

Third World Legal Studies

Volume 10 *Realizing the Rights of Women in
Development Processes: Women's Legal Entitlements to
Agricultural Development and Financial Assistance*

Article 3

1-3-1991

Women's Legal Right of Access to Agricultural Resources in Africa: A Preliminary Inquiry

Florence Butegwa

Follow this and additional works at: <http://scholar.valpo.edu/twls>

Recommended Citation

Butegwa, Florence (1991) "Women's Legal Right of Access to Agricultural Resources in Africa: A Preliminary Inquiry," *Third World Legal Studies*: Vol. 10, Article 3.
Available at: <http://scholar.valpo.edu/twls/vol10/iss1/3>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Third World Legal Studies by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

WOMEN'S LEGAL RIGHT OF ACCESS TO AGRICULTURAL RESOURCES IN AFRICA: A PRELIMINARY INQUIRY

Florence Butegwa*

I. Introduction

The central role played by women in the agricultural economies of Africa is internationally acknowledged.¹ It is also a fact that these countries are under very intense pressure from within and outside to improve their economic performance. They must produce more to feed and render basic services to an ever-increasing population and to meet their foreign debt obligations. The magnitude of this task needs little emphasis in light of falling world commodity prices and the low levels of technology employed in the agricultural production process.

With such a scenario, it is logical to expect that governments would do all that is possible by way of policy, legislation and practice to create incentives and remove impediments in the way of maximum utilization of available agricultural resources. One such incentive would be the promotion of a more gender-neutral system of land ownership and control so that women, who form the backbone of rural labour in small holder farming units, can have the power to make production choices. In many African countries, the land belongs to or is in the control of men who decide the productive uses to which it will be put. The man also claims ownership of the animal and/or crop produce reared on his land by his otherwise dependent wife or female relatives.

The stories of two women, Regina and Dorotea, from Uganda may illustrate.

* LL.B., LL.M. Regional Coordinator, Women in Law and Development in Africa (WiLDAF), December 1991.

1. ESTER BOSERUP, *WOMAN'S ROLE IN ECONOMIC DEVELOPMENT* (1986); *see also* LYNNE BRYDON & SYLVIA CHANT, *WOMEN IN THE THIRD WORLD; GENDER ISSUES IN RURAL & URBAN AREAS* (1989).

Story 1

Regina grew up with an uncle who never had children of his own. On his deathbed, he bequeathed his customary law piece of land (*kibanja*) to her. Being already married and living some considerable distance away, she decided to sell the land and buy several head of cattle, which she could look after in her new home. Her husband was very supportive. Several years later, when the cattle had increased in number, her husband turned up with several people (unknown to Regina) who selected several head of cattle. It transpired that her husband had agreed to marry a second wife and these were arrangements for payment of dowry! His argument was that the cattle were really his because he was the head of the family and the land on which they had been grazing was his. If the wife did not agree to that she had five minutes to get off his property, leaving the children and the cattle until elders decided the proportion he should keep as compensation for his pastures and indirect support in the venture!

Story 2

Dorotea attended a series of women's meetings organized by the ministry responsible for women's affairs. The officials explained the need for farmers to diversify agricultural production to offset falling coffee prices. In particular, the government had identified markets for horticultural products. The ministry was willing to assist any farmer interested in taking up this new opportunity, especially at the marketing stage.

Dorotea excitedly narrated the information to her husband, urging him to consent to trying out ginger production since it thrived with almost no additional inputs except their labour. After a year of pleading and cajoling, Dorotea has given up and the land remains under cultivation of a type of banana used for local beer brewing. Her husband says that it saves him from buying beer. When he brews, he drinks his own; and when he has not brewed, he drinks from the homes of those who drank at his home when he had brewed!²

The right of women to have effective access to agricultural resources, especially land and credit, is an aspect of official policy in Africa that needs closer examination. Many women limit themselves to food crop production because it is too risky to invest labour in a long-term venture

2. Case studies collected during the Uganda Women Lawyers Association legal awareness program for women in 1990.

or cash crop growing when the benefits ultimately belong to another. If many scholars and policy makers bothered to ask the women, they would tell stories which are common knowledge in Africa and are part of history in many developed countries. These women have seen fellow women who devoted years in tending coffee and cotton fields and cattle on their matrimonial piece of land, ending up being divorced with just the clothes they had on their backs!

This paper seeks to examine the law and practice relating to the right of access to agricultural resources. It attempts to address two main questions: 1) To what extent does the law promote effective access to land and agricultural credit?, and 2) What are the prospects for change? The paper looks at the relevant laws and practices in selected African countries. Although Africa is a vast and diverse region, there are marked similarities in the legal position of women so that the examples used in this paper are indicative of the general pattern in sub-Saharan Africa.

II. Women and the Right of Access to Land

One of the questions that has often been asked when one talks of a right of access to economic resources in respect to women is whether or not in fact such a right exists. Both the Charter of the United Nations and the Universal Declaration of Human Rights affirm the internationally accepted principles of non-discrimination and equality of rights between men and women. The Convention on the Elimination of All Forms of Discrimination Against Women picks up this recurrent theme and restates it more specifically.³ In fact, national constitutions of many countries in Africa incorporate a bill of rights which includes a prominent clause for non-discrimination. Some constitutions do not, however, explicitly prohibit discrimination on the basis of sex. Examples in this category include the constitutions of Uganda and Zimbabwe. The Zimbabwean provision is typical:

Subject to the provisions of this section,

(a) no law shall make any provision that is discriminatory either in itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any written law or in performance of the functions of any public office or any public authority.⁴

3. See the Preamble to the Convention and also Articles 1-5.

4. CONSTITUTION OF ZIMBABWE § 23.

A discriminatory law or action is described as being one which results in discrimination between persons of different races, tribes, place of origin, political opinions, colour or creed. The omission of "sex" is conspicuous and in fact the constitutions go on explicitly to state: "Nothing contained in any law shall be held to be in contravention (of the above provision) to the extent that the law in question relates to any of the following matters: (a) adoption, marriage, divorce, burial, devolution of property on the death or other matters of customary law. . . ."⁵

Countries with this kind of provision therefore have a constitutionally sanctioned policy of discrimination in areas most relevant to women. Certainly, as will be discussed in this paper, discrimination against women in "devolution of property on the death" of a male relative or husband has far reaching consequences for women in getting access to agricultural land.

So a right of access to economic resources is nothing new. It is a restatement of the legal right of non-discrimination. If men have a right to acquire, hold, manage and dispose of land, states have an international and domestic obligation not to deny women equal access to land. If a man can go to any financial institution for agricultural credit, states have an obligation to accord similar opportunities to women, regardless of their marital status. In addition to the fact that women have a right of access to agricultural resources, it is sound economic policy to make the resources available to such a large proportion of the agricultural productive force.

State obligation in this regard should not be construed as being limited to the adoption of legislation which is non-discriminatory. States must ensure that the enforcement machinery works. They must create avenues for redressing discrimination which often occurs out of the formal court and official government agencies. This is especially so in Africa where there is no culture for adversarial dispute resolution in courts of law.

III. The Law and the Right of Access to Land

At independence, most African countries adopted a dual system of law in which Western-oriented laws applied (and continue to apply) alongside customary laws. It is within these two systems of law that the law governing the right of access to land can be found. Generally, statutory

5. *Id.* at § 23(3). See also E. Tinarwo, Law as an Instrument of Social Control: The Case of Zimbabwe, a project paper for the Institute of Women's Law, University of Oslo (unpublished).

law does not explicitly distinguish between men and women when regulating acquisitions of and transactions in land. Acquisition is presumed to be governed by the general law of contract in which contractual capacity is determined by the age of majority (18-21 in many jurisdictions).

A. Acquisition on First Registration

This presumption of law, which unfortunately is often relied upon by policy-makers in governments, obscures the realities of land acquisition in Africa. Historically, land was owned communally by clans. When individual ownership was introduced during the colonial period, the land was registered in the name of the head of family, invariably a man. The women lost out on the first generation of land ownership. Even in communities, such as Uganda's, in which established kings allocated land to individuals in return for outstanding service, the beneficiaries were mostly men. These titles were recognized both by the colonial governments and, at independence, by the new regime.

Subsequent to this first registration, land can be acquired through inheritance from a deceased title holder or through direct purchase.

B. Acquisition Through Inheritance

Access to land through inheritance has always been an important factor in determining gender ratios in property ownership. The right to inherit property is still governed by customary law in many African countries. This is particularly true as regards the right to inherit land. Both legislatures and courts have been extremely conservative on this issue. In the Tanganyikan case of *Mtoro bin Mwamba*, for instance, the court was required to determine whether Islamic law or customary law should govern the distribution of the property of the deceased, a practicing Moslem. The judge had this to say: "The fact that a tribe may have been converted to Islam does not necessarily mean that its customs, particularly those relating to land tenure are thereby changed. . . ."⁶

This decision is all the more interesting because the court was dealing with not just one man who had adopted a new way of life indicating a possible opting out of customary law, but a whole community who lived by Islamic religious practices. In Zimbabwe, land is still inherited by male heirs. Even a current proposed amendment to the Customary Law and

6. *Mtoro bin Mwamba v. Attorney General*, 20 E. Afr. Ct. App. 108 (1953).

Local Courts Act⁷ maintains this position and in fact seeks to enhance it by giving it statutory sanctioning. The proposed provision reads as follows:

Upon the death of a person who

(a) during his lifetime contracted a customary marriage and who was not subsequently a party to a civil marriage; and

(b) is survived by one or more spouses of that customary marriage and additionally, or alternatively, one or more children of that customary marriage;

any immovable property forming part of his estate and not devised by will shall devolve upon his heir at customary law.⁸

In most African countries, land is inherited by male heirs. It is assumed that a married woman will be looked after by her husband and young girls and unmarried women by their parents. A widow is expected to be dependent upon her late husband's family if she remains with them or upon her own family if she chooses to return to them. The reality, however, is often far from the expectations. Heirs sell off the land without the knowledge of the widow and use the proceeds for their own purposes.

In spite of this reality, these archaic assumptions in customary law are often excuses for governments to dismiss the whole underlying question of the right of women and the economic advantages of availing them access to land. *Oki Ooko-Ombaka* has written thus:

When matters which have had a bearing on women's issues have come before Parliament the legislators have exhibited remarkable chauvinism and a general lack of awareness. Chauvinism has taken two forms. First is male chauvinism. . . . Second is a more subtle cultural chauvinism in which progressive initiatives have been shot down by invoking African culture.⁹

Although *Ombaka* was writing about the Kenyan experience, his remarks are not far removed from realities in other African countries. For instance, in Uganda the customs of many communities regard the land of a deceased man as "naturally" belonging to his heir (a male).¹⁰ In Swaziland, the situation is similar. Women can never inherit from their

7. Act No. 6 of 1981.

8. A memorandum of the Ministry of Justice, Legal and Parliamentary Affairs, Zimbabwe, August 1991.

9. Oki Ooko-Ombaka, *The Kenya Legal System and Prospects for the Woman Question in WOMEN AND LAW IN KENYA: PERSPECTIVES & EMERGING ISSUES* (Mary Adhiambo Mbeo and Oki Ooko-Ombaka eds., 1989).

10. WOMEN, LAW AND DEVELOPMENT IN AFRICA (WiLDAF): ORIGINS AND ISSUES 31 (Margaret Schuler ed. 1990).

husbands or fathers. The problems for a woman when her husband dies leaving a will in her favour are quite similar to those when he leaves no will at all. Her in-laws take the property, including land, and distribute it among themselves leaving the widow and children destitute.¹¹ Under Tanzanian custom, wives are not regarded as members of the family for land holding purposes and the contribution of labour by a wife does not give her inheritance rights in her husband's family land.¹² In *Iddi v. Ali s/o Mpate*, for instance, the court ruled that:

a wife does not acquire proprietary rights in her husband's landed property simply because she contributed labour in developing them and therefore she gains no inheritance rights therein. . . . It is a duty of a wife to help her husband in his employment whether it be cultivation, shopkeeping or any other lawful engagement.¹³

In Cote d'Ivoire, despite the Law of August 2, 1983 making a widow the substantive heir of her husband's estate, in practice customary law overrides this to provide for children, brothers, sisters and other relatives of the deceased.¹⁴ This is partly due to a general lack of awareness of applicable law but also due to the lack of political will on the part of governments to see real change in the status quo.

C. Access to Land Through Direct Purchase

A woman may acquire land by buying it from an existing holder. As mentioned earlier, the law of contract is in many countries gender neutral. This, however, is another example of legal blind-spotting. Direct purchase presupposes that the interested buyer either has money or is credit-worthy enough to obtain a loan from a financial institution. Both are qualifications that many rural women do not have in Africa. Although they work with their husbands on cash crops, the marketing of the produce and the decision as to what is to be done with the money is for the man alone.

Even women in paid employment in urban centers are less likely to buy agricultural land than their male counterparts. Statistics show that the largest proportion of employed women are in the lower paid jobs of

11. *Id.* at 93.

12. R.W. James & G.M. Fimbo, *CUSTOMARY LAND LAW OF TANZANIA* 189 (1973).

13. 1967 High Court Digest No. 49; *see also* N.L. Tenga, *The Law of Succession in Tanzania: Women's Position Under the Customary Rules of Inheritance*: a project paper for the Institute of Women's Law, University of Oslo (unpublished).

14. Tenga, *supra* note 13, at 50.

the public and private sector.¹⁵ Regardless of the causes, these statistics, together with the economic status of women in the rural area, simply point to one fact: Very few women can have effective access to agricultural land.

IV. Access to Agricultural Credit

A. General

The importance of a right of access to agricultural credit cannot be overemphasized. Acquisition of land and inputs are made considerably easier with credit. Credit would make it possible for a rural farmer to hire tractor/plough services, to buy good quality seeds and to have paid labour, all of which should lead to a better harvest.

It must be pointed out from the outset that in most African countries where agriculture is dependent on rural small-scale farmers, the whole concept of agricultural credit is unknown or misunderstood. A number of factors account for this. Credit has been and still is looked at as an institution of commercial banks. Banking facilities have for decades been operating only in the main urban centers where people in formal employment and in business are the regular customers. With poor roads, lack of social amenities and falling economic performance in the rural areas, banks have seen little to attract them to go rural.

Awareness of this kind of background is necessary to understand the fact that the right of access to agricultural credit has been somewhat limited for both male and female rural farmers. Whatever credit there is has tended to be availed from government-sponsored agricultural credit programs. It is perhaps because of this fact that the emerging patterns can be interpreted as reflections of official policy or at least as evidence of a lack of political will to promote changes which would ensure equal access to resources for both men and women.

Governments have used two main avenues to extend credit to rural farmers: the cooperative movement and special agricultural credit quasi-financial institutions.

B. Credit through Cooperatives

Agricultural credit channelled through cooperatives can only benefit members of the cooperative movement. In agriculture-based cooperatives,

15. Wariara Mbogua, *Women's Employment Patterns in WOMEN AND LAW IN KENYA*, *supra* note 9.

membership has tended to revolve around land ownership. The landowner is the one qualified to join the cooperative. Since land is owned by the men, women have found it difficult to acquire membership in the cooperatives. Women-only cooperatives have tended to be on a small scale and less successful, starting as savings and credit cooperatives and with some luck progressing to acquire land with the savings. There are indeed few such lucky ones.¹⁶

C. Credit through Special Financial Institutions

Some African countries have established quasi-banking institutions to provide agricultural credit for purchases of land, implements, seeds, cattle and agricultural inputs like fertilizers and pesticides. Zimbabwe and Kenya, for instance, have Agricultural Finance Corporations established for the purpose.

D. The Rural Farmers Credit Scheme in Uganda

In Uganda the Uganda Commercial Bank administered Rural Farmers Credit Scheme (RFCS) was established to ensure that rural farmers (many occupying unsurveyed parcels of land unacceptable as security by banks) had access to security for agricultural inputs. The program was launched at a time when the government's barter trade initiative was at its height. Under this initiative, the government bartered agricultural produce, especially non-traditional cash crops like maize, beans and soya, for industrial machinery, technical expertise and pharmaceutical products. To meet its barter commitments, the government wanted production substantially increased. One way of doing this was to avail credit to rural farmers. The credit was to cover the cost of ploughing, labour and other inputs.

Security for the loan was the "good character" of the farmer and the produce expected at the end of the season. Local village officials were enlisted to affirm the good character of the applicant, the fact of the borrower's residence in the area and his having access to land on which to utilize the credit.

E. Women as Beneficiaries

The RFCS was explicitly mandated to give special consideration to the needs of women as rural farmers. They were a specially important

16. See Mutsembi Manundu, *Women in Cooperatives in Kenya* (a paper prepared for the Kenya Government for the U.N. Decade for Women Conference 1985); Audrey Wipper, *RURAL WOMEN: DEVELOPMENT OR UNDERDEVELOPMENT?*, African Studies Center, Michigan State University (1976).

group because they rarely owned land but the targeted crops were traditionally classified as food crops, which historically have been grown by women. Many women were excited about the prospect of obtaining credit in their own names. It meant managing the production and the marketing.

Unfortunately, the practice was disappointing to many. Many RFCS officials insisted on having the application either in the joint names of husband and wife or of having the husband give written consent for his wife to receive the loan. It is worth noting that when a married man applied for a loan his wife's consent was not required. Asked to comment on this practice, a senior RFCS official stated that the bank wanted to avoid being seen as "breaking up homes" by dealing with a married woman without her husband's consent. He claimed that some men had complained of such dealings, at times angrily alleging a love affair between the RFCS official and the woman concerned.

Whether or not the reasoning of the RFCS official was based on facts, women never got effective access to the credit. This denial of a right of access to credit to women highlights the government's failure to prepare the population systematically for this major step for women as de facto adults. The government knew or ought to have known that the RFCS was being introduced in a society in which ultra-conservatism reigned in matters of decision-making, contractual capacity and economic independence within a marital relationship. Some background effort at changing attitudes ought to have preceded the program if the government had been seriously interested in promoting change.

V. Prospects for Change

The above discussion clearly shows that there is a sharp difference between the law and the practice insofar as they relate to the women's right to have access to land and credit. In countries where the right of access is still determined by customary law the denial of a right of access exists both in the law and in practice. What are the prospects for change?

A. Law Reform

For some countries the first step has to be law reform to give legal recognition to the woman's right of access to land. The nature of reform should take into account the appropriate methods of land acquisition in the country. It is not very useful to the majority of women merely to grant de jure adulthood through an "Age of Majority" statute if access to land is still governed by customs completely unaffected by the new

statute. A few countries have indeed passed such legislation. Though unsatisfactory, it is a small step in the right direction.

Zambia passed the Intestate Succession Act 1989¹⁷ in which a surviving spouse was allowed a 20% share in the estate of her deceased husband, and the children of the deceased were allowed 50% without distinguishing between male and female children. The Act, however, is unlikely to benefit many women insofar as the right of access to land is concerned. It does not apply to land which at the time of the death of the intestate had been acquired and was held under customary law.¹⁸ A large number of rural farmers hold land under customary law. Even where the land is not held under customary law, the family members and the courts are not likely to hold that the land should form part of the widow's 20% share.

In Kenya, the Law of Succession Act 1972 vests the net estate of a deceased man in his surviving spouse for life or until she remarries. On the termination of this interest, the property goes to the children of the deceased. She is in law and practice treated as a trustee of the immovable property for the children. Thus she may not sell it or mortgage it without the consent of the court. The courts will often consult the adult children before giving consent. Thus the widow has a secure means of livelihood but not effective ownership of the land.

While appropriate law reform is necessary to remove some of the inequalities rampant between sexes, it is necessary to appreciate the inherent limit of law as an instrument of social change. Lipman-Blumen and Bernard have written: "Laws are passed, rights are guaranteed and equality is mandated. But the structural aspects of society, that is, our institutions and customs and codes that legitimate them, in many instances have actually been used to preserve the unequal divisions based on sex. Thus inequalities, discrimination and even oppression remain."¹⁹

B. Rights Awareness Programs

To promote a change of attitudes and practice claimed to be shaped by customs, there is urgent need to mount special legal rights awareness programs all over Africa. The concept of individual rights is not understood or appreciated. A widow is not seen as an individual with rights

17. Act No. 5 of 1989.

18. *Id.* at § 2(2).

19. Jean Lipman-Blumen & Jessie Bernard, *SEX ROLES & SOCIAL POLICY: A COMPLEX SOCIAL SCIENCE EQUATION* 367 (1979); see also Joan May, *CHANGING PEOPLE, CHANGING LAWS* (1987).

and obligations at law, but as a woman who must conform to what women did one hundred years ago. No analysis is put into the whole concept of a dynamic customary regime. Nobody, for instance, wonders why men were not doing what men did one hundred years ago.

In this regard, legal rights awareness needs to avoid an overly legalistic approach, but build on what the local communities know and have experienced. These programs are also erroneously directed at women to the exclusion of men, local chiefs and informal dispute-settlement organs, many of whom are not aware of the law. Since many rights abuses and discriminatory practices take place at village level, it is imperative that promoters of change pay special attention to these traditional and influential structures.

Many countries in Africa now boast of at least two or more non-governmental organizations with legal rights awareness at grassroots level as their main goal. The Women in Law and Development in Africa (WiLDAF) network based in Zimbabwe boasts of member organizations in fifteen African countries. All of them have such programs targeting not just the grassroots people but also official structures like courts and the police force where women seeking to enforce their rights are often met with unswerving conservatism and a lack of gender sensitivity.

C. *Progressive Judiciary*

The role of the judiciary in protecting a woman's right to effective access to land and credit cannot be overemphasized. The interpretative power of courts to extend limited statutory provisions, to limit unfair customary practices and to fill in legal lacuna is well known. In a Tanzanian case, *Ndewawosia d/o Ndeamtzo v. Imanuel s/o Malasi*, a male relative of the deceased wanted to evict a blind daughter of the deceased from her father's land on the ground that girls do not inherit. The then-Chief Justice had this to say:

Now it is abundantly clear that this custom which bars daughters from inheriting clan land and sometimes their own fathers' estate, has left a loophole for undeserving clansmen to flourish within the tribe. Lazy clan members anxiously await the death of their prosperous clan men who happen to have no male issue, and as soon as death occurs, they immediately grab the estate and mercilessly mess up things in the dead man's household, putting the widow and daughters into terrible confusion, fear and misery. These men are not entitled to take the property towards which they have contributed absolutely nothing. . . .²⁰

20. 1968 High Court Digest Case No. 127, quoted by Tenga, *supra* note 13.

Progressive judges like this are admittedly rare, many preferring to dress personal prejudices and a lack of appreciation of the issues in ancient judicial precedents. Progressive organization for change needs to regard the judiciary as requiring reorientation in many matters involving women's rights.

D. Community-Level Support Groups

Many women fail to enforce their legal rights because of fear of social disenfranchisement, the fear of being an outcast in their own communities, the fear of being avoided by both men and women, the fear of being treated as a social scandal is real in Africa. Because it is so rare for a woman to stand up for what is hers as of right, social sanctions are often cruel in their impact on the woman and her immediate family. If law grants a right of access to land through inheritance, women need to go to court if any relative tries to deny them effective rights over the land. They will not be able to do this unless they build social alliances as women, to give each other support during such a trying period. Programs committed to promoting real change may have to devise ways of promoting the formation and strengthening of such groups at community level so that the bonding factor is the security of knowledge that when a woman needs to take action the rest of the group will be solidly behind her.

VI. Conclusion

The right of access to agricultural land and credit is not yet a reality for the majority of women in Africa. Laws have either explicitly denied them this right or have proceeded on a misconception as to the relevant methods of acquiring land in the country. Thus, where acquisition of land is mainly through inheritance, giving a woman contractual capacity and the right to deal in land is irrelevant if she cannot inherit it in the first place. Laws guaranteeing this right are ineffective if the enforcement mechanisms, like family gatherings and chiefs, operate in ignorance of the statutory law. There is a need to adopt both legal reform and other strategies which would ensure that women as agricultural producers have effective access to these resources. Political will by governments to see real change would appear to be lacking if policy statements reflected in statutory laws and accession to international instruments like the Convention on the Elimination of All Forms of Discrimination are not supported by action and productive of results

