



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
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Assessing Women's Land Rights and Food Security in Kenya: Challenges and Opportunities

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Abstract

Kenya has made important strides towards enhancing women's land rights through the 2010 Constitution and the enactment of laws that seek to achieve gender equality. This is particularly important for livelihoods and food security in the country since studies indicate that secure land tenure for women directly contributes to improved food security. Studies also show that women's resources are largely used to improve the well being of the family compared to those of men. This is partly attributable to the fact that women in the majority of families act as the nurturers and caretakers who are responsible for ensuring that their families are well fed. Insecure land tenure rights for women directly affects food security in instances where their access to land is negated by ownership regimes that often exclude them.

Sustainable Development Goal (SDG) 5 addresses gender equality and the empowerment of women and girls noting in particular, the fundamental role of women in achieving poverty reduction, food security and nutrition and the sustainable development goals. This has to be read together with SDG 1 whose aim is eradication of poverty. Poverty eradication in agrarian societies such as Kenya can only be achieved if women have secure rights to access and use land for both livelihood and economic activities. Such rights will facilitate both their economic empowerment and self-reliance, which will in turn impact on the family and contribute to poverty reduction. SDG Goal 4, which provides for quality education has a dual link to women's empowerment. On the one hand, quality education for women is likely to contribute to their enhanced capacity to take their children to school. On the other hand, the Goal is likely to be met when women have secure land rights since they will have a source of income with which to put their children through school. Undoubtedly, the overall achievement of the Sustainable Development Goals 2015 are largely predicated on whether women's rights to productive resources such as land are secured in law, not only in Kenya but in the whole of developing economies.

According to an assessment of the progress of women's land rights in Kenya's legal framework in 2017 commissioned by the Food and Agriculture Organization (FAO), the country appears to have done well in a few aspects while it has performed dismally in others. On the positive side, Kenya has enacted a law mandating the inclusion of women in land management and land administration institutions. The study also found that the legal framework protects women's land rights even under customary tenure holding in its recognition of customary land holding. This is hardly surprising considering the robust equality provisions in Kenya's Constitution. However, the assessment unearthed unsettling facts noting that contrary to the widely held view, Kenya is not faring well on various aspects regarding women's land rights; and this has implications on the food security question in the country. For instance, the study noted that there is neither a law mandating the joint titling or registration of land as between men and women in marriage unions and there are no economic incentives to encourage such joint titling in the law. This has to be viewed with the context of research showing that women title-holders constitute a negligible proportion of total private titleholders despite women being the ones who provide the bulk of labour for agriculture. The assessment further found that while there is a legal requirement for spousal consent in land transactions such as charging or selling, there is not enough legal protection afforded to women living in cohabitation arrangements (*de facto* couples) since cohabitation is not recognised in formal law. This is significant because of the ubiquity of cohabitation particularly in urban centres. Further in light of the fact that under most customary laws



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



marriage is a process that takes time and not a one off event, many people can be on the journey to marriage for a long time.

In addition, while it has frequently asserted that the Kenyan law provides for equal inheritance rights for women and girls, the assessment noted that this is not so. In particular, the law on inheritance exempts agricultural land from its ambit. This means that women's right to inherit agricultural land on which they expend considerable labour is not guaranteed. The law also exempts Muslims, who now constitute the second largest religious group in Kenya, from its application. With respect to Muslims, the law applies Islamic law to personal law matters including inheritance to persons professing the Islamic faith, which means that Muslim women still do not get to enjoy equal inheritance rights as Muslim men. Another important finding that the study noted is the absence of express allocation of finances from the state to institutions mandated by law to increase women's ownership and control of land despite the general consensus about the weak economic status of women which limits their ability to acquire land.

Within this context, we assess the extent to which Kenya's land law secures women's land rights as required under the Constitution. Further we will explore the role that law has played in enabling women to contribute to food security. In doing this, we will identify pathways for enhancing women's access to land and the shortcomings of the legal framework broadly conceived to include a wide array of actors, structures and interests in laws, policies and institutions. We will suggest ways in which women's land rights can be better secured to promote food security.



Key Words:

SDGs, gender, sustainable development, food security

I. Introduction

The link between secure land rights for women and food security in any particular society is now well established, as is the amount of assets owned by women and household expenditure on food.¹ According to FAO, up to 60-80% of the total food consumed in developing countries is produced by rural women and therefore, women in general play a central role in ensuring household food security.² Further, there is evidence to show that women are more likely to spend their income and resources on the nutritional needs of their family.³ Studies conducted in Central America lend credence to this assertion as they show increased household food expenditure with increased land holding by women.⁴ It has also been found that children of mothers who own land are less likely to be malnourished compared to those whose mothers own no land.⁵

In addition, there is empirical evidence to the effect that insecure land rights for women impacts agricultural productivity and food security since women tend to overwork the land for fear that failing to work the land would lead to their losing access rights.⁶ According to an empirical study conducted in Uganda, this leads to a decline in agricultural productivity and leads to food insecurity.⁷ On the other hand, lack of secure land rights tends to disincentivise women from working the land thereby reducing the productivity of land as was established among tea farmers in tea plantations in Kericho, Kenya.⁸

Despite the close link between women's land rights and food security, women in Kenya have barely enjoyed land rights given the gendered nature of access, control and ownership of land where such access and use

¹ Agnes R Quisumbing & John A Maluccio, 'Resources at marriage and intrahousehold allocation: Evidence from Bangladesh, Ethiopia, Indonesia, and South Africa' (2002) 65(3) Oxford Bulletin of Economics and Statistics 283.

² FAO, <<http://www.fao.org/sd/fsdirect/fbdirect/fsp001.htm>> accessed 10 February 2018.

³ Agnes Quisumbing, 'Male-female differences in agricultural productivity: Methodological issues and empirical evidence' (1996) 24(10) World Development 1579; Cheryl Doss, 'The Effects of Intrahousehold Property Ownership on Expenditure Patterns in Ghana' (2006) 15(1) Journal of African Economies 149.

⁴ Elizabeth Katz & Juan Sebastian Chamorro, 'Gender, land rights, and the household economy in rural Nicaragua and Honduras' (2002) Paper prepared for USAID/BASIS CRSP. Madison, Wisconsin.

⁵ Keera Allendorf, 'Do women's land rights promote empowerment and child health in Nepal?' (2006) 35(11) World Development 1975.

⁶ Karen O Mason & Helene M Carlsson, 'The development impact of gender equality in land rights' in Philip Alston and Mary Robinson, eds., *Human Rights and Development: Towards Mutual Reinforcement* (New York, NY: Oxford University Press, 2005).

⁷ Ibid.

⁸ Ibid.



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



is mediated by patriarchal customary laws.⁹ For instance, under customary law, land is mainly controlled by male household heads on the assumption that the rights therein are held in trust for all in the household.¹⁰ This means that the land rights of the women either as wives, daughters, sisters or mothers is predicated on continued cordial relations with the male relative. It is within this context that Kenya promulgated the Constitution of Kenya 2010 that sought to entrench gender equality generally and promote women's land rights specifically.¹¹ The constitution further provided for enactment of land laws aimed at ensuring that the rights of women to land are safeguarded by proscribing gender discrimination in matters of land and by protecting the matrimonial property from disposal without spousal consent.¹² This notwithstanding, Kenya still suffers from food insecurity which may be blamed at tenuous land rights for women due to glaring oversights within the legal and policy framework.

This paper seeks to demonstrate the glaring gaps in the legislative framework through a replication of the results of an assessment of a study conducted on Kenyan land laws as commissioned by FAO. Our aim is to illustrate the weaknesses of the land law regime and areas that may be improved upon through legal reform so as to promote women's land rights and consequently food security. This paper is divided into five parts. Part I is the introduction which links women's land rights and food security while part II conducts an overview of the Kenyan land law regime with a focus on women's rights. Part III assesses the weakness of the land law regime. Part IV considers the role of law in addressing women's land rights while part V concludes.

2. Kenya's Legal Framework

2.1 Constitution

Kenya promulgated a constitution in August 2010,¹³ which has robust provisions on gender equality. The National Land Policy¹⁴ contains similar provisions, which address the unequal access and insecure rights of women to land.¹⁵ Article 27 (1) of the Constitution is emphatic that every person is equal before the law and has the right to equal protection and equal benefit of the law. It further provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹⁶ Article 27 (4) provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. In addition, Article 40 (1) is to the effect that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya. These provisions, on the face of it,

⁹ P Kameri-Mbote, 'I Want It and I Want It Now: Women and Land in Africa' in *Women and Land Rights: Questions of Access, Ownership and Control* (Heinrich Boll Stiftung: Cape Town 2013) 6.

⁹ Ibid 8.

¹⁰ Ibid.

¹¹ Constitution of Kenya, art. 27, 60, 68.

¹² Ibid.

¹³ <https://www.kenyaembassy.com/pdfs/the%20constitution%20of%20kenya.pdf> accessed 11 July 2017.

¹⁴ Republic of Kenya, *Sessional Paper No. 3 on Land Policy of 2009*

¹⁵ See para of Sessional Paper No. 3 of 2009, the National Land Policy.

¹⁶ The Constitution of Kenya 2010 (Article 27 (3)).



provide a bulwark against discriminatory practices against any person including women. Article 45 also entrenches the doctrine of equality in marriage by providing that parties to a marriage are equal before, during and after marriage.

Article 60 of the Constitution of Kenya 2010 which sets out the principles undergirding land policy includes the elimination of gender discrimination in law, customs and practices related to land and property in land, as a key principle.¹⁷ Further, the Constitution mandates Parliament to enact legislation to regulate the recognition and protection of matrimonial property during and on the termination of marriage¹⁸ and to enact a law to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land.¹⁹

2.2 Land Acts and Matrimonial Property Act

Kenya enacted other pieces of legislation relating to land and property to implement the various constitutional provisions. These include: the Land Act, No. 6 of 2012;²⁰ the Land Registration Act, No. 3 of 2012 (as amended in 2016);²¹ the Community Land Act, No. 27 of 2016;²² and the Matrimonial Property Act, No. 49 of 2013.²³ Section 79 (3) of the Land Act 2012 provides that a ‘charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons’. This means that a transaction relating to matrimonial home absent spousal consent is void. This is meant to secure the matrimonial home by preventing dispositions of the matrimonial home by a registered owner (usually the husband) without the knowledge or consent of the wife leaving the wife and children destitute.

It is worth noting however that, these provisions were attenuated due to legislative amendments to the Land Registration Act 2012 (LRA). Section 31 of the Land Laws (Amendment) Act 2016 deleted section 93 (3) of the LRA, which required a lender or transferee to ensure that the borrower or transferor had spousal consent or to ascertain whether the transferor or borrower had the property registered individually. Effectively therefore, the amendment removed the duty to inquire on the part of lenders and transferees. In its place, the amendment provided that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses, then such property would be regarded as matrimonial property and dealt with in accordance with the Matrimonial Property Act 2013. Moreover, section 11 of the Land Laws (Amendment) Act 2016 deleted spousal rights over matrimonial property from the list of overriding interests over registered land meaning that they would no longer be automatically assumed to exist in cases where they were not noted on the register.²⁴ This effectively reduced the protection

¹⁷ As above, Article 60 (f).

¹⁸ As above, Article 68 (iii). Parliament enacted the Matrimonial Property Act, No. 49 of 2013 in pursuance thereto.

¹⁹ As above, Article 68 (vi).

²⁰ http://admin.theiguides.org/Media/Documents/Kenya-LandAct_No6of2012.pdf accessed 11 July 2017.

²¹ <http://extwprlegs1.fao.org/docs/pdf/ken112133a.pdf> accessed 11 July 2017.

²² http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CommunityLandAct_27of2016.pdf accessed 11 July 2017.

²³ <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/97351/115471/F-540095358/KEN97351.pdf> accessed 11 July 2017.

²⁴ See, Land Registration Act 2012, sec 28 for the list of overriding interests over registered land.



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



of the rights of women to land, particularly in situations where their names are not included in the title documents as joint-owners of the land as is predominantly the case in most African societies.

Fortunately, section 12 (1) of the Matrimonial Property Act 2013 (MPA) still retains the need for spousal consent for transactions relating to matrimonial property during the subsistence of a monogamous marriage. However, due to the narrow definition accorded to matrimonial property under section 2 of the MPA, only in respect of property obtained during the subsistence of a marriage and not before, would spousal consent be required. The constitutionality of these amendments and provisions of the MPA in light of the constitutional provision stating that parties to a marriage are equal before, during and after a marriage²⁵ is questionable.²⁶

Section 12 (5) of the MPA also requires the written and informed consent of a spouse before a lease or a charge over a matrimonial home. Section 11 of MPA also secures land and property rights of women by providing that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including— (a) the customary law relating to divorce or dissolution of marriage; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.

2.3 Succession Law

On the other hand, the Law of Succession Act, Cap 160 secures the inheritance rights of women to land in the event of the death of a husband or father. Section 29 of the Act defines dependant liberally to include

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.

The Act further provides that the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.²⁷ The predication of a widow's right on remaining unmarried is discriminatory, as it does not apply to widowers.

Section 37 of the Law of Succession Act provides that a surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance: Provided that, in the case of immovable property,

²⁵ Constitution of Kenya 2010, Article 45.

²⁶ For a detailed assessment of this issue, see P Kameri-Mbote & M Muriungi, 'Much Ado about Nothing: A Critical Analysis of the Matrimonial Property Act 2013' (2017) *Zanzibar Yearbook of Law* (2011-2016) (on file with author).

²⁷ Law of Succession Act of 1981, Cap 180 (sec 35 (5)).



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



the exercise of that power shall always be subject to the consent of the court. This is in recognition of the centrality of land as property. The law further takes care of inheritance rights for women (both the married and the unmarried/girls) by providing that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.²⁸

Section 40 of the succession law also caters for women's land and property rights in a polygamous setting, which is prevalent in particular African societies by stating that where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children. Similarly, where net intestate estate, or the residue thereof, is devolving upon a child or children under the Act, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.²⁹

2.4 Community Land Act

Section 14(4) c(i & ii) of the Community Land Act 2016 provides that a registered community shall, when considering an application for customary right of use or occupancy, have regard to equality of all persons including (i) equal treatment of applications for women and men; and (ii) non-discrimination of any person on the basis of gender, disability, minority, culture or marital status. In addition, section 30(3, 4 & 5) of the Act establishes that women, men, youth, minority, persons with disabilities and marginalized groups have the right to equal treatment in all dealings in community land and that 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. It proceeds to state for the avoidance of doubt 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 divorce and the woman remarries or the woman remarries after the death of a spouse.³⁰

2.5 National Land Policy

Kenya's first National Land Policy was drafted between 2004 and 2007 and passed in 2009.³¹ Among the contemporary manifestations of the land question it identifies are 'gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in

²⁸ As above, sec 38.

²⁹ As above, sec 41.

³⁰ Community Land Act, No, 27 of 2016, sec 30 (5).

³¹ Republic of Kenya, Sessional Paper No. 3 on National Land Policy, 2009.



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



land decision making processes³² and ‘disinheritance of women and vulnerable members of society, and biased decisions by district tribunals, committees and boards’.³³

The Policy also tackles laws, customs and practices that discriminate against women, minorities, children and persons with disabilities, with respect to access to and ownership of land rights.³⁴ The Policy also called for the ‘recognition, protection and registration of community rights to land and land based resources taking into account multiple interests of all land users, including women’³⁵ With regard to inheritance, the Policy required the proscription of all customary law which discriminates against women and children.³⁶

Paragraph 170 (e) required the government to address land rights of women among a category of issues requiring special intervention. Among the issues raised are: recognition and protection of land rights of women in pastoral communities;³⁷ legislation to ensure effective protection of women’s rights to land and related resources;³⁸ repealing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;³⁹ establishing a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;⁴⁰ provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals;⁴¹ and proportionate representation of women in institutions dealing with land at all levels.⁴²

The National Land Policy also addressed the issue of matrimonial property separately requiring that laws be reviewed to ensure that they conform to the principle of equality between women and men;⁴³ enactment of specific legislation governing division of matrimonial property;⁴⁴ protection of the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property;⁴⁵ appropriate legal measures to ensure that men and women are entitled to equal rights to land and land-based resources, before marriage (in cases of inheritance), during marriage, upon dissolution of marriage and after the death of the spouse;⁴⁶ and mechanisms to curb selling and mortgaging of family land without the involvement of the spouses.⁴⁷

³² Ibid para 24(c).

³³ Ibid para 25(f).

³⁴ Ibid para 39 (h).

³⁵ Ibid para 66 (d) i.

³⁶ Ibid para 91.

³⁷ Ibid. Para 183 (e)

³⁸ Ibid. Para 223 (a)

³⁹ Ibid. Para 223 (b)

⁴⁰ Ibid. Para 223 (c)

⁴¹ Ibid. Para 223 (d)

⁴² Ibid. Para 223 (h).

⁴³ Ibid. Para 225 (a).

⁴⁴ ibid, Para 225 (b).

⁴⁵ ibid, Para 225 (c).

⁴⁶ ibid, Para 225 (d).

⁴⁷ ibid, Para 225 (e).



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



III). Assessment of Kenya's Legal Framework with Respect to Food Security

It would appear from the immediate analysis of Kenya's legal framework on women's land rights and gender equality with respect to land that the rights of women and consequently food security in Kenya is guaranteed. However, an assessment conducted on Kenya's legal framework under a commissioning from the Food and Agriculture Organization of the United Nations (FAO) indicates that this is not so. We seek to explicate the results from this assessment using the matrix that FAO provided in conducting the assessment, with a view to illustrating the inadequacies in the law and suggest solutions.

According to the assessment, there is neither a law mandating the joint titling or registration of land as between men and women in marriages nor are there economic incentives to encourage such joint titling in law. This state of affairs needs to be viewed with the context of research showing that women title-holders constitute a negligible proportion of total private titleholders despite women being the ones who provide the bulk of labour for agriculture.⁴⁸ Indeed, estimates indicate that only a paltry 1% of women in Kenya are sole registered owners of land and only 5% of women are registered owners of land jointly with their husbands.⁴⁹ More significantly, community land, which constitutes the largest proportion of land in Kenya at nearly 65%, does not secure the land rights of women owing to patriarchal customs, attitudes and practices, which largely determine access, control and utilisation of community land and resources.⁵⁰ In this context, then it becomes apparent why mandated joint titling under the law becomes important if women's land rights and consequently, food security is to be secured. In addition to providing for compulsory joint registration of land between couples (men and women), it would also do to provide economic incentives to encourage this such as through tax benefits or tax breaks. An express legal requirement that the name of the spouse be included in title documents during registration of land where one is married, is required to give effect to this. However, this is again also predicated on there being proper identification and registration processes for women which is not always the case, and calls for a coordinated approach between the various state agencies to ensure this happens.

In addition, the assessment indicated that while there is provision for spousal consent before disposal of matrimonial property including land among married couples,⁵¹ this provision does not cover or protect persons living as married couples though they are not formally married (cohabiting). Yet, the number of cohabitees in Kenya particularly in the urban areas is significant due to premarital pregnancies and the stringent formalities and costs associated with registration of marriages.⁵² Since such couples operate within the shadow of the law, women's rights to land and property generally under such cohabitation unions are at the mercy of the courts and as to whether they will consider their union as a marriage under the common

⁴⁸ AfDB, *African Equality Index 2015-Empowering African Women: An Agenda for Action* (African Development Bank: Abidjan, 2015) 5.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ Matrimonial Property Act 2013, art. 12(1).

⁵² This situation was captured two decades ago here, Janet Kabeveri-Macharia & Celestine Nyamu, 'Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya' (1997) 14 *The Zimbabwe Law Review* 46.



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



law doctrine of advancement or presumption of marriage.⁵³ This situation leaves married couples and especially women in these contexts quite vulnerable and at risk of being disinherited, with remarkable consequences for food security generally.

Further, despite the provision of equal inheritance rights for both men and women as children under the Constitution and the succession laws, it is notable that agricultural land from a number of gazetted regions (formerly districts), is exempt from the application of the Law of Succession.⁵⁴ Given this legal position, it means that it is possible for agricultural land to pass or devolve under the existent cultural norms which are frequently patriarchal to the detriment of women. In the same breadth, the Constitution exempts the application of the Law of Succession Act to persons of the Islamic faith in personal law matters such as inheritance where they so desire.⁵⁵ This must be viewed within the context that Muslims constitute the second largest religious group in Kenya.⁵⁶ This means that if the parties in contest profess the Islamic faith, and submit to the jurisdiction of the Kadhi's courts,⁵⁷ they are to be governed by Shariah law, which is highly patriarchal.⁵⁸ The implication of the foregoing is that Muslim women are largely left to grapple with the principles enshrined in Sharia law (Islamic law), which does not provide for equal inheritance rights.⁵⁹ The consequence of this is that Muslim women are likely to have tenuous land rights and this hampers efforts at ensuring food security.

Finally, the assessment illustrated that there lacks express allocation of finances from the state to institutions mandated by law to increase women's ownership and control of land despite the general consensus about the weak economic status of women that limits their ability to acquire land. Since there are already institutional structures geared towards promoting the economic empowerment of women such as the Women Enterprise Fund, it would be expedient if funds set aside by the state are channelled through such institutions with the sole purpose of giving women the economic wherewithal to acquire land so as to ensure food security. Such a move would seek to cause a shift in the balance of power and further empower women who would then be more incentivised to work their lands, thus contributing to improved productivity and food security. A mere allocation of funds to the various demographic groups without an express requirement for particular investments would barely work in ensuring that women are able to acquire land.

⁵³ The doctrine of presumption of marriage was applied in the Kenyan cases of *Hortensia Yawe v Public Trustee* Misc Case No 16 of 1977 and *Mary Njoki v John Muthuru & Others* Civil Appeal No 71 of 1984.

⁵⁴ Law of Succession Act, sec 2(3).

⁵⁶ Republic of Kenya, 'Religion' <<http://www.republicofkenya.org/culture/religion/>> accessed 2 August 2017. It indicates that up to 10% of Kenyans profess the Islamic religion.

⁵⁷ Constitution of Kenya 2010, art. 170(5).

⁵⁸ S Bano, 'In pursuit of religious and legal diversity: a response to the Archbishop of Canterbury and the "Sharia debate" in Britain' (2008) 10(3) Ecclesiastical Law Journal 283.

⁵⁹ For instance, under the Koran intestacy rules, sons are allowed to take up to double the inheritance given to daughters. See, A Ellis, *Gender and Economic Growth in Kenya: Unleashing the Power of Women* (Directions in Development; Private Sector Development. Washington, DC: World Bank, 2007) 27.



Land Governance in an Interconnected World

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 19-23, 2018



IV) Role of Law in Enhancing Women's Land Rights in Kenya

As evident from the foregoing section, most of the challenges hampering the actualisation of women's land rights and thereby food security in Kenya arise out of an inadequate legal infrastructure. Admittedly then, this situation may be improved upon through a tinkering with the legal infrastructure through a conduct of a legal audit and then seeking to cure it through legislative amendments. In this paper, we have, crudely, conducted a legal audit of the laws in Kenya through the analytical approach adopted by FAO and identified gaps in the law that may be fixed through legal reform.

For instance, to our minds, the issues of mandatory joint registration or titling of land among married couples; the recognition of cohabitees within the marriage laws and their entitlement to compulsory mandatory registration of land; and the inclusion of agricultural land and all persons including Muslims within the relevant law of succession regime-can all be cured through legislative amendments. We are under no illusions however, that this process is as easy as it would otherwise appear. In fact, their lack of inclusion in the laws in time gone past is not due to ignorance but due to the sensitive nature of the issues. In particular, the exemption of persons professing the Muslim faith from the general law of succession is in the constitution and would require a constitutional amendment-quite an arduous task. Notably, it was a contentious issue during the drafting of the constitution and formed a key referendum campaign issue in efforts to have the constitution passed in the national referendum. Its inclusion in the constitution was a consequence of the various political compromises made with the various stakeholders- and a quest to change it would elicit backlash and invite difficulties. The requirement to mandatorily register both married couples-men and women- upon acquisition of land even where only one of the couples has contributed to the acquisition of such property would certainly invite debate. Perhaps, a less contentious but in no way non-controversial issue would be recognizing cohabitation expressly in the law to avoid reliance on courts' interpretation of the doctrine of advancement to read marriage and thereby entitle a cohabitee to property rights. The law would better protect such persons by being amended to expressly provide for the common law position in statute and with further provisions requiring mandatory titling of property acquired by cohabitees.

The issue regarding the allocation of finances to women to enhance their purchasing power so as to enable their acquisition of land may be done either as a matter of policy or in law. It is possible that the same could be done within the current constitutional framework which adopts various affirmative action provisions-but this simply hands the particular government in power a blank cheque to determine how to implement the affirmative action programmes. It would therefore be prudent were there to be a law requiring the setting aside of money for women specifically to enable them purchase land, even though momentarily, and availing mechanisms of ensuring that this happens.

V) Conclusion

This paper has canvassed the well-worn argument that women's land rights is linked to improved food security in any society since women are mostly the nurturers in the home and that a significant proportion of their income is usually spent within the home particularly on food. It has also shown that land rights of women in Kenya, as in many other countries, are still tenuous and there is need for securing these rights besides increasing the number of women who have title, access and control over land. The paper then



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reported the results of an assessment of Kenya's legal and policy framework on land commissioned by FAO, with a view to illustrating the inadequacies of the laws that explain the insecure land rights of women. We have then urged for legislative amendments and lobbying to ensure a change of the laws, while noting that there is likely to be a lot of opposition to the same due to the sensitive nature of the issues.