

‘Land markets’ on customary land in Africa: Implications for land governance

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Abstract

Buying and selling of customary land is a phenomenon which has been reported in Africa for over a century now. Although many analysts observe that monetary transactions on customary land is not something new in Africa, they also agree that this phenomenon has now become widespread and almost a normalised form of transaction. However, reports of rampant sale of customary land contradict views expressed by many Africans in rural areas that customary land cannot be sold. In this context, there seems to be a disconnect between what people say and what they actually do. This paper examines this apparent disconnect, seeking to understand the meaning and impact of the reported sale of customary land. Drawing from a case study conducted in two rural districts in Zambia, the paper shows that the growing monetary land transactions in customary areas have serious implications not only on land governance but the broader governance and social order in rural communities. One of the obvious impacts is that the local systems of governance are weakened by the fact that monetary transactions involving customary land are discrete (mostly informal) and less amenable to regulation by local institutions tasked with land administration. The paper argues that in order to understand the apparent disconnect between what people in rural communities in Africa say and what they are doing when it comes to the sale of customary land, one has to locate this in the broader context of the convergence of two different land traditions (the European and African) which are pulling in different directions.

Keywords: customary land, land sale, traditional leaders, land markets, land transactions, Africa

1. Introduction

The phenomenon of 'selling' and 'buying' customary land in Africa has been reported by many researchers for a long time. Although many analysts agree that monetary transactions involving customary land is not something new in Africa (Chimhowu and Woodhouse 2006, 2005, Chauveau *et al.* 2006, Colin and Woodhouse 2010, Otsuka and Place 2009, Chitonge *et al.* 2017, Colin 2018), it has been observed that this phenomenon has now become widespread and almost 'normalised' (Holden and Otsuka 2014). In other words, 'buying' and 'selling' land under customary tenure has become a commonplace transaction, just like any other. While some of the studies on this topic have touched on urban land, majority have focused on transactions on rural customary land (both sale and rental transactions). The practice of selling customary land has generated interesting but controversial debates, raising critical questions such as, what exactly is being transacted when one buys customary land? Does buying customary land have the same meaning as a standard commercial transaction? These questions arise amidst claims by many Africans in rural areas that customary land can neither be sold nor bought; it belongs to the community. Given widespread reports by researchers that the selling of customary land in many African communities has become a common phenomenon, there seems to be a disconnect between what people say and what they practice. It is thus important to explore this seeming disconnect between what people say they believe in and what they do. In this paper I explore this disconnect and try to understand what is happening and how we should interpret this seeming contradiction.

I argue that to understand the apparent inconsistency between what people in rural communities in Africa say and what they are doing when it comes to 'selling' customary land, it is important to take into account the collision of two different traditions which seem to be pulling in different directions: the widespread belief among most Africans that customary land should not be sold like any other property or commodity, and the belief that land is a commodity (commodification) just like any other, and should therefore be an object of monetary transaction. In this paper, I focus particularly on the reportedly growing phenomenon of monetary transactions on customary land (see Chimhowu 2019). I draw from an ongoing regional research on Land Use and Rural Livelihoods in Africa Project (LURLAP) to examine the nature of these transactions and their implications on land governance in Africa, particularly customary land. The paper focuses on questions around what is being sold in transactions involving customary land? What types of rights are exchanged? What are the effects of subjecting customary land to monetary transactions? What are some of the factors which account for the alleged rise in monetisation of land transactions on customary land? Is the belief that customary land should not be sold mere rhetoric? What is the impact on the social fabric in rural communities?

2. The customary land sale debate

2.1. Customary land is not for sale?

Several analysts who have examined the phenomenon of transactions involving customary land have for a long time been intrigued by the fact that while there is strong belief among many Africans residing on customary land that the land should not be sold, they often do the opposite. They deviate from this strongly held view and engage in the ‘selling’ of customary land. Meek (1946) for example observed that ‘Chiefs and elders will often assure you that it is against tribal customs to sell land; yet a glance at the court records may show that the buying and selling of land has been going on for many years.’ In Malawi, a similar situation is reported around the sale of customary land, with some analysts arguing that, ‘In principle [customary] land cannot be sold, but if proper procedures are followed it is done’ (Berge *et al.* 2014: 65). As Meek (1946) observed, even though most African traditional leaders and clan members maintain that customary land cannot be ‘sold’ or ‘bought,’ evidence on the ground shows that monetary land transactions on customary land have been a common practice among many African communities for some time. Anthropologists who have done work in rural communities have long argued that monetary land transactions in customary areas have been reported in different parts of Africa including among the Sukumas in Tanzania, the Sokoto in Nigeria, the Nubia in Sudan, the cocoa growing areas in Cote d’Ivoire and Ghana, way before colonial regimes were established in Africa (see Moyo 2008).

Analysts have argued that although the nature of transactions on customary land differ from community to community, the transfer of customary land involving some form of payment (in cash or kind) has been observed in many parts of Africa even before the beginning of colonialism. For example, Kenyatta (1962 [1938]) in his study of the Gikuyu in Kenya reports that as population among the Gikuyu grew, they started to ‘buy’ land from the neighbouring tribes of the Ndorobo who were willing to ‘sell’. ‘After land was bought from the Ndorobo, any man who held such land, through purchase or inheritance, had full rights to sell it outrightly or give it to any one as he liked without consulting any one, except the elders who acted as ceremonial witnesses in all land transactions’ (ibid, 32). Although this practice of selling and buying customary land among the Gikuyu and their neighbours refers to the period before colonial land institutions and frameworks were established, transactions involving customary land became widespread with the introduction of money and individual titles.

As I show in this paper, even today, there are many people in rural Africa who still believe that customary land should not be sold although they, in practice, sell the same land they say should not be sold. Even in communities where the chiefs and village heads have issued strong instructions prohibiting the sale of customary land, we get reports of people selling the land. Sometimes even the chiefs themselves are alleged to be involved in the selling of the land which they tell people should not be sold. If the selling of customary land is more common than we have been made to believe, it is important to explore what is behind this seeming oxymoron. In the context of reports that this phenomenon is now

prevalent in many communities across Africa, it is important to explore what the implications of this practice are on the future of customary land and the governance of rural communities. In the debates on land markets, the focus has been overwhelmingly directed to the impact of these transactions on productivity (see Holden *et al.* 2009), growth and poverty (Deininger 2003) and security of tenure (Migot-Adholla and Bruce 1994). Little attention has been given to the impact of the emerging 'land markets' on customary land on land governance and the broader social dynamics in the rural communities.

2.2. 'You cannot sell customary land, but...'

When researchers ask people residing on customary land in many parts of Africa about whether one can purchase or sell the land, the common answer one gets is 'it is against tradition to sell customary land.' In the study conducted in Zambia in two rural districts, most residents stated clearly that selling customary land is forbidden. In one of the focus group discussions, we asked participants about whether people in the communities sell part or all of their customary land, and the common response was that customary land cannot be sold; the land belongs to the community. Other participants argued that customary land cannot be sold because it belongs to the chief and the village head. However, some respondents qualified this by saying that, 'Tradition does not allow to sell land, but if one has financial problems, he can sell a portion' (LURLAP Interviews 2016). Analysts who have done research in different parts of Africa have observed similar situations where local people believe that customary land cannot be sold and yet many of them are transacting on customary land in ways which resemble selling (Biebuyck 1963, Feder and Noronha 1987, Chimhowu and Woodhouse 2005, Chauveau and Colin 2010, Colin 2018). As illustrated below, it is important to understand what selling in this context means. Perhaps the term selling is misleading here, in that it signals a different set of relationships from what most Africans mean when they argue that customary land cannot be sold.

It seems that members of the community who argue that customary land cannot be sold are basing their argument on a different understanding of what customary land is as elaborated on later in the paper. The fundamental principle that these residents are invoking when they say that customary land cannot be sold or bought is that of the inalienability of customary land because of its embeddedness in intergenerational relations (Okoth-Ogendo 1989).

2.3. Land markets and the 'No Intrinsic Value' principle

There have been suggestions that the idea that customary land is inalienable can be attributed to the *mystical* conceptualisation of land in Africa, linked to ancestors and the supernatural world (see Colin 2018: 4). The inalienability of customary land is also closely linked to the widely held view in African rural communities that land in itself *has no value* apart from the developments made on it. This is one of the reasons often given for not selling the land. In other words, in the African traditional system of thought the belief that land has *no intrinsic value* implies that it is not treated as a commodity which can

be a subject of commercial exchange or exchange for gain. When one is operating in this world view, it makes sense to argue that land cannot be sold in the conventional sense since selling entails an exchange of value or rights in property.

In the traditional African thought, land is given to someone who requests for it, and the giver of the land is not expected to ask for payment because the person requesting for land is not understood as buying the land, since there is no value to sell. The no-value principle is intricately linked to the belief in the inalienability of customary land in the sense that because land is embedded in social relations, it is not a property that can be isolated for personal exchange. This view is also evident in the idea that land is too valuable (invaluable) to attach a value or price to it. It is like life which is priceless, precisely because it is too valuable to be dispensed through a commodity exchange process.

2.4. Is customary land a colonial creation?

The debate about the belief that customary land cannot be sold or bought is sometimes attributed to the influence of the colonial policy of denying individual property rights in land to natives. According to this view, customary land and the current norms adopted in many rural African communities is largely a construction of the colonialists in their bid to sustain *indirect rule* (Meek 1946, Colson 1971, Mamdani 1996). What is meant by this is that there is nothing traditional about what we refer to today as customary land norms or tenure; what we have today is largely a distorted version of the original traditional land norms and practices. Those who subscribe to this view argue that the colonial regimes in different parts of Africa gave more power over land to traditional authorities as a mechanism to maintain control over the rural population, adding that the prohibition of sale of customary land had nothing to do with customary norms or traditions around land (see Bassett 1993). Here the argument has been that the colonialists, in order to implement their policy of *indirect rule*, had to concentrate power over land in the traditional leaders (mainly the chief and villageheads) knowing that if traditional leaders have control over land, it would be easy to control the rural population. It has been argued that it is specifically because of this that the colonial governments across Africa, particularly in the British colonies, strictly prohibited the granting of freehold rights to natives, but only to settlers (see Meek 1946). In a sense, the British colonial advisers were aware of the power that comes with the control over land and warned against alienating customary land through individual freehold titles, a practice which they saw as a threat to the policy of indirect rule:

The authority of chiefs, sub-chiefs and heads of clans and families is bound up with the land. The grant, therefore, to individuals of absolute rights of ownership would tend to disrupt the native policy, and so, too, would the indiscriminate sale of tribal land by chiefs. The control of alienation of land has in consequence been one of the planks of the British system of Indirect Rule (Meek 1946:10).

Critics argue that, in effect, the colonialists 'created' customary land and gave it the mystical idea of collective or communal rights such that it precluded the assertion of individual rights, including the right to sell the land. Mamdani (1996) and Agbosu (2000), for instance, have both argued that the deposition of ownership rights in the traditional leaders is one of the major distortions introduced by the colonial land tenure system in Africa, a distortion that post-colonial African governments have conveniently inherited and endorsed.

2.5. Customary land tenure a barrier to land markets

Analysts who support this view argue that had it not been for the colonialists' 'manufacture of land norms' in Africa, land rights would have evolved differently such that transfer of land rights would not be shrouded in the mysticism of communal land rights (Feder and Nisho 1999). Most analysts who want to see the emergence of land markets in rural Africa argue that it is the mystical nature of customary rights which accounts for the disconnect we are seeing in many African communities where people say customary land cannot be sold and yet they engage in selling customary land. According to this view, the lack of clarity that this has generated has, in a sense, blocked the emergence of formal land rights and markets in most parts of rural Africa. Some analysts have even gone further to suggest that the failure to create conditions for the development of land markets in rural areas has acted as a barrier not only to the efficient use of the land but also to the development of infrastructure in rural areas leading to low investment and the perpetuation of poverty (Deininger 2003, Feder and Noronha 1987). Analysts who support this view contend that perpetuation of customary tenure has blocked the realisation of the massive potential of land in Africa (see de Soto 2000). For these analysts, the seeming disconnect between what residents in customary areas say and what they do is a direct outcome of restricting the development of markets.

3. Land in African thought system

While some analysts point to communal land rights as the main reason for the disconnect reported in many African communities, there are analysts who explain the apparent disconnect by drawing from the African concept of land. They point out that understanding land from an African perspective helps to appreciate the complex nature of land rights in Africa (see Akufo 2009). These analysts argue that the mysticism attributed to land relations in Africa is a result of the failure to understand how land in Africa is conceptualised. Land in African thought is defined by a clear distinction between the *solum* (*solum*) and the *things that grow* on or attached to it. It has, for instance, been argued that there is (maybe was) 'a clear separation in African thought and law between the *solum* and any *manifestation*, such as crops, trees and buildings which symbolises human interaction with it' (Okoth-Ogendo 1989: 8). In the African worldview, the *solum* is regarded as the mother from which everything arises and returns. This is linked to the principle of the inalienability of land mentioned earlier. While things attached to the *solum* can

be alienated and owned by individuals, the *solum* itself is an integral part and a key definer of the community, broadly understood to include the past, present and future generations. It is in this sense that the *solum* is inalienable and priceless or without value (Agbosu 2000). Seen from this angle, it becomes clear what people mean when they say that customary land cannot be sold.

There are two key fundamental implications of this conceptualisation of land in terms of the land market debates. First, the soil as the mother cannot be owned by anyone; people can have the right to use it but not to own it in the sense of a property that can be owned by an individual. Secondly, following from the first, since the soil is so central in the African world view, it is so valuable that no price can be fixed on it to capture its value—it is invaluable just like one cannot put a price on motherhood. As noted above, some analysts argue that this approach leads to the mystification of land in Africa which has acted as a barrier to a clear delineation of rights and relations around land, and in turn has prevented the emergence of formal land markets and the benefits that come with that. Others argue that this conception of land is not typically African, it is a common feature of traditional societies in other parts of the world which have not transformed the traditional value system (Colin 2018). Some have argued that the fact that this is still prevalent in Africa is a sign that the continent has not yet transitioned from traditional to modern social organisation (Feder and Noronha 1987).

3.1. The collision of two world views: The African and European conception of land

Analysts who draw from what they regard as the African cosmology disagree with the view that the African land system has not transitioned to modern systems of land relations. Okoth-Ogendo (1989) for instance argues that such a view fails to grasp the African conception of land because it focuses on *man-to-land* relation when in actual fact the real relations around land are between people. He argues that to understand the conception of land in Africa one must understand the African world view in which land and land relations are embedded. As Akufo (2009) explains, the conception of land in most African societies is deeply embedded in the complex social relations which define access to land and the exercise of power over land. This is fundamentally different from the European conception of land where it is seen as a property (commodity) like any other. In the European system, all land, like any other property, has to have an ‘owner’, in whom absolute ownership (property) rights are deposited. Consequently, in the European system of rights, the most important right is the right to dispose of any property, including land, at will. As such, land tenure in the European system, is conceived as a set of clearly delineated rights and claims that one holds in land with the ultimate right being the disposal right. On the basis of this, the rights in land that one has can be sold on the market like any other property rights. Given this approach to land, it is difficult for a European to come to terms with the African idea where land is not about the property one has, but about how one relates to other people. The African understanding of land is more complex and goes beyond the reductionism of seeing everything as commodity.

3.2. The land ownership trap

Scholars who adopt the African conception of land argue that while the colonial governments across Africa distorted the traditional land relations by installing traditional leaders as the owners of the land, the reality of land relations in Africa is complex due to the communitarian nature of the African world view (see Agbosu 2000). This is why before the colonisation of Africa it was only the collective (family or community in the broader sense) that could own land in the sense of absolute ownership; not even the chief had ownership rights to the *solum* (Agbosu 2000, Mamdani 1996, Okoth-Ogendo 1989). When the colonialist arrived in Africa, they transported the European concept of ownership to Africa and totally overlooked other forms of ownership (Chanock 1991, Bassett 1993). This led to collision of two different land systems which has created not only confusion around ownership, but tension and conflict between them:

the transposition of Western (Roman-Dutch/civil law and Anglo-American) property concepts and terminology in the analyses of African processes is a veritable source of confusion. The characterisation of property concepts and legal relationships using Western analogies and paradigms is perhaps understandable but has nevertheless, led to an unnecessary degree of confusion with wholly negative practical consequences such as destructive litigation over land titles and land alienation (Akufo 2009: 62).

One of the tangible outcomes of this collision is what Okoth-Ogendo (1989) refers to as the 'ownership trap'. In a fundamental way, the tension arising from the collision of the two land systems accounts for the apparent disconnect between the strong belief common among many Africans in rural communities even today that customary land cannot be sold, on the one hand, and the now prevalent practice of selling customary land, on the other. This disconnect is a result of confusing two different systems. The idea that customary land cannot be sold makes perfect sense when one is operating in the African system of thought, while at the same time, the selling of customary land makes perfect sense when one is operating in the European system that sees land as property just like any other. As a result, residents in most rural communities who sometime try to combine these two systems are struggling to reconcile the tension between the two systems—leading to the observed disconnect.

One of the main reasons why outright sale of customary land in Africa has been restricted by both traditional authorities and post-colonial African state is that it leads to the well-off members of the community buying most of the land, a situation that creates highly unequal distribution of land (Holden *et al.* 2009). From this point of view, there are fears that if land markets on customary land are allowed to develop without being regulated in some way, it could lead to loss of land especially among the poorest members of community who might engage in *distress* selling of the land (Holden and Ostuka 2014). Arguably, the restriction or complete ban on the sale of customary land, which many post-

colonial African governments adopted, has been justified as a means to prevent inequality in the distribution of land (Chanock 1991) and landlessness (see Holden and Otsuka 2014).

4. Land market dynamics: The case of Chibombo and Chongwe district in central Zambia

This paper draws from an ongoing regional study of land and livelihoods in Africa. The paper is based on the case study conducted in two districts in central Zambia: Chibombo and Chongwe Districts, both bordering the city of Lusaka, on north and east respectively. The three chiefdoms where fieldwork was conducted are Chieftainess Mungule in Chibombo District, and Chieftainess Nkomesha and chief Bundabunda in Chongwe District. Data were gathered through in-depth interviews with key informants including members of the royal advisory councils, villageheads, zone chairpersons, and local residents including those who work in Lusaka and other towns who have managed to ‘buy’ land in these communities. We also conducted 8 Focus group discussions (FGDs) in total. A short survey was used to collect complementary data on landholding, the prevalence of land sales, and land conversion from customary to statutory tenure. In total, 129 residents in the three chiefdoms covering 13 villages, participated in FGDs, in-depth interviews and in the survey.

4.1. Study sites

Both districts (Chongwe and Chibombo) are predominantly rural districts, despite their proximity to Lusaka. In both districts residents depend on small-scale farming, relying on customary land, except for a few scattered urban settlements. In this context, customary land is crucial because it is the major livelihood resource for majority of the people in these districts. Chibombo and Chongwe districts were selected for this study because of their closeness to the City of Lusaka. The two districts have experienced significant increase in demand for land in the last decade, and this presents a good opportunity to learn about the dynamics of land markets and their impact on governance in customary areas. Further, while selling of customary land is openly conducted in Chieftainess Mungule’s chiefdom, it is reported to be an underground activity in Chieftainess Nkomesha. The main reason for these differences is that there is no formal prohibition on the sale of customary land to ‘outsiders’ in Chieftainess Mungule, while in Chieftainess Nkomesha, selling of customary land is prohibited. In this context, it is interesting to examine if these different approaches engender different dynamics in the communities.

4.2. Selling of customary land

When we asked residents in our study area if they sell customary land, we got different answers. Some respondents made it clear that customary land cannot be sold or bought. One respondent told us that ‘Tradition does not allow the sale of land because the land belongs to the chief and the village head’ (LURLAP Interviews 2016). Other respondents reported that ‘we do not sell land because the land is

not enough to share or sell' (ibid). These views were quite common in Chieftainess Nkomesha where the sale of customary land is outrightly prohibited. In the other two chiefdoms in our case study area, residents reported that selling customary land is common especially for families with large pieces of land who sell part of the land to people from the city—Lusaka. One woman in a Focus Group Discussion confirmed this, saying that 'we have been approached by people who want to buy land, but we refused because we have children' (ibid).

When we asked residents why some of them are selling the land when they know that customary land should not be sold or bought, they reported that although they know that customary land is not supposed to be sold or bought, there are many people who sell land even in Chieftainess Nkomesha where this is strictly forbidden. 'All I can say is that it is true this activity of selling land is common. But the law is broken because customary land is not supposed to be sold' (Ibid). Some residents openly acknowledged that they had sold land, and saw nothing wrong with selling part of their land:

I sold a portion of my land to raise money and I have built a better modern house where I live. I retired in 1990, so I needed some money to improve my status and living conditions. People from Lusaka come to look for land to buy. So, we subdivide, sell and remain with plots for houses only. You can sell customary land then the owner converts the land to get a title. Some sell customary land to build houses, bring electricity to their homes and improve their living conditions (ibid).

From the responses cited above, it is apparent that the selling of customary land is a common phenomenon even though many respondents acknowledged that it is wrong to sell customary land. In all chiefdoms where we conducted fieldwork, the village heads confirmed that they do not allow residents to sell customary land because the practice of selling customary land endangers the existence of traditional authorities. One of the village heads noted that 'selling customary land threatens us because by converting the customary land into private land we are giving away our powers. Losing land will be bad for the chief because without customary land it means that we have no control, no power' (LURLP Interview 2016). Traditional leaders are well aware that their power lies in their ability to control the land and this is why they are opposed to the idea of converting land from customary to statutory tenure (Chitonge 2019). This is the main reason why some of the chiefs have openly banned residents from selling or converting land under customary tenure into leasehold tenure. However, this ban is being undermined by many residents who secretly sell land to outsiders. Some respondents pointed out that many people who are selling the land are doing it illegally without the permission of chiefs: 'The manner in which the selling of land is done is illegal because it is done without the knowledge of the chief' (LURLAP Interviews 2016). There are numerous reports in many African countries that some traditional

leaders (not all of them) are in the forefront of selling customary land (Chitonge *et al.* 2017, Ubnik and Quan 2008, Chimhowu 2019).

4.3. The nature of land sales in customary areas

Given that people believe and know that selling customary land is against tradition, it would seem that markets on customary land are clandestine markets by nature (Sitko 2010). This is especially so in areas where there is a formal ban on the sale of customary land. But in areas where there is no restriction on the sale of customary land, the transactions are done openly, sometimes with placards by the roadside advertising land for sale (see Chitonge *et al.* 2017). In such cases, the sale of customary land does not seem to be illegal or clandestine. However, it is important here to discuss the meaning of the term ‘selling’ which can be misleading if it is used indiscriminately.

In the African land system, land is expected to be given to anyone (local resident or outsider) who is a member of the community (see Mafeje 2003, Akufo 2009). Often the person who is given land is expected to give *a token of appreciation* to the benefactor, who could be a chief, village head or an ordinary resident. Even if in recent days this token of appreciation has taken mainly monetary form, the fundamental principle is that the person giving land is not supposed to ask for anything in return. In this sense, the transaction is not an act of sale which entails that one person (seller) sets the price that the buyer, after negotiation, agrees to pay in exchange for the item on sale. For many non-Africans, the giving of something as a sign of appreciation for being given land is widely interpreted as an act of sale; with some arguing that as long as this involves money, it is disguised sale (see Holden and Otsuka 2014). Here again we see that a concept of sale transported into African land relation system can lead to misunderstanding and create disconnect between what people say and what they do. The dangers of the indiscriminate use of borrowed terms was noted by some of the early anthropologists who argued that,

English terms such as ‘rent,’ or ‘lease’ have been employed to denote practices which bear only a superficial resemblance to those denoted by these terms. The gift given to chiefs as administrators of land have been assumed to be ‘rent’, and the chiefs to be ‘landlords’ (Meek 1946: 11).

It is therefore important to understand the context to these transactions to avoid drawing wrong conclusions about land sale. The risk of confusion grows when one is mixing concepts from different contexts.

Given that most of the transactions noted above take place on customary land, it is important to understand the nature of these transactions and the broader context in which they are situated. In the case of customary land transactions in Zambia, what is widely believed to be the sale of customary land is actually not the sale of land in the sense of transfer of property. What the person pays for in the

transaction is the right to have access to the land in the community; it is the right to become a member of the community in the traditional sense. Even in cases where the sale of customary land is permitted, what the supposed buyer is paying for is not the property in land in terms of the *solum*, but the right to be allocated customary land (Chitonge 2018). For outsiders who want land, the importance of paying for land is that it is only when a person has the right to access customary land that they can then use this right to seek permission from traditional authorities to convert the land (see *ibid* for details). Thus, the reported growth of monetary transactions involving customary land in Zambia can largely be attributed to the policy which allows customary land tenure rights to be converted into leasehold tenure. For instance, M'membe (2005) and Tembo (2014), have argued that the practice of converting customary land into leasehold tenure is responsible for the growing phenomenon of selling customary land.

4.4. Paying for the right to access customary land

The Zambian government, since the enactment of the *Lands Act of 1995*, allows customary land tenure rights to be converted to leasehold tenure. The effect of the permission to convert customary land is that the converted land is then administered through the Commissioner of Lands, which essentially means that the converted land is effectively removed from customary land administration. Most of the people who are 'buying' land in customary areas do so with the intention of converting the piece of customary land they are allocated into leasehold by obtaining a leasehold title (Chitonge *et al.* 2017). In this case, the transactions involving customary land which residents refer to as selling, are technically transactions in which the person seeking land is given the right to access customary land, not to purchase the land in the conventional sense. Most of the people 'buying' the land are paying so that they can have access to customary land and by virtue of this access convert the rights of access which they have into leasehold tenure. As Chitonge (2018: 35) argues,

It is important to note that customary land 'bought' or acquired by an outsider remains under customary tenure until the 'buyer' converts it to leasehold tenure. In this sense, what the outsider 'buys' is not strictly land, but the right to be declared a right holder (or a resident) with existing rights in customary land. This can be done even for people who are not resident in the community as long the person who is 'selling' customary land confirms that he or she has granted ('sold') part of his or her land to the outsider, and this process is officially endorsed by the village head.

Therefore, the market that is emerging in customary areas is not the same as the formal land markets where ownership rights are exchanged in a transaction. Outsiders who are buying customary land do not get a title or any formal document on the land; they are only 'paying' for the land with the intention to convert to a leasehold tenure. If they do not convert, the land remains customary land, administered by

customary authorities. If they convert, the land effectively becomes state land and can be formally transacted in the formal market. Thus, the nature of the market involving customary land is largely informal, which some analysts have referred to as *vernacular* (Chimhowu and Woodhouse 2006) or *clandestine* (Sitko 2010).

4.5. From a ‘Token of Appreciation’ to a ‘Price’

The informality of these transactions lies in the fact that the land relations which are a subject of the transactions are still embedded in the social relations under the traditional tenure system (see Colin 2018). The informal land markets in customary areas have made it possible for anyone who has money to negotiate and pay a local resident or chief to gain access to customary land. In the past, and in many other instances today, access to customary land was largely tied to membership to a clan, family or community (see Mafeje 2003). Access to land for outsiders was restricted to those who became part (members) of the community. It was not impossible for an outsider to access customary land, but access was restricted depending on whether the new comer is willing to be part of the community (Chanock 1991). Under such circumstances, the land was given for free; no payment was expected from the new comer or outsider because the person was not seen as buying land in the ordinary sense of the term with powers to abuse or dispose of the land as he or she wished. Because the person who was allocated land was understood to have the rights to use the land as long as he or she remained a member of the community, whatever the person gave in appreciation for being given the land was seen as ‘a token of appreciation’. It did not matter whether this was in cash or in kind.

But the emergence of a quasi-land market has changed this practice to a full-blown monetarised transaction such that the person who is giving with the land can stipulate not only the form of payment, but the amount as well. It is in this sense that the transactions resemble a market transaction (Chitonge *et al.* 2017). But this is a distortion of the traditional African land relation norms. What this has meant is that access to customary land is now open to everyone who has the means to pay for the land regardless of whether the person wants to be part of the community and participate in the social and cultural activities of the community or not. In fact, most of the people buying land in customary areas, do not actually stay in the community; they end up hiring a caretaker to look after the land (LURLAP Interviews 2016). It is in this sense that the dominant approach to land has shifted from the African to a European system of commoditisation. The disconnect that researchers in different parts of Africa pick when it comes to selling customary land is a direct product of the conflation of the African and European conception of land.

5. Reasons why people sell customary land

5.1. To improve living conditions

As evident above, residents in customary areas give different reasons why they sell customary land.

Most residents mentioned the fact that they sell part of the land and use the money they get to improve their living conditions and livelihoods. They argued that since there are many people from Lusaka and other urban areas who are willing to pay for the land, they see this as an opportunity to improve their living conditions. Focus group discussion participants acknowledged that those with large plots sell part of their land to build new houses, renovate old and crumbling houses or connect electricity to their homes. A number of residents argued that there is no reason why they should keep a lot of land when they can derive some benefit from the land by selling it to those who want.

5.2. Distress selling

The other common reason mentioned by local residents why they sell land is when people have financial problems. One respondent noted that 'our tradition here does not allow us to sell land, but if one has financial problems, he can sell a portion' (LURLAP Interviews 2016). Another respondent reported that 'We have different problems. Sometimes you may encounter problems and selling of the land becomes one thing to do. That happens too' (ibid). This may suggest that some of the land is sold under financial distress which is common in low-income households with limited access to credit or other sources of income (see Holden *et al.* 2009).

Distress sales is one of the reasons why government policy in most African countries in the past restricted land markets to prevent poor household on customary land from being deprived of the only means of livelihood. But it seems that traditional leaders who ban the sale of customary land do it as a *social reproduction* mechanism to ensure the continuation of their power and control. As noted above, some of the traditional leaders are aware that selling customary land may in future undermine not just their source of power and control, but their existence as well. As one village head noted, 'if the induna (village head) does not have land then there is no use of being the induna in my opinion. Because removing land from the induna and the chief means getting authority and power from them and in the end culture will be disturbed'(LURLAP Interviews 2016). While traditional authorities are concerned about the negative impact that a full-blown land market may have on their power, the main concerns for policy makers is the real risk of landlessness as a result of distress selling (Deininger 2003, Holden *et al.* 2009).

5.3. Threat of urbanisation

The other main reason which many respondents in the case study areas mentioned why they sell customary land is the threat of urbanisation. This concern was particularly strong in Mungule area where the expanding Lusaka City has previously swallowed parts of customary land. The fear among the local residents on customary land is that since they are occupying land without title or any document to show that they have rights to the land, it is very easy to be displaced from their land when the city expands. So, they sell part of their land to build houses as a form of security since it is not easy to displace

someone who has developed the land. One of the village-heads we interviewed argued that people from Lusaka ‘are rich and they have money to buy all the land from us. This is why we encourage our people to get titles because of the fear of being kicked out of the land’ (LURLAP Interviews 2016). However, although local residents have been encouraged to get titles as a form of security, only a few have managed to get title deed for the land they currently occupy and use. This is mainly attributed to the high costs of obtaining a title (see Chitonge *et al.* 2017).

6. Customary land sales and the evolutionary theory of land rights

In trying to explain the phenomenon of land markets, analysts often draw from the evolutionary theory of land rights. According to this theory, land markets are bound to emerge over time as population rises and the demand for land grows (Demtsez 1967). Proponents of the evolutionary theory of land rights such as Harold Demtsez (1967), Johnson (1972), Boserup (1965), see the shift towards individualisation of customary tenure as a *natural* process driven by various factors including population growth, commercialisation of agriculture, land scarcity, economic growth and technological change. This theory asserts that the change from communal to individual private tenure is a positive development since private tenure is seen as a more efficient and more productive form of landholding (see Johnson 1972, Demtsez 1967). For example, Harold Demtsez’s (1967) paper argues that property rights are an instrument for society to increase the internalisation of externalities or simply the reduction of transaction costs. According to this view, the ‘primary function of property rights is that of guiding incentives to achieve a greater internalisation of externalities’ (Demtsez 1967: 348). Externalities in this sense are understood as those costs and benefits (monetary or non-monetary) which are external to a land transaction between two or more parties. It is argued that defining and clarification of property rights is the most effective way of internalising these external costs.

In cases where such rights are not clearly demarcated, it is difficult to internalise externalities to land transactions, giving rise to higher transaction costs (see Deininger 2003). In order to establish mechanisms through which transactions costs can be internalised effectively, ‘the cost of transaction in rights between the parties ... must exceed the gains from internalisation’, otherwise there will be no incentive for the parties involved to embark on this arrangement (Demtsez 1967). In the case of land, the broader argument is that clearly defined individual rights in land lead to increased efficiency in the allocation and use of land since the costs and the benefits are clearly accounted for. For instance, it has been argued that, ‘Where private property rights exist and at the same time these rights are clearly defined and have legal and tenure certainty, there is complete internalization of costs and rewards, and the private and social profitability of investments in and attached to land coincide’ (Johnson 1972: 273). But these clearly defined rights emerge over time due to social and economic pressure, evolving from the unclear rights in traditional society.

6.1. From customary to individualised landholding

The key idea in the evolutionary theory of land tenure and property rights in general is that as the pressure from commercialisation, population growth, technological advancements and economic transformation increases, customary norms that regulate access to land and other resources become inadequate to cope with the new socioeconomic conditions. Advocates of the evolutionary theory of land rights would, for instance, argue that the emergence of informal land markets in customary areas is a natural process induced by factors including rising population and economic growth. The land market is thus seen as an inevitable consequence of the changing social and economic conditions in society as a result of the growing economy and commercialisation of agricultural, all of which give rise to rising demand for land (Demtsez 1967: 350).

As Chitonge *et al.* (2017) observe, in the evolutionary theory of land rights, customary land tenure is seen as a transient phase of landholding, which is expected to give way to individualised landholding arrangements. With specific reference to customary land in Africa, it has been predicted that the spread of market relations on the continent 'will eventually produce a land tenure system that, while not identical, will bear a strong resemblance to the western concept of ownership' (Bruce *et al.* 1994: 262). Often the evolution of customary land tenure into more individualised forms of tenure is seen as a linear process leading to greater integration of customary land relations into market transactions (see Yngstrom 2002). Proponents of this theory would argue that the informal land markets we are seeing in Africa will eventually evolve into more formal markets with clearly defined rights in land.

But evidence to support this view has been weak. In Africa, particularly, a linear progression from either communal to individual ownership or to full blown land markets is not borne out by the evidence on the ground. For example, although the existence of land markets in customary areas has been reported over a century ago, customary land tenure has remained quite resilient, constituting close to 75 percent of total arable land on the continent, on average (Wily 2011). Critics of the evolutionary theory of land rights warn that experience from cases where individualisation through titling or other forms of land formalisation have been implemented show that this process often negatively impacts on the poorer members of rural communities (Cotula *et al.* 2009, Platteau 1996, Bassett 1993, Okotho-Ogendo 1993, Shipton and Goheen 1992, Yngstrom 2002).

In terms of the steady progression towards more private individual land rights, it has been observed that,

...in many parts of Africa, this does not appear to be occurring. Although increased commercialisation and land scarcity may have provoked private claims on land, evidence show[s] that ...even in areas of commercial agriculture where there is evidence of land markets, the landholding systems remain tightly bound up with kinship institutions (Yngstrom 2002: 24).

Chanock (1991), for instance, argues that the evolution of customary tenure relations in Africa is not a straight forward linear process. It often involves a gradual shift to a situation where informal land markets exist side by side with the formal ones. The combination of contractual arrangements and traditional practices is still evident today in land dealings in many parts of Africa. While there are some indications that new forms of tenure, amenable to market relations are on the rise in many parts of Africa (Chimhowu 2019), the emergence of these relations is far from being a linear process where everyone willingly accepts the spread of markets to customary land. There have been communities and governments which have opposed and reversed the drive towards land markets on customary land.

7. Implications on land governance

In the context of the increasing monetary transactions on customary land discussed above, it is important to assess the implications regarding the governance of land in customary areas. Here I only highlight a few issues arising from the study areas.

7.1. Traditional leaders' loss of control over land

One of the common implications of land markets on customary areas is that traditional authorities lose control over land. This happens at two levels. Firstly, as noted above, when customary land is converted to leasehold tenure, even if it remains in areas surrounded by customary land, it is effectively removed from the purview of customary authorities. In other words, even if the land physically remains in customary areas, surrounded by customary land, it is not under the control of the traditional authorities. This was raised by many respondents who pointed out that the people with title deeds in the areas are not controlled by the village head or the chief. As one respondent observed, 'if you have a title, the land is yours, the headman or chief cannot touch you. No one can evict you from titled land. You have control over the land you own' (LURLAP Interviews 2016).

However, other respondents disagreed with this view and argued that even if you have a title, the land still belongs to the village head and the chief, although they did admit that the village head often does not interfere with those who have titles. For instance, those with titled land usually fence their plots, a practice which those on customary land are not permitted. Respondents confirmed that when those with title deeds fence their land, the village head cannot do anything. This is the second way in which the loss of control by traditional authorities occurs. For residents under customary land the traditional authorities have total control such that those who are not following the rules of the community can be evicted from their land. This is not the case for people with title deeds to their land; it is difficult to bring them under the control of traditional leaders.

But, some members of the communities where the research was conducted argued that the village head can report a person with title, who is not cooperating, to the chief and have his or her title revoked: 'A difficult person who has a title can be reported to the chief, and if he is failing to cooperate with the

community his title can be revoked' (LURLAP Interviews 2016). We asked residents if any of the people with title deeds have had their titles revoked by the chief, and they reported that this had not happened, although they insisted that the chief has the power to revoke a title on land within his or her area. In principle, even if the chief were to revoke a land title in his or her area, it would have to involve the Commissioner of Lands who issued the title; the chief can not revoke the title issued by a statutory institution. In this way, traditional leader lose control over the governance of customary land which is titled.

7.2. Weakening social cohesion

The other implication of the growing monetary transactions involving customary land is that it affects social cohesion. Many of the respondents in this study area reported that those who have managed to get titles have become cheeky and arrogant because they do not want to participate in community activities (LURLAP Interviews 2016). The administration of customary land and the maintenance of social order in many rural communities has heavily relied on local residents' acceptance of cultural norms and practices (see Mafeje 2003). In cases where the people buying land in these communities are not willing to accept the local cultural norms, this can lead to tension and disorder in the communities. A number of respondents in our study area noted that some of the people who have bought customary land and obtained title deeds disregard the local cultural practices. Residents in Chieftainess Mungule observed that many of the people who have title deeds do not contribute to the local cultural ceremony of *Kulamba Kubwalo* which is celebrated annually (LURLAP Interviews 2016). This situation is compounded by the fact that not all the people who are buying land in customary areas accept the local cultural norms. This might lead to the problem of not just land governance, but the maintaining of harmony and social cohesion in the communities. For example, a Chinese guy who buys land in these areas is not interested in the local cultural ceremonies or practices; he or she is there to make money and his or her main concern is to ensure that the business succeeds.

7.3. Uncertainty in land governance

The way customary land is being parcelled out and converted into leasehold tenure creates challenges in terms of land governance. This is so because customary land is not converted to leasehold tenure in an organised manner. What is happening is that small and isolated pieces of customary land are converted into leasehold tenure. As such the land which is eventually titled is surrounded by customary land such that what you have are pockets of titled land in the sea of customary land. If the titled land is administered by the formal state structures, this creates a problem in terms of the enclaves of leasehold land within customary areas. Given the capacity constraints of the state departments responsible for land administration and management in many African countries (see AU/AfDB/ECA 2010, Platteau 1996), coordinating land governance in this context becomes a challenge. In Zambia, the state has tried to evade

this complication by arguing that converted customary land does not change its *status*; it still remains customary land, only the *tenure* changes. But this is surely an academic argument which has little practical implications on the ground as some analysts have observed (see Chitonge and Umar 2018). Under the current system where customary land is separately administered from state land, the situation of having pockets of titled land in customary areas creates a huge land governance challenge. One of the best ways to address this challenge is to come up with a single land administrative structure that covers both state and customary land. But this has been a big hurdle for most African governments; they have found it easier to maintain the dualism introduced by the colonial regimes.

7.4. Weak land governance

As land markets spread to customary land, it is becoming evident that land governance mechanisms and instruments in customary areas are weakening. Land governance, if understood as a systematic approach to regulating relations around land (Chauveau *et al.* 2006), is strengthened when there are mechanisms to administer and manage land in a coordinated manner. This often entails the synchronisation of the different structures and mechanism to create coherent and strong leadership. But in a situation where formal markets are operating a long side informal markets, the situation leads to the weakening of land governance because the two systems are not in sync. This weakness manifests itself on the ground where the land rights of the poor people are undermined and difficult to protect precisely because it is difficult to coordinate and regulate the informal market. As it has been argued,

Weak governance leads to weak tenure systems, often depriving individuals and communities of essential rights and access to land and other natural assets and contributing to poor land and resource management practices, which further degrades the limited resource base (USAID 2015).

While most African states' reason for promoting land reforms, particularly land governance, should be to protect the rights of poor rural residents and ensure that there is equitable access and sustainable use of the land (AU/AfDB/ECA 2010), the growing monetary transactions on customary land is weakening the land rights of individuals and groups in these communities. This is why there is need for strong governance of land in customary areas to protect and strengthen the rights of the poor.

8. Conclusion

This paper has examined the phenomenon of land markets involving customary land, drawing from a case study conducted in two rural districts in central Zambia. The paper has shown that the spreading of monetarised transactions into customary land has serious implications not only on land governance but the broader governance and social cohesion in rural communities. Local systems of land governance are

weakened by the fact that transactions involving customary land are informal and less amenable to regulation by state institutions tasked with land administration. If effective mechanisms are not found to address this challenge, the situation may threaten the existence of traditional systems and social cohesion in rural communities.

The paper has also discussed the seeming disconnect between what people residing in customary areas believe and what they do when it comes to the issues of sale of customary land. The paper has illustrated that this disconnect is a direct outcome of the collision of African customary and European concept of land. While most people residing in customary areas report that traditional norms do not allow the sale of customary land, the sale of the land under customary tenure is reportedly a growing phenomenon, not just in the study area but in many parts of Africa. This can be attributed to the emergence of land markets in customary areas which is certainly a domination of the European conception of land over the African land thought system. Although the growth of land markets in customary areas is seen widely as an inevitable consequence of the modernising African societies, it brings with it several negative developments including the concentration of land ownership and displacement of poor residents. It was for this reason that most newly independent African countries prohibited the outright sale of customary land, except under regulated conditions. In order to prevent the growing land markets from disrupting social order and land governance in these communities, these developments have to be addressed systematically through policy. Even then, regulating informal land markets in customary areas will be challenging given that most of the dealings are concealed.

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