

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 6

1-6-1991

Women's Land Ownership Rights in Kenya

Perpetua Wambui Karanja

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

Recommended Citation

Karanja, Perpetua Wambui (1991) "Women's Land Ownership Rights in Kenya," *Third World Legal Studies*: Vol. 10, Article 6.
Available at: <http://scholar.valpo.edu/twls/vol10/iss1/6>

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 LAND OWNERSHIP RIGHTS IN KENYA

Perpetua W. Karanja*

Introduction

Kenyan women have made tremendous contributions to the overall economic growth of the country through their almost exclusive participation in the agricultural sector in particular and in their employment in other sectors of the economy in general. However, an examination of the operation of the country's laws, government policies and directives, particularly in sectors where women are highly represented, such as in the agricultural sector, reveals a high degree of marginalization, neglect and outright discrimination of women in the distribution of economic resources.

Currently, women comprise more than 50% of the country's population and 85% of all women reside in the rural areas, contributing to the rural economy.¹ Yet, while the need for more effective participation by women in the agricultural sector and their incorporation into the development process has been recognized, government intervention through land legislation and the formulation of policies intended to protect women's access to land have not been successful in correcting the existing sexual inequalities in access to and ownership of land. The enactment, therefore, of more equitable and distributive laws that determine the rules of access to and ownership of land and the distribution of the benefits of agricultural production should be a priority issue of government. Unfortunately, this is not so. Women's economic well-being has continued to depend largely on their rights in marriage, divorce and inheritance, and their rights to land ownership as an instrument of social and economic transformation has increasingly been neglected.

* Perpetua W. Karanja, L.L.B., University of Nairobi, 1980; L.L.M., University of Toronto, 1991, is a lawyer whose research interests are in the areas of Law and Development, Women's Issues and Property Law.

1. Joan Harris, *Women in Kenya: Revolution or Evolution?*, 30 AFR. REP. 30 (Mar.-Apr. 1985).

Past studies on the status of women in Kenya have examined various analytical issues and concerns including socio-economic, political and anthropological analyses of women, the role they play in the Kenyan economy, their constraints and obligations in society and the impact modern development strategies have had on their lives.² Others have focussed on women's rights and obligations under the law and their legal status in general.³ Few of these studies, however, have analysed in detail, the intricate relationship between the status of women and land ownership rights in Kenya from the perspective of the centrality of land as a commodity and its ownership as a springboard to effective participation in the modern sector economy. Still, fewer studies have dealt with the importance of the role of women in agriculture as an integral part of Kenya's rural development strategy⁴ and the failure of government's agricultural policies to give adequate attention to the relationship between the social organization of production, access to and ownership of land to local agrarian processes and to women's economic status. The intention in this article is to add to this body of literature by exposing the existing sex inequalities in Kenya's land laws and government land policies and to further explain how those inequalities have affected the economic lives of women.

Various theories have tried to explain the existing gender inequality in land ownership. It has been argued that during the colonial period, patriarchal African males collaborated with biased colonial officials to whittle away and erode women's legal rights. This, it has been argued, was done through the incorporation of traditional laws that favoured males into the new body of laws drawn up by the colonial forces, the

2. See, for example, studies by researchers like Katherine Staudt, *Agricultural policy, Political Power and Women Farmers in Western Kenya* (1976) (unpublished Ph.D. dissertation, University of Wisconsin); OTIENO ACHOLA PALA, *THE PARTICIPATION OF WOMEN IN KENYAN SOCIETY* (1978); Angelique Haugerud, *Land Tenure and Agrarian Change in Kenya*, 59(1) AFR. (1989); Fiona Mackenzie, *Land and Territory: The Interface Between Two Systems of Land Tenure*, 59(1) AFR. (1989); and ANNE P. MUNRO, *AFRICA AND THE LAW* (1968).

3. Examples are S.B.O. GUTTO, *SOME LEGAL RIGHTS AND OBLIGATIONS OF WOMEN IN KENYA: A LAY PERSON'S LANGUAGE APPROACH* (Working Paper No. 367, Institute of Development Studies University of Nairobi, 1977), also by the same author, *THE STATUS OF WOMEN IN KENYA: A STUDY OF PATERNALISM, INEQUALITY AND UNDERPRIVILEGE* (Discussion Paper No. 235, Institute of Development Studies, University of Nairobi, 1976); and Florence Butegwa, *Creating an awareness Among Kenyan Women of their Legal Rights*, 7 CAN. WOMAN STUD. (1&2 1986).

4. ACHOLA OTIENO PALA, *Women's Access to Land and Their Role in Agriculture and Decision Making on the Farm: Experiences of the Joluo of Kenya* (Discussion Paper No. 263, Institute of Development Studies, University of Nairobi, 1978); also, *AGRICULTURE WOMEN AND LAND* (Jean Davison ed., 1988).

result of which was the emergence of a new sexist colonial law.⁵ Other arguments point to Western ideological imperialism and the introduction of capitalism and subsequent neo-colonialism as the linchpins of gender inequality in Africa.⁶ A look at the place of women in traditional African societies, however, reveals a degree of gender inequalities reinforced by custom and culture. Colonialism, capitalism, neo-colonialism and the prevailing macro-social global inequalities have institutionalized existing sexual inequalities. Capitalist competition, the colonial legacy of sexist laws and social stratification of society have served to elaborate on the pre-existing gender inequalities to create substantial legal, socio-economic and political inequalities between the sexes, which have manifested themselves in inequitable land tenure relations.

An inquiry into the pertinent factors that have contributed to gender inequalities in land ownership must include an extrapolation of women's *de jure* and *de facto* land rights, the significant role land as an entity and as a commodity has played and continues to play in the lives of Kenyans from pre-colonial times to the present day and the impact that lack of rights to land ownership has had on the lives of Kenyan women. This article intends to show that legislative intervention and the adoption of modern standards of living have not revolutionized the patterns of women's access to and ownership of land in Kenya and their land rights have continued to be marginalized. To do this, and in order to get a clear perspective of the prevailing gender inequalities in the ownership of land, it is imperative to look into the historical antecedents of current land tenure relations.

The Importance of Land: The Cultural Perspective

Since pre-colonial times, the economy of Kenya has been based on land and land has remained the principal economic asset through which a very large proportion of the population have derived their livelihood. Kenyans have therefore always maintained a unique relationship with their land and its ownership has been the primary objective of every Kenyan. The economic aspect aside, Kenyans have always maintained a great emotional and psychological attachment and investment in land as an asset intrinsically linked to and inseparable from their cultural and tra-

5. Jane Parpart, *Women's Rights and the Lagos Plan of Action*, 8 HUM. RTS Q. 180 (1986).

6. Rhoda Howard, *Women's Rights in English Speaking Sub-Saharan Africa*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA, 46 (Claude E. Welch, ed. 1984).

ditional beliefs.⁷ Christopher Leo has stated that land is the single most important political issue in Kenya and that both the rich and the poor consider land the most important form of personal wealth. He has posited that "land is Kenya's obsession as order is Germany's and as self-sufficiency is Israel's"⁸ A leading Kenyan political scientist, Mwangi Wa-Githumo, writing on land and nationalism in Kenya, has stated that, "[q]uintessentially, land and life are to the agrarian people, what energy and gravity are to the physical environment of the world itself."⁹ It is the ownership of land that gives a Kenyan his or her true identity and land is considered the single most important form of social security.

The Nature of Customary Land Tenure

African customary land tenure is intrinsically connected with other socio-economic, cultural and religious aspects of the African customary way of life. Traditionally, land and religion were connected to each other as was the inhabitant and the soil.¹⁰ The special relationship of the people and their land largely regulated people's relationships with each other. An understanding of these relationships is crucial to grasping the real nature of customary land tenure, and any inquiry studying customary land tenure regimes must guard against that to which most Western scholars studying less "developed" cultures and regimes have been prone. The application of Western concepts and meanings of words to other regimes assumes an element of universalism based on a hierarchical paternalistic ideal which fails to recognize differences that are constitutive of the entity. In an inquiry into customary land tenure, one must understand such words as ownership, communalism, sale, tenure and freehold in the context of the meanings given to them by the inhabitants and not necessarily in the context of their meanings in Western jurisprudence. For example, the use of the word "communal" to describe customary land tenure has been a subject of controversy among students of customary land tenure regimes. The word was used to describe and to depict a tenurial system that had not evolved and developed with time. It was premised on the notion that private ownership, the highest form of evolution in land tenure, was only peculiar to civilized societies and at

7. See JOHN W. HARBESON, *NATION BUILDING IN KENYA: THE ROLE OF LAND REFORM* (1973).

8. CHRISTOPHER LEO, *LAND AND CLASS IN KENYA* (1984).

9. MWANGI WA-GITHUMO, *LAND AND NATIONALISM* (1981).

10. Davison, *Land and Women's Agricultural Production*, in *AGRICULTURE, WOMEN AND LAND*, *supra* note 4.

best, "the primitive savages of the interior could only have a form of tribal ownership."¹¹

Customary land tenure was, however, only communal to the extent that there were no individual titles as in Western land tenure and in the sense that the community ensured that everyone had access to land. Social limitations and control over land use which were used to define communalism in African land tenure only applied to those resources that had to be shared such as salt licks and forests. Such limitations were analogous to those limitations that individual tenure imposes on resources that society must use collectively. Downs and Reyna have stated that all land tenure systems are communal to some extent, reflecting a community interest in the land and its use, and individual to some extent, reflecting the need for security of expectations by the individuals and the families who cultivate the land.¹² Communalism in African land use imported the notion that everyone had access to whatever land he or she pleased, yet this was not so. Land that belonged to a certain lineage could not be encroached on by outsiders and was passed down for generations. What lands were indeed communally held were lands which had specific cultural usages such as shrines, salt licks and grazing lands.

Pre-colonial land regulations precluded both self-interest and monopoly of land and everyone, irrespective of status, was guaranteed access to land. This, together with the fact that the customary concept of ownership was different from the Western concept, led to the erroneous conclusion that all land was communally held in a situation which today might resemble a citizenry's communal ownership of their nation. The application to customary land tenure of terms such as "purchase," which in Western jurisprudence meant and still means outright purchase, while, because of the inalienability of land among the Africans and the nature of land holding, the term could only mean redeemable purchase, was based on a misunderstanding of customary land transactions.¹³ According to Angélique Haugerud,

Western concepts such as titled land 'ownership' often mask the complexities of particular property systems in which rights do not involve absolute jurisdiction or exclusive individual control. Rarely do land rights have an absolute or fully exclusive character: 'they are . . . subject to certain limitations and modalities that are contained in

11. F.D. LUGARD, *THE DUAL MANDATE IN TROPICAL AFRICA* (1922).

12. *LAND AND SOCIETY IN CONTEMPORARY AFRICA*, (R.E. Downs & S.P. Reyna eds. 1988).

13. C.K. MEEK, *LAND LAW AND CUSTOM IN THE COLONIES* (1949).

various principles of social organization, situational contexts, ethical principles and rules of etiquette.' Understanding the relationship between land tenure and agrarian change, then, requires attention not just to tenure rules, but to the observed social dynamics of the organization of agricultural production in particular localities.¹⁴

Two major characteristics of customary land tenure were, first, that land belonged to the dead, the living and to posterity, and access to it was ensured for everyone. Secondly, land was held and used on a family, lineage or clan basis, holding the members of a particular clan together through a male line of inheritance.¹⁵

Among the Kikuyu for example, the main social grouping and basic land owning unit was the *mbari* or lineage.¹⁶ This consisted of a group of people tracing their descent from a common ancestor usually three or four generations back.¹⁷ The land owned by the *mbari*, known as the *githaka*, was acquired by the founding ancestor of the *mbari* through first occupation or, in places where the land had previously been occupied by other tribes, by "purchase" with sheep and goats.¹⁸ The *mbari* was a dynamic group from which other smaller *mbari* were founded as men moved out because of overcrowding to found *mbari* that would be named after them.

On the death of the *mbari* founder, who was considered the titular head, ownership of the land passed jointly and exclusively through the male line. The eldest son of the founder succeeded him as the titular head and was called the *muramati* (trustee). He maintained administrative control over the land and was charged with the responsibility of allocating any vacant land to the men within the *mbari*. He also ensured that land within the *mbari* was not alienated to foreigners as this would interfere with the cohesiveness of the *mbari* and he acted as the arbitrator in any disputes that arose.

Land rights accrued to male members of the *mbari*, who were separately entitled to plots of land on marriage. They were also entitled to inherit their respective fathers' portions of land. *Mbari* land then consisted

14. Angelique Haugerud, *Land Tenure and Agrarian Change in Kenya*, 59(1) AFR. (1989).

15. Wa-Githumo, *supra* note 9.

16. For a detailed anthropological account of the Kikuyu system of land tenure see JOMO KENYATTA, *FACING MOUNT KENYA* (1938).

17. Jean Fisher, Reports on the Kikuyu 1950-1952 (unpublished manuscript on file in the Kenya National Archives, Nairobi, file ref. DC/FH/3/1).

18. H.E. Lambert, *The Systems of Land Tenure in the Kikuyu Land Unit* (1949) (unpublished manuscript on file at University of Cape Town).

of a patchwork of independent family holdings to which the allottees had perpetual rights of ownership to the exclusion of other *mbari* members with the exception of communal grazing lands and salt licks. As population increased and vacant lands became less and less, individual male members could only realize their rights to land within the *mbari* through inheriting a portion of their fathers' holding.

A person could only claim rights in the land of the *mbari* of which he was a member. However, customary practices of land occupancy and use were inclusive rather than exclusive and they ensured that everyone had access to land. A person who did not belong to the *mbari* could get cultivation and building rights from individual family heads on the basis of friendship. Such a person could be a *muhoi* (tenant), one having temporary cultivation rights. He did not pay any rent apart from the annual tribute of beer and first fruits. Alternatively, he could become a *muthami* (immigrant), who had the rights of a *muhoi* save that he was allowed to build on the land. Both of these were tenants at will of their benefactors and could be turned off the land.¹⁹

Women's Land Rights under Customary Land Tenure Regime

The fact that everyone without distinction had access to land, while true, fails to take into account the different processes through which each gender acquired access. The erroneous impression is that both men and women had equal access to land. First, access was acquired through clearance of bush and the planting of crops; the person who cleared the bush was deemed to be the "owner." Roles, however, were gender differentiated and women did not clear bushes, their work being to plant and cultivate the land after it had been acquired. Further, clan land was allotted only to male heads of households and was inherited by males down the line. Women did not have rights of inheritance of land under customary land tenure. While married women gained access through their husbands, who were obligated to provide them with land, unmarried daughters or single or divorced women were given smaller portions of land on which to farm until they married or remarried, or alternatively could rely on their mothers' portions of land. However, although women had complete control of and guaranteed rights over portions of land to which they had access, and had absolute rights to dispose of any excess food they produced, they still did not enjoy rights to land equal to those of their male counterparts.

19. M.P.K. SORRENSON, *LAND REFORM IN THE KIKUYU COUNTRY* (1967).

In the absence of absolute ownership of land as a determinant of equality in rights to land, a look at other social institutions reveals the sex inequalities that existed in rights to ownership and access to land. One of these indicators is the institution of inheritance. Women had no rights of inheritance and access to land could only be gained through the status of a wife. Further, unmarried and separated women, while having access to their mothers' portions of land, could be dispossessed on the death of their mothers, their interest being deemed to have ceased forthwith. Where an unmarried woman had been allocated land by her father and she was not chased off the land by her brothers, her land could be inherited by her male children through her.²⁰ This act of benevolence in favour of an unmarried woman's sons was premised not on an acknowledgement of the woman's right to the land but on the fact that such male children were taken to be useful members of the clan who could be incorporated into the clan to enhance and strengthen its social status.²¹ A daughter therefore continued to have temporary rights to her father's land, but she was expected to marry and have access to land through her husband in which event she ceased to have any access to her father's land.²²

However, even with this insecurity, the economic structure based on subsistence and consumption and the social organization of the families ensured that women enjoyed strong economic and social security within their families. There was no shortage of land, and a lineage which grew in size could acquire additional land by clearing new bush or migrating to other parts where land was uncleared. It was therefore possible for every woman, married or unmarried, to get access to land enough for her use. Although they could not inherit land, women held positions of structural significance, serving as the medium through which individual rights passed to their sons.²³ They enjoyed security of land tenure rooted in their structural role as lineage wives.²⁴ As a widow, a woman could exercise more control and autonomy over her husband's land and herself respectively in the *mbari* while the customary institution of widow inher-

20. L.S.B. LEAKEY, *THE SOUTHERN KIKUYU BEFORE 1903* 536, 566 (1977).

21. Such boys could be useful in tending cattle, help in clearing acquired land and when they matured, they became useful warriors who would be used to fight in inter-tribal wars and in other disputes that threatened the territorial integrity of the clan.

22. Fisher, *supra* note 17.

23. Mackenzie, *supra* note 2.

24. Achola Otieno Pala, *Daughters of the Lakes and Rivers: Colonization and the Land Rights of Luo Women*, in *WOMEN AND COLONIZATION* (Mona Etienne & Eleanor Leacock eds. 1980).

itance and the widow's ability to become a female "husband" through a levirate union ensured that she retained control over her deceased husband's land. Widows who did not inherit or those who did not engage in levirate unions were entitled to use rights for life over a portion of their deceased husbands' land.²⁵ In a situation where land was in abundance and the social organization of the society ensured that women held important structural positions, women's right of access to land seemed secure. However, with the advent of colonialism and the tenurial and agrarian changes that accompanied the colonial and subsequent independent government regimes, women lost all the security and power they had hitherto enjoyed. Their inability to get access other than through the status of a wife and the inability to inherit land were to adversely affect their future land rights. The whittling away of women's land rights by the changes instituted by these subsequent regimes was a direct result of their disabilities arising from the customary rules of inheritance and the customary division of labour which had resulted in women not being able to acquire land for themselves.

Colonial Capitalism, Land Tenure Reform and Gender Relations of Production

The origin of European interest in land in Kenya can be traced back to 1898 when the East Africa (Acquisition of Lands) Order-in-Council, the first legislative measure to expropriate land for European settlement, was passed vesting all land outside the coastal strip in the Commissioner of the East African Protectorate. The Order in Council was an attempt to expropriate land from the Africans who were already in occupation and to devise suitable legislation to regulate settlement. Although under British law the Crown was the source of all title to land, in the East African Protectorate it was legally impossible for the British Crown to make grants of land to the settlers without first acquiring title itself. The process through which the Crown acquired title was simple. First, the colonial government capitalized on the African system of land tenure which had no notion of individual ownership of land in the English sense, and, secondly, it disregarded the African system of land use based on shifting cultivation and pastoralism.

All the large tracts of land which were left to lie fallow after use to be cultivated when they became fertile again under shifting cultivation

25. EUGENE COTRAN, 2 RESTATEMENT OF AFRICAN LAW 12 (1969).

and pastoralism were declared wasteland and the colonial government proceeded to assert title to this and all other unoccupied land and sold or leased it to the European immigrants.²⁶ According to the British, Africans had rights of occupation only; such rights were limited to the lands that were in active use. In 1902, the Crown Lands Ordinance was enacted, allowing all expropriated land to be given, sold, leased or otherwise disposed of at the discretion of the Commissioner on behalf of his Majesty. It also allowed for the granting of ninety-nine year leases to the settlers, thus sealing the fate of African rights to land. Between 1905 and 1914, nearly 4.4 million acres of land had been expropriated throughout Kenya.²⁷

The total extinguishment of African rights to land was given judicial affirmation and validity in the leading case of *Isaka Wainaina v. Muritwa Indangara and the Attorney General*.²⁸ The plaintiffs claimed possession of a piece of land from the first defendant on the grounds that they had purchased it from the Ndorobo tribe before European settlement. The Attorney General applied to be made a party to the suit. A preliminary issue arose as to whether the plaintiffs were entitled to bring an action since according to the Crown Lands Ordinance of 1915, Native land was also part of Crown land. Chief Justice Barth ruled:

The effect of the Crown Lands Ordinance 1915, and the Kenya (annexation) Order in Council 1920,²⁹ by which no native private rights were reserved, and the Kenya (colony) Order in Council 1921 . . . is clearly *inter alia* to vest land reserved for the use of the native tribes in the Crown. If that be so then, all native rights in such reserved land, whatever they were, disappeared and natives in occupation of such Crown land became tenants-at-will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier. Such land would include fallow. Section 54 of the Ordinance puts a specific embargo on any alienation by such a tenant.³⁰

The ruling confirmed the insecurity of tenure for the Africans. They had lost not only rights of occupancy but had become tenants-at-will who could be removed from their lands at the pleasure of the Crown. With the African land rights finally extinguished, Europeans could now enjoy

26. Sorrenson, *supra* note 19, at 47.

27. J. WORDIS, *AFRICA, THE ROOTS OF REVOLT* 4 (1962).

28. [1922] 9 K.L.R. 102.

29. By virtue of this legislation, Kenya became a British Colony.

30. *Wainaina*, *supra* note 28.

African land at least until the wind of change began to blow in the middle of the 1950's.

The effect of the changes introduced by European settlement was to transform the social organization and mode of production of the African people. The displacement of the Africans from their ancestral lands to the reserves resulted in the cultivation of fewer and smaller parcels of the little land that had been left after the best lands had been expropriated for European settlement. The practice of shifting cultivation ensured that parcels recuperated after prolonged use, hence yielding better crops; but the practice became increasingly impossible. This, coupled with the fact that Africans were often moved to poorer lands as the most fertile lands were taken up by European settlement, saw the decline in food production, the basis for women's social economic status in pre-settler days. Jean Davison has commented on the situation as follows:

With the increased concentration of arable land in settler's hands in the 1930s, Gikuyu women in the 'Native reserves' found themselves with poorer quality land and smaller plots on which to grow food. Moreover, with the high concentration of people in the reserves, the soil quickly became depleted from overuse. With soil depletion also came erosion. In response to the problem of soil erosion in Ndia, which borders Mutira Location and was within the Gikuyu Reserve, the colonial government in 1938, forced women to plant grass. Women in Ndia protested by pulling up the grass after they had planted it and then marched, grass in hand, to the administrative headquarters in Nairobi.³¹

This period also saw the advent of colonial capitalism which drastically altered former patterns of land use and occupancy among Africans as a money economy was introduced to the Africans through the creation of a labour market. The effect was that money became an alternative resource and as men migrated to work on European farms, women remained behind to care for the children and cultivate the limited land available. This destabilized the social organization of families and women's economic status and power was undermined.

Although women's land rights in the pre-reform period were insecure to the extent that they had usufructuary rights only and did not enjoy the rights of ownership or disposition, the advent of European settlement and colonialism saw whatever security they had in land being eroded and

31. Davison, *Who Owns What? Land Registration and Gender Relations of Production in Kenya*, in *AGRICULTURE, WOMEN AND LAND*, *supra* note 4.

eventually extinguished with the passing of legislation which failed to recognize the rights they previously had. European settlement first and foremost resulted in a disruption of African social organizations which protected and gave women security in land. The introduction of the process of land reform saw the introduction of a new form of land tenure which had no place for women's usufructuary rights. It also failed to include them in the new agenda of land reform and therefore worsened their land rights.

The arguments for land tenure and agrarian reforms started by the colonial administration in the 1950s are to be found both in political and economic considerations. The displacement of the Africans through the reserves policy had resulted in poverty which the Africans attributed to the expropriation of their lands by the Europeans. Further, the Europeans had proved themselves untrustworthy in their failure to honour their agreements once their objectives had been achieved, and had resorted to taking oppressive measures towards Africans. This attitude adversely affected the relationship between the Africans and the Europeans with the Africans responding by voicing land grievances.

Secondly, the colonial government was convinced that the economic problems facing the Africans were a result of poor farming methods based on customary tenurial practices which, because of insecurity of customary land tenure, did not encourage investment in land improvement. The solution, it was envisaged, lay in changing the nature of customary tenurial practices with a view to making African farming more enterprising and productive. Land reform, it was argued, would solve the problems of fragmentation and insecurity of tenure which militated against modern farming practices by killing incentives to invest in land. The reforms were further intended to reduce land disputes among the Africans, encourage long-term investment and thereby facilitate availability of credit and enhance personal enterprise since titles would become mortgageable and negotiable.³²

Land reform was also seen as a strategy through which the political *status quo* would be preserved and enforced. The Mau Mau political movement had gained a stronghold in Kikuyuland and had started spreading to other parts of the country threatening to destabilize the country politically. Among other things, it had challenged the cornerstones of

32. For a detailed account of these arguments, see Parker Shipton, *The Kenya Land Tenure Reform: Misunderstandings in the Public Creation of Private Property*, in *LAND AND SOCIETY IN CONTEMPORARY AFRICA* 98 (R.E. Downs et al. eds. 1988).

colonialism by calling for the restoration of stolen lands. Land consolidation and registration was therefore seen as an asset that could be used to reward the loyalists and to punish the agitators. The colonial government had passed the Forfeiture of Lands Ordinance, 1953; its invocation resulted in many Mau Mau fighters and supporters being forced to forfeit their land as a punishment for their allegedly terrorist activities.³³ The reforms came via the recommendations made by R.J.M. Swynnerton:

Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and a system of farming whose production will support his family at a level . . . comparable to other occupations. He must be provided with such security of tenure through an indefeasible title as will encourage him to offer it as security against such financial credits as he may wish to secure.³⁴

The gist of land reform was the individualization of title. The process would start with adjudication in which ownership of fragmented parcels of land would be ascertained. There would then be consolidation of an individual person's parcels into one parcel and finally, registration of title to that parcel in registers as proof of title. Such titles would then be used as collateral for credit by enterprising African farmers and this would in turn enhance enterprise and improve farming.

Land reform, adversely affected women's land rights. Women were neither represented in the adjudication committees nor did they participate in the adjudication committee meetings.³⁵ The adjudication process itself was premised on the patrilineal nature of African societies and on the customary practices of land ownership and inheritance which did not allow women to own or inherit land. It conveniently overlooked the strong socio-economic status and positions of power that women enjoyed in traditional African societies by giving precedence to individual ownership of land vested in male heads of households without reserving any rights for women. This not only undermined the usufructuary rights women enjoyed under customary tenure but it also resulted in very few women being registered as land owners.³⁶

33. See FORT HALL DISTRICT ANNUAL REPORT (1956). Approximately 887 plots in all were forfeited by the Mau Mau in the then Fort Hall District.

34. Kenya Colony & Protectorate, Dept. of Agriculture, *A PLAN TO INTENSIFY THE DEVELOPMENT OF AFRICAN AGRICULTURE IN KENYA* (R.J.M. Swynnerton comp., 1955).

35. See Shipton, *supra* note 32.

36. H.W.O. Okoth-Ogendo, *The Adjudication Process and the Special Rural Development Process* (1975) (unpublished Occasional Paper no. 12, Institute of Development Studies, University of Nairobi).

While the reforms focussed on men as the primary actors, women as a group became singularly neglected. Their rights were either ignored or subsumed under male interests. The process of land reform solidified the role of men as the inextricable link between women and the land and further hardened their land rights into absolute ownership to the exclusion of women.³⁷ Achola Pala, writing on the Luo women's land rights under the reform regime, has posited that, "[l]and is being transferred to an almost exclusively male individualized tenure system which leaves no provision concerning how women's access is to be defined when the reform is complete."³⁸ Anne Flueret has reported on the situation among the Taita of Kenya that the system of tenurial and agrarian reforms introduced in the late colonial period and continued under independence legitimizes and makes permanent existing inequities in land distribution with the effect that women's ability to make independent decisions in agriculture has been jeopardized.³⁹ The registration of title in men's names almost exclusively ensured that women did not participate in any credit or loan facilities owing to their lack of collateral and had to rely on their husbands for money to invest in food crop production. Finally, the destruction of African institutions like the *ahoi*, *athami* and the *jodak* for example, which ensured that everybody had access to land, and the deliberate efforts of the colonial administration to create a landless class through individualization of titles not only adversely affected the rights of men to land ownership but also vicariously affected the rights of women to access to land. The wives of the landless, having no traditional social organizations to rely on for access, found themselves sorely dependent on limited cash resources for their survival.

The agrarian reforms also allowed Africans to engage in agricultural activities hitherto prohibited. It was during this time that Africans were allowed to grow coffee for the first time in the belief that allowing them to do so would satisfy the nationalists and facilitate economic development. L.D. Smith has asserted that the success of the Swynnerton Plan was not due to the process of consolidation and registration *per se* but rather to the final removal of restrictions on certain cash crops and the provision of the necessary resources to grow them.⁴⁰ Hitherto, Africans

37. See Shipton, *supra* note 32.

38. Pala, *supra* note 4.

39. Anne Flueret, *Some Consequences of Tenure and Agrarian Reform in Taita, Kenya*, in LAND AND SOCIETY IN CONTEMPORARY AFRICA, *supra* 12.

40. L.D. Smith, *An overview of Agricultural Development Policy*, in AGRICULTURAL DEVELOPMENT IN KENYA (Judith Heyer et al. eds. 1976).

who attempted to grow certain cash crops reserved for the settler economy could be prosecuted. With the introduction of cash crop farming, a money economy was brought into play and land use patterns and objectives were transformed.

Increasingly, it became more profitable in terms of acquiring money, to grow cash crops instead of food crops. Money was needed not only for the purchase of western goods and merchandise but also for the payment of taxes. Since food crop production was primarily a woman's job, the capitalization of agriculture that came with the reforms resulted in the marginalization of women's labour in food crop production as more and more land was allotted to cash crop production at the expense of food crops. The principles of obligation and responsibility under African land tenure had guaranteed women's access to land and control over certain food crops. Land reform reversed this order and introduced male domination in income generating agriculture. According to Ruth Nasimiyu,

Since the production of cash and subsistence crops were directly linked to the access of land, women were confronted with a whole range of handicaps in fulfilling their role as producers. Lack of control over land and all that goes with it became a major cause of women's economic dependence. Without land, women were reduced to a state of dependency with no security.⁴¹

The effect of this on women's economic status was to move them from a position of self-sufficiency to one of relative dependency resulting in the loss of their socio-economic power. As more land was reserved for cash crops, women became increasingly reliant on cash to buy food they could no longer produce and turned their labour to cash crop production the monetary benefits of which were reserved for men.

Although it has been argued that women benefitted from the reforms⁴² and that women now enjoy greater security than ever as their lands can not now be encroached on by male relatives, such women and particularly widows constitute a very small minority of women. For example, in 1982 in Kanyamkago Location in western Kenya, out of 246 registered parcels of land, only 17 were registered in the names of women and of those 17, only 8 were registered in the names of widows.⁴³ The adverse effects of

41. Ruth Nasimiyu, *Women in the Colonial Economy of Bungoma: Role of Women in Agriculture*, in *WOMEN AND DEVELOPMENT IN AFRICA* 56-73 (G.S. Were ed. 1985).

42. E.N.H. Njeru, *Land Adjudication and its Implications for the Social Organization of the Mbeere*, 1 *AFR. J. Soc.* (1981).

43. Shipton, *supra* note 32.

land tenure and agrarian reform on the rights of women to land ownership can be summarized as follows. Although European settlement had disrupted the social organization of the Africans and had interfered with the high socio-economic status that women enjoyed under traditional culture, women still enjoyed access to the limited land available in the reserves and they could still control the manner in which the available land could be used. Their access was limited by the smaller sizes of the parcels after the rest of the land had been expropriated. Agrarian and tenurial reforms facilitated further limitations to access as land previously used for food crops was planted with cash crops. Women therefore lost the right of ownership of land and also lost access in terms of control of land use. The reforms therefore resulted in the deterioration of women's land rights. They destroyed the social structure through which women's economic power and stability were guaranteed and maintained and introduced a new structure which neither reserved nor guaranteed any rights for women in return for what they had lost.

Contemporary Land Rights of Women in Kenya

An understanding of contemporary land rights of women in Kenya calls for the definition of the terms "ownership" and "landlessness" in relation to women and land. The definition of the term "ownership" of land, as constituting *de jure* landlessness has been the subject of controversy among scholars. While some inquiries have defined ownership as constituting the acquisition of a negotiable title, others have argued that mere access without the need for title is what is crucial in defining ownership. Bentsi Enchill has posited that in ascertaining ownership, the question to be asked is "Who owns what interest in land."⁴⁴ While this is true, care must be taken not to confuse proprietary interests with usufructuary rights since only the former can constitute ownership. Robertson and Berger have elevated usufructuary rights over proprietary rights by stating that as long as women exercise control and use of land, they are not disadvantaged.⁴⁵ However, the terms "use" and "control" of land, when applied to women's dealings with land, define their usufructuary interests and relate exclusively to subsistence production and the supply of labour. Market production, the power to make decisions on how much land is to be allocated to what use and the power to alienate,

44. Kuamena Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?*, 9 J. AFR. L. 114 (1965).

45. WOMEN AND CLASS IN AFRICA (CLAIRE ROBERTSON & IRIS BERGER EDS.) 15 (1986).

the main hallmarks of ownership, all remain outside the realms of women's control. Without further qualification, the terms "use" and "control" of land then become questionable epithets in defining women's rights to land because they exclude the need for acquisition of title and the benefits that flow from ownership exclusively.

Diana Hunt has postulated a definition of landlessness as the lack of secure rights in land.⁴⁶ Security in land can, however, only be guaranteed by acquisition of some form of a registrable interest which carries with it a bundle of rights enforceable by law. Squatters and the holders of usufructuary interests who have no registrable interest are by this definition *de jure* landless although they may have access to land. Although from a legalistic approach, and for purposes of this article, landlessness is confined to *de jure* landlessness, the lack of title to land, from an economic standpoint there is also need to adopt a more liberal approach to the definition to accommodate those women who hold parcels of land that are so unproductive as to have no economic utility. Such women would be able to benefit from any government programs intended for the landless exclusively.⁴⁷

Scrutiny of Kenyan women's land rights in the post reform regime is of necessity an examination of the manner in which their rights to land ownership and access have been affected by political changes and economic development programmes instituted by the independent government regime. It is also an examination of the effect of the continuation in independent Kenya of the colonial government policy on land reform and the contradictions and conflicts between freehold tenure and customary tenure on the rights of women to land.⁴⁸

One of the policies adopted by the independent government was to continue the process of land reform on the justification that it had improved farming practices, which had in turn boosted and would continue

46. DIANA HUNT, *THE IMPENDING CRISIS IN KENYA: A CASE FOR LAND REFORM* 40 (1984).

47. Going by statistics, 95% of Kenyan women are *de jure* landless. (See Rayah Feldman, *Women's Groups and women's Subordination: An Analysis of Policies Towards Rural Women in Kenya*, 27/28 REV. AFR. POL. ECON. 67 (1983)). These statistics would include women who have access to land through associations with husbands, fathers, brothers or other male relatives and the *de facto* landless who operate as squatters and labourers on private farms and government lands. Government resettlement schemes have only concerned themselves with the *de facto* landless and particularly those who squat on government land reserved for game parks and forest conservation.

48. For a brief account of these contradictions, see Angelique Haugerud, *The Consequences of Land Tenure Reform Among Smallholders in the Kenya Highlands*, RURAL AFRICANA 65 (Winter/Spring 1983), and Homan, *Succession to Registered Land in the African Areas of Kenya*, 2 J. LOC. ADMIN. OVERSEAS.

to boost the country's economy. The emphasis on improving agriculture has resulted in subsequent land policies' being informed by national economic growth and efficiency irrespective of equity considerations without effective measures being taken to address women's landlessness specifically.⁴⁹ Land resettlement schemes established to settle the landless and subsequent legislative measures have had little positive effect in alleviating the problems of women's landlessness.⁵⁰

Current land rights of women in Kenya must also be understood in the context of the complexity of land tenure systems in the country. Currently, there is a dual system of land tenure. Where land reform has been completed, individual tenure prevails. In other parts of the country the reforms are unknown. These parts of the country are still under customary land tenure although government land policy is to bring them under individual tenure. Even in areas where reforms have taken place, the *de facto* situation is that customary practices continue to define the rules of access to land and to regulate behaviour in dealings concerning land.⁵¹

Currently, statistics reveal that only 5% of Kenyan women own land in their own names in the areas under individual tenure.⁵² In the non-reform areas, women only not have no right to own land but their social and economic status has continued to deteriorate as a result of changes in value systems and the adoption of cash-oriented agricultural practices. A majority of women in all areas have continued to have access to land through associations with their fathers, brothers or husbands.

Irrespective of the mode of access to land, women continue to have parcels of land of limited size available to them. This access to or ownership of smaller and fewer sub-economic parcels of land impairs women's economic self-sufficiency and in turn makes them increasingly dependent on men for economic survival. In the coastal region of Taita, Kenya, for example, in 1985, women constituted only 4% of all land owners in the Msiduyi land register with their land holdings averaging 2.5 hectares in size as compared to 5.8 hectares for men's parcels.⁵³ In a study carried out by Jean Davison among women in Mutira and Chwele

49. Shipton, *supra* note 32.

50. The Law of Succession Act, Chapter 160, which allows for daughters to inherit property and the *Land Control Act*, Chapter 302 are examples of laws passed to protect women but which are only partially effective.

51. See Mackenzie, *supra* note 2.

52. Feldman, *supra* note 47, at 71.

53. Fleuret, *supra* note 39.

areas of Central and Western Kenya respectively, none of the 101 women interviewed in Mutira owned land in their own names and out of 75 women interviewed in Chwele, only one widow owned land in her name.⁵⁴ As of 1978, approximately 7.6 million hectares of land throughout the country had been registered largely in men's names. Such statistics spanning a cross section of Kenyan society testify to the extent of women's landlessness.

With male migration out of rural areas in search of employment in non-farm activities and industry, the bulk of the rural poor are women and children. Eighty-five percent of Kenyan women reside in the rural areas, contributing to the rural economy.⁵⁵ Statistics reveal that 89% of the poor in Kenya live in the rural areas.⁵⁶ With 75% of the population living on small holdings, the concentration of poverty in the rural areas and the majority of the rural population comprising women, the need for women to have greater control of land by way of ownership and decision making in the farm becomes critical.

Insecurity of Tenure for Women

Coupled with lack of title is the issue of insecurity of tenure for women irrespective of the mode of access. Traditionally, women gained access to land through their status as daughters or wives. Both means failed to afford significant security. The situation remained unchanged even after the reforms. A daughter's tenure under land reform and where title has not been transferred to her still depends on her father's goodwill during his lifetime and its effect after his death. A wife's tenure depends first, on her husband's goodwill and later, sometimes, on that of her sons. Although current land laws, unlike customary land tenure rules, allow women to inherit land from their fathers and husbands, whether they do inherit and acquire the capability to exercise the rights that go with individual ownership depends largely on the goodwill of their fathers and availability of abundant land to cater for male heirs. Only big land owners have been known to allocate land to their unmarried daughters and, even then, this has been justified on the basis that there is more than enough land to cater for male children.

54. Davison, *supra* note 10.

55. L.E. NGUGI, *THE SITUATION IN KENYA: PROCEEDINGS OF THE INTER-REGIONAL SEMINAR ON THE INCORPORATION OF WOMEN INTO DEVELOPMENT PLANNING* (1986).

56. Hunt, *supra* note 46.

Customary laws of inheritance, which are still highly respected even in areas under land reform, preclude a daughter's right to inherit land. A widow under customary tenure could not pass land to her daughters and her land passed to her husband's male relatives. Under current land legislation, a widow whose children are female may be effectively unable to pass on land to her daughters, not because legislation precludes it but because it would be considered socially unacceptable. To pass such land to daughters would threaten the territorial integrity of the clan upon marriage, which though not legally wrong, would, however, still be considered socially unacceptable. While customarily, daughters have no rights of inheritance, under land reform, the situation is slightly improved although encroachment by male relatives claiming customary rights to inherit the land are a common phenomenon.⁵⁷

Under land tenure reform, widows are vulnerable in that they lack special protection under the law and as inter-generational gender relations continue to worsen, their land rights become threatened not only by their deceased husbands' relatives but also by their own sons. In her extensive research in Muranga District, Fiona Mackenzie cites the case of *K.W.W.*, a widow whose deceased husband's land was invaded by her brother-in-law and his sons. Although she holds legal title to the land, she has been unable to exercise the proprietary rights guaranteed under freehold tenure and the brother-in-law has remained in illegal but physical possession.⁵⁸

Under both customary and freehold tenure, a widow is taken to be a caretaker of the title deed until her sons become of age.⁵⁹ Thereafter, and irrespective of the nature of tenure, customary rules of inheritance become operative and demand that a widow pass on title to her sons who, in turn, must guarantee her access to a portion of the land until she dies. She is usually not considered an absolute owner although she may have the title registered in her name. In some situations widows have been dispossessed or have willingly surrendered their land rights to their sons only to be abandoned and neglected once the sons transfer title to themselves. Subsequent sales of such land by the sons on acquisition of title have rendered widows landless.⁶⁰

Married women also suffer insecurity of tenure through lack of title and also through land sales by spouses. The concept of absolute ownership

57. The Law of Succession Act, Chapter 160 of the Laws of Kenya, allows daughters to inherit property.

58. Mackenzie, *supra* note 2.

59. See the Kenya Law of Succession Act, *supra* note 57.

60. Pala, *supra* note 24.

coupled with the ease in negotiability of titles saw a proliferation of genuine and improvident land sales which resulted in many families' being rendered landless or near landless through sale of family land by men when they acquired title. This problem caused the colonial administration and, later on, the independent government anxiety. The colonial government reacted to the problem by passing the Land Control (Native Lands) Ordinance of 1959, which was later to become the independent government's Land Control Act of 1967.⁶¹ The 1967 Act requires that all land transactions including, for example, sales, gifts, subdivisions, mutations and mortgages must be approved by a Land Control Board, which has to consider, among other things, the land needs of the applicant's family before granting consent to the transaction in question.

The intention is that the requirement for consent, coupled with a recent government directive that requires the applicant's spouse and adult children to appear before the Board to indicate their awareness of the proposed transaction, will grant women a measure of security from being rendered landless or semi-landless through sale of land by their spouses. The reality, however, is that the requirement of the Land Control Board's consent to a transaction has not been successful in curbing improvident land sales because parties have always found ways of obtaining the requisite Land Board consent, lack of familial consent notwithstanding.⁶² Consequently, genuine and *de facto* illicit land sales which are legally void for lack of requisite Land Board consent but which are recognized and honoured by the parties concerned have continued to be made. While this may be partly due to ignorance of the legal implications of the failure to obtain required consent as people opt for the more familiar customary methods of executing land transactions, the prevalence of fraudulent land deals, distaste for the red tape associated with statutory procedures together with the costs involved militate against the effectiveness of government efforts to stop the proliferation of transactions that threaten a family's security in their land.⁶³ Insecurity of tenure for married women has also come through the creation of mortgages. When land is registered in the husband's name only, there is no legal requirement for the wife's consent to the creation of a mortgage or other encumbrance on the title. Although women may consent to the use of family land as collateral for

61. Ordinance No. 28 (1956) and Chapter 302 of the Laws of Kenya respectively.

62. See James K. Byamukama, *The Socio-economic Impact of Land Tenure Reform in the Former African Areas of Kenya, 1950-1987* (1988) (unpublished L.L.M thesis, York University).

63. See *id.*

loans where title is jointly held, it is mainly the women and the children, whose only source of livelihood is the land, who suffer the consequences of foreclosure.

Women's security of tenure therefore continues to be threatened by customary practices of inheritance, lack of adequate protective legislation and by unwillingness or failure to strictly observe government and legal measures intended for protection of women's land rights. The trend is that while male rights to and control over land are safeguarded and reinforced by individual tenure and male solidarity in institutions, women's rights to land ownership have been thwarted, threatened and sabotaged at every opportunity.

Impediments to Women's Acquisition of Title to Land

Explanations for women's inability to acquire title to land despite the apparent freedom of ownership of property enshrined in Kenya's land laws⁶⁴ must be sought within the current legal framework, the shortcomings in the implementation of relevant legislation and in the socio-cultural attitudes that continue to govern people's dealings with land. Where the law has been inclusive of women rights to own title to land, social attitudes have precluded such ownership or full exercise and enjoyment by women of the benefits that flow from such ownership. Consequently, the interpretation and implementation of current land laws has increasingly manifested a conservative bias which tends to view the land ownership rights of women in the traditional customary sense.

The effect of such attitudes has been that legislative efforts to address inequity in land ownership between the sexes has not been altogether successful. The Registered Land Act,⁶⁵ the substantive law in land reform, while not being discriminatory *per se*, has been an obstacle to any attempts women make to redress the inequalities perpetrated by the reforms. Under the Act, once title to a parcel of land has been registered, it vests absolutely and it is unchallengeable even where it is proved that such title has been obtained by fraud.⁶⁶ The result is that once registration has taken place, women whose interests and rights in land have been omitted can not

64. Examples of such Legislation would include the KENYA CONSTITUTION, (see ch. 5); the *Registered Land Act* Chapter 300, the *Law of Succession Act* Chapter 160; the *Land Control Act* Chapter 302 and the *Married Women's Property Act of England* (1882) all provide for a woman's right to own property or protect her property ownership rights.

65. Registered Land Act, Laws of Kenya, Chapter 300.

66. See *id.* §§ 27 and 28.

maintain an action for alteration of the register to accommodate their interests, the only recompense being by way of monetary damages.

Similarly, the Law of Succession Act⁶⁷ gives daughters the same rights as sons to inherit their parents' property. Once a disposition in favour of a daughter is made, it can not be voided by reason only that it was made to a daughter who will eventually have access to land through marriage. This, however, does not guarantee her full enjoyment of the land or protect her from being dispossessed by her brothers, especially where the land has not been registered in her name. The Act also does not require the equitable distribution of a parent's assets amongst his or her children and particularly, it does not obligate a father to provide for a daughter. The practice therefore is that fathers continue the customary practice of transferring land to their sons on the assumption that a daughter will marry and gain access to land through her status as a wife.⁶⁸ The decision on whether to transfer land to a daughter is solely at the discretion of the father even where access to land through marriage is unpredictable for the daughter. This particular legal provision for a daughter's right to inherit from her parents becomes ineffective for lack of a willingness to break away from tradition and the fact that there is nothing in the law that compels a parent to make a disposition in favour of a daughter. For daughters then, their only hope of access to family land is through marriage and with land passing through the male line, acquisition of title would only come through widowhood.

Male pressure on women's decision-making capacity has also affected women's ability to own land. Apart from situations where husbands outrightly forbid their wives to buy land in their own names, registration of land in women's names has also been thwarted by the prevailing practice of registering land bought with joint incomes in the names of the husbands only. In the event of marital breakdown, a woman's rights to a portion of the land as a joint contributor in its purchase is threatened by the law's insistence on the indefeasibility of a registered proprietor's title.⁶⁹ Furthermore, laws such as the Married Women's Property Act of England, 1882, which is a statute of general application in Kenya,⁷⁰ and which is meant to cater for such situations, have been only partially

67. *See id.*

68. Davison, *supra* note 10.

69. *See* Simon Coldham, *The Effect of Registration of Title upon Customary Land Rights in Kenya*, 22 J. AFR. L. 91 (1978).

70. *See* I.v.I [1971] E.A. 278.

effective in creating an equitable pattern of land ownership between the sexes and are invoked only in cases of marital breakdown or widowhood. The effect is that women's *de jure* land rights are almost nonexistent, while changed socio-economic conditions, values and modes of land use have marginalized their *de facto* rights to land.

From a socio-cultural perspective, the *status quo* has also been partly maintained by women's lack of awareness of their land rights, a factor that has been exploited fully in maintaining male control over land. A study conducted by Florence Butegwa in 1986 in Nairobi and Busia revealed that of 400 women interviewed, almost 60% of them thought they had no right to own property in their own names.⁷¹ This ignorance manifests itself in women's dealings with land upon death of their husbands. Widows rarely transfer ownership of land to themselves when their husbands die, and even when they do so, they are usually regarded, and indeed do regard themselves as trustees for their male children until those same male children grow up and kick them out!⁷² Even in cases where women manage to effect transfers of title in their names, their ability to exercise rights guaranteed under freehold tenure is usually less than that of male individual title holders due to the continued interplay of customary and freehold tenure. Evidence has suggested that customary tenure rules are a considerable force in defining rules of descent, residence, inheritance and access to land irrespective of the nature of tenure and female land owners still consider themselves bound by these traditions in their dealings with land.⁷³

Women's poverty has also affected their land ownership capacity. The rapid growth of a land market as a result of population pressure and land accumulation by the rich has put the price of land outside the reach of many women including part of the elite. Secondly, women's efforts to acquire land in their own names have often been interpreted as an attempt to disrupt the balance of power in the household and to threaten the husband's authority in the home. To avoid marital problems, women who would otherwise be willing to and are capable of buying land have abandoned their rights in favour of stable relationships with their spouses.⁷⁴ The effects of all these impediments are that only a small percentage of

71. Butegwa, *supra* note 3, at 69.

72. For a detailed account of this situation, see Fiona Mackenzie, *Local Initiatives and National Policy: Gender and Agricultural Change in Muranga District, Kenya*, 20 CAN. J. AFR. STUD. 385 (1986), and case histories cited by the same author in her article, *Land and Territory*, *supra* note 2.

73. Mackenzie, *supra* note 2.

74. See the case of M.J.R. in Mackenzie, *supra* note 2.

women in comparison to men manage to buy land in their own names. In 1984, out of 923 land purchase transactions that took place in Muranga district, only 11.7% of the purchases were made by women.⁷⁵ With the marginalization of women in every sphere of the Kenyan economy, the rising and intensified land market created by high population growth and women's lack of collateral for credit purposes, women are caught up in a vicious cycle of landlessness and they have become increasingly dependent on unwilling husbands or fathers for access to land.

Conclusion

The implications for the marginalization of women in land ownership and the disabilities that arise from such a situation have affected women's overall economic well-being. A strong economic base in Kenya, for every person, has its origins almost exclusively in land ownership or the ability to control some land as an economic resource. Traditional land tenure and the agrarian reforms introduced by the process of individualization of tenure have denied women such ownership and control of land and have ensured that women do not rise above the subsistence level of the economy not only in the agricultural sector but also in the national economy at large.

Closer scrutiny of Kenyan land laws and the land tenure systems obtaining reveal that the bundle of rights which constitute women's tenure status is significantly smaller than that of men. This bundle excludes the hallmarks of ownership such as the ability to gain access to credit, to lease, to alienate for cash or dispose of by will.⁷⁶ The explanations for this reality are both cultural and historical. While customary land tenure was based on the traditional view of women and was therefore exclusive of women, the reforms instituted by the colonial administration and adopted by the independent government continued to undermine the land rights of women by reinforcing the *status quo*. The introduction of a money economy based on land as the chief economic resource and the accompanying exclusion of women from ownership of land undermined and has continued to undermine women's economic well-being.

One of the underlying arguments made in this article is that non-ownership of land by women has been the major cause of their low socio-economic status. Without a strong economic base and with the strong

75. See Muranga District Land Registry, *Presentation Books* (1984).

76. Kathryn Cloud & Jane Knowles, *Where Can We Go from Here? Recommendations for Action*, in *AGRICULTURE, WOMEN AND LAND*, *supra* note 10.

cultural beliefs that exist about the status of women, social institutions and infrastructure have not been designed to give women equal opportunity with men to participate in the economy. Since women are almost exclusively engaged in agriculture,⁷⁷ it is imperative that land policies be designed to enable women to own land or to have clearly stipulated rights over land that are commensurate with their producer roles. To do this, women's status as legal adults capable of adult decision-making must be recognized. Such policies must, however, come through legal and procedural reforms which give women a reasonable and equal stake with men, in land and in assets they have been involved in producing.

Policy decisions must be made at the national level to implement the laws that guarantee women's right to own land. Much progress would be achieved, for example, by obligating parents to provide for their female children. Existing laws must also be enforced so as to override the cultural barriers that militate against women's exercise of their land rights. Apart from addressing the issue of women's non-ownership of land as the main cause of their economic instability, there is also need to address their limited access to secondary factors of production such as education, employment and credit. Of particular note, the government should devise policies that make available to women, irrespective of social position, access to capital in the form of loans that do not require land as collateral. Such policies coupled with gender-sensitive agricultural extension services that do not bypass women farmers and the establishment of a more equitable method of sharing the fruits of agricultural labour would enhance the economic status of women.⁷⁸

The implementation of such policies would be hard to achieve within the current framework and tenure systems. Current land laws are exclusive rather than inclusive and have operated against women and the poor in society. There is urgent need for a more distributive land reform policy that will be premised on the rights of women to share this resource on an equitable basis with men. Laws should be made to prohibit the current practice of land concentration where the best arable land is concentrated in the hands of rich civil servants, business men, foreigners and multi-national corporations.⁷⁹ A law that puts a ceiling on the amount of land

77. Ngugi, *supra* note 55.

78. Katherine Straudt, *Administrative Resources, Political Patrons and Redressing Sex Inequities: A Case Study from Western Kenya*, 12 J. DEV. AREAS 399 (1978). Straudt has found that over 98% of Agricultural Extension Staff in Western Kenya are men.

79. Del Monte company owns millions of acres of land at Thika near Nairobi for pineapple

that any individual should own is long overdue. Cultural attitudes and biases must also give way to equity considerations in the allocation of women's rights to land in particular. Legislative changes on which such a land reform policy would be anchored must be made within a supportive framework that will promote simultaneous change in all spheres of life. The outcome of the enactment and implementation of such laws would be a social transformation that recognizes not only the basic right of every Kenyan to own land but also the adult capacity of women and their right to share equally with men the resources that are available.

growing. This has resulted in the displacement of many people from Kiambu and Muranga Districts respectively and there is a very large squatter population around the pineapple plantation. Other multinational corporations own coffee, tea and cattle ranching farms in various other parts of the country and considering that only approximately 30% of Kenya is arable land, the effects of land concentration are disastrous to ordinary Kenyans and to women in particular.

