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SECURING PROPERTY RIGHTS IN LAND IN KENYA

FORMAL VERSUS INFORMAL

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Securing Property Rights in Land in Kenya: Formal Versus Informal

Joseph Kieyah and Patricia Kameri-Mbote

13.1 Introduction

Land is the centrepiece of Kenya's development and has often dictated the pulse of nationhood since independence. The essence of the land question confronting Kenya is insecure and unclear property rights for over two-thirds of 144 million hectares. Furthermore, the enforcement of private property rights for over 28 million hectares has not been forthcoming because of institutional factors. Clear and well-defined enforceable property rights to land will induce landowners to invest resources in productive activities instead of spending them on defending their claims. The absence of clear and secure property rights might inhibit the ability of the Kenyan government to deal adequately with new emerging issues. For example, global warming and climate change are expected to affect land use.

Since independence, the land issue has remained contentious. Although Kenya has developed since independence, a majority of the population continue to depend on the land for their livelihoods and economic well-being, making it increasingly complex. New land-related problems due to rapid population growth have added to historical legacies resulting in a labyrinth of problems that require focused and serious attention (Government of Kenya, 2002). However, failure by the government to adequately address the problem continues to threaten the social, political, and economic well-being of the nation (Kameri-Mbote and Kindiki, 2009). Indeed, land is the fulcrum of Ken-

ya's development as rightly recognized by recent government publications (Government of Kenya, 2007). It is worth noting that land has emerged as one of the issues that needs to be dealt with if the underlying causes of violence, such as that sparked by the disputed presidential election in 2008, are to be avoided (Government of Kenya, 2008). Thus, any debate on Kenya's prosperity must incorporate the land issue. Land commissions have been established since colonial times to address the land question, and the main recommendations have been the call for urgent overall land reform and the singling out of lack of a national land policy as the root cause of land problems in Kenya (Government of Kenya, 2002). The report on Illegal/Irregular Allocations of Public Land (Government of Kenya, 2004) implicitly attributed the haphazard dealing over land to the absence of a land policy.

Through a widely consultative process, the Ministry of Land completed drafting the National Land Policy (NLP) in 2007 to address the land problem and fill the identified gap. The policy was adopted by Cabinet in 2009, and the National Land Policy was passed as Sessional Paper No. 3 of 2009. The overall objective of the policy is to secure property rights in land to provide for sustainable growth, investment, and the reduction of poverty in line with the government's development objectives. Although it has correctly diagnosed the land problem, it does not offer prescriptive measures on how to resolve these issues, leaving these to be spelt out in laws that will implement the policy. The provisions of the policy have sparked controversy, which is expected to continue in the implementation phase. It sets out long-term goals and principles of land management that enable the achievement of a socially optimal utilization of land.[1]

Vision 2030 acknowledges land reform as a critical ingredient in socio-economic transformation. Based on the current land debate, the land problem has gained a national importance.[2] Agenda four of the *Agreement on the Principles of Partnership of the Coalition Government* signed on 28 February 2008 deals with long-term solutions to the conflict that was witnessed in Kenya pursuant to the disputed 2007 presidential election. The land question comprises a major issue in Agenda four. Given that the land problem is not monolithic, it is difficult to recommend a one-size-fits-all solution. As one of the commission's reports points out, the land question has, over time, been shaped by economic, political, social, and legal parameters (Government of Kenya, 2002). These include the dependency of the economy on land, making the issues of tenure, access, distribution, and regulation critical. The political nuance of the land question is pegged to the administrative and political control of the economy based on land. The land–social structure nexus is clearly discernible in the African economy where the communities remain largely dependent on land for their livelihoods as well as economic activities (Government of Kenya, 2002). Each issue must be examined on its merits.

Conventional economic theory maintains that secure property rights in land, especially individual property rights, are a prerequisite for land development and economic growth (Demsetz, 1967; Ellickson, 1993). Secure rights comprise rights defined with sufficient precision and enforceable with least cost (Deininger, 2003). One important legal institution used for protecting those rights is land title registration. Attempts to institute land title registration on a voluntary basis have not succeeded in most parts of the world. De Soto (2000) argues that the reason why developing countries have not enjoyed the fruits of capitalism is the failure to institute formal title systems. He argues that lack of formal title is what prevents poor landowners from using their considerable land holdings as collateral for the purposes of 'unlocking' capital value.

In a review of De Soto's book, Woodruff (2001) questions why the gains from formal property rights are so great, and why formal property rights have not emerged as economic theory suggests they should have (Demsetz, 1967). However, he argues there exists an externality:

> An individual owner internalizes some of the gains from formal title – an increase in land value, increased access to credit, for example. But other gains are external to the person receiving the title. The ability to trade with strangers has network characteristics – I gain from you being formalized. Property registration systems help utilities collect from their customers. My cost will be lower if you are forced to pay. Thus, the benefit of universal titling might exceed the costs and the system may fail to develop spontaneously. Indeed, this is the case in the contemporary developing world, in De Soto's view.
>
> Woodruff (2001: 1217)

Based on empirical studies, the general consensus is that security of land tenure has no effect on agricultural productivity of land in Africa. Migot-Adholla *et al.* (1991) found no significant relationship between land rights and productivity at farm level based on cross-sectional data from Kenya, Ghana, and Rwanda. Place and Hazell (1993) reached similar results based on further examination of the same data set. Carter *et al.* (1994) found that land title in Kenya had no impact on yield output, income, and profit per acre. Pinckney and Kimuyu (1994) compared land use practices in two similar coffee-growing communities: Kenya, where individual land title has been promoted by the government; and Tanzania, where the state owns all the land. Consistent with the above studies, they found that land title has had little effect on land investment and the use of credit markets. In a detailed re-examination of the World Bank data set, Migot-Adholla *et al.* (1993) and Besley (1995) essentially reinforced the above conclusion. Using the conceptual model of Feder (1991), Place and Migot-Adholla (1998) tested the effects of land title in

Kenya on productivity as a function of exogenous factors and obtained similar results. However, using a district-level cross-sectional data set, Miceli *et al.* (2001) found that demand for land title registration in Kenya is influenced by economic factors. These results contrast with studies that have used farm-level data to suggest that title registration in Africa does not seem to have produced the sort of increases in productivity and capital investment that proponents of the system promised.

However, other comparable studies of countries such as Brazil demonstrate that secure titles enhance property values and promote farm-specific investment (Alston *et al.*, 1996). In Thailand, Feder and Onchan (1987) confirmed that security of landownership has substantial effects on agricultural productivity.

The conventional view that land titling has no or little impact on productivity is problematic because it is contrary to economic theory, which states that secured property rights in land are a prerequisite for land development and economic growth. Notwithstanding methodological concerns, one possible explanation for the failure of land title registration to affect productivity in Kenya is that the expected gains from registration have not yet been fully realized for various reasons.

There has been empirical evidence linking land reform and growth around the world. For example, Besley and Burgess (2000) used the general equilibrium framework to explain the linkages between land reform and poverty in India. Land reform in India aimed to increase tenure security through tenancy reforms, abolish intermediaries, implement ceilings on land holdings and consolidate disparate land holdings. Empirical work done in Nepal (Adhikari and Chatfield, 2008) has indicated that conventional redistributive policies, such as the redistribution of agricultural land through land reform programmes, has a direct impact on the incomes of the poor who benefited from these transfers. The aim of land reform in Nepal was redistribution of property rights in cultivatable land. Using time series data from Thailand, Byamugisha (1999) has shown that there is a positive and significant long-term effect between land titling and economic growth. In Zimbabwe, Moyo (1995) has shown that land reform in the form of redistribution has improved the well-being of resettled households dramatically over the last twenty years. The land redistribution reforms have not had negative impact on large-scale commercial farm outputs given the underutilization of arable land in the large-scale commercial farm sector in Zimbabwe. Chirwa (2004) has shown that land reforms, through land redistribution in Malawi, which led to access to land, are important factors that can translate to poverty reduction. Kieyah and Kivuti (2009) have empirically demonstrated that ownership of titled land affects household poverty. The data used for the analysis in this study are from the Kenya Integrated Household Budget Survey (KIHBS), which was conducted in 2005/06 by the Kenya government and consists of 13,430

observations in 1,343 clusters. Using consumption expenditure as a proxy for poverty and controlling for household characteristics, they found that ownership of titled land is positively and significantly related to poverty. These findings are consistent at both national and provincial level with the exception of the Western, Rift Valley, Nairobi, and North Eastern provinces due to data collection problems.

It is important, however, to consider the social side of the property institution, which nuances the economic aspect: property deals with value-enhancing relationships regarding assets. Consequently, legal enforcement of property rights enhances the owner's probability of retaining possession. It could mesh with assets that are not capable of being commodified,[3] such as property belonging to a group for a bereaved widow, kinship, and other familial ties. Indeed, the value of property increases with each additional subscriber, and the utility of property draws from the network of subscribers who can keep away the free-riders. The state provides the mechanism for public enforcement of property as a public good, ensuring that the law standardizes forms of property and reduces the costs of investigations. An effective title registration system needs to relate to the social side of property because the acceptance by one's neighbours of the legitimacy of a property owner's claim is quintessential to the enjoyment of that property. It is this acceptance that makes people keep off and, where people perceive some inalienable rights in the *res* that is claimed as property by another, the costs of protecting the property rise exponentially.

This chapter suggests that a definition of property rights and the formulation of mechanisms for protecting these rights are critical for both individuals and communities. Assuming clarity of land property rights, the chapter examines the formal and informal options for property rights protection. Section 13.2 traces the history of land reform in Kenya during the colonial and post-Independence period. Section 13.3 provides a comparative analysis of informal and formal mechanisms of protecting land rights. It examines the weaknesses and strengths of informal institutions. The benefits of the formal system notwithstanding, the section provides a simple economic model to explain the failure of land title reform in Kenya. Section 13.4 concludes.

13.2 Background information

This section explores the history of land reform in Kenya. During the colonial period, land policy was skewed in favour of European settlement at the expense of African reservation. The post-Independence Kenya government vigorously pursued the inherited land tenure reform coupled with its own land reform initiatives including land redistribution as embodied in settlement schemes and group ranches.

13.2.1 Colonial land policy

Kenya inherited colonial land laws that are a hybrid of English and African customary law. The colonial government viewed African customary land tenure as an impediment to greater agricultural production and proper land use. The newcomers proposed replacing the customary system with an English-style system based on individual land rights. Implementation of this remedy became a stated part of the colonial government's land policy in 1933 through the recommendation of the *Report of the Kenya Land Commission*. The inability of the colonial government to meet domestic food demands after the Second World War coupled with the Mau Mau revolt of the early 1950s created an urgent need for land reform (Okoth-Ogendo, 1976). In the wake of the revolt, an appointed Royal Commission published the *East Africa Royal Commission Report 1953–1955*, which became the blueprint for subsequent land reform policy. At the same time, the colonial government published the Swynnerton Plan, which called for the intensified development of African agriculture (Swynnerton, 1955). Both reports recommended the replacement of customary land tenure with private, titled property as a means of increasing agricultural productivity and redistributing land to efficient farmers (Kiamba, 1989). Pursuant to the recommendations of the two reports, the colonial government embarked on a major social engineering agenda to facilitate the formalization of African land tenure and institute a land title registration framework in the native 'reserves' (Government of Kenya, 1966; Coldham, 1979). More specifically, the Swynnerton Plan recommended the consolidation of land holdings of families into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. This process was to end the perceived uncertainty of customary tenure already considerably modified by years of European contact (Okoth-Ogendo, 1991).

Following the publication of the Swynnerton Plan, the colonial government established a commission to consider specific legislation to implement the recommendations of the plan. As a result of the commission's report, the Native Land Tenure Rules were enacted in 1956.[4] This formalized the administrative process of consolidation, adjudication, and registration. To ensure that the rights granted through the process were not disturbed, the African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation to which the 1956 Rules applied.[5] The net effect of these laws was to close avenues available to aggrieved land holders and dispossessed peasants. Three years later, two more comprehensive statutes, the Native Lands Registration Ordinance and Land Control Ordinances, were passed. The Native Lands Registration Ordinance of 1959 spelt out the rights of the registered proprietor at §37(a), namely an estate in fee simple in such land together with all rights and privileges belonging or appurtenant thereto.[6] These three pieces of legislation established the legal framework for formalizing the African land tenure system, which was to be implemented on an ad hoc basis.

13.2.2 Post-Independence land policy

At the time of independence, there were three substantive regimes in property law[7] and five registration systems[8] supported by administrative institutions to effect the objects of the regimes. The net effect of this was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasants. The duality was manifest in:

- Systems of land tenure based on principles of English property law and a largely neglected regime of customary property law;
- A structure of land distribution characterized by large holdings of high potential land and highly degraded and fragmented small holdings;
- An autonomous and producer-controlled legal and administrative structure for the management of the European sector, as opposed to a coercive control structure for the African areas; and
- A policy environment designed to facilitate the development of the European sector of the economy by underdeveloping its African counterpart (Government of Kenya, 2002).

To structure the inherited land tenure reform, the newly elected government enacted the Registered Land Act (RLA), which adopted many of the provisions of the Native Lands Registration Ordinance of 1959. In addition to addressing the competing interests between Kenyan Africans and the European settlers, the Kenyan government instituted land redistribution through land settlement schemes. The colonial authorities had initiated the Million Acre Scheme to resettle Africans. In the post-Independence period, the government offered to finance private people, both Kenyans and Europeans, to purchase large farms outside the settlement areas (Leo, 1989).

The intention in promulgating the RLA was to bring all land under this statute and thus achieve two sets of objectives (Kagagi, 1992). First, the Act set out to unify the multifarious systems of land registration in Kenya. This process entailed voluntarily bringing previously registered land in compliance with the RLA (Jackson, 1988). Specifically, land titles privately held under the Government Lands Act, Land Titles Act (LTA) and the Registered Titles Act (RTA) were to be converted and transferred to the new register in compliance with the RLA (Jackson, 1988; Kagagi, 1992). This has not been achieved.

The second objective involved converting land that was formerly held under African customary law into the modern tenure system of the Act through consolidation, adjudication, and registration. Under the adjudication, existing land rights and interests under African customary law in a particular par-

cel are finally and authoritatively ascertained under the Land Adjudication Act (LAA). Once ownership is determined, consolidation of the land holdings is allowed whenever appropriate, according to the Land Consolidation Act. It entails owners giving up their adjudicated fragmented plots in exchange for a single plot with the same acreage as the fragmented plots (Onalo, 1986). The final step includes recording the interest of the land in the public register and the issuance of land title deeds under the RLA.

TRUST LAND

Areas that were classified as native reservation and non-scheduled were reclassified as Trust land. The notion of Trust land was a way of giving recognition to group and native rights. Trust land consists of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated, and registered in individual or group names, and native land that has not been taken over by the government.[9] It is governed by the Trust Lands Act, Chapter 288, of the Laws of Kenya. Trust land is divided into two: that which should be registered under the RLA and that which is not for registration. Currently, Trust land falls within three broad categories: adjudicated, unadjudicated, and public land. Although a small part of the country has undergone the process of consolidation, adjudication, and registration, most of the Trust land has remained unadjudicated. The ownership of the Trust land is constitutionally vested in the local government on behalf of residents within its jurisdiction. The occupiers of Trust land that is unregistered land have rights that are in limbo and awaiting confirmation through registration. These rights are, in some cases, guaranteed under some form of customary tenure. Tenure of Trust land is increasingly changing from the trust status to ownership by individuals, legally constituted groups and the state, with the application of customary law being ousted and land removed from the ambit of local government control (Kameri-Mbote, 2002).

GOVERNMENT LANDS

Colonization, it has been argued, introduced a novel and alien concept of property relations in Kenya, namely the state–land relationship, with the assertion of the protectorate as a political entity owning land and granting property users subsidiary rights (Okoth-Ogendo, 1991). The 1901 East Africa (Lands) Order in Council defined Crown Lands as

> all public lands within the East African Protectorate which for the time being are subject to control of His Majesty by virtue of any Treaty, Convention or Agreement, or of His Majesty's Protectorate, and all lands which have not been or may hereafter be acquired by His Majesty under the Lands Acquisition Act, 1894, or otherwise howsoever.[10]

This was followed by the Crown Lands Ordinance No. 21 of 1902, which vested power in the Commissioner to sell freeholds in Crown land to any purchaser in lots not exceeding 1,000 acres.[11] These regulations conferred enormous discretionary power on the colonial authorities, which had a virtually free hand to determine what was 'waste and unoccupied' land. The tendency was to treat all native rights to land as temporary and only exercisable if the native is in actual occupation of the land.

The 1915 Crown Lands Ordinance ended the official pretence of concern for the interests of the natives by declaring all land within the protectorate is Crown land whether or not such land was occupied by the natives or reserved for native occupation.[12] The Ordinance mandated the colonial authorities to grant 999-year leases, although the settlers clamoured for perpetual leases.[13] Chief Justice Barth's interpretation of the provisions of this Ordinance in the case of Isaka Wainaina & Another v Murito wa Indagara & Ors. was to the effect that Africans were mere tenants at will of the Crown with no more than temporary occupancy rights to land.[14] Upon independence, Crown land was renamed government land governed by the Government Lands Act, Chapter 280 of the Laws of Kenya. Section 3 of this Act gave the President, like the Governor before him, power to make grants or dispositions of any estates, interests, or rights in or over unalienated government lands (Kameri-Mbote, 2002). Although some of the original land has been retained, some has been reserved for railways and allocated to private owners. Land previously owned by Europeans through grants became private land under freehold or leasehold.

SETTLEMENT SCHEMES

At independence, the Kenyan government adopted a market-based land distribution strategy to address landlessness and stimulate agricultural production (Government of Kenya, 2004). The struggle for independence was centred principally on the quest to regain control of land that had been taken by the colonial authorities. By the late 1940s, there was widespread discontent among Africans about colonial occupation of their land. Following independence, the new government embarked on settling its citizens who had been displaced from their ancestral land through discriminatory colonial policies of land alienation.

The objective of the strategy was to facilitate the transfer of large-scale European farms to Africans through settlement schemes. To start with, the Kenyan government financed the settlement through loans and grants from the British government and other international agencies (Leo, 1989). Upon acquisition of the European farms, based on a willing seller and buyer principle, the government subdivided them into economic units and mortgaged them to Africans. The Settlement Fund Trustees (SFT) was established to execute the

programme. The beneficiaries purchased land on mortgage from SFT by paying periodically until the purchase price had been fully paid.

GROUP RANCHES

Formalizing land title in Maasailand posed several challenges to the new government: the area was dry with poor soil and bad landscape. Since Maasai land tenure was based on customary law, it was impractical to formalize land rights (Coldham, 1979); and international forces exogenously pressured the government to induce development by increasing livestock productivity while protecting Maasai communal ownership rights. Indeed, the *Report of the East Africa Royal Commission of 1953–1955* on the policy on land tenure in the East African Protectorate noted that, although individualization of land ownership should be the main aim, it should not be confined to individuals but should also be extended to groups such as companies, co-operatives, and customary associations of Africans.[15]

The Kenyan government introduced the concept of the group ranch as a compromise between conflicting communal ownership and private ownership interests. The concept is a hybrid of Maasai customary land tenure and private land tenure (Galaty, 1994). It involves setting aside a piece of land that is communally owned by a group of people who are recorded and registered as legal owners of that land in a ranch (Rutten, 1992). Although the Maasai had previously resisted various forms of development that would change their way of life, the concept of group ranches was attractive to the educated members of the community. It offered them security of title and protected them from land loss to other tribes (Government of Kenya, 1966).

A group ranch consists of members who hold group land title in common. Elected group representatives co-ordinate and implement ranch development projects including the management of resources and community organization (Galaty, 1994). The conventional view is that group ranches have failed to meet their intended objectives. Instead, most group ranches have been subjected to ongoing rapid subdivision, driven in part by their members. The inefficiency of group representatives in management, together with government pressure to privatize the ranches, has increased demand for subdivision (Kieyah, 2007). These inefficiencies are rooted in the original establishment of the group ranches, which disregarded Maasai customary laws. For instance, the territorial boundaries of these ranches were arbitrarily created and did not correspond with each group's previous boundaries.

13.3 Analysis

This section analyses the two options for the protection of property rights that are currently in place: informal and formal systems.

13.3.1 Informal protection

Some of the benefits of the informal system embodied through customary laws include protection of individuals' security of tenure and limited unsustainable use and dissipation of rents. However, the scope of its enforcement tends to be narrow and restricted to small communities. As the informal system lacks legal legitimacy, it is difficult to enforce against outsiders of a given community. Furthermore, the system remains vulnerable to break down if the custodians of customary law behave opportunistically as the resources rise in value.

As a means of protecting property rights in land, informal systems have not worked in Kenya. The post-Independence land laws have retained an element of hostility to the informal system, which was inherited from colonial land policy. The assumption was that the customary systems would fall into disuse and be replaced by modern/formal tenure systems. This has not happened, and those whose claim to land draws from informal systems have not received sufficient legal protection, leaving many vulnerable to legal usurpations and evictions (Lynch, 1996).

Although the existing Kenyan national laws recognize and protect customary land rights, the government's failure to enforce the law continues to undermine these rights. For instance, the Kenyan Constitution recognizes African customary law as the guiding legal principle under which the rights, interests, or other benefits of local residents over Trust land in a given county are held. However, subsequent provisions of the Constitution undermine these rights by imposing, in some instances, restrictions or extinguishment. First, under the repugnancy clause, 'no right, interest or other benefit under African customary law shall have effect ...so far as it is repugnant to any written law' (Government of Kenya, 2002). This makes indigenous peoples' land rights in Trust land subject to the vagaries of national politics. Any arbitrary legislation could be enacted that may explicitly contradict the African customary law and thereby supersede it. This is because of the assumption that customary tenure needs to be modernized and that, being the principle guiding land policy and law in Kenya, there is very little documented information on customary tenure norms, values, and institutions. Attempts to recognize and protect customary tenure have been through organizational forms, the institutional norms and values of which clash with those of the community. Group ranches and local authorities are cases in point.

Second, the Kenyan Constitution, through an Act of Parliament, grants the local government and the President eminent domain power to 'set apart an area of Trust land' for public use.[16] Appropriation under this section extinguishes all the interests previously held under the informal system. Anecdotal evidence indicates that councillors have illegally allocated Trust land set apart for public purposes to individuals and to themselves (Government of Kenya,

2004). With regard to group ranches, there is evidence of parcellation into individual holdings, thus negating the intentions that informed this form of land holding. Indeed, one could argue that such titling seeks to lock in the benefits of formalized tenure in a situation in which the land holders perceive their holdings as unsecured.

13.3.2 Formal protection

Kenya's experimentation with formalization of land title through registration is a mixed bag. Methodological issues of evaluating the impact of the registration process notwithstanding, it might be the case that expected gains from registration have not yet been fully realized for various reasons. Since its inception, the title registration process has been predicated on voluntary adoption, which might have been the main reason why the process failed.

This section provides a verbal description of a simple model showing that title reform, based on voluntary adoption of a new system, will most likely result in underutilization (Miceli and Kieyah, 2003). The model is developed in the Appendix.

The fundamental question the model seeks to answer is whether the voluntary policy may have contributed to its failure. Title registration is a necessary condition for economic development, yet economists and policy-makers often assume that the demand for it will arise spontaneously. Suppose the government decides to formalize ownership through title registration in a region where ownership is predominantly protected by informal means. Assume economies of scale of administrative costs of title registration per parcel depend on the number of parcels in the new system. Costs per parcel decline as the number of parcels in the system increases. Given the cost, only landowners whose parcels' net values exceed those of the prevailing system voluntarily demand title registration. In so doing, they ignore the benefit that their entry confers on all other entrants by lowering costs. As a result, few owners may choose to enter the system.

The anecdotal evidence on the assessment of Kenya's land title registration supports the model. The first objective of land title reform is to unify the multifarious systems of land registration under a single act. This process is costly where landowners whose titles are governed by the pre-Independence registration laws are expected to voluntarily bring them into compliance with the RLA (Jackson, 1988). Since enactment of the RLA, not a single title has been converted (Kagagi, 1992).

The second objective entailed formalization of African land tenure through a land title registration process where land claims are filed voluntarily during the adjudication phase. The rate of formalization has been slow, protracted and stalled in some regions. Moreover, in some other cases, gains of title registration have been reversed. For instance, in regions where land registration

has been completed, land transactions have continued to be conducted informally (Coldham, 1979). Out of 144 million acres, only 4 million titles have been issued, and about 18 per cent of all land available for title registration countrywide has been entered into the system (Syagga, 2006).

One other contributory factor is institutional reforms such as the regulation of agricultural land transactions, which have generated unintended consequences in impeding land title reform. Through the Land Control Act (LCA) of 1967, the government established a legal framework under which the transactions of agricultural lands were to be administratively regulated. Specifically, the Act provided for efficient use of agricultural land by controlling fragmentation, landlessness, and speculation. It establishes a three-tier land control board system with unimpeachable statutory powers to grant or deny consent for the controlled transactions of agricultural lands. Controlled transactions as defined in the LCA are not capable of conferring any interest and right to land without the board's consent. Evidence shows that the land board control system has not been operating inefficiently, but that the administrative nature of the system propagates rent-seeking behaviour, which raises the transaction costs of dealing with agricultural land (Government of Kenya, 2002).

Another reason why the benefits of formalization may not have been realized is the disconnection between the objects of formalization and its actual operations on the ground. As Nyamu-Musembi (2006) and Bromley (2008) aver, the benefits of formalization may be overrated compared with the actual results. Bromley asserts that 'formalisation erodes and displaces existing social networks and arrangements that do offer security' and that 'formalisation offers little assurance that beneficial outcomes are inevitable' (Bromley, 2008).

13.4 Conclusion

This chapter offers two options of property rights protection on land: formal and informal systems. The informal system offers security of tenure with minimal costs; however, its effectiveness is localized, which severely impedes the development of a land market. Furthermore, although the existing national laws recognize the informal system, they provide weak legal enforcement mechanisms, which are sometimes contradictory. From anecdotal evidence, individuals and communities whose claims to land draw from informal systems do not have sufficient legal protection. This leaves many of them vulnerable to legal usurpations and evictions including land grabbing and illegal takings.

On the other hand, formal protection through land title registration offers maximum security of tenure but it is costly. Kenya's experimentation with land title registration has not produced the sort of increases in productivity and capital investment the proponents of the system promised. Formal title sys-

tems are essential to economic development; however, economists and policymakers often assume that they simply exist or will arise spontaneously.

This chapter shows that, even in the extreme case where all landowners would gain from the institution of a new system, equilibrium usage may fall short of the optimal level due to a fundamental externality. Of course, it is impossible to determine the importance of this effect relative to a myriad of other factors that contribute to the success or failure of title reform. Even under the most favourable conditions for reform, policies based on voluntary reform are unlikely to achieve their full potential. Therefore, Kenyan government provision and maintenance of a title system is a necessary, although perhaps not a sufficient component of a successful economic development policy.

Land remains the fulcrum of Kenya's development. It forms a critical link between the three pillars of development: political and legal, economic, and social, as envisaged by *Vision 2030*. *Vision 2030* acknowledges the implementation of the draft as a key ingredient to socio-economic transformation that the country envisages by the year 2030. Land is a critical input in the productivity of the agriculture and tourism sectors, which *Vision 2030* has identified as major drivers of overall economic growth. Clear property rights in agriculture will increase revenues through taxation as well as reduce incidences of poverty. Proper management of public land would provide for other land uses such as manufacturing, mining, and urban planning. Socially, protection of property rights may positively affect the reduction in poverty incidence.

Appendix

Simple model

Suppose there are N parcels of land in a given region. Let v be the value of a given parcel under the prevailing land title system, where, for simplicity, differences in v across parcels solely reflect varying title risks. Let F(v) be the distribution of these values over the range $[0, v_{max}]$.

Suppose that, by bringing a parcel into the new title system, a landowner can eliminate all (or nearly all) existing defects, resulting in a value of V that is the same for all parcels (reflecting the fact that the parcels are identical, apart from title defects). Further, $V>v_{max}$, implying that all parcels attain a higher value under the new system. Thus, if the new system was costless to operate, all landowners would rationally enter it.

However, the new system is not costless. Specifically, let t(n) be the cost per parcel of operating the new system as a function of the number of parcels in the system, n. The key assumption is that there are scale economies in these administrative costs. That is, $t'(n)<0$, or costs per parcel decline as the number

of parcels in the system increase. Decreasing average cost might reflect, for example, high fixed costs associated with the establishment of a title registry, coupled with low variable costs.

Compulsory title reform would require that all N landowners enter the new system and assess each at a cost of t(N). Such a reform would therefore constitute a Pareto improvement if

$$V-t(N) \geq v_{max} \tag{13.A1}$$

which means that the net value of the land is higher under the new system for the parcel with the highest value under the prevailing system. Although this need not be true, we assume that it is in order to show that, even when it is in the interest of all owners to enter the new system, a policy of voluntary entry may nevertheless fail to achieve this outcome.

Now, suppose that the entry into the system is voluntary, and that individual landowners take the cost of entering the system, t, as given. An owner whose land is worth v under the prevailing system will therefore enter the new system if

$$V-t \geq v \tag{13.A2}$$

According to this condition, owners with the most serious defects will be the most willing to enter the new system. For a marginal landowner, V–t=v. We therefore define

$$v^*(n)=V-t(n) \tag{13.A3}$$

as the highest valued parcel that enters the system under a voluntary regime when n parcels are in the system. In equilibrium, therefore, it must be true that

$$n=N\,F(v^*(n))=G(n) \tag{13.A4}$$

where $F(v^*(n))$ is the fraction of parcels entering the new system as implied by Equations (13.A2) and (13.A3). To determine the implication of Equation (13.A4), note first that

$$\partial G/\partial n=NF'(\partial v^*/\partial n)=-NF't'(n)>0 \tag{13.A5}$$

where the positive sign reflects the scale economies in administrative cost.

Now, suppose that n=0, or no parcels are in the new system. In that case, $v^*(0)=V-t(0)$. If this is positive, then the owners of the lowest valued parcels under the prevailing system would find it privately optimal to enter the new

system. In that case, G(0)=NF(v*(0))>0. Alternatively, if v*(0)<0, no individual owners would find it optimal to establish the system, in which case G(0)=0. It follows that G(0)≥0. Now suppose n=N, or all parcels are in the new system. From Equation (13.A1), v*(N)≥0, which implies that F(v*(N))=1 and G(N)=N.

Note that, although n=N, the efficient outcome, is one equilibrium, there may exist others with n<N (including n=0 in the case where G(0)=0). The reason for the existence of these suboptimal equilibria is the externality embodied in the t(n) function. Specifically, in a regime of voluntary entry, individual landowners take the entry cost, t, as given and enter according to Equation (13.A2). In so doing, however, they ignore the benefit that their entry confers on all other entrants by lowering t(n). As a result, too few owners may choose to enter the system.

Figure 13.A1 indicates that multiple interior equilibria may exist, depending on the particular shape of the G(n) function. Some of these equilibria are stable and some are not. The stable equilibrium are those in which G(n) cuts the 45° line from above, i.e. where the slope G(n) is <1. In Figure 13.A1, there are two stable equilibria, namely the interior point A and the efficient point n=N.

General model

Suppose the cost of registering a property in the new title system is given by t(v, n) where $t_v < 0$ and $t_n < 0$. The fact that $t_v < 0$ implies that it is costlier to repair more serious title defects. From Equation (13.A2), the condition for an owner with property value v to enter the new system is

$$V \geq t(v, n)+v \equiv A(v, n) \qquad (13.A6)$$

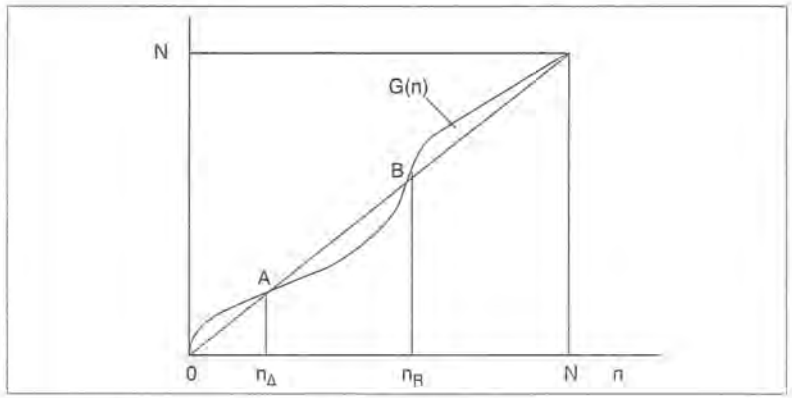

Figure 13.A1 Equilibrium adoption of the new title.

Note that $A_v=t_v+1 \geq 0$ or $A_v=t_v+1 < 0$. Thus, it is no longer necessarily true that the owners with the lowest values of v will be the first to enter the new system.

Let us define S(n) to be the set of parcels for which it is profitable to enter the new system for given n, that

$$S(n)=\{v: A(v, n)\} \leq V \qquad (13.A7)$$

The number of parcels in the system is therefore given by

$$G(n)=N \int dF(v) \qquad (13.A8)$$

It follows that, in equilibrium,

$$N=G(n) \qquad (13.A9)$$

The fact that $A_n=t_n < 0$ implies that S(n) is non-decreasing in n. Thus, G'(n)≥0, and the conclusions in the text carry through.

Finally, we need to revise Equation (13.A1), which ensures that it is socially optimal for all parcels to enter the new system. Define v*(N) to be the parcel for which entry into the new system is least desirable when all parcels are in the system. From Equation (13.A1), it follows that $v^*(N)=\arg_{max} A(v, n)$. Thus, Equation (13.A1) is replaced by

$$V \geq A(v^*(N), N) \qquad (13.A10)$$

Note that if A(v, n) is increasing in v for all n, then $v^*(N)=v_{max}$ as in the text.

Notes

1 Paul Syagga, 'Objectives Principles and Key Recommendations of the Draft National Land Policy', a paper presented at the Workshop on Land Reforms for Sustainable Peace, Stability and Development by the Institution of Surveyors of Kenya at Nairobi Safari Club on 10 June 2008.

2 Kofi Annan's Recommendation. Recent Safari Park Workshop convened by the Minister of Land.

3 See Margaret Jane Radin (2001) explaining the distinction between fungible property (not unique and not linked to persona), which is easily amenable to transaction in the market, and non-fungible property (unique and personal as part of the owner's personality; sentimental, emotional link), the value of which to the owner is beyond the market.

4 These rules empowered the Minister for African Affairs to set up machinery for the adjudication of areas of 'native' lands within which private rights to land were considered to exist.
5 The Kikuyu districts of Kiambu, Nyeri, and Fort Hall (now Murang'a) (comprising Central Province) and Embu and Meru (comprising part of Eastern Province) were among the first areas where tenure reform was carried out. See examples from figures given in J. D. MacArthur, 1961, Land Tenure Reform and Economic Research into African Farming in Kenya, *East African Economic Review*, 82. Consolidation consisted of the process of amalgamating all the pieces of land owned by one person to determine the acreage to which the person was entitled. It would be followed by adjudication, namely determination of the rights of each person to that land, and then registration, which vested absolute rights in the registered proprietor to the land.
6 See Colony and Protectorate of Kenya, Native Lands Registration Ordinance No. 27 of 1959 (1959) (hereinafter the NLRO, 1959). The aim of this ordinance as stated in the Preamble was 'to provide for the ascertainment of rights and interests in, and for the consolidation of land in the native lands; for the registration of title to and transactions and devolutions affecting such land and other land in native lands and for purposes connected therewith and incidental thereto'. It was the precursor to the current Registered Land Act, Chapter 300 of the Laws of Kenya (hereinafter the RLA).
7 The Transfer of Property Act of India, 1882, the Registered Land Act, Cap. 300 of the Laws of Kenya and customary law.
8 Registration of Documents Act (Cap. 285), the Registration of Titles Act (Cap 281), the Government Lands Act (Cap. 280), the Land Titles Act (Cap. 282) and the Registered Land Act (Cap. 300).
9 See §115 of the Constitution of Kenya (1983).
10 See §1 of the East African Order-in-Council, 1901, passed at the Court of St James on 8 August 1901.
11 See §4 of the Crown Lands Ordinance, 1902.
12 See §5 of the Crown Lands Ordinance, 18 May 1915.
13 See §34 of the Crown Lands Ordinance, 18 May 1915.
14 (1922–23) Kenya Law Reports, Vol. IX, 102.
15 See Report of the East Africa Royal Commission of 1953–1955, Cmd 9475 (1955).
16 Ibid. at §117, cl 1.

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