



Responsible Land Governance: Towards an Evidence Based Approach

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WOMEN LAND AND PROPERTY RIGHTS IN KENYA

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Abstract

While women's rights to land and property are protected under the Kenyan Constitution of 2010 and in various national statutes, in practice, women remain disadvantaged and discriminated. The main source of restriction is customary laws and practices, which continue to prohibit women from owning or inheriting land and other forms of property. Customary practices in Kenya generally grant women secondary rights to land, namely through their relationships to a male relative; women are rarely able to inherit land in their own right.¹ Kenya has undergone legal reforms that are geared towards granting Kenyan women equal inheritance rights. This paper highlights some of the key challenges that women face as a result of customary practices while at the same time looks at some of the legal reforms that promotes women's rights highlighting gaps that still exist.

Key words: customary practices, women's land rights, Kenya, formal equality, substantive equality

Introduction

The need to strengthen women's access to land and property has elicited a lot of discussion especially from a background of African customary law. In Kenya particularly, there have been a number of attempts to reform family laws but, on the whole, this has not been very successful. In 1967, two commissions were appointed to review the laws on marriage and divorce, and another to review the law of succession.² From this process only the Law of Succession Act was operationalized in 1981. Nevertheless, the women land question in Kenya is not only based from an inheritance point but also ownership. The 2010 Kenyan Constitution changed the discourse on land ownership by shifting it from its sexist and patriarchal underpinnings to an equality point of view. Article 60 (f) of the 2010 Constitution calls for elimination of gender discrimination in law, customs and practices related to land and property in land. The 2010 Constitution has been an achievement for the Kenyan women and the country as a whole given its gender neutral and sensitive language and express affirmation of women's rights. Indeed women's right to land is a critical factor as it not only empowers women but also improves their social status and economic well-being. Despite the legal and policy reforms, women's economic well-being continues to depend largely on their rights in marriage, divorce and inheritance, while their rights to land ownership have increasingly been neglected.

¹ Hakijamii, GI-ESCR, FIDA (2016) Joint Shadow Report To The United Nations Committee On Economic, Social And Cultural Rights, 57th Session

² (1973) 9 East Africa Law Journal 77

The 2010 Constitution, also guarantees gender equality under national values and principles of governance which include equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.³ The 2010 Constitution only permits customary law to the extent that they are not inconsistent with it; any act or omission in contravention of the Constitution is invalid. A case in point here is *Rono vs Rono*⁴ which brought an interesting dimension to succession where the High Court took customary law into account but the Court of Appeal held that customary law was no longer applicable following the coming into force of the Law of Succession Act. In the first instance the women had been prohibited from inheriting the property on account that they are women and would soon leave and get married elsewhere thereby acquiring the properties of their husbands. It was held that this amounted to discrimination with the appellate judges holding that children are children for the purposes of succession whether male or female. This is the position that the Law of Succession Act subscribes to and the international laws against all forms of gender⁵ discrimination which Kenya has ratified and subsequently form part of the laws of Kenya as per Article 2 (5) of the 2010 Constitution. Kenya has been a signatory to these instruments but their enforcement was a challenge given they were not recognized in any domestic law, but this is no longer the case.

There have been some reforms in family law that saw the Marriage Act of 2014 enacted and the Matrimonial Property Act 2013 replacing the Married Women Property Act 1882 which was adopted from English common law and did not hew well with the contemporary Kenyan context given that it was passed over 130 years ago. Some of these international instruments include the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979.⁶

Articles 2(2) and 3 explicitly prohibit sex-based discrimination in the enjoyment of the rights contained in the ICESCR. Further, in its General Comment 16 on the equal rights of men and women, discrimination was defined to mean “any distinction exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights” CEDAW is unique among existing human rights instruments because it is concerned exclusively with promoting and protecting women’s human rights which operates from the premise that patriarchy is a global reality. It is the most important legally binding international document concerning the human rights of women. CEDAW is sometimes referred to as the

³ Otieno. O Vincent, Women and Land Rights under the Kenyan Constitution, https://www.academia.edu/6863162/Women_and_Land_Rights_under_the_Kenyan_Constitution

⁴ [2005] 1 EA 363

⁵ Ibid., 4

⁶ Alice Edwards, (2009) Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women, retrieved from <http://www.unhcr.org/4a8d0f1b9.pdf>

international bill of rights for women as it offers the most comprehensive coverage of women's rights for both public and private spheres by bringing together all conventions and treaties that protect and promote the rights of women. Under Article 14 of CEDAW, states are obliged to ensure equal treatment of men and women in land and agrarian reform, it also give particular reference to rural women. It goes on to state that women are equal to men before the law and women must be given equal rights to conclude contracts and to administer property to guarantee legal autonomy. Article 16 of CEDAW states that land tenure reform must ensure women's property rights during marriage, at divorce and in the event of her husband's death. This provision is mirrored in the Kenyan Constitution.⁷ All these strengthen the case of women's right to property ownership in Kenya.

Despite these legal developments women are not only disadvantaged in terms of actual land ownership but also meaningful participation in some of the key land administration bodies but this could be as a result of the gender neutral language in some of the key land laws. However, it is evident that even with laws and policies that provide for equality and non-discrimination it is still possible that inequalities can persist and thrive in the given society. For example, despite express recognition of gender equality, women hardly sit in strategic institutions such as the Land Control Boards either due to traditional or cultural beliefs. Indeed, it is these foregoing distinctions that have conventionally perpetrated the subordinations of the female gender in as far as land is concerned in Kenya enabling the 2010 Constitution to adopt the two notions of equality: formal equality and substantive equality. Formal equality yields to indirect discrimination given it implies sameness of treatment irrespective of content and circumstances thereby failing to consider the root causes of the inequality.

In this respect, especially in regards to women land rights, formal equality fails to address circumstances such as entrenched societal patriarchy and women's economic subordination. Substantive equality, on the other hand, seeks to ensure that equality provisions retain a meaningful. It is an approach that is salient throughout the 2010 Constitution's text but its implementation has thus far remained elusive. The 2010 Constitution has explicated a clear a two thirds gender representation rule in every institution set to undertake national policies. However, representation is not merely a matter of placing women in positions to add to numbers, but should ensure that their voices are heard meaningfully. It is imperative that this is implemented for women's rights to be actually realized and this must be seen from the structures in the Land Control Boards, to the National Land Commission and the very grassroots Community Land Management Committees.

⁷ FIDA, Women's land and property rights in Kenya a training handbook Retrieved from: <http://www.fidakenya.org/dr7/sites/default/files/Women%20Land%20rights%20Handbook.pdf>

Past studies on the status of women land and property rights in Kenya have examined various dimensions including customary laws, legal and policy barriers, socio-economic factors and the impact this has had on their access (or lack thereof) to property.⁸ The aim of this paper is to flesh out the legal policy reforms in Kenya that have advanced women's rights to own property and, at the same time, expose the inadequacies therein by demonstrating how these have affected both the social and economic lives of women.

Methodology

This study was conducted through qualitative methods by considering legal and academic literature based on materials sourced from internet and books. The author reviewed various papers and journal articles that have been written on the issues of women's land and property rights in Kenya, Africa and internationally. Based on the forgoing, this study is based largely on qualitative information, and it brings together useful information needed to improve women's land rights in Kenya.

Women and Security of Tenure in land

Security of tenure in land encompasses the right to own, inherit, rent, lease and remain on one's land or in one's property with protection from arbitrary or involuntary removal, i.e. forced evictions. Discriminatory norms, customary laws, and cultural practices, domestic violence, and economic obstacles all contribute to women's susceptibility to lack of security of tenure.⁹ In practical terms, for women tenure insecurity ensues, meaning exclusion from ownership, access and control over housing and land, as well as exclusion from the processes by which rights to housing and land are allocated, secured and enforced or protected. For instance, within the context of HIV/AIDS, women are susceptible to forced eviction due to real or perceived positive status, or upon the death of a spouse. In the rural areas especially, women who live with their in-laws are mostly at risk of forced eviction upon divorce from their male spouse, death, or domestic violence where the woman is chased from her matrimonial property despite the Matrimonial Property Act 2013 that safeguards them from evictions from their matrimonial property. For women, security of tenure is often especially precarious because women may not be able to independently access

⁸ Dr. Winifred Kamau, Customary Law and Women's Rights in Kenya <http://theequalityeffect.org/wpcontent/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>; Prof. Kameri-Mbote (2005) The land has its owners! Gender issues in land tenure under customary law, UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action Nairobi, October 31 – November 3, 2005 (Proceedings: <http://www.undp.org/drylands/lt-workshop-11-05.htm>) Retrieved from: https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/191/Gender_customary.pdf?sequence=1

⁹ COHRE, 2010 Briefing Paper: The impact of forced evictions on women

their homes and the land on which they live. This is because it is accessed through her relationship with a male.¹⁰

In Kenya tenure especially for women has been protected by different laws like the Matrimonial Property Act, 2013. Therefore the over reliance on, and abuse of, custom and traditions has significantly been reduced. This is particularly a significant shift from the former constitution which allowed customary practices without a filter on whether they were harmful or not to women this was the case of *SM Otieno* where the court ruled in favour of customary practices on burial rights which ultimately were disadvantageous to the widow. Similarly the case of *Echaria vs Echaria* the court ruled that a woman could only get a share of the matrimonial property upon divorce if she showed monetary contribution towards the acquisition and maintenance of property. Such examples illustrate that the marginalized in the society, especially the women, are the ones who are frequently threatened by eviction threats. These are amongst the reasons why security of tenure is considered one of the cornerstones of the right to adequate housing and the right to property under the Kenyan Constitution.¹¹

In addition to this manifestation of gender discrimination, poverty is also both a contributing factor and determinant of women's access to housing, land and property and ultimately women's tenure security. Even where there are no statutory or customary barriers permitting women to own land or housing, the lack of economic resources necessary to secure access to land and property, particularly where money is the chief determinant of access, remains an obstacle. Women remain concentrated in the informal labour sector, and engage in work which is on the whole less secure and less gainful. The implications of poverty are not, however, purely monetary. Women often lack the means, access and resources to seek judicial or other redress to secure their rights to housing and land. A common example is formal registration of land that may be ultimately too expensive, time consuming and inaccessible for poor and often illiterate women. It is absolutely crucial for women to obtain legal security of tenure. As the former Special Rapporteur on the Right to Adequate Housing, Miloon Kothari, noted, without security of tenure women "are disproportionately affected by forced evictions, domestic violence, discriminatory inheritance laws, development projects and globalisation policies that circumscribe access to productive land and natural resources."¹²

¹⁰ Ibid.

¹¹ Generally, the Constitution 2010 under article 14(1) ensures that women are able to pass on citizenship to their children regardless of whether or not they are married to Kenyans. Under article 45(3), it provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This essentially means parties have same rights over matrimonial property regardless of whether there was direct or indirect contribution from the spouses. The Constitution under article 53(1)(e) assures that parental responsibility shall be shared between parents regardless of marital status. Article 60(1)(f) eliminates gender discrimination in relation to land and property and gives everyone including women the right to inheritance and unbiased access to land. Article 68(c)(iii) provides that parliament shall enact legislation for the protection of matrimonial property with special interest on the matrimonial home during, and upon the termination of the marriage.

¹² UN Women, Realizing women's rights to land and other productive resources

Women's rights to own property, inherit, manage or dispose-off the property has continuously been under attack from customs, laws, and individuals including government officials who believe that women cannot be trusted with or do not deserve property. Women in Kenya constitute 80 percent of the agricultural labour force and provide 60 percent of farm income, yet own only 5 percent of the land.¹³ In addition to many widows being disenfranchised of their property through repugnant customs, in some areas, widows are forced to engage in risky traditional practices involving unprotected sex in order to keep their property. These practices include what is known as wife inheritance, whereby a widow is "inherited" as a wife by a male relative of her deceased husband, and ritual "cleansing," which involves sex with a social outcast, usually without a contraventions that prevent STDs. Female children seldom inherit from their parents on an equal basis with their brothers since women are expected to marry and be "absorbed" by their husbands' families.¹⁴ This was seen in the case of *Rono vs Rono*.¹⁵

There has been no existing legal framework on eviction in Kenya and this has had its fair share of problematic judicial interpretations, more so when the property ownership is under contestation. Forced evictions not only disenfranchise women of their right to property but also affect their rights to other social goods such as education and health, thereby exacerbating poverty. There is a direct co-relation between forced evictions and rise in deaths from HIV prevalence for example. Evictions mean that one loses their property and there is no room to salvage anything including vital medicine that is used by HIV victims, these women especially those that live in poor urban informal settlement have no financial muscle to go to private clinics to get another set of medication therefore what is left is for them to go to public hospitals where one cannot be given medication unless the government records show that one is due for a refill. This means that one has to wait for months before they can access medication and this could reduce their immunity dealing to premature deaths. This is just a single case example of some of the consequences of forced evictions.

<https://www.scribd.com/document/237431726/Realizing-Women-s-Rights-to-Land>

¹³ Human Rights Watch, Fact Sheet Women's Property Rights Violations In Kenya

¹⁴ Ibid.

¹⁵ [2005] 1 EA 363, The case *Rono vs. Rono*, presented sons who claimed a greater share of their father's property than their sisters and father's widow. The sons backed their claim with the customary laws, but the court decided to respect The Convention on the Elimination of All Forms of Discrimination Against Women and international law. This allowed for the recognition of women's inheritance rights. The court found that, where discrimination is at stake, the Constitution and human rights standards must prevail.

Legal Procedure on Forced Evictions in Kenya

In 2016 the Government of Kenya enacted the controversial Land Laws Amendment Bill of 2016 with provisions on evictions. Though not quite elaborate as in General Comment No. 7 of the ICESCR, the Act serves as a good starting point on a legislative framework on forced evictions. be carried out in a manner that respects the dignity, right to life and security of those affected; include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities; include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; include mechanisms to protect property and possessions left behind involuntarily from destruction; respect the principles of necessity and proportionality during the use of force; and give the affected persons the first priority to demolish and salvage their property.

Women's participation in land administration institutions

Women's participation in land administration institutions must be meaningful so as to bridge the inequality gap that currently exists. To situate the importance of these institutions, it is vital to give a background on their function and the impact they have on land. Land boards draw their mandate from the Land Control Act of 1967 and their primary role is controlling transactions in agricultural land. Historically, the boards were established to bring some control over transactions involving native agricultural land that was sold by foreigners at exorbitant prices.

One must obtain consent from the board before undertaking any transaction that affects agricultural land. The boards are composed of a district commissioner (now deputy county commissioner) or a district officer (assistant county commissioner) as the chairperson, two public officers, and seven residents who have agricultural land within the jurisdiction of the board, and who are appointed by the Cabinet secretary. The Land Control Act retains no gender sensitive language and does not specifically call for inclusion of women in the administrative structures. Furthermore, it is common knowledge that men own most of agricultural lands in Kenya therefore chances of women sitting in these boards is quite minimal.

Secondly, the boards enjoy wide discretion without adequate mechanisms for accountability, leading to great variations in decision-making. In many cases and in practice when the board refuses approval of certain transactions they are ignored and this opens a Pandora's Box for violations of rights especially for weaker parties like women.

The operational law is somewhat now archaic and must be reviewed in tandem with the 2010 Constitution which calls for two thirds representation of women in institutions and calls for all state organs and public officers to address the needs of vulnerable groups including women. This

could be a good place to start with the protection of women's property and land rights, as the Land Control Boards are instrument yet forgotten/neglected institutions.

Customary land tenure vs Community Land Act, 2016

It must be stated from the onset that not all customary practices are repugnant; customary law forms part of the law of Kenya as per Article 2(4) of the 2010 Constitution and Section 3 of the Judicature Act. Thus it is clear from the Judicature Act that customary law is a source of law in Kenya. However, the application of customary law under section 3 (2) is limited in a number of ways. Firstly, the application of customary law is restricted to civil cases only, where at least one of the parties is subject to customary law. Secondly, customary law should not be inconsistent with written law. This suggests that where there is a conflict between customary law and a written law, such as a statute or constitutional provisions, then the latter should take precedence. Unlike the old Constitution of Kenya under section 82 (4) (b) which excluded the non-discrimination provisions of the Constitution in matters of personal law, and also allowed for customary law to be applied even where it was discriminatory, the 2010 Constitution addresses this ambiguity.

The ambiguity from the former constitution provided grounds for judges to rule in favour of customary law over common or statutory law. Hence, in the S.M. Otieno case,¹⁶ customary law relating to burial was held to have precedence over common or statutory law. Happily, Article 2 (4) of the 2010 Constitution clearly provides that any law, including customary law, which is inconsistent with the Constitution is void to the extent of the inconsistency. This section clearly subordinates customary law to the Constitution and removes the ambivalence in the former Constitution with regard to customary and religious laws in the realm of personal law. Thus customary law cannot now be used to trump the provisions of the Bill of Rights in the new Constitution. Thirdly, the Judicature Act subjects the application of customary law to the "repugnancy test", that is, customary law must not be repugnant to justice and morality.

Women's exclusion from formal and customary systems of property inheritance has received increasing attention over the past few years. Because property inheritance is fundamental to how wealth is transferred within a society, it directly relates to the protection of a woman's economic livelihood and long-term security. Moreover, in many systems of customary law, primary property rights are allocated to the males in the household, and widows are not permitted to inherit those rights from their deceased husbands.

When it comes to land inheritance, women are regarded as neither belonging to the homes where they were born nor to where they are married. Women's access rights to use land are also associated with their relationship to men as mothers, wives, sisters or daughters. Again, women's rights to land continue to be determined by their marital status, and by laws of male inheritance,

¹⁶ Otieno v. Ougo & Siranga [1987] eKLR.

succession and divorce. The Kenyan National Land Policy recognizes that gender, equity principles and the impact of HIV/Aids pandemic on agricultural production and access to land rights as special areas requiring concerted effort. The Law of Succession Act which is the statutory law of succession in Kenya embraces certain concepts which are African in nature and which are meant to reflect the “Kenyaness” of the statute. There is for example reference to wives and relatives in relation to the provisions relating to dependents and this in itself is recognition of the concept of polygamy and the extended family respectively common in traditional African societies. This provision accords well with Article 11 of the 2010 Constitution which provides recognition of culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.

Despite all the repugnant customary practices, some legal reforms that have been employed are laudable like the case of the “other woman”, Legal Notice No. 10 of 1981 made changes to the Law of Succession Act by introducing a new subsection which provides: That notwithstanding the provisions of any other written law a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman nevertheless a wife for the purpose of this Act and her children thereof. This provision was quite important to reduce the cases of women being disenfranchised by virtue of them not been legally married.

In 2016 a group of 45 women drawn from various counties in Kenya¹⁷ presented a charter to the Cabinet Secretary of Lands that had enlisted demands ranging from calls for reforms on policies and legal provisions violating women’s rights to land ownership, as contained in the Matrimonial Property Act 2013 and the Land Amendment Act 2016; joint titles bearing the names of both spouses on matrimonial property, and that affirmative action be applied to ensure 60 per cent of direct beneficiaries of settlement schemes are women; They also urged the lands ministry to organize awareness and education programmes on policies and laws that contain specific bias towards women on property and natural resource rights calling for the government to simplify land titling process to local languages. Other demands included social inclusion of women living with disabilities or HIV-Aids in land governance, including having titles in Braille format for the blind. They also wanted the two-thirds gender rule applied during the constitution of land boards to guarantee women fairness during conflict resolution. This is just but one of the many examples showing how women in the country continue to face challenges despite very many progressive laws apart from the 2010 Constitution and the Land Acts.

Kenya is also a signatory to international laws and agreements that guarantee women equitable land ownership. They include the AU Specialised Technical Committee on Agriculture, Rural

¹⁷ Emmanuel Wanjala, (2016 Oct, 18th) **Women push Kaimenyi into action on their rights to land**, **The Star Newspaper** retrieved http://www.the-star.co.ke/news/2016/10/18/women-push-kaimenyi-into-action-on-their-rights-to-land_c1437761

Development, Water and Environment which in 2016 urged member states to move towards allocation of 30 per cent of land to women to improve the rights of women to land through laws and other means. Article 7 of the Maputo Protocol also stipulates that state parties shall enact appropriate legislation to ensure men and women enjoy equal rights in case of separation, divorce or annulment of marriage. The other is the Beijing Platform of Action, which removes obstacles to women's access to affordable land and housing.

The Community Land Act¹⁸ gives effect to Article 63 (5) of the 2010 Constitution by providing for the recognition, protection and registration of community land rights, management and administration of community land among other related roles. Community land vests in the community and shall be held under either customary, freehold or leasehold tenure or any other form of tenure recognizable under written law. The communal ownership of land is a new form of land ownership introduced by the 2010 Constitution and within the Act "communal use of land" means holding or using land in undivided shares by a community. The Act also brings out equality aspects and states that every member of the community has the right to equal benefit from community land. Equality includes full and equal enjoyment of rights of use and access. Vulnerable and marginalized groups have the right to equal treatment in all dealings in community land. A registered community shall not directly or indirectly discriminate against any member of the community on any ground including race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture. A registered community¹⁹ shall not directly or indirectly discriminate against any member of the community on any ground including race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture. However despite these assertions it does not specifically provide for mandatory seats to be given to women in the different strategic institutions created under the Act like the community land management committees. It is common knowledge that without such clear provisions women are likely to be left out in these key institutions where decisions are made.

The Community Land Act is also categorical in regards married women, the law provides that every man or woman married to a member of the community shall gain automatic membership of the community and such membership shall subsist until the spouses legally divorces and the woman remarries or the woman remarries after the death of a spouse. This is the general practice

¹⁸ The Community Land Act is a fairly new legislation having being enacted in August 2016 and gives effect to Article 63 of the Constitution of Kenya recognizing community land ownership legally for the very first time in Kenya. Within the meaning of the Constitution Article 63 (2) community land consists of land lawfully registered in the name of group representatives under provisions of any law; land lawfully transferred to a community by any process of law, any land declared as community land by any Act of Parliament, lawfully held land by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter gatherer communities, land lawfully held as trust land by the county governments.

¹⁹ In this respect, the term "Community" has been defined to mean a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry, similar culture or unique mode of livelihood; socioeconomic or other similar common interest; geographical space; ecological space; or ethnicity. The constitution of a community is therefore not limited to ethnic lines as is the case with the current practice.

also under the law of succession act that a married woman gets some form of ownership of matrimonial property upon marriage but that changes upon remarriage, but it also should be understood that community land under the principles of the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the 2010 Constitution. Therefore a woman for instance will only gain membership to the community giving her rights of usage and not inheriting the land per se as it is communally owned unless a two thirds majority of the community assembly agrees for its transfer. As for unmarried women, they have equal rights to the community land as their male counterparts and shall be part of a registered community who shall form the community assembly²⁰ which shall consist of all adult members of the community. However the gap here is that there is no particular mention of the threshold of women in the quorum for decision making by the community. This is an issue of concern given community land is formerly the customary system of land ownership in which women had no rights to own land and only limited rights to access or use land, therefore it is quite easy for their voices to be muzzled in the community land system.

The distinct constitutional recognition of community land makes it possible for land to be held communally and be recognized legally. The community land act operationalized Article 63 of the 2010 Constitution and legitimizes both men and women to hold their lands in equal rights a departure from the previous customary tenure which was not at all recognized by the constitution and ownership was mainly skewed towards men.

Situating women's land rights discourse in the existing institutional, legal and policy context

Until the recent developments in family law, Kenya's family law was clearly outdated. The law represented the thinking of an era that is already past. The current law still exhibits weaknesses the law which should urgently be amended to be able to meet international standards which Kenya has adopted and forms part of the law as per Article 2 of the 2010 Constitution.

Despite the progressive laws concerning land and matrimonial property, in practice women continue to face discrimination through biased customary norms that are skewed towards giving men more rights as compared to women. Only 5% of land titles are registered jointly to women and men, and only 1% of all titles are registered separately to women.²¹

The area of matrimonial property law in Kenya that has an appropriate law enacted by Parliament is the Matrimonial Property Act which addresses the distribution of property upon dissolution of

²⁰ Community Assembly means a gathering of registered adult members of a community convened in accordance with this Act;

²¹ Ibid. 11

a marriage. Before the Matrimonial property act came into effect in 2013, the married women property act 1882 initially provided that: in any question between husband and wife as to the title or possession of property either of them may apply to the high court or county court and the judge may make such order with respect to the property in dispute as he thinks fit. The matrimonial property act now provides that a person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or former spouse of the person. This is quite expansive which is good bringing in the dimension of former spouse which even in the law of succession act are deemed dependents as long as they have not remarried.

Upon coming into effect of the Matrimonial Property Act, 2013 the Married Women's Property Act 1882 ceased to apply. The Matrimonial Property Act is instrumental as it seeks to provide legal definition of matrimonial property, vests the ownership of such property according to either spouse contribution and it also attempts to restrict the alienation of matrimonial property during the subsistence of marriage and goes on to give rights to the spouses to own property in their separate names and gives rights to either party to apply to a court for the declaration of rights in contested property. The law also recognizes contribution by a spouse towards acquisition of matrimonial property - both monetary and non-monetary. Non-monetary contribution includes domestic work, management of the matrimonial home, family business and property, childcare, companionship and farm work.

The courts also have the duty to determine what amounts to contribution and the entitlement as provided in Section 6(1) of the Act. For instance, a spouse claiming entitlement to a share in the matrimonial property has to prove that they put in some form of direct, indirect, material or emotional contribution. It therefore means that for a spouse to get anything after divorce, he or she must prove some sort of contribution to the matrimonial property. This takes us back to the old practice, which was considered oppressive to the women where they had to prove their wifely duties to be able to get matrimonial property. In fact during the debating stage of the bill, it was argued that this provision is unconstitutional but either way it was not done away with. Let us look at how the good judges in Kenya have interpreted this "non-monetary contribution". Justice Tuiyot said that by recognizing non-monetary contribution, the Act was in sync with Article 45(3) of the Constitution and that each party should walk away with what he or she deserves, a lazy spouse gets nothing. Here is what the good judge pronounced himself that where there is evidence that a non-monetary contribution entitles a spouse to half of the marital property then, the Courts should give it effect. But to hold that Article 45(3) decrees an automatic 50:50 sharing could imperil the marriage institution. It would give opportunity to a fortune seeker to contract a marriage, sit back without making any monetary or non-monetary contribution, distress the union and wait to reap half the marital property. That surely is oppressive to the spouse who makes the bigger contribution. That cannot be the sense of equality contemplated by Article 45(3).

In this case, the husband had acquired virtually all the properties subject of the case. The wife however contributed to the management of three properties indirectly. The good judge ordered that the three properties be valued and equally be divided between the parties. The court however did not consider other aspects of non-monetary contribution such as domestic work, child care and companionship. Essentially, in many marriages there exist child bearing and care and companionship. How then would this be quantified?

Now we get to the ugly of the matrimonial property act Section 7 says: “Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.” Further, Section 8 of the Act provides for division of property in a polygamous family upon divorce. Article 45(3) of the Constitution entitles spouses to equal rights at the time of marriage, during and at dissolution of the union. The argument is that an Act of Parliament (Matrimonial Property Act) cannot override the Constitution by taking away property rights during marriage and predicate them on divorce. There are more arguments in the Constitution that buttress the legal arguments that the Act is unconstitutional. For instance, Article 27(4) provides that the State shall not discriminate directly or indirectly against any person on marital status, among several other grounds. Separately, Article 40 of the Constitution provides that every person has a right, either individually or in association with others, to acquire and own property. It further states that Parliament shall not enact a law that permits the State or any person to arbitrarily deprive a person of property or interest or right. This section, as shown earlier, will take the women back to the era where women had to prove their “wifely” duties as seen in the case of *Echaria vs Echaria*. It could also subject the spouses to try and prove contribution through monetary value.

While the Act requires spousal consent for transfer of matrimonial property, it falls short of addressing existing power dynamics within the home and the society. The Act assumes equality within the household or the family in which women may freely, without coercion or pressure, consent to such transactions. This assumption stands in stark contrast to a reality, particularly in rural areas, of gender disparities in access to resources, education, and decision-making power. Overall in Kenya, the 2014 Demographic and Health Survey estimates that only about half (54%) of married women participate in decisions pertaining to major household purchases.ⁱ A mere requirement for spousal consent absent concrete safeguards seems insufficient at best.

Moreover, the Act as passed on 24 December 2013 only requires spousal consent for transactions of matrimonial property in monogamous marriages (Sec. 12(1)). The Act is silent about consent in polygamous marriages, where power dynamics may be even more complicated. This leaves a dangerous gap in protection for wives in polygamous marriages which continue to occur throughout Kenya.

The place of “come we stay” marriages or cohabitation unions in the new laws

Cohabitation as defined by The Black’s Law dictionary is the act of a man and a woman openly living together without being married to each other. The Marriage Act, 2014 defines cohabiting as living in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage, (though what amounts to ‘long term’ is not defined). However that is as far the statute goes it does not recognize cohabitation as a category of marriage therefore it is not clear what these unions amount to. These unions leave spouses in precarious situations when it comes to inheritance upon the demise of a spouse given they have no legal standing and it can only be pronounced by a court order.

It is a common and accepted practice in Kenya for unmarried couples to live together as husband and wife. There is no law in Kenya that legitimizes cohabitation unions. Accordingly, these unions are not formally recognized in Kenya. Consequently, the benefits granted to marriage unions are not available to cohabitees whose union is marred by legal uncertainties. Cohabitees are not eligible for maintenance upon separation. Further, upon the death of one party, the surviving party is ordinarily not eligible to inherit from the deceased’s estate unless they can prove that the survivor evolved from a mere cohabitee to a dependant under section 29 of the Law of Succession Act. i.e cohabitee can only benefit from the estate of the deceased if they have an issue(a child) In the absence of a law regularizing cohabitation, Kenyan courts have traditionally sought reliance on the English common law principle of presumption of marriage as a vehicle through which cohabitation unions may be legitimized as amounting to a marriage. Section 3 (1) of the Judicature Act identifies common law as a source of law in Kenya. As was stated in *Hortensia Wanjiku Yawe vs Public Trustee*, parties seeking to rely on presumption of marriage must prove two elements namely;

1. Prolonged cohabitation; and
2. That they held themselves out to the general public as a married couple

Unfortunately, there is no fixed period that automatically gives rise to the presumption of cohabitation in Kenya. In the *Hortensia* case, it was stated that the parties must have cohabited continuously for a minimum of two years. However, in *R v. Peter s/o Mikhayo*, it was held that the presumption of marriage had arisen where the accused had cohabited with a lady for a period of between 4 and 8 months. There is lack of security in these unions because cohabitation can only be confirmed to have attained the status of a marriage through a court declaration. In the interim, the status of cohabitees cannot be ascertained with clarity. Because of the difficulties of proving the existence of a marriage between cohabitees, there developed a practice of swearing an affidavit

of marriage to stand as documentary proof of marriage. Even so, the Affidavit is not conclusive proof of the existence of a marriage between cohabitantes.

In case there is a child born during cohabitation. The child can approach the court under **section 26 of the law of Succession Act**. This is distinct from the woman who seeks the help of the court to enjoy the fruit of unlawful companionship; since succession will only be to the extent of the welfare and upkeep of the child born by the deceased. It would be interesting to see how the judges will try to balance the sanctity of family with the issue of presumption of marriage for the purposes of succession.

The lack of formal recognition is problematic for spousal land rights registration, as many of the marriages in customary communities in Kenya are not currently registered, and it is unlikely that they will be in the near future. Spouse-like partners in unregistered unions or co-habitation arrangements will not be able to prove their interest in matrimonial property, rendering them at risk of losing the land they rely on for food and income upon separation or death of one of the partners.

Conclusions

In this paper, it has been demonstrated that in Kenya women property and land rights are generally weaker and insecure in comparison with those of men. The problem is located to the fact that Kenya is generally a culturally patriarchal society with glaring legal and policy gaps. It has been argued that access to secure land rights by women is critical for development given statistics show that they make a bigger percentage of agricultural farmers in the country. Therefore, gender discrimination with respect to land is at variance with the aspirations of any democratic society. The government should align its laws and policies with the 2010 Constitution and other international conventions that it has ratified.

A complex mix of cultural, legal and social factors and obstacles stand in the way of women's realising equal property rights in Kenya. The deep rooted cultural beliefs continue to give precedence to male ownership of land as opposed to women.²² The guise of men "protection" by customary law actually strips off women their right to property and asserts control over women's autonomy. This cultural discrimination influences the service by some public officers. Some government officials ignore the law and rights of women and instead apply the prevailing cultural beliefs and make decisions that favour men²³, some officers simply say they do not want to interfere with culture. Deliberate steps must be shown by government in practice to remove some of these cultural barriers.

²² Federation of Women Lawyers "Women Land and Property Rights in Kenya – Training Handbook (2013).

²³ Ibid.

Recommendations

Majority of women in Kenya have little awareness of their rights and seldom have the means to enforce them, women have 67% literacy level as compared to men 78%²⁴. There should be deliberate efforts by government to create more awareness on land rights especially to women and simplify the language used in succession documents.

Most women are not engaged meaningfully in land administration institutions. In both elected and appointed land bodies, women are either missing or disproportionately outnumbered by men.²⁵ The 2010 Constitution under Article 27 (8) provides that the state shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective and appointive bodies shall be of the same gender. There should be deliberate efforts to include more women in crucial land administration institutions.

Cohabitation unions constitute most “marriages” in Kenya, the government should recognize these unions as marriages through an amendment of the Marriage Act.

The constitution²⁶ calls for two thirds gender rule and this must be seen practically to ensure inclusion of women in decision making on land matters. The government should also ensure gender equality in land administration bodies, and ensure that these institutions are trained on women’s equal rights to land and property and how to protect them.

Polygamy has been recognized in the Marriage Act (Customary Marriages – Part V). The Law of Succession Cap 160 section 26, equally recognises polygamy and provides for co-wives and their children. However unlike monogamous marriages the Matrimonial property act is silent on spousal consent for polygamous unions which is disadvantageous to these sort of unions.

In a report submitted to the CESC body during the 57th session it was the submission of human rights organizations in Kenya that if polygamy remains legal, the government must enact legislation in enforcing equitable arrangement for all wives involved. To emulate the South Africa Law Commission’s approach “*Although customary marriages should be recognised on the basis of Constitutional right to culture, it is necessary to distinguish areas where human rights prevail*”

²⁴ The World Bank IBRD-IDA wdi.worldbank.org/table/2.13

²⁵ The National Gender and Development Policy (2000)

²⁶ Under article 27(3), the constitution ensures that women and men will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination.

²⁷ Kenya must be committed to advocating a view of women that transcends stereotypical gender roles and advocates for equal rights. Registration of polygamous unions is necessary to protect the women involved. The registration should meet stringent requirements such as written consent by each prior wife and the future wife and a property distribution agreement which outlines the matrimonial property interest that each wife enjoys.

To hasten the pace of development, it is important for Kenya government also ensure that women's human rights and gender issues are integrated in planning and budgeting. There must be more deliberate efforts towards women empowerment programmes on land and property rights, provide subsidized costs for legal fees.

²⁷ South African Law Commission, harmonization of the Common Law and Indigeneous law, Issue paper 3, (Customary marriages) 31 October 1996.

References

Alice Edwards, (2009) Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women, retrieved from <http://www.unhcr.org/4a8d0f1b9.pdf>

Collins Odote, (2013) The dawn of uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya Source: Nomadic Peoples, Vol. 17, No. 1, Special Issue: Securing the Land and Resource Rights of Pastoral Peoples in East Africa (2013), pp. 87-105 retrieved from <http://www.jstor.org/stable/pdf/43123922.pdf>

COHRE, (2010) Briefing Paper: The impact of forced evictions on women http://www.ssauganda.org/uploads/womenbriefing_paper_on_the_impact_of_forced_evictions_on_women_22_oct_2010.pdf

Dennis Karani, (May 2015) The place of cohabitation unions under the Marriage Act 2014 Retrieved from: <http://www.jurisnooks.com/2015/05/07/the-place-of-cohabitation-unions-under-the-marriage-act-2014/>

Dr. Chebii JK, Developments in Family Law in Kenya: Reflections on Recent Reforms in Family Law Law society of Kenya Journal, Volume 12 2016 No. 1

Dr. Winifred Kamau, Customary Law and Women's Rights in Kenya <http://theequalityeffect.org/wpcontent/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>

Emmanuel Wanjala, (2016 Oct, 18th) Women push Kaimenyi into action on their rights to land, The Star Newspaper retrieved http://www.the-star.co.ke/news/2016/10/18/women-push-kaimenyi-into-action-on-their-rights-to-land_c1437761

FAO, IFAD, WB (2008), Women's rights and access to land. Gender in agriculture source book. FAO. 2008a. Compulsory acquisition of land and compensation. Land Tenure Studies No. 10. Rome. <ftp://ftp.fao.org/docrep/fao/011/i0506e/i0506e00.pdf>

FIDA, Women's land and property rights in Kenya a training handbook Retrieved from: <http://www.fidakenya.org/dr7/sites/default/files/Women%20Land%20Rights%20Handbook.pdf>

Hakijamii, GI-ESCR, FIDA (2016) Joint Shadow Report To The United Nations Committee On Economic, Social And Cultural Rights, 57th Session Retrieved from: <http://www.hakijamii.com/wp-content/uploads/2016/05/Women-and-Land-Rights-Report-GI.pdf>

Human Rights Watch, Fact Sheet Women's Property Rights Violations in Kenya Retrieved from: <https://www.hrw.org/legacy/campaigns/women/property/factsheet.htm>

Kanika Mak, Engendering property rights: women's insecure land tenure and its implications for development policy in Kenya and Uganda Retrieved from <https://www.princeton.edu/jpia/past-issues-1/2005/7.pdf>

Millicent Odeny, (2013) Annual World Bank Conference on Land and Poverty 2013 Improving Access to Land and strengthening Women's land rights in Africa Retrieved from: http://web.law.columbia.edu/sites/default/files/microsites/gendersexuality/odeny_improving_access_to_land_in_africa.pdf

Otieno O. Vincent, Women and Land Rights under the Kenyan Constitution Retrieved from https://www.academia.edu/6863162/Women_and_Land_Rights_under_the_Kenyan_Constitution

Perpetua Wambui Karanja, Volume 10 Women 's Land Ownership Rights in Kenya Realizing the Rights of Women in Development Processes: Women's Legal Entitlements to Agricultural Development and Financial Assistance
<http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1070&context=twls>

[Prof. Kameri-Mbote \(2005\)](#) The land has its owners! Gender issues in land tenure under customary law, UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action Nairobi, October 31 – November 3, 2005 (Proceedings: <http://www.undp.org/drylands/lt-workshop-11-05.htm>) Retrieved from: https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/191/Gender_customary.pdf?sequence=1

Statutes

Constitution of Kenya, 2010
Marriage Act, 2014
Law of Succession Act, CAP 160 Laws of Kenya 1981
Land Laws Amendment Act, 2016
Matrimonial Property Act, 2013
Constitution of Kenya, 1963 (Repealed)
Married Women Property Act, 1882

List of cases

SM Otieno
Echaria vs. Echaria
Hortensia Wanjiku Yawe vs Public Trustee
Rono vs Rono
R v. Peter s/o Mikhayo