

Chapter 1 Dynamics of Land Tenure: A Village Case Study

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シリーズタイトル(英)	Africa Research Series
シリーズ番号	12
journal or publication title	Current Issues of Rural Development in Malawi
page range	1-22
year	2006
章番号	Chapter1
URL	http://hdl.handle.net/2344/00016627

Chapter 1

Dynamics of Land Tenure: A Village Case Study^a

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1. INTRODUCTION

Land is the basic source of livelihood and food security in Malawi. More than 80% of the country's population of 11 million derive their livelihood from the land. Most of the food consumed in the country is owner-produced on family smallholdings. In addition to being an important economic resource, land is valued as a source of social security. Many urban-based Malawians expect to retire to the village and work on the land to supplement their pensions. For the Malawian access to land is a fundamental right.

Societies develop rules that define the way their members hold or own land, the rights that accrue from such holding or ownership and the obligations that arise there from. These rules constitute the land tenure system. The rules are created to regulate the relationship of members of society to the land and are enforceable in a formal court of law or through customary structures. These rules either evolve over time to accommodate changing circumstances or are changed through deliberate action such as legislation. The Registered Land Act of 1967 was an attempt by the Malawi government to introduce into Malawian smallholder agriculture the Eurocentric concept of land ownership under registered title on the assumption that customary land holding did not offer adequate security for

^a Tsutomu Takane, ed., *Current Issues of Rural Development in Malawi* (Chiba, Japan: Institute of Developing Economies, 2006)

agricultural investments, especially those of a long term nature. It was intended that if successfully implemented in the Lilongwe West Rural Development Project, where it was introduced, the Act would be extended to other areas. The negative responses from the communities have compelled government not to extend the implementation to other parts of the country. It can be argued therefore, that all existing land tenure systems have undergone some changes during the history of the societies in which they exist.

This study was interested in how rules governing access to, utilization and transfer of land rights are changing and the forces underlying those changes, in an area which falls under Group Village Headman Kachenga, in Balaka district, Southern Malawi. Kachenga is a highly productive agricultural area which has experienced immigration since the 1950s.

The information which forms the basis of this paper was collected using both formal and informal interviews during visits to the area between June and September 2005. Formal interviews were conducted with key informants in land matters which included Sub Chief Kachenga, Group Village Headman Kachenga, hamlet heads, village headman's counselors, (nduna), leaders of indigenous matrilineages and heads of non-indigenous households. The interviews were conducted in both Chichewa and Chiyao, the two languages spoken and understood in the area and which the researcher speaks fluently. Interview guides were used and notes were taken with the permission of the respondents. More informal interviews were conducted with ordinary members of the village found working on their holdings during transect walks. Some useful information related to land acquisition and distribution was chanced upon during ordinary conversations with villagers. The informal interviews frequently provided an opportunity to crosscheck information obtained in the formal interviews. Information collected in this manner was recorded in the field notebook at the earliest opportunity.

2. THE CREATION OF KACHENGA VILLAGE¹

The area in Balaka district, southern Malawi that is known as Kachenga comprises 13 hamlets under the leadership of Group Village

Headman Kachenga. The area was inhabited in 1951/1952 by a group of matrilineally related kinsmen under the leadership of Mpilisi Makochela. The group moved into this previously uninhabited area from Chiunda, near Ulongwe in Balaka district, where the headquarters of the Yao Chief Kalembo are located. The occupation of the area was done with the permission of Chief Kalembo under whose jurisdiction the uninhabited land fell. It is said that Kalembo wanted to create a buffer against encroachment by the Ngoni of Ntcheu, the district which bordered his area of jurisdiction to the west.

On arrival in this large, uninhabited area, leaders of mbumba² were allowed to claim and occupy different parts of the area which they could tame for settlement and farming. Thus specific areas came to be identified with specific mbumba groups. The cluster of houses belonging to women and their uxori locally resident husbands constituted a hamlet.³ The hamlets were named after their original leaders. The earliest of these were Kachenga, Mizinga and Chikamana. Intralineage conflicts and natural growth of membership led to parts of matrilineages hiving off to create new hamlets. All these hamlet heads recognized the overall leadership of Mpilisi, who had been elevated by Chief Kalembo to the status of Group Village Headman.⁴ Following a succession dispute in 1957 the leading lineage split, with the losing section leaving to join Chief Msamala's jurisdiction in a different part of Balaka to continue the Mpilisi name. The group that remained behind opted to adopt the name Kachenga for their leaders. This name, according to oral tradition, was the one that their leaders were known by in Mozambique, their original home. Since the schism, the village has been known by the two names simultaneously. The current Group Village Headman Kachenga would prefer to erase the Mpilisi name completely since the breakaway group is also using it in a different jurisdiction in the same district. There is also the underlying fear that the group might return to claim the Group Village Headmanship in a future succession dispute.

While the matrilineage-based hamlets occupied distinct parts of the village, all land that was not claimed by them fell under the Group Village Headman's trusteeship. This land could be accessed by newly formed households when their own matrilineages ran out of unallocated land. It was in effect reserved for future use.

Most of the hamlet heads are Yao and can trace a relationship with the group that came from Chiunda. Jere and Douglas, however are non-Yao. Jere, who was a timber sawyer, came from Mzimba, northern Malawi in the 1960s. The area is said to have had many hardwood trees suitable for furniture making and other carpentry work. Group Village Headman Kachenga allocated him large tract of land to build on and farm. The existence of abundant land and a small population made it easy for the Group Village Headman then to make large allocations of land to favoured individuals and families. As time went on new land seekers came to join him. In this manner a new settlement developed. The Group Village Headman granted him the authority to settle disputes over the people who had settled on his land. Douglas, also a timber sawyer, was originally from Chiradzulu. In his wanderings as a timber sawyer he came to Kachenga. As in the case of Jere, he was given a large tract of land which he could not cultivate alone. Soon he was joined by his sisters and other relatives from Chiradzulu, which is a district suffering from serious land pressure due to high population densities. The women got married, had children and the settlement grew into a hamlet. As in Jere's case, he was granted permission by the Group Village Headman to settle disputes among his mbumba and all others who settled on his land.

The case of Jere and Douglas illustrate the fact that village headmanship stems from control of access to land. One can build up a following through that control. The following can be built up on the basis of kinship or a combination of kinship and patronage. The two cases also highlight the Yao tradition noted by Kandawire (1979:101) of allowing other groups to settle among them which they carried over from Mozambique, and the notion that chiefs and village headmen derived their power from the number of people who followed them. The colonial practice of paying annual honoraria to village headmen on the basis of the number of taxpayers in a village acted as a further incentive for accepting non-kin members into a village. It must be noted however that all hamlet heads exercise delegated authority from Group Village Headman Kachenga and he reserves the right to withdraw it.

3. VILLAGE COMPOSITION

The Yao constitute about 95% of the population of the area and claim ownership of the land on the basis of primacy of settlement. They are a matrilineal people. Descent is reckoned through the female line. Matrilineally related women form the core of a village. Matrilineages occupy different parts of the village with their houses forming clusters. These clusters of houses constitute a hamlet and is led by the most senior matrikin by order of descent. Hamlets are associated with specific farmland. The average hamlet consists of about ten houses.

Uxorilocal marriages are the norm. Men marry out of the village, and are expected to reside in their wives' villages until they are divorced or predeceased by their wives. Those who ascend to a village headmanship are exempted from the uxorilocality rule as they are required to live among the people they lead. The women bring in men from other lineages into the village to help them reproduce their lineages. Children born out of a union are deemed to belong to their mother's matrilineage. Most adult men in the village are men from other areas who have married local women (see e.g. Peters 1997:190). They are treated essentially as 'strangers' in the village. Their essential role is that of helping the local women reproduce their matrilineages.

Until very recently the village continued to experience considerable immigration of non-Yao people seeking to take advantage of the good agricultural soils which permit the production of maize, cotton, groundnuts, sunflower, and rice in dambos⁵. The largest immigration occurred in the 1970s as people were leaving areas in Machinga district alienated to commercial tobacco farmers to find a place where they could continue their subsistence agriculture. Unlike the earlier Yao immigration the new immigrants tended to consist of individual families rather than whole lineages.

The following categories of village members can be identified:

- Core matrilineages. These are a group of sisters and their offspring related to the founding leader of the hamlet. A few men may be found in the village under special circumstances.
- Uxorilocally married men. This category comprises men who have married women who are members of local matrilineages. They live

in the village by virtue of having married local women. They constitute the largest group of adult men in the village.

- Immigrants. These have no blood or affinal ties with the local lineages. They are predominantly people who came into the village in search of land for agriculture or settlement.
- Virilocally married women. This category consists of women brought into the village as wives to local men. They constitute a small minority. Their presence in the village is possible under special circumstances which allow men, who are traditionally supposed to live in their wife's villages, to return and live in their maternal villages.

4. ACCESS TO LAND AND TRANSFER OF LAND RIGHTS

The Malawi Land Act defines three categories of land: private, public and customary. Private land is defined as all land held, owned or occupied under a freehold title, a leasehold title or certificate of claim,⁶ or is registered under the Registered Land Act. Public land is all land occupied, used or acquired by the government, and includes forest reserves, national parks and lapsed leaseholds. Customary land, on the other hand, is defined as all land held, occupied or used under customary law. Customary law is not codified and varies from area to area depending on the dominant ethnic group. Customary and public lands are vested in the president in perpetuity. All the land in Kachenga falls into the category of customary land.

The traditional view is that land is a gift from God for the sustenance of humankind. Its value lies in its capacity to produce what people need to stay alive, which is food. Access to land is therefore a fundamental right for everyone created by God. Chiefs and village headmen, according to this view exist to ensure that land is equitably distributed to all in a community; it is protected against outsiders; and it is properly used. The sale of land is prohibited. The matrilineages that were in the original settler group claim ownership of the areas that they tamed and inhabited when they arrived in the area. Hamlet heads exercise trusteeship of the land in their specific areas on behalf of Kachenga. Kachenga in turn recognizes the overlordship of Chief Kalembo over land matters, although the latter does not have any direct control over the land.

Traditionally, primary rights to land belong to women, and are intergenerationally transmitted through the female line. A female child is entitled to a piece of land on which to build a house and grow food crops on marriage, or on having her first child. This piece of land will come from the share of land allocated to her mother. All daughters born to a woman, regardless of the circumstances of their birth are entitled to a share of their mother's allocation. More land may be received when older matrilineal kin become too old to work or die (see Peters 1997:203). Men acquire access to land through their wives. They are expected to remain in their wives' villages until they die; or they get divorced; or they are predeceased by their wives. Any of these three eventualities would render a uxori locally married man landless. He must remarry to be able to gain access to land again. The system of land acquisition favours females and effectively discriminates against males.

The customary entitlement to land enjoyed by females leads to constant sub-division of a mother's holding as the daughters get married. Families with many daughters tend to experience accelerated shrinking of holdings. In the event that a mother's holding cannot be subdivided any further, a grandmother or any other female relative may be requested to give the newly established household some land. Where this is not possible, the village headman would be requested to make an allocation from unallocated land in the village. Population growth has led to a situation where all good land is under cultivation. Newly formed households therefore acquire land through the subdivision of existing holdings. Agricultural holdings in the area tend to be small, estimated by Department of Agriculture officials at 0.4 hectare. Given this small size of holding and lack of fertility enhancing inputs, agricultural output is very low. Large family sizes in the context of low agricultural production contribute to the recurrent situation where more than 70% of households run out of food before the next harvest season.

While kinship is the basic means of acquiring land, residence in the community has been an important means of acquiring land for non-indigenous people. Accepting immigrants has traditionally been seen as a way of increasing the number of subjects under a village headman's authority and enhancing his/her status. The more people a village headman has in his area of jurisdiction the higher his status among his peers. In turn,

the larger the villages, the higher the status enjoyed by the chief in whose jurisdiction they fall. Chiefs are therefore likely to encourage, rather than discourage, immigration.

Certain conditions have to be met by a prospective immigrant before they are allowed to acquire land in the village; inter alia he/she should not be a fugitive from justice; that he/she would respect the Group Village Headman, and all those who hold positions of authority in the village; and also to respect local customs. It is a common practice that the person applying for land must be supported by someone well known in the village. This person acts as surety for the good conduct of the applicant. Immigrants may pass on their land rights to the next generation using their own customs. This brings diversity to intergenerational transmission of rights in the village.

Land may be loaned out to other users for specified periods, usually an agricultural season. Families may have land to loan out because they do not have the labour to put it all under cultivation; or because the usual cultivator is temporarily away; or is too ill to work. Borrowing land enables people with smallholdings to have access to additional land and increase their production of certain crops. As the loan is a short-term arrangement it can only accommodate quick maturing or seasonal crops. Traditionally only residents of the village can access land on loan.

Three distinct categories of land can be identified in the village: 'Private' land, common land and reserved land.

- 'Private' land: this is land for the exclusive use of the family or individual to whom it is allocated. No person may enter or use it without the permission of the rightholder. It includes residential sites and crop fields.
- Common land: this is land to which all bonafide members of the village have a right of access. Grazing grounds fall into this category.
- Reserved land: this is land that has not been allocated to any family or claimed by any of the matrilineages. It comes under the direct control of the Group Village Headman. Only he can make allocations from this stock of land. Normatively non-indigenous landseekers would receive allocations from this stock of land, provided that the interests of indigenous members of the village are not thereby

jeopardised.

5. SECURITY OF TENURE

A study by Reader (1971) in the Lilongwe Land Development Programme (LLDP) revealed that the status of a landholder in a community influences the degree of security enjoyed on the land. The study revealed that individuals and families cultivating land belonging to their matrilineages enjoy high security of tenure. They cannot be arbitrarily removed from their land by a village headman or chief. Nankumba and Machika (1988) made a similar observation. Such people enjoy lifetime rights of use and occupation. For all practical purposes they own the land they use. Should any part of their land be required for a project which would be of common benefit to the community the Group Village Headman is required to compensate them with an equivalent amount of land elsewhere if they do not want to donate it. The Mpilisi Community Day Secondary School, the postal agency as well as the police unit stand on land belonging to individual families and whose release was negotiated by the Group Village Headman. In the three cases the surrendered land was treated as a donation to chitukuko (loosely translated as 'development').

The matrilineal system effectively strengthens female security on the land by according them the primary rights to land while simultaneously weakening those of the male counterparts who have only secondary rights enjoyed through the women they marry. Female ownership of land rights combined with uxori-local post-marital arrangements and absence of lobola⁷ as part of the marriage contract which characterizes matrilineal social systems, are believed to create conditions for marital instability, especially where early marriages are common. Phiri (1983) found that insecurity among uxori-locally married Chewa men would be felt particularly in the first years of marriage. During the initial period of mutual adjustment by the married couple, brought up in totally different social environments, there is bound to be much conflict, probably exacerbated by the woman's matrikin, which if not properly handled, could result in early divorce. During the early stages of marriage, it is unlikely that a man would feel secure on the land. This situation also obtains in Kachenga. It is not unusual in Kachenga to find a young woman of twenty who has been

married more than once. Part of the explanation is that marriages occur when both parties are very young and the man is unable to cope with the combined responsibilities of husband and son-in-law roles, which include providing for a wife and often helping with farm work on a mother-in-law's holding. However, during the study we recorded three cases of men who had been married and lived in their wives' villages for more than 50 years, suggesting that even in matrilineal social systems marriage is potentially a life long union. One of these men serves as one of the counselors to Sub Chief Kachenga and plays an important role in village affairs.

While members of local matrilineages enjoy lifetime rights of use and occupation the tenure of immigrants is not very strong especially in the early years. Immigrants owe their presence in the village to the Group Village Headman. Traditionally the recipient of land is expected to give the village headman a gift as a token of appreciation. This used to be a basket of the first maize harvest on the land. In recent years this has come to include packets of sugar and even cash. A study by the World Bank (1987: 9) noted that these non-indigenous people often come under pressure to give gifts to the village headman who gave them land to maintain his/her favour. The land rights of the immigrant may be revoked by the village headman where the immigrant is deemed to behave in a manner that is detrimental to the good order of the community. Such detrimental behaviour includes the practice of witchcraft, repeated failure to participate in funerals or community development projects. The double standards are clear, because for the same offences the non-immigrant members of the village would get away with only fines in kind, the highest of which would be a goat. It was recorded during informal interviews that some hamlet leaders had sought to use personal differences that developed between them and particular immigrant members as a reason for revoking their land rights. One such attempt required the intervention of Chief Kalembo himself to stop it, after apparently the Group Village Headman had endorsed it. Immigrant members of the community interviewed during the study indicated they would leave voluntarily if their relationship with the village headman or hamlet heads soured for fear of being bewitched. At the time of the study we were not able to record any recent cases of eviction, suggesting that it is a rare phenomenon. Immigrants may give up their land voluntarily if they are not happy with their host community. Such land

reverts to the village headman.

Immigrants ultimately integrate into the community. We have already referred to immigrants who have acquired the status of hamlet heads. There are also cases of families who came from elsewhere and lived in the village for three generations. These non-indigenous families, who have tended to be more educated and more economically enterprising than indigenous families, have been the major source of local level development initiatives in the village. Intergenerational transmission of land rights by non-indigenous families is on the basis of their own customs. Among the patrilineal Ngoni sons would be the preferred inheritors. We were not able to establish this in practice as the Ngoni were very recent arrivals.

The differential security of tenure enjoyed by the various categories of people has implications for the type of investment that can be made on the land: there is a adequate security for land conservation measures and tree crops on land owned by one's matrilineage. Since it is women who have this security a case can be made for targeting agricultural advice on them as opposed to men as in the current situation. It may not be prudent for new immigrants to engage in long-term investments although this may change after a number of years. There was agreement among village leaders interviewed that a family that has lived in a village for a generation or more cannot continue to be regarded as strangers and are treated as full members with all the rights such a status entails. Permanent structures and the burial of a family member in the village appear to strengthen a family's claim to membership of the community.

6. CHANGES IN LAND TENURE

When the first group of Yao settlers arrived in Kachenga they brought notions of land and society's relationship to it developed under specific historical conditions in their original home in Mozambique. The conditions in the new area as they have evolved during the last 54 years have provided opportunities for modifying some rules governing access to and utilization of land. The fieldwork indicates that important changes, which are likely to become permanent, have occurred. These changes are discussed below:

6.1 Increased perception of land ownership as opposed to rightholding

While matrilineages claimed ownership of specific parts of the village, it is individual families within the matrilineages who work the land that is parceled out to them by their leaders. These families have lifetime rights of use and occupation. They also have the right to exclude others from entering or using the land. These rights are passed on intergenerationally following the female line. Families that have enjoyed uninterrupted use of specific pieces of land for generations do not perceive themselves as mere rightholders but owners of the land they use. The notion of another entity beyond themselves being the real owners of the land appears fictive, although the role of the hamlet heads and the Group Village Headman in settling land disputes is acknowledged. It is this new perception of their relationship to land that makes it possible for families to let out, give away, pledge, and as is becoming frequent, sell part of their land. Hamlet heads and the Group Village Headman, who as trustees of village land would normally have been expected to prevent the sale of land as required by custom have apparently acquiesced and in some instances actively participated in the transactions as witnesses. Village leaders interviewed argued that they cannot stop a family that wants to sell its land: they can only advise about the possible negative consequences of such action on subsequent generations. This suggests that village headmen's authority over land is declining while that of individual landholding families is increasing. It would appear that while there was a customary prohibition against the sale of land compliance was achieved by moral pressure rather than by specific negative sanctions. Under increased perception of ownership moral arguments do not appear adequate to deter what may be socially unacceptable behaviour.

6.2 Declining allocatory role of the village headman

Population growth has increased the number of people needing land for their livelihood and sustenance as well as for building houses. The effect is that virgin land has disappeared. This means that the village headman can no longer play the role of allocator of land. Land seekers now have to deal with individual families which have some land which they are not cultivating. In this emerging situation the receiver of land is beholden to the family that gave them the land. The situation creates pressure on the

receiver of land to retain the favour of the land giver. Security of tenure is compromised because the transaction is on a personal basis. The phenomenon of the village headman's declining allocatory role in land transactions was observed in Bosworth's (1997) study of land tenure in Chief Kaomba's area in Kasungu district, central region. Just as in the current study this is attributed to the absence of unallocated land. Apart from being arbiter in land disputes, the Group Village Headman is increasingly called upon to witness the demarcation of allocations made by families to non-indigenous land seekers, and in some cases, sales and pledges of land.

6.3 Male occupation of land in maternal villages

Cases were noted of men living in their maternal villages and cultivating land belonging to their matrilineages contrary to the uxorilocality rule. Investigations revealed that this situation is possible under the following conditions:

- where there are no daughters to inherit the land
- where a family has a great deal of land
- where female heirs are not able to cultivate all land at their disposal due to shortage of labour

Under circumstances where there are no females to inherit the mothers' land a man's security on land held in his maternal village is assured. It is not so assured whenever there are female heirs, no matter how young they might be. For example, sisters are likely to reclaim land from their brother when their daughters or grand daughters begin to need more land. The man is essentially a usurper of his sisters' land rights and his status on the land can only be temporary. Peters (1997:205) notes in her study of land and gender in the Shire Highlands, Southern Malawi, that serious disputes between brothers and sisters or sisters' daughters often arise which might compel the men to relocate. In disputes over land between brothers and sisters customary law comes strongly in favour of women.

6.4 Informal sale of land

During the study we recorded ten cases of land sales, while one garden was being offered for sale. The archetypal buyer of land was someone with ready cash either from business or employment; while the sellers tend to be poor indigenous households desperate for cash. The prices ranged from K2,000 – K15,000 depending on size. What is actually paid though does not reflect the economic value of the land; rather the desperation of the seller and the bargaining ability of the buyer. The high mortality being experienced in the village has tended to free up some land which families are selling, in some cases to repay debts incurred during the illness of the deceased. The informal sale of land is an indication that in the context of a monetising economy, limited opportunity for earning cash incomes, and increased needs families will tend to impose a monetary value to assets that they had hitherto thought had no such value. The development of an informal market for land, means that families with access to economic resources can acquire, and even accumulate land by means of purchase; while at the same time destitute families in need of cash risk losing the most important social and economic resource that they have. In the case of Kachenga the beneficiaries of this development have been shop owners at the trading center, primary school teachers, a health worker and a retired civil servant.

7. VILLAGE LEVEL TENURE CHANGES AND THE NEW LAND POLICY

On March 18, 1996 the Malawi Government appointed a commission of inquiry into land policy reform. The commission was mandated to undertake a broad review of land problems throughout the country and recommend the main principles of a new land policy which would foster a more economically efficient, environmentally sustainable, and socially equitable land tenure system (Government Notice No. 20 of 1996). The commission completed its report in March 1999 and presented its report to the president in October of the same year. A national land policy based on the commission's recommendations, as amended in light of additional consultations with stakeholders was approved by cabinet on January 17, 2002. At the time of writing the legislation to provide a legal framework for the policy has not yet been presented to parliament. There

has been strong resistance from traditional leaders who see their traditional powers over customary land administration being eroded.

The appointment of the commission was an attempt by the government to find a solution to the many land related problems that had become more widespread following the advent of multiparty politics and democracy in 1994. The liberal political atmosphere apparently made it possible for individuals and organized groups to engage in behaviours that they must have been afraid to engage in under a dictatorship. The rural sector experienced increasing instances of encroachment on privately held tea and tobacco estates, protected areas such as national parks and forest reserves; boundary encroachment and consequent disputes among smallholder farmers; and wanton sale of customary land. It became clear that land encroachments and the tensions that they engendered had the potential to cause great harm to the agricultural economy.

The national land policy makes several important pronouncements on customary land which will affect how village land is administered, which in turn will have a bearing on issues of access and security of tenure. We will discuss the major pronouncements in detail below.

7.1 Registration of land and security of tenure

Insecurity of tenure on customary land emanates from the unfettered exercise of ministerial powers to dispose of customary land enshrined in the Land Act, instability of marriages and the status of the landholder in the community. Under the Land Act, customary land is treated as a subset of public land, the right to which is vested in the president. The minister responsible for land matters has vast discretionary powers over it. It can be taken by the state and converted to public land without compensation being paid for its loss. Leases can also be created out of it. Although ideally only unallocated land can be allocated to lease applicants in practice even land under use has some times been allocated, thus depriving families of land they may have used over generations and to which they have a historical claim. Traditional leaders are powerless against ministerial powers since according to the Land Act their powers and authority to administer customary land are delegated by the minister. On the other hand, divorced men in matrilineal social systems lose land rights in the matrimonial village, just as divorced women lose them in patrilineal

social systems. Perceived security of tenure is closely related to the longevity of marriage.

The land policy requires that the entire land under the jurisdiction of a chief be demarcated and registered as a 'traditional land management area'. Within this area will be demarcated customary estates. These are the individual family holdings. The property rights contained in a customary estate will be usufructuary rights in perpetuity and once registered, the title of the owner will have full legal status and can be leased or used as security for a mortgage loan (Ministry of Lands, Physical Planning and Surveys (MLPPS) 2002:14). However, because the interest of the proprietor of a customary estate is usufructuary the registration of a sale, lease or mortgage is not with absolute right and will be subject to the overriding interests of the community and sovereign rights of the state (for example, mineral rights). Following the formalisation and the granting of legal status to customary estate, the state cannot continue to treat customary land as if it is not owned by anybody.

The policy also requires that holdings have properly marked boundaries. The reliance on landmarks, as opposed to clearly marked boundaries, has tended to encourage encroachment among neighbouring landholders, especially in land-short areas. The registration of title to a clearly demarcated piece of land will reduce, if not completely eliminate, disputes arising from encroachment. Formal title to the land, with full backing of the law, and signified by a Land Certificate, will protect non-indigenous landholders in a community from the arbitrary decisions of village headmen and chiefs who allocated the land to them (cf. Bosworth 1997:20). The enhanced security of tenure emanating from recognized formal title can be expected to motivate such persons to make long-term investments in the land. People from land pressure areas might become more willing to relocate to new settlement areas, knowing that their security on the land will be assured.

The question of who should be titleholder of a customary estate, which the policy does not specify, raises potential problems. Assuming that title will be in the name of the head of household, who in the Malawian cultural context is assumed to be male, the question that will arise in a matrilineal social system such as that predominant in Kachenga is whether a woman's matrikin would allow a person they consider a 'stranger' to

become title-holder to land they consider their heritage. A further question that arises is whether, on the death of a wife, an uxori locally resident man who is title holder to a family holding will be allowed to remarry and to bring the new wife to the village where he is resident. These scenarios appear unlikely as long as matrilineages regard land as their own and the men who marry into the group as 'strangers'. The existence of a registered title to the land held by a man in an uxori local situation may not guarantee security of tenure as lineage members may resort to behaviour that may compel him to leave (see e.g. Msisha 1998: 82). Arson and witchcraft (or the threat of it) are known to have been used to drive some families and individuals out of villages although we were not able to record instances of this in Kachenga.

In patrilineal social system where women are regarded and treated as subordinate to men and land rights traditionally belong to men, registration of title in a man's name would be only natural. Joint registration would, however, allow a widow to retain control of the land after a husband's death. But in practice it would be contrary to cultural norms which do not permit women to hold land in their own right. It is likely that viri locally resident women would face the same restrictions on the exercise of authority over land as they do under current arrangements even after the implementation of the policy and in spite of the law. Those who hold positions of power in rural society and those who benefit from the status quo, are not likely to readily accept changes that threaten their traditions.

7.2 Transparency in land administration

The commission noted that chiefs were increasingly treating unallocated land in their jurisdiction as if they owned it. Some clandestinely sold it to commercial farmers and other rich individuals in clear violation of their trustee role (Presidential Commission on Land Policy Reform 1999: 104). In some cases landholders were forced out of land they were cultivating to make way for some rich people who had apparently bribed the chiefs. Those mostly affected by these actions were non-indigenous members of the community. While affirming the role of village headmen and chiefs in the administration of customary land the policy seeks to make the exercise more transparent. To this end traditional

land administration will be formalized. All transactions involving village land will be required by law to be recorded by a Land Clerk in a 'Traditional Land Index'. A Village Land Committee comprising the village headman serving in an ex-officio capacity as chairman, and three elected community leaders, one of whom must be a woman, will oversee the allocation and general administration of village land. The intention is to democratize village land administration and to confer collective responsibility upon the community over an important social and economic resource (MLPPS 2002: 26). The new arrangement does not allow any individual member of the committee, including the village headman, to authorize any transaction in village land. The traditional powers of the village headman in allocating land are thereby removed. The powers of a chief are similarly reduced. This has resulted in much resentment by traditional leaders who view this as a first step towards the abolition of chieftaincies ('Tamvani', supplement to 'Weekend Nation', 10-11 September, 2005: 6). While as in the few areas in the country where virgin land still exists village headmen and chiefs might resent the diminution of their powers under the policy, such resentment may not make much sense in those areas such as Kachenga where the absence of unallocated land has already led to the decline of the village headman's role in village land administration. It might be argued that the institution of the Village Land Committee would allow the village headman, whose role risks being irrelevant, to continue playing a role in land administration.

7.3 Land inheritance

Customary inheritance practices currently in existence discriminate on the basis of gender. In patrilineal social systems women cannot inherit their father's land even if they are the eldest in the order of birth. Women can only access land through their husbands. In matrilineal social systems, such as that of Kachenga, it is women who inherit their mothers' land. In either case, the excluded gender has to depend on their spouse's land. In this cultural setting marriage is a means of gaining access to land. To avoid the inequities often associated with land inheritance and to confer equal rights on men and women, the land policy requires that children, regardless of gender inherit land belonging to their parents equally (MLPPS 2002: 24). While this provision removes gender inequality, there still remains the issue

of cultural acceptability, especially in the patrilineal social systems where notions of male superiority over women are very pronounced. There is the added problem that if children are going to inherit their parents' land, which is already small, the result will be tiny holdings, inadequate even for subsistence production. Equity in this case will be achieved at the expense of agricultural productivity.

7.4 Transfer of customary estates

The policy recognizes the existence of an informal market in customary land and seeks to formalize it. The evidence suggests that land scarcity has generated informal land markets. However, any disposition of land would effectively transfer only the usufructuary rights and not the residual property interest vested in the community (MLPPS 2002: 19). The sale of customary land will become legal, with the seller obtaining the market value for it as opposed to the present practice where prices are decided arbitrarily and often reflect the bargaining abilities of the buyer and the desperation of the seller to acquire cash. The determination of a market value for land implies the involvement of a valuer. The question that arises is who would pay for the services of a valuer given the high level of poverty in the rural areas. If this problem is settled land will be able to move from 'inefficient' to 'efficient' producers. The reality, however, is that the 'inefficient' producers tend to be resource poor households while the 'efficient' producers are likely to be people with financial resources either from business or salaried employment. Individuals with sufficient financial resources could potentially buy up large amount of land in a village without necessarily putting it to productive use. The trend observed in Kachenga could escalate, resulting in a landless or near-landless indigenous community.

The policy recognises the possibility of families rendering themselves landless through careless sale of land. To safeguard against this the policy requires that all dispositions of customary land have the approval and signature by the relevant head of the land-owning group, the chief and a member of the Village Land Committee (MLPPS 2002: 19). Before approval to sell is granted, the committee will have to satisfy itself that such dispositions of land do not negatively affect the livelihoods of members of the household. In effect the freedom of land-owning

households to dispose of their land is not absolute as the interest of the household and the community will be protected. If these measures are effectively implemented, it can be expected that only those households with land surplus to their needs, will be able to sell. It is not immediately clear though, what sanctions the committee would use against a landholder who sells in spite of its objection.

8. CONCLUSION

The study has revealed that the land tenure system in Kachenga has adapted to changing circumstances: for example, the allocatory role of the village headman has declined in the absence of virgin land to be allocated. Land is predominantly accessed through intra-family allocations. Increasingly non-indigenous land seekers obtain land through families who have it, with the village headman merely ratifying such allocations. This change creates a new form of allegiance between the land seeker and the land given which excludes the village headman

The monetisation of the economy has led to the recognition of land as a saleable commodity which, in turn, is fuelling the development of a new conception of landholding, that of ownership as opposed to mere right of use. Families believe they have the right not only to loan out, rent out, pledge but also sell their land. The relevant village leaders acquiesce in these sales and declare themselves powerless to stop them, when previously they would have used their authority as trustees of the land to prevent it from passing out of the control of kin to non-kin.

From the changes that have been detailed here it is apparent that land tenure is dynamic, responding to demographic pressure and economic opportunity. The trend in Kachenga seems to be towards ownership of land in the sense of not only accessing, managing and benefiting from the land but also excluding others from what they perceive as their property. The changes that have occurred have not been proclaimed by the village leaders, but are manifested in practice. The effect of the national land policy, when implemented, will be to give formal recognition to practices such as land selling which is already in existence, while simultaneously introducing the novel element of democracy in village land administration. The emerging land tenure system will be effectively the product of evolutionary change

and deliberate government policy and legislation.

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ENDNOTES

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- ¹ Kachenga is interchangeably used with Mpilisi. These are names of the leaders of the Yao groups which occupied the area.
 - ² A mbumba is a group of sisters and their children under the “guardianship” of an elder brother. Anthropologists view it as the smallest matrilineal group or ‘effective minimal lineage’.
 - ³ The local word for hamlet is mudzi. The same word is used for the larger entity, the village.
 - ⁴ Former President Muluzi elevated Group Village Headman Kachenga Kazembe to the status of Sub Traditional Authority or Sub Chief in 2001 thereby creating a vacancy in the Group Village Headmanship. Thus there is Sub Chief Kachenga to whom Group Village Headman Kachenga reports. They are matrilineally related. The role of the Sub Chief in village matters does not seem to be very clearly defined and he is often accused of interference.
 - ⁵ Wetlands.
 - ⁶ ‘Certificates of Claim’ were issued by early Governors to European settlers who had obtained land from African chiefs by various agreements to legitimize their claims.
 - ⁷ Bridewealth usually paid in the form of head of cattle or cash equivalent.