where land has become an even greater focus of attention since the recent postelection violence in January 2008, but also true for African nations more generally.

## **Official Land Rights in Kenya**

Growing population, a history of politicized land distribution, and land grabs by those in power have led to serious interethnic tensions over land in Kenya. During the 2008 postelectoral violence, land was confirmed as one of the major underlying issues, and one that continues to fester to the present day (Wakhungu, Nyukuri, and Huggins 2008). In the "Statement of Principles on Long-term Issues and Solutions" mediated by UN Secretary-General Kofi Annan during the Kenya Dialogue and Reconciliation efforts, land was placed high on the agenda as one of the crucial issues requiring attention (Kenya National Dialogue and Reconciliation 2008). Since then, a variety of actors have begun to pay greater notice to land distribution among ethnic groups and to scrutinize historical land claims.

At the same time, women's access to land has seriously eroded. Land is a scarce commodity, and the incentives for in-laws seeking additional land to chase a woman from her lands are high. Today, Kenyan women account for a small portion of formal land title holders (IFC and World Bank 2006, DFID 2007). Partly responsible for this situation is the British colonial period, when land was administered using British tenure principles, which pushed for definitive and absolute individual rights to land, in contrast to Kenya's traditional communal land rights that were tied closely to family and clan identities.

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<sup>3</sup> Interview with community paralegal, Butere District, October 2008; interview with community paralegal, Nyeri District, September 2008.

Formal and individualized titling was continued by the postindependence government (Whitehead and Tsikata 2003). The result was the 1963 Registered Land Act (RLA).<sup>4</sup> The RLA was enacted as part of a land reform program specifically designed to eliminate and replace the customary systems of communal ownership with the formal British-style system, particularly promoting individualized ownership. The ultimate aim remains for all land to be registered under the RLA (Kenya Law Reform Commission 2008).

The crux of the RLA is legally defined certainty for land interests acquired through formal registration. It does not, however, recognize customary interests.<sup>5</sup> Once land has been registered under the RLA, the application of “customary” land law and any residual “customary” interests are supposed to cease. In practice, this has not occurred, as customary law remains highly prevalent in Kenyan land issues and is a critical area of conflict, with registered owners contesting those claiming customary rights (Kenya Law Reform Commission 2008).

Individual land titling contrasts with indigenous communal landholding systems, in which individuals do not necessarily own the land as conceptualized in western systems but exercise usage and access rights allocated by their community or family (Deweese 1995, Akech 2001, Mackenzie 1989). Thus, while “customary” land tenure is based on ideas of collectively governed access and usage, modern land tenure introduced the notion of absolute individual ownership rights (Whitehead and Tsikata 2003, Akech 2001, Mackenzie 2003). When individualized tenure was instituted, men registered their names on land deeds and extended the logic of the patrilineal system whereby land was administered exclusively by the men (Ik Dahl et al. 2005, Mackenzie 1989, Akech 2001, Cotula 2002, Musembi 2007, Pottier 2005, Yngstrom 2002). Given men’s traditional role as household heads granted rights to land allocation, it was virtually inevitable that men would register, since formal ownership closely relates to their “traditional” allocative powers. That women held a disadvantaged position in society and within family structures in this respect eliminated any potential resistance to such registration. Not surprisingly, men overwhelmingly registered lands and women did not register as “landowners” under the RLA process, since women lacked the opportunity to contest the “customary” access and usage rights that the RLA does not recognize. As a consequence of this process, today women are dependant on what their male family members “own.”

Because males hold the vast majority of titles, inheritance is the principle manner<sup>6</sup> through which women—as widows and daughters—access land and encounter land disputes and rights violations (GJLOS 2006). This applies to both access and usage rights

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<sup>4</sup> Registered Land Act (RLA) 1963 (ch. 300).

<sup>5</sup> As discussed below, many authors note that the RLA considers only “formal” interests in land as defined in British law and neglects common “customary” interests.

<sup>6</sup> Many of the problems associated with daughters returning home, in cases of separation and/or divorce from their husband, and seeking inheritance stem from their having been improperly denied a portion of the wealth accumulated during their marriage. Arguably, resolving the issue of marital property would help reduce violations of daughters’ land rights as daughters, insofar as these women may not be forced to return to their natal home. However, this would not address the underlying fact that daughters are denied their right to inherit land.



under local systems as well as “ownership” rights under the formal system. Widows are often chased from their lands by in-laws, and land-seeking brothers deny their sisters any portion of their fathers’ inheritance, splitting it among themselves instead.<sup>7</sup> Increasing HIV rates in some areas of Kenya are leading to additional opportunities (and purported reasons) for removing widows from their husbands’ lands (Aliber, Walker, et al. 2004). In the past, traditional social structures provided safety nets for women,<sup>8</sup> but these systems have both evolved and eroded and no longer protect women as they once did, evidenced by the current practice of seizing land from women and forcing them into landlessness. Without access to land for agriculture, widows and daughters may be left in dire poverty.

The postelection violence in January 2008 has led to renewed emphasis on the Draft National Land Reform Policy, which noted the immense gender disparity in land ownership.<sup>9</sup> The latest draft considers Kenya’s dual customary and formal tenure systems and notes that the economically advantaged exploit the formal system, while those living under customary regimes are neglected.<sup>10</sup> This has caused “gross disparities” in land ownership and gender discrimination in succession matters, and the overall exclusion of women from land.<sup>11</sup> These and other factors combine to create an uncertain tenure security, including overlapping and undefined rights in both the formal and customary systems, the exclusion and disinheritance of women, and a highly inequitable distribution of land skewed heavily in favor of men.<sup>12</sup> The Policy identifies women’s land rights as an issue that requires special intervention and attention, specifically with regard to discriminatory customary practices in inheritance and land ownership, women’s insufficient representation in land institutions and communal ownership schemes, and the paucity of women with formally registered land.<sup>13</sup> On June 25, 2009, the Kenyan Cabinet approved the Draft and submitted it as a Sessional Paper to parliament for approval.

Though Kenya is a party to numerous social and economic human rights treaties<sup>14</sup> ensuring women’s rights and has developed a number of legal tools and legislation to

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<sup>7</sup> This practice was reported in all research areas to varying extents.

<sup>8</sup> Communal social safety-network features that protect and prevent women from falling into poverty include: diverse protective land “rights”; various “rights of return” to a woman’s natal home; the use and occupation of those natal lands for farming and raising any children from a dissolved marriage; and levirate marriage of widows to secure their connection to patrilineal lands.

<sup>9</sup> Republic of Kenya, Ministry of Lands, Draft National Land Policy for Kenya, National Land Policy Secretariat (May 2007), S. 1.5.1, ss. 7(c); S. 1.5.2, ss. 8 (h).

<sup>10</sup> Ibid., S.2.2.3.

<sup>11</sup> Ibid., S. 2.3.

<sup>12</sup> Ibid., S. 2.3, at 25 & 3.2, at 37.

<sup>13</sup> Ibid., S. 3.6.10.3.

<sup>14</sup> Namely, economic, social, civil, and political rights as enshrined in, *inter alia*: *Convention on the Elimination of All Forms of Discrimination against Women*, UN General Assembly Resolution 34/180, U.N. Doc. A/34/46; *International Covenant on Civil and Political Rights*, 999 UN Treaty Series 171, entered into force March 23, 1976; UN General Assembly Resolution 2200 (XXI), 21 UN GAOR Supp. (no. 16), UN Doc. A/6316; *African Charter on Human and Peoples’ Rights*, Organization for African Unity Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Nairobi, Kenya, adopted June 26, 1981; *Protocol to the African Charter on Human And Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, Ouagadougou, Burkina Faso, June 10, 1998; “The Beijing Platform for Action,” Declaration from the 4th World Conference on Women, 1995.

support women's land rights, the unfavorable situation for women with regard to land ownership continues. On its face, Kenyan law does not discriminate on the basis of gender. Section 70 of the constitution guarantees every Kenyan the enjoyment of fundamental rights and freedoms irrespective of his or her sex, while section 82 outlaws discrimination on the basis of sex and prohibits the passing of laws with this effect.<sup>15</sup> Despite these antidiscriminatory guarantees, section 82(4) exempts a number of laws, including personal laws and, most relevantly, laws pertaining to divorce, inheritance, and succession, as well as in cases where customary law is concerned.<sup>16</sup> Thus, discrimination on the basis of gender is permissible in these categories of law.

The current constitution restricts the application of "custom" to matters of personal law. The Judicature Act<sup>17</sup> defines the applicability of customary law. Section 3(2) states that the high court, court of appeal, and subordinate courts "shall be guided by African customary law in civil cases in which one or more of the parties is subject to it, or affected by it, and in so far as it is not repugnant to justice and morality, or inconsistent with any written law." This does not bind these courts to follow customary law, but rather to be guided by it in reaching decisions using formal law. However, the Magistrates' Courts Act<sup>18</sup> grants district magistrates courts the jurisdiction to hear cases based on customary law—defined by section 2 as claims concerning personal matters under customary law, including lands under customary tenure, marriage, divorce, maintenance/dowry, intestate succession, and administration of intestate estates. Customary law applies unless superseded by written law.<sup>19</sup>

The Law of Succession Act<sup>20</sup> also has certain deficiencies regarding intestate succession, though it technically remains important in helping some women secure land willed to them. For example, there is a limitation on a widow's inheritance that restricts her portion to a contingent life estate on her husband's land. Additionally, the failure to explicitly include daughters—married or otherwise—in the definition of children who stand to inherit, combined with community succession practices that do not include daughters, means they may be excluded.<sup>21</sup>

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<sup>15</sup> The Constitution of Kenya (1998), revised edition (2001).

<sup>16</sup> Ibid., art. 82(4) ... (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.

<sup>17</sup> The Judicature Act, ch. 8 (1983), revised ed. (1988).

<sup>18</sup> The Magistrates' Courts Act, ch. 10 (1985) revised edition (1989).

<sup>19</sup> The government of Kenya tabled a draft constitution in 2005, but it was defeated. It attempted to expand antidiscriminatory provisions to include sex, pregnancy, marital status, and culture, and the blanket exemption for personal laws was removed. For example section 42(5) of the draft required parliament to make laws recognizing family law systems based on religion and tradition, "to the extent that such ... systems are consistent with this Constitution," implying no recognition if inconsistent.

<sup>20</sup> The Law of Succession Act, ch. 160.

<sup>21</sup> Ibid., ch. 16, sec. 35(1). Though defined in the Law of Succession, the definition of "child" or "children" does not explicitly include female children, which may permit a discriminatory interpretation. Interviewee responses revealed that it is being interpreted informally as such by a number of community power-holding members with some knowledge of the Law of Succession Act, sec. 3, ss. (2) and (3).

Regardless, most attempts by women to secure their land rights do not reach a formal court. Instead, intracommunity power dynamics stifle potential court cases and most disputes play out locally.

## Refusing Inheritance

*“Women cannot be trusted with land. They will sell it and use the money to plait their hair and buy nice clothing to attract a husband while their children run around the fields filthy and neglected.”<sup>22</sup>*

### **Widows and Daughters in the Patrilineage**

Under patrilineal inheritance systems in Kenya,<sup>23</sup> ancestral land is kept within the family to ensure the continuation and security of the lineage. Patrilineal inheritance typically sees tracts of ancestral land carved into ever-smaller plots to accommodate subsequent inheriting male generations in the communal holding. Sons are expected to subdivide their already subdivided portions for their sons to inherit and so on. In this manner, the patrilineage remains intact with secure access to land. Inheritance and the patrilineal legacy provide a social safety net and underpin all land dealings. Though operated on communally held ancestral lands in the past, this system remains important because it has been extended into the individualized tenure domain. Since the kinship system is unilineal, permitting daughters or widows to inherit can remove land from the patrilineage and threaten the lineage and the security of future generations. It remains rare.<sup>24</sup>

Widows are seen as stewards of the land for their sons and are limited in what they can do with inherited land. Because inheritance is meant to secure their sons' inheritance and ensure that the patrilineage persists, it is not for the widows' own benefit, since as replicated in the Law of Succession Act noted above, widows receive a “life estate” and their interest terminates upon death. After a widow dies, land goes to any sons or returns to the patrilineage.<sup>25</sup> In some areas, widows can be seen as holding land in trust for their sons until a designated age.<sup>26</sup> When sons take over, a widow may remain securely on the land, but if there are no boys, her position is tenuous since she lacks a link to the patrilineage.

Levirate marriage (“wife-inheritance” in colloquial language) is a local institution that counters such insecurity. An in-law<sup>27</sup> (usually a brother-in-law) marries the widow.<sup>28</sup>

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<sup>22</sup> Interview with local male, Shinyalu Division, October 2008.

<sup>23</sup> There is no universal customary system in Kenya. This description represents certain facets of the systems described by respondents in agricultural communities where research was conducted.

<sup>24</sup> Despite the cultural significance of land, purchased lands are considered different from ancestral family lands. Ancestral land usually cannot be sold or is difficult to sell, while purchased lands are alienable. The reason is that the patrilineage relies on this land, and its subsequent inheritance by sons, for its continuance.

<sup>25</sup> Interview with community paralegal, Koibatek District, October 2008.

<sup>26</sup> There was no uniformity in this practice. Sons take control over the land at a designated age and are expected to care of and provide for their widowed mother until her death.

<sup>27</sup> In some cases, outsiders may be permitted to remarry a widow—provided there are guarantees that all lands remain within the in-law patrilineage.

This satisfies the dual purpose of ensuring that a widow has help raising her children and working the land and that land remains within the patrilineage should she have no children (or only girls). It confirms a widow's attachment to the land through the patrilineage and prevents her eviction (though unscrupulous in-laws may encroach nonetheless).<sup>29</sup> Today, however, the levirate seems to be practiced only in a small fraction of communities, with variance among individual families.

The main type of abuse widows suffer is land grabbing by in-laws. They do this to secure the land for themselves (economic motivations) and to ensure it remains within the patrilineage (increased inheritance size for their children, or cultural motivations). In-laws may follow a number of approaches. For example, in areas with relatively high legal awareness, there seems to be a trend to use a more legal approach, in which in-laws "run" to the courts to attempt to cheat a widow out of her formal inheritance rights under the Law of Succession Act. They obtain the husband's death certificate and quickly file a succession claim listing themselves as sole beneficiary and thereby dispossess the widow and any daughters.<sup>30</sup> In other cases, brothers-in-law *appropriate* a widow's formal land documents and threaten the widow with violence, using custom as justification. Land grabbing is not limited to in-laws or males, however; sisters-in-law may also instigate and support abuses. A high court judge recounted one case where a more knowledgeable polygamous widow quickly filed a succession claim to exclude her fellow widows.<sup>31</sup>

Just as widows are not considered "firm" members of a patrilineage, daughters are perceived as transients in natal families, as there is an underlying presumption and expectation that they will eventually marry out of the lineage. Daughters thus have great difficulty accessing land through inheritance, since marriage would transfer their lands outside the natal holdings into their husband's. Daughters may be treated differently depending on their marital status and circumstances, though these distinctions are not always made.

As a result, unmarried daughters are more likely to inherit land than married.<sup>32</sup> In the few cases where it is permitted, formal titles usually remain with a male (brother or father) to ensure land stays fixed to the patrilineage.<sup>33</sup> These daughters can grow crops on the land but cannot sell it. Brothers almost never permit married daughters to inherit land because their inheritance directly diminishes their brothers' access to patrilineal lands for themselves and their sons. Married women are not considered part of their natal family; married daughters may not even bother attempting to return and claim inheritance, since

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<sup>28</sup> The term "wife inheritance" is a pejorative term commonly used by human rights advocates in denouncing harms resulting from the practice. However, since it serves certain community and protective purposes, we have chosen to use more neutral language.

<sup>29</sup> It also alleviates the problems associated with a daughter attempting to return to her natal home, which is discussed in the next section.

<sup>30</sup> Interview with judge, Nyeri Town, September 2008; interview with a chief and his assistant chief, Nyeri North District, September 2008.

<sup>31</sup> Interview with judge, Nyeri Town, September 2008.

<sup>32</sup> Interview with Deputy District commissioner, Nyeri Town, September 2008; interview with local elder, Nyeri South District, September 2008.

<sup>33</sup> Interview with elderly widowed land owner, Nyeri South District, September 2008.

their exclusion is seen as “traditional” and impossible to overcome.<sup>34</sup> The only possibility for married daughters to obtain land is when their father specifically wills it to them or gifts it to them before his death, though even here, brothers still often interfere.

According to some community members, women are also denied inheritance for other reasons. For example, “if married women are allowed to inherit, they will become hard headed and unruly and will refuse to develop their husband’s plot.”<sup>35</sup> Inheritance is denied as a means of “instilling discipline in women.”<sup>36</sup> This denial also provides an incentive for women to struggle and keep a marriage intact, as women are thought to be more willing to dispense with a troubled marriage should they have somewhere to which to “escape.” Thus, in some communities, a daughter receives absolutely nothing: “There is no consideration of this – that is just how it is.”<sup>37</sup> Regardless, when daughters are permitted to inherit, their brothers inevitably inherit more.

Although some contributing factors have roots in the cultural context, respondents indicated that the overarching motivation behind land grabs and the exclusion of women from land inheritance is self-serving behavior. This included the desire to gain land for economic purposes, to ensure one’s own children had land to inherit, or some combination of both. Because women are considered outsiders, exploiting them causes no remorse. Arguments pointing to “tradition” are made to convince the rest of the community that what is essentially greedy behavior is correct and justified. However, closer consideration of local customs reveals that in fact, the majority of such actions against women are unsupported by—and actually contradict—traditional norms. Despite the fact that many elders proudly explain that their culture “protects” women, “custom” is routinely (and falsely) invoked as a pretext for greedy land appropriations.<sup>38</sup>

### ***Dispute Trajectories***

Facing land disputes with in-laws or brothers, most women follow an informal, roughly hierarchical approach in their attempts to redress their grievance. They first turn to family and community. The Provincial Administration, which employs mixed elements of community and formal law, may be approached next. The formal justice system may also be approached, but in practice only rarely. Moving to this next “stage” may be necessary if either or both parties are dissatisfied with a decision, or no decision could be reached. Outside this hierarchy, people may also seek help from a religious institution where such institutions are strong, or a *kadhi*<sup>39</sup> for Muslims.

Usually a woman approaches her husband’s family if married or her natal family if not. Family elders call the family and disputants together to discuss the matter. Since it is

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<sup>34</sup> Interview with local elder, Nyeri South District, September 2008; women’s focus group, Nyeri North District, September 2008.

<sup>35</sup> Interview with local male, Butere District, October 2008.

<sup>36</sup> Interview with land tribunal member, Emuhaya District, October 2008.

<sup>37</sup> Ibid.

<sup>38</sup> Interview with a female elder, leader of multiple women’s groups, Koibatek District, October 2008.

<sup>39</sup> Also spelled *qadi*, these are Islamic judges who hear civil cases, basing and upholding their decisions on Islamic norms and rules.

often the family that is responsible for disputes, the issue may not be resolved. Women can find themselves in a difficult situation if they decide to pursue a land grievance any further; indeed, some women suffer violence for daring to complain about a land situation at all. Community members explain that socialization and local informal practices may quash women's will to fight. As a consequence, when confronted with land disputes, women sometimes may not react at all and instead "sit" without seeking help or fighting to resolve their problems.<sup>40</sup> The threats and physical abuse women receive for speaking out supplement "custom" as a deterrent.

The end result is that women may be removed from their land and put into the street merely for attempting to defend their rights. Whether she wins or loses, a woman is thought to be guilty of disrupting family harmony and is frequently cut off from the family support network. Even elders have problems. Though often tasked with protecting women, community elders may no longer be highly regarded, in part because an increasingly youthful population is challenging their traditional influence, leaving them with diminished authority to speak on land issues. In one instance, family elders attempted to intervene on a widow's land case, but her brother-in-law chased them away with a club when they did not support him.<sup>41</sup> In any case, since family elders are in most instances from the in-law side of the family, they are likely to be biased in favor of immediate patrilineal land interests. Moreover, elders may be more interested in extending customary arguments and helping the more powerful than in fulfilling their protective role.

If unresolved, land matters may be brought to the Provincial Administration, beginning with the chief as the "grassroots" administrative unit.<sup>42</sup> The assistant chief takes note of the case and calls the parties together to attempt to negotiate a resolution. If a party is dissatisfied or no resolution is reached, the assistant chief shares his notes with the chief and refers the case to him. Chiefs usually originate from the location they are deployed in and are familiar with local norms. They are also civil servants with a mandate to maintain order in their communities and generally apply local methods to do so; at the same time, they are gatekeepers to the formal system. The chief reviews the assistant chief's notes and calls the parties to discuss the issue again. The chief may also marshal members of the community for input, particularly the elders.

The Provincial Administration, in particular, assistant chiefs and chiefs, have the greatest opportunity to have a positive impact on women's access to land once a woman approaches this body for help. They are the focal point for all local disputes, understand local practices, and are generally respected. However, this means that decisions may depend on their personality and opinions, which often leads to inconsistent results. Some were described as proactive in their efforts to direct the equal subdivision of lands for daughters and protect widows; others were not.

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<sup>40</sup> Interview with district officer, Butere District, October 2008.

<sup>41</sup> Interview with local elder, member of sublocation village elder's committee, Butere District, October 2008.

<sup>42</sup> A civil servant deployed at the sublocation level.

There is an inherent tension in these important administrative officials' role as gatekeeper between local systems and official law. They seek to apply what limited legal knowledge they have in an *ad hoc* (and thus potentially erroneous) manner, while simultaneously attempting to represent community values. Given chiefs' limited legal knowledge, in cases where there is a "conflict of laws" between local practice and formal laws, the propensity is to alter the content of formal law (or ignore it entirely) to accord with local values, in order to retain local legitimacy and relevance and to secure community stability over substantive, rights-oriented "justice."

Many chiefs, however, are involved—directly or indirectly—in violating women's land formal rights. Some misdirect women inadvertently, others intentionally; the latter was particularly the case for widows defending themselves against formal legal attacks from brothers-in-law. Chiefs may quash those cases that are liable to challenge, question, or supersede their authority. One respondent stated that her chief always sides with the in-law family in disputes with widows because they promise him a portion of the disputed land and/or of the husband's wealth. Chiefs tend to bow to stronger parties, especially if they receive a "cut."<sup>43</sup> To this end, they may support claims to purported "cultural" practices that accord with neither informal systems nor formal law.

Chiefs are also direct perpetrators. In one case recounted before he died, a father left his title deed with his chief to protect his wife, two daughters, and very young sons from encroachments by his in-laws. Soon after the man's death, the chief took the land title to the Land Control Board (LCB) and sought consent to sell a portion of it. He cajoled the uneducated widow saying, "give me a piece of your land so I can educate your girls." He has since bullied the mother into consenting and has been trying to sell the land—all of it. The daughters, who are both grown and educated (one working as a school teacher and the other a doctor), have decided to fight back. One went to the local LCB to put a caution on the land and prevent any transactions. When the chief discovered this, he used his influence to have one daughter fired from her teaching job and has been attempting to do the same with the other. The family is now considered "enemies" of the chief and their lives in the community are very difficult.<sup>44</sup>

If parties remain unsatisfied after the chief's intervention, the matter may be brought to the district officer (DO), a civil servant.<sup>45</sup> The chief passes the written case information to the DO and he attempts to forge a resolution. Although DOs and district commissioners may play a role, they often simply refer cases back to a family and hence, back under the chief. Some respondents said it was "necessary" to bribe the DO to ensure progress. It should be noted that resolutions reached with, or decisions made by, any Provincial Administration officials have no legal force or effect but are made on the basis of that official's moral authority and status in the community, with concomitant social pressure as a compliance mechanism. In reality, these officials play a larger role through their

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<sup>43</sup> Interview with elderly widowed land owner, Nyeri South District, September 2008.

<sup>44</sup> Interview with female focus group, Koibatek District, October 2008.

<sup>45</sup> The sublocation is the lowest administrative unit, followed by the location, the division, the district, and the province.

oversight of, and participation in, the quasi-judicial LCBs and Land Dispute Tribunals (LDTs).

## **Institutionalizing Women's Exclusion**

There are two institutions in Kenya that were created to “formalize” customary land concepts: Land Control Boards (LCBs) and Land Dispute Tribunals (LDTs). Both are practical examples of the integration of customary land tenure and involve grassroots authorities in formal institutions. Research data indicates that the integration of local elements in LCBs and LDTs does not necessarily empower women and guarantee their land rights; in fact, these institutions are instead influenced and often undermined by those in power. As a result, outcomes are subject to the same local power dynamics that prevent women from accessing land under the informal community systems.<sup>46</sup>

### ***Land Control Boards***

In 1967, the government passed The Land Control Act, which established “Land Control Boards” (LCBs) to control land transactions involving agricultural lands. All “sale[s], transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land” are subject to an LCB’s consent.<sup>47</sup> Thus, the owner of agricultural land must apply for—and receive—an LCB’s consent before any transaction can take place.<sup>48</sup> LCBs are directed to refuse consent where persons seeking to purchase are unlikely to farm or develop the land, unlikely to use it profitably, or already have “sufficient” land.<sup>49</sup> LCBs are further directed to refuse consent where a transaction is “markedly unfair” and/or “disadvantageous” to one of the parties, and/or where land division is likely to reduce productivity.<sup>50</sup> Essentially, the LCB is an administrative body, which, in being able to approve or reject land transactions, has a quasi-adjudicatory role. Appeals of LCB consent decisions may be challenged at the Provincial Land Control Appeals Board and further appealed to the Central Land Control Appeals Board.<sup>51</sup> Disputes over boundaries and transactions are outside the LCB mandate and referred to LDTs (discussed below) and may ultimately arrive in court.

In consultation with the district lands registrar, the district commissioner (DC) appoints members of both LCBs and LDTs from elders or respected persons in the land control areas. The DC sends out a public notice to identify people who may become members, and those who qualify are selected from that list. Members must possess a minimum level of education, be respected members of their community, and be knowledgeable on land issues. At least one-third of the members should be women, though this is rarely the case.

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<sup>46</sup> Though respondents uniformly asserted that LCBs and LDTs exclude women, quantitative figures on use of, and participation in, these institutions by women were not available. Data on how women are treated in decisions rendered by these institutions also does not exist. This is an area where further quantitative and qualitative research may be warranted in the future.

<sup>47</sup> “Agricultural land” is defined as land that is not within a municipality, township, or a market; Land Control Act (1967), revised 1981 and 1989 (cg, 302), sec. 1, 2, and 3.

<sup>48</sup> Ibid., sec. 3.

<sup>49</sup> Ibid., sec. 9(1)(b)(i).

<sup>50</sup> Ibid., sec. 9(1)(b)(iii) and (iv).

<sup>51</sup> Ibid., sec. 11 & 13.



Since provincial administrative officials are included and certain members must vie for nomination in a competitive appointment process, the appointment process and LCBs themselves are seen as politicized.<sup>52</sup> Moreover, in practice, LCBs are controlled by the same men (generally) that enable the abuse of “custom” to dispossess women from land in village consultations and disputes brought to the Provincial Administration.

LCBs were intended to prevent land fragmentation by denying consent for transactions deemed detrimental to productivity (Benschop 2002). The government issued an additional policy guideline in the early 1980s instructing LCBs to consider the families of those involved to help prevent them from being left landless because of unscrupulous land transfers done without their knowledge or involvement. Transactions are supposed to be blocked if, for example, a woman reports that her husband is attempting to execute a land transaction (such as selling a portion of or the whole plot). Daughters are concerned parties and may contest exclusion during consent proceedings for the subdivision of family lands (Benschop 2002).

Though LCB consent deliberations must include the “family,” a clear definition explicitly requiring the inclusion of wives<sup>53</sup> and daughters is lacking. As a consequence, in practice, this guideline is rarely adhered to, full family units are not consulted, and sales continue to adversely impact women. In fact, women are frequently excluded entirely. Absolute ownership rights conferred by formal land registration combined with LCBs’ propensity to exclude women permits men to supersede informal practice (which usually dictates consultation with the entire family) and alienate lands without consulting the family (their immediate family and the patrilineal line). Since there are universal reports of the unscrupulous sale of women’s lands without their knowledge, it may be said that LCBs are failing to consider and protect women.

A portion of this problem may be attributed to the LCB’s reliance on chiefs and assistant chiefs (who, in turn, rely on community elders) to identify interested family members during consent deliberations. Chiefs and elders often act to perpetuate cultural practices and seek to secure their continued local relevancy and legitimacy. This means that wives and daughters may be intentionally excluded from LCB proceedings, since only males are identified and land is sold without women’s participation or consent—even when they have clear interests in it.

When women are included, husbands are reported to bully their wives into consent. One respondent recounted an incident where a father brandished a *panga* (machete) and

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<sup>52</sup> More specifically, LCBs are composed of the district commissioner of the district where the Land Control area/division is located or a district officer deputized by him in writing (either will be the LCB chairperson); possibly another two public officers other than the district commissioner and the district officer; two other people nominated by the county council with jurisdiction in the area; between three and seven residents within the land control area, all appointed by the minister of lands; and the secretary—also a representative from the Ministry of Lands—though this position is based on practice, since the position is not provided for in the Land Control Act. Interview with Kenya Land Alliance Gender Officer, Nakuru District, October 2008.

<sup>53</sup> Including those in polygamous marriages.

menaced his entire family to secure their support at the LCB.<sup>54</sup> As one chairman recounted, LCBs always support parties' decisions and the terms of a transaction—even if they are highly discriminatory and exclude women.<sup>55</sup> This is despite the fact that the Land Control Act itself specifically directs LCBs *not* to grant consent for such unfair sales and that the guidelines require families to be considered.<sup>56</sup>

LCBs could help to protect women living on agricultural lands registered in a male relative's name if their legal mandate and government-issued guidelines were followed and they refused to consent to harmful and discriminatory sales. Yet, in practice, LCB proceedings are subverted and dominated by the same local power dynamics that already hamper a woman's access to land under communal practices.

### ***Land Dispute Tribunals***

Land Dispute Tribunals (LDTs) were established in 1990 at the district level in a limited number of districts.<sup>57</sup> They are a hybrid, quasi-judicial mechanism that utilizes some elements of the formal system in its procedures and decisions, which are reached with considerations based mainly on customary concepts. They are mandated to adjudicate cases involving, *inter alia*, disputes over the division of land, the determination of boundaries to land, and claims to occupy or work land, issues that arise in the context of succession and land transactions.<sup>58</sup> Disputes over such issues arising in LCB proceedings (apart from those challenging consent) are referred to LDTs. In theory, LDTs should be of particular importance to women with land disputes, but they too are subverted by local power dynamics and may operate against women seeking access to land.

Technically, LDTs are to base their decisions “in accordance with recognized customary law.”<sup>59</sup> There is, however, no elaboration as to what “recognized customary law” is. The Act points to elders as sources, yet they are appointed largely on advice from chiefs. This means that decision makers in this process are—as in the communal process and under the LCBs—the power holders at the community level.<sup>60</sup>

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<sup>54</sup> Interview with female focus group, Koibatek District, October 2008.

<sup>55</sup> Interview with a district officer/chairman of LCB, Butere District, October 2008.

<sup>56</sup> Land Control Act, sec. 9(1)(b)(iii) and (iv).

<sup>57</sup> Land Disputes Tribunal Act (Act No. 18, 1990). LDTs have been established in the following districts, many of which are agricultural areas: Tharaka, Marsabit, Meru Central, Meru South, Embu, Mbeere, Baringo, Koibatek, Keiyo, Trans Nzoia, Laikipia, Thika, Murang'a, Bondo, Siaya, Nyamira, Teso, Vihiga, Lugari, Butere/Mumias, Kakamega, Taita/Taveta, Uasin Gishu, Wajir, and Malindi. Minister for Lands and Settlement orders regarding “Establishment of Land Disputes Tribunals,” Land Tribunals Act. Apparently additional tribunals have been set up in other districts and at the division level as well; see: Samuel Kibara Wainaina v. Land Disputes Tribunal, Kieni West Division & Another [2006] eKLR; Republic V Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex-parte Peter Maru Kariuki [2005] eKLR. The team interviewed an LDT member in Kieni West Division.

<sup>58</sup> Land Disputes Tribunal Act, sec. 3(1).

<sup>59</sup> Ibid., sec. 3(9).

<sup>60</sup> “Elders” refers to persons who are recognized by custom in the community or communities to which the parties raising the issue belong as being, by virtue of age, experience, or otherwise, competent to resolve issues between the parties. Land Disputes Tribunal Act, sec. 2 “elders.”

Where established, LDTs are a “court of first instance” for land disputes (including those arising in LCB proceedings) and retain jurisdiction to the exclusion of magistrates courts.<sup>61</sup> They have jurisdiction in areas outside the application of the Law of Succession Act. LDTs may also have primary jurisdiction in areas where the Law of Succession is applicable, thereby supplanting formal law with “recognized customary law.”<sup>62</sup> Appeals are possible to an appeals committee; however, there is no prohibition on members of the LDT also sitting on the appeals committee and they frequently do.<sup>63</sup> Further appeals must be filed with a high court and can only pertain to questions of law; questions of fact are deemed finally decided by the appeals committee.<sup>64</sup> The content of customary law is considered a question of fact and therefore cannot be appealed.<sup>65</sup> In areas where there is no LDT, disputes arising in LCBs and those unsatisfactorily resolved by the Provincial Administration’s informal dispute-resolution efforts may go to court.

In practice, LDTs have a dubious record protecting women’s access to land, not least because their rulings are based on local informal concepts and practice. On the one hand, this allows them to grant locally legitimate decisions, legitimate because they represent communal norms and values; on the other hand, LDTs tend to root those decisions in local, male-dominated power structures and thereby perpetuate asymmetric power arrangements that exclude women from accessing land. LDTs may also negate the application of formal laws—like the Law of Succession Act—that grant women greater rights and protections. Despite the fact that LDT decisions may be highly biased against women, there is no right of appeal unless a question of law exists. Costs may also play a role in keeping women away.<sup>66</sup> Corruption and a lack of transparency in the functioning and appointment of LDT members also undermine faith in the institution. Moreover, there were clear instances where conflicts of interest existed, such as an LDT member actively involved in a case involving a family member. One respondent indicated that LDTs actually prevent women from attending hearings, or if in attendance, prevent them from speaking.<sup>67</sup>

The appointment process is unclear to communities, a lack of transparency that adds to the sentiment that LDTs are corrupt, particularly when they are top-down processes that may produce members who lack a connection to their jurisdiction. Appointment standards are unclear and arbitrary; though LDT composition is part of the law, there are no legal guidelines on how to hire and the process and criteria are vague.<sup>68</sup> Because land is a powerful political tool and politically appointed Provincial Administration officials

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<sup>61</sup> Land Disputes Tribunal Act, sec. 3(9).

<sup>62</sup> Republic V Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex-parte Peter Maru Kariuki [2005] eKLR.

<sup>63</sup> Land Disputes Tribunal Act, sec. 8 & 9.

<sup>64</sup> Ibid., sec. 8 (8) & (9).

<sup>65</sup> Ibid., sec. 8 (10).

<sup>66</sup> A case costs K Sh 1000 (approximately \$13) to file. Though cases can be appealed, the cost to do so is an additional K Sh 3000 (approximately \$39); interview with deputy district commissioner, Nyeri Town, September 2008.

<sup>67</sup> Interview with deputy district commissioner, Nyeri Town, September 2008.

<sup>68</sup> Though respondents did not similarly complain about LCBs as such, their appointment processes are likewise largely arbitrary.

are involved, there is also significant political influence in the appointment process (controlled by the district commissioner). This does little to inspire women's confidence in LDTs, since appointees are distrusted and may lack community knowledge. Although there must be a proper balance struck between local legitimacy and "legal" abilities for appointees, LDTs seem to fail that balance. Members were also confused regarding their roles and the principles they use to decide cases. With such confusion, it is not surprising that people complain that LDT decisions are protracted; despite being tooled for speed, one LDT member noted that a case was already into its fourth year.<sup>69</sup> Another respondent described LDTs as "disorganized" and noted that they frequently summoned elders to appear at the tribunal when the LDT was not ready to hear them, even though the elders must pay for their own transport.

Thus, whether due to confusion regarding the various procedures, roles, and mandates—and a lack of means to navigate them, or a lack of knowledge of and confidence in LDTs and their propensity to reinforce existing power imbalances at the expense of women, or a combination of all these factors, women are not engaging LDTs. At present, the Draft National Land Policy tentatively aims to repeal The Land Disputes Tribunal Act and replace it with a more appropriate mechanism.<sup>70</sup> Until such time, some women disregard LDTs and go straight to court.<sup>71</sup> However, ignoring local systems and approaching the formal justice system directly brings its own set of problems.

### **Formal Courts**

Because of all the disruptions and enmity it causes, many respondents stated that communities are often "infuriated" when someone goes to court. Though resolutions reached in the community or with Provincial Administration officials have no legal force or effect, ignoring or challenging them is seen to undermine their status and directly challenge their authority. With regard to women, this feeling is particularly strong, as it was indicated that this is seen to undercut the man's household role of "owner" and "controller." Respondents also called it insulting and disrespectful toward a husband and community, which perceives such a woman as unreasonable and disrespectful of family and elders. Communities may also consider women who opt for court to be "enemies of the community" and reconciliation is frequently impossible. As a result, her in-laws may hate her and/or harass her: "if you do not stop, we will kill you."<sup>72</sup> Most women give up their case before taking it to court because of the complications with costs, procedural requirements, lawyers, and court proceedings—in addition to the social pressures from her family and community.

Should a woman brave the negative consequences and succeed in court, success may prove pyrrhic. The most common term to describe the reaction to a court decision was "cold war." A woman may succeed in securing her land rights, but she may then be seen as an enemy to her family and community. She consequently receives no support from either group and minor issues can become open disputes. Litigiously successful women

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<sup>69</sup> Interview with a district officer/chairman of LCB, Butere District, October 2008.

<sup>70</sup> Draft National Land Policy for Kenya, sec. 4.3.4 Land Disputes Tribunals.

<sup>71</sup> Interview with Caritas legal officer, Nyeri Town, September 2008.

<sup>72</sup> Interview with woman, Butere District, October 2008.

also face threats of violence, altercations, beatings, and murder. They may be prevented from working the land, have their house burned down, or be killed by thugs sent during the night.<sup>73</sup>

Though victories through the formal system may be short-lived, this is not necessarily the case when they have progressed through the informal system first. Formal legal decisions, whether supported or not, are more likely to be respected and garner less hostility if they progress through local justice channels first, for example, through family, elders, chiefs, or other Provincial Administration channels.<sup>74</sup>

Apart from the challenges at the community level, the formal system itself presents a substantial barrier. Formal court procedures are informed by some of the same local powers that already prevent women from accessing their land rights at the community level. In outlining formal succession, chiefs play a significant role insofar as they enumerate all beneficiaries to a particular piece of land for the court. Chiefs may accept money to ensure women are kept off the letter as beneficiaries, or replicate existing inequalities by omitting women's names while brothers or in-laws file succession claims themselves. Male-biased communal power dynamics can inform cases at the most formal level, with chiefs and other local powers capable of "fixing" a court outcome.

Furthermore, the number of steps and the complexity of the paperwork required to file a succession claim are a substantial procedural impediment. There are a total of 17 different legal steps to complete; at least 13 forms to fill out; numerous affidavits that require a lawyer, a number of which must also include the signatures of sureties to back a claimant who must be identified and brought to the lawyer; and multiple locations to visit. There is also an approximate time frame for succession proceedings of seven months to one year. Obtaining the most basic of documents—for example, a death certificate—can lead to further intrafamily struggles. Intricately related to the number of steps are the significant costs involved, including for filing a case, administration fees, hiring a lawyer, or carrying out an official survey. Respondents noted that only women with the necessary monetary resources can fight a land dispute. A formal succession claim can cost over K Sh 60,000 (approximately \$780)—even more if there is another claimant and it becomes adversarial.

Lawyers are seen to encourage litigation, sometimes manufacturing cases against women by pushing brothers to litigate, providing advice to both sides of a dispute to secure more fees, inciting wives in polygamous marriages to litigate against one another, and colluding with other lawyers to extract extra fees.<sup>75</sup> Some lawyers are alleged to have become intimately involved with female clients to gain control of their lands.<sup>76</sup> Whether or not these claims are true,<sup>77</sup> such assertions offer an important insight into people's

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<sup>73</sup> Interview with community paralegal, Butere District, October 2008.

<sup>74</sup> Interview with community paralegal, Nyeri Town, September 2008.

<sup>75</sup> Interview with chief magistrate, Nyeri Town, September 2008.

<sup>76</sup> Interview with elder and member of a town planning committee, Koibatek District, October 2008.

<sup>77</sup> Such perceptions are supported by the findings of the *2009 East African Bribery Index*, published by Transparency International, which identified the judiciary as the third most corrupt institution in Kenya.

attitudes toward the legal profession and why they might avoid engaging lawyers and pursuing a formal legal option that requires a lawyer's involvement.

Should a woman persevere through all of the above-mentioned challenges and bring her land and/or succession case to court, it is unlikely a magistrates court will have jurisdiction. Magistrates courts have a jurisdictional value cap that precludes their involvement in many (if not most) land disputes, meaning that such cases must go to the high courts.<sup>78</sup> This is unfortunate because magistrates courts are far more accessible (geographically and potentially monetarily) than high courts in Kenya, which are more distant and costly. Thus, women attempting to bring land cases to a magistrates court usually find their case dismissed due to lack of jurisdiction.

These barriers clearly act to deter women from approaching the formal system for help in accessing land should they be brave enough to consider the formal court as an option.

## Shifting the Debate

It is widely acknowledged among practitioners, policy makers, and academics that the barriers African women face in claiming their land rights are significant. The most detrimental consequence is the impediment of women's economic empowerment, replaced instead with a descent into extreme poverty. However, current debates on the causes are multifaceted and often produce diametrically opposed solutions, resulting in a lack of clarity for policy makers on how to generate effective and positive change. The present focus is primarily on the relation between formal law and customary systems; however, the debate may need to shift to a greater focus on challenging the role local power holders play and changing locally accepted behavior.

There is a tendency to argue for the general integration of "customary rights" in formal land tenure, since these have far greater local legitimacy than formal land laws (Cousins and Claassens 2006, UNDP 2006). This is a possible solution for certain situations, such as where formal land tenure entirely contradicts local concepts of land usage or the formal system is used by more powerful actors to take lands from small-scale farmers. Another set of policy makers, however, argues that the integration of informal systems allows discrimination against women (Asian Development Bank 2007) and perpetuates local power asymmetries (Wojkowska 2006, Kenya Land Alliance 2008).

This double-edged sword also emerged in more recent debates. For example, the Commission for Legal Empowerment of the Poor emphasized the need for equal

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Transparency International Kenya, "The East African Bribery Index" (Nairobi, Kenya: Transparency International, 2009).

<sup>78</sup> The Magistrates' Court Act limits jurisdiction to disputes falling under a maximum value of K Sh 500,000. However, scarcity of land has pushed land values far higher, anecdotally reported to be K Sh 60,000 per acre in some places and perhaps more in others. See: Magistrates' Court Act (ch. 10) sec. 9 and 5. The value cap has been updated a number of times by the Chief Justice and may require another revision. As of December 2006, Section 5(1) of the Magistrates' Courts Act amended and granted Acting Senior Principal Magistrate to Kenya shillings two million (K Sh 2,000,000). Magistrates' Court Act (ch. 10), Gazette Notice NO. 10709, Vol. CVIII- No. 90, 29 December 2006.

inheritance rights between men and women, yet simultaneously called for the increased recognition of customary rights when many customary systems are based on the exclusion of women from land ownership (CLEP 2008). No suggestion was made on how to mediate these contradictory facets. It may prove difficult to retain the legitimacy customary systems enjoy while trying at the same time to reengineer an integral part of them into a more gender-friendly mold.

LCBs and LDTs in Kenya are a practical example of integrating customary land tenure and involving grassroots authorities in formal institutions. Their regulations aim to include women. However, reality shows that these hybrid institutions remain subject to local power dynamics and produce exclusionary outcomes similar to those in entirely informal processes; they can also be undermined by those in power. This demonstrates a lack of success in the goal of utilizing local structures on the one hand and trying to change fundamental features of those systems on the other.

Apart from the procedural and cost barriers noted above, and despite being the ultimate formal institution, courts are equally weak in providing rights for women, since actions and decisions of personnel in formal institutions (for example, police or judges) are often informed by “customary” understandings (Benschop 2004, UN-HABITAT 2007). Further, a UN-HABITAT report points out that “In many countries with both formal and customary law, formal law provides women with rights that are not yet recognized by social or customary norms” (UN-HABITAT 2007). In Kenya, when women actually do succeed in asserting their rights, they may be rejected by the community and suffer physical attacks.

All systems in Kenya contend that they protect the weak. Local sociocultural systems, though functioning in a way that denies women land ownership, do possess safety network features that protect women in other ways and prevent them from falling into poverty. These include diverse protective “rights,” varied “rights of return” to natal homes for divorced daughters, the ability to occupy and use natal lands, and levirate marriage practices. LCB and LDT regulations emphasize the inclusion of women and formal courts equally aim to protect women using formal legal tools that strive for equality in inheritance.

Nevertheless, the Kenya example demonstrates that the formal system provides no real alternative to informal systems governed by asymmetrical power structures. Despite the appearance of being more fair and equitable, in reality, the formal system is subjected to the same structures that underpin community solutions—that is, those with power, money, or education are much more likely to gain from it. Many accusations of bribery are made, and there is a general perception that those with money win. Those educated with a better understanding and legal awareness often utilize the formal system only when they are certain to win, or navigate it in such a way that others have no chance. Legislation involves local power actors to identify parties and generate the forms required for many court cases; chiefs and family leaders can therefore “fix” a court outcome at the local level by manipulating documentary evidence and excluding parties before a case

begins. Thus, while the legal education of women may play a role in helping fight for access to land, other factors in the legal system frequently thwart a successful outcome.

Some practitioners identify a trend in the evolution of informal systems with weakening local authorities and increasing disrespect for cultural norms—except in cases where local authorities and cultural norms are invoked for self-serving land acquisitions (International Land Coalition et al. 2005). Some have conceded that it is impossible to state whether informal systems or formal laws are more or less protective of women (Ik Dahl et al. 2005), or state that both formal and informal systems tend to disadvantage women (UN-HABITAT 2008). The Kenya example confirms the latter assumptions. From the Kenya data, it is clear that the problems cannot be framed as a question of whether the formal or informal laws or systems should be applied; rather, the main issue is that all the systems can be undermined equally by those who hold power. Those who have more power than an individual woman can forum shop, using communal systems of inheritance and land tenure, the LCDs and LDTs, or the formal court system to gain control over a woman's land.

The problem occurs where multiple systems intersect and mix. In a pluralistic legal environment, the inherent logic of a system based on individual rights cannot be upheld, since sociocultural realities can be disconnected from communal rules or formal legislation, and it is in this “space” that abusive behavior becomes possible. One can condemn neither the traditional systems nor the formal structure, since it is the multiplicity that weakens the logic of each, leaves gaps between them, and enables perpetrators to move between and among systems to suit whatever their particular goal may be.

The focus should therefore shift from pitting customary land tenure or customary justice systems against the formal system and toward taking stock of local political and economic contexts, sociocultural values, and belief systems—all of which inform the reaction of the community at large. Because economic and political contexts can motivate individuals and lead to the acceptance of otherwise totally unacceptable actions, the debate needs to move beyond the juxtaposition of “formal and informal/customary” and examine the social context—or the community mind set—in greater detail.

## **Working with Constructive Values in this Context**

Formal legal and judicial reforms are undoubtedly important factors in improving women's access to land rights. Such approaches should seek to improve equality and ensure that legislation is not discriminatory. Equally relevant, the government should strive to increase socioeconomic protections for its citizens through, for example, economic empowerment, retirement funds, and other social safety programming, all of which enable communities to navigate away from informal kinship and social systems that currently serve to guarantee their welfare in the absence of the state. In addition, broader local and administrative corruption related to land ownership must be addressed.

It is just as important to address the problem of women's lack of secure access to land rights at its roots. Communities must be pressed to reject attempts to “hijack custom” and



legitimize abusive, self-serving behavior that results in the extreme impoverishment and marginalization of women. This problem needs to be tackled using the same avenues facilitating the marginalization itself: sociocultural value systems that define which behavior, arguments, and actions are legitimate and acceptable within a community. It is only here that destructive values can be identified and constructive ones emphasized—and where those seeking communal change can retain local legitimacy. Communal concepts that enable certain abuses can likewise be used to eliminate them.

A thorough assessment of how land institutions work in practice might be undertaken to establish concretely their role in increasing (or decreasing) access to justice for the marginalized and the poor and how they support and extend asymmetric local power structures at the expense of women. Such an assessment should consider the significant role Provincial Administration officials play in these institutions, and their role in perpetuating and supporting harmful sociocultural practices and values. Likewise, the content and procedural requirements of formal laws relating to women and land should be reviewed with an eye toward simplification and altering provisions that undermine gender equity.

Overall, policy makers and practitioners must work to identify sociocultural values that can contribute to changes in behavior that abuses women's rights. In very practical terms, this means, for example, rather than promoting the concept that land needs to remain within the patrilineage and therefore cannot possibly be given to women, other values, such as the protective elements within the patrilineal system, should be promoted.

Programming undertaken by the Kenya National Commission for Human Rights (KNCHR) provides an excellent practical example of this approach (Chopra 2007). Among communities in Nyanza province, it was widely reported that widows were being expelled from their deceased husbands' lands. Although in-laws routinely seized the lands and pushed many widows into dire poverty, elders in the communities proudly proclaimed that their culture "protected" women. KNCHR provided the framework for widows to challenge the elders by telling their story of being chased from their lands. The elders, caught between securing patrilineal land rights and protecting women, had to develop innovative means to resolve their dilemma. In many cases, they defended the widows and ensured that they received a life interest in the land for their own protection and to ensure that their sons would receive a portion as dictated by patrilineal practice. Thus, ongoing civil society and community-based projects and best practices that reject negative values and seek to expand protective ones need to be carefully evaluated and, perhaps, expanded. Further opportunities for support could include, for example, instances where a woman's natal family extracts promises for her protection from the husband's patrilineage or where communities actively intervene to protect widows from in-laws (or others) seeking to force them out.

By working with existing positive values, which justice system used becomes less important, since communities can legitimize the outcomes of multiple systems, including even victories in formal court. Ultimately, the aim must be to empower women to navigate whichever forum they find most available, convenient, effective, and cost-

efficient, in the same manner as those who currently “forum shop” as a means to impede women’s access to land rights. This could be seen as a necessary first step toward the larger goal of securing and protecting land rights, not just for women in Kenya, but perhaps in other African nations as well.

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