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# **THE LAND HAS ITS OWNERS!**

## **GENDER ISSUES IN LAND TENURE UNDER CUSTOMARY LAW IN KENYA**

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## I. INTRODUCTION

Women the world over, have been at the centre-stage of economic production, including agricultural, livestock and business sectors. In Africa, where the mainstay of most economies is farming or agriculture and livestock production, women contribute to over 80 percent of the workforce.<sup>1</sup> In most parts of Africa, women are closely associated with production of food and raw materials for the industrial sector. Indeed, women are also more directly involved in small-scale crafts and localized industries, trade and general business. This has until recently been ignored or obscured in national production statistics.<sup>1,2</sup>

However, women who comprise over half of the world's population, rarely own any reasonable forms of property; do not have adequate access to the same, and do not even make major decisions pertaining to allocation and use of such property. Among farming communities where the basic property is land, women's access to it is determined by men as a matter of patriarchy cultural tradition. According to a study carried out by Women and Law in East Africa (1995) on *Inheritance Laws and Practices in Kenya*, women only own land to the extent that they perceive or believe this be the case especially within marriage or other cohabitation relationships.<sup>3</sup> It only dawns to them that they neither own nor control property when such relationships go sour.

For instance, among various Kenyan communities, women do not traditionally own land or other immovable properties. At best, they have *usufruct* rights, which are hinged on the nature of the relationship obtaining between them and men either as husbands, fathers, brothers or such other male relatives. Such access can be denied, as it is dependent on the whims of such male benefactors. This situation does not only place women in a precarious position in terms of their survival and livelihoods, but stifles their effective role and contribution to national development. With agriculture and other land based natural resources being the main sources of livelihood, the consequences for women not owning, controlling or accessing land are grave.

This paper looks at issues of gender and tenure in African customary law. It argues that under all systems of law in many African countries, ownership of land and associated resources is very much anchored in patriarchy. It decries the failure to isolate positive aspects of customary law and the preponderance of women-unfriendly customary law which influences statutory and other forms of law. Part II of the paper provides the conceptual and theoretical premises of the paper. It looks at patriarchy, gender and law and their impact on tenure relations emphasising the male dominance paradigm. Part III looks at the issues of access, control and ownership as informing paradigms for exploring the gender-land tenure issue. Part IV looks at women's rights to property under customary law and points to the preponderance of male control and the relegation of women's rights to use. It also underscores the precarious nature of women's rights and the inability of women to access statutory legal provisions on tenure to land even when these are in their favour. Part V comprises the conclusion.

## II. CONCEPTUAL AND THEORETICAL PREMISES

To understand the interface between gender, customary law and tenure, one has to look at gender as a social construct and the role that it plays in pastoral communities. The patriarchal ordering of many traditional societies also gives useful insights into the roles that men and women play in society. It is also critical to look at the legal rules that govern the relations between men and women in society as well as the interface between gender and these rules. In this part we will look at the concepts of gender, patriarchy and the legal system. Our aim is to underscore the dominance of men in the traditional realm and the validation of that dominance in the legal realm.

### A. Patriarchy

In its traditional conception, 'Patriarchy' literally means the rule of fathers. But today it goes beyond the 'rule of fathers' and includes the rule of husbands, of male bosses, of ruling men in most societal institutions, in socio-

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1 Ester Boserup, *The Role of Women in Economic Development* (1970).

2 See Society for International Development, *Pulling Apart: Facts and Figures on Inequality in Kenya* 2004.

3 W. V. Mitullah *et al.*, *Women Inheritance Laws & Practices*, WLEA, Nairobi (2002) .

political and economic dimensions of the society. Thus the contemporary conceptualization of patriarchy encompasses all forms of male dominance. Patriarchy is equated to male domination, a system of socio-cultural and legal relations in which men as a class have power over women as a class. Those power relations are social constructs and not biological nor natural. This power can be ideological, social, political and economic. The cultural aspect of patriarchy in most cases takes the form of the devaluation of women's work or achievements while the ideological aspect portrays women as natural, biological creatures inherently different but inferior *vis a vis* men.<sup>4</sup> Patriarchy also describes the form of male domination in terms of the household authority of the father. It denotes the historical depth of women's exploitation and oppression. Its contemporary manifestation is capitalism and all its attendant facets, especially in terms of access to and control over a society's productive resources.<sup>5</sup> Thus conceived, patriarchy is a 'struggle concept' that denotes the totality of oppressive and exploitative relations which are viewed through the gender angle.

Patriarchy is the framework within which gendered relations of power are played out and has assumed a dominant role and relationship *vis a vis* other forms of social organization to the extent that even where matrilineal forms of social processes survive, it is the patriarchal power relations which underpin and strongly influence the manner in which men and women live together in such societies.<sup>6</sup> It is indeed conceded that in most societies, male power is embedded and rooted in the maintenance of patriarchal social relations and institutions which are underpinned by an ideology which defines the adult male as the ultimate decision-maker, controller of material resources and controller/user of women and children's productive and reproductive capacities.

## B. Gender

The term gender means the state of being either male or female. The male and female genders define and characterize all human beings in society. The two genders are distinguished from one another by physical, that is, biological sexual/ reproductive differences.

The term 'gender' has however increasingly acquired a social meaning where it defines how the male and the female gender relate in society. The social meaning refers to social characteristics of one's biological sex. These characteristics include gender-based division of labour whereby duties are allocated on the basis one's sex. For example the female gender is allocated duties such as cooking, washing and other domestic chores, which belong to the private rather than the public sector. The male gender is allocated non-domestic duties such as decision-making, bread winning and others, which belong to the public sector.<sup>7</sup>

Thus when one adverts to the issue of gender today, one is not merely talking about the *physical difference* that being biologically male/female would entail. One is also talking about *social constructions of maleness and femaleness* and these often translate into *power relations* between men and women. Sex then is distinguished from gender by what one is born as, that is female or male, and therefore it is a biological concept. Culturally determined patterns of behaviour such as rights, duties, obligations and status assigned to women and men in society (gender roles) are varied even within the same society.<sup>8</sup>

Feminist scholars use *gender* as an analytical variable. *Gender* is a relational concept that denotes the manner in which women and men are differentiated and ordered in a given socio-cultural context. Sexuality appears as the interactive dynamic of gender as an inequality. As an attribute of a person, sex inequality takes the form of gender, moving as a relation between people, it takes the form of sexuality. Gender emerges as the congealed form of the sexualization of inequality between men and women. So long as this is socially the case, the feelings, acts or desires of particular individuals notwithstanding, gender inequality will divide their society into two communities of interest. The male centrally features hierarchy of control.

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4 Hanne Petersen, 'Discard Yet Embrace-Customary Law', in *Changing Families: Changing Laws*, 1994.

5 Signe Anfred, 'Gender, Power, Knowledge', in *Changing Families: Changing Laws*, 1994.

6 Patricia McFadden, 'Gender, Power, Patriarchy', in *Changing Families: Changing Laws*, 1994.

7 Clarion, An Introduction to Gender, Law and Society: Constitutional Debate No. 11 (Claripress Limited, Nairobi 2001) p.2.

8 P. Kameri-Mbote, 'Gender Considerations in Constitution-Making: Engendering Women's Rights in the Legal Process', in *University of Nairobi Law Journal* (2003)

## C. The Role of Law

Law can be used to reinforce or give permanence to certain social injustices leading to the marginalization of certain groups of people. In the realm of women's rights, legal rules may give rise to or emphasize gender inequality. Legal systems can also become obstacles when change is required in legal rules, procedures and institutions to remove the inequality by the oppressed. This necessitates an inquiry into what injustices are intertwined within the legal systems and the extent of their operation. One often finds that the *de jure* position, which may provide for gender neutrality cannot be achieved in practice due to the numerous existing obstacles, which make the law powerless.

There are three issues to be noted with regard to law in its governance of tenure relationships. First, statute books contain legal rules and principles which are or can be seen as a legitimation of the subordination of women to men. Two, the structure and administration of laws can occasion the subordination of women to men. Three, the socio-economic realities in many African countries and the patriarchal (the ordering of society under which standards – political, economic, legal, social- are set by, and fixed in the interests of, Men) ideology pervading society prevent the translation of abstract rights into real substantive rights.

Women have been systematically removed from fully participating in the development process despite their active participation in the production processes alongside men. Even where women's legal rights have been provided for, ignorance of such rights exacerbated by illiteracy ensures that they do not benefit from such provision. The effectiveness of laws in according women equal opportunities with men depends largely on the society's willingness and ability to enforce such laws. It is at this point of enforcement that one gets caught up in the dichotomies and conflicts of statute law, customary law and law in practice which many a woman find themselves warped up in.

To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In many cases, despite the gender neutrality of legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in *de facto* discrimination. As Tove Stang Dahl aptly points out

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality...<sup>9</sup>

## D. Land Tenure

Land tenure systems vary from community to community and are influenced by the unique historical development of each political grouping and consequent variation of legal and institutional structures.<sup>10</sup> A search for the tenure system operative in a particular society is an attempt to answer the tripartite question as to *who* holds *what interest* in *what land*.<sup>11</sup> Land tenure refers to possession or holding of the rights associated with each parcel of land. It ordinarily has at least three dimensions namely, people, time and space. In so far as people are concerned, it is the interaction between different persons that determines the exact limits of the rights any one person has to a given parcel of land. These rights are not absolute since there are rules that govern the manner in which the person with tenure is to utilise their rights. While the time aspect of tenure determines the duration of one's rights to land, spatial dimensions limit the physical area over which the rights are to be exercised. The spatial dimension of tenure may be difficult to delineate in exclusive terms since different persons may exercise different rights over the same space at different times.<sup>12</sup>

Tenure systems represent relations of people in society with respect to the essential and often scarce land. They are culture-specific and dynamic, changing as the social, economic and political situations of groups change.<sup>13</sup> Under

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9 Tove Stang Dahl, *Women's Law: An Introduction to Feminist Jurisprudence* (Oslo, Norwegian University Press, 1987).

10 See, e.g., R. G. Crocombe, *Improving Land Tenure* (1968) and J. B. Ojwang, *Laying a Basis for Rights: Towards a Jurisprudence OF Development* (1992).

11 See H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya* (1991).

12 Louis Fortmann & James Riddell, *Trees and Tenure: An Annotated Bibliography* (1985).

13 See Steven Lawry & John Bruce, *Resource Tenure and the Management of Natural Resources in Africa* (1987).

both African and western systems of land holding, for instance, ownership can be sub-divided and lesser interests can and are frequently held by different persons simultaneously. While most African customary laws recognised a measure of individual control over the broad interests that were hosted by land, paramount or allodial title was perceived as vested above society and whatever rights any one person had to the land were subordinate to the entire community's rights.<sup>14</sup> The saying by the Ghanaian Chief Nana Ofori

I conceive that land belongs to a vast majority of whom many are dead, a few are living and countless host are still unborn succinctly captures the conception of land ownership by a majority of African communities.<sup>15</sup> The rights of individual members of the community in this regard are critical to understanding the tenure relations.

Colonialism had profound effects on African tenure systems by introducing the notions of individual and state ownership of land in a bid to promote economic development.<sup>16</sup> In Kenya for instance, the Torrens title system based on statutory registration and ownership of individually demarcated plots was introduced to replace pre-existing customary notions of land ownership.<sup>17</sup> The latter have, however persisted and informed and been informed in practice by the introduced system. Thus Bentsi-Enchill notes that the defects of African systems of land tenure have arisen from the fact that these systems have been left to informally adapt to changed circumstances.<sup>18</sup> It is within this context that one excavates women's rights to own, access and control land. The terms and conditions under which rights to land are acquired, retained, used, disposed of or transmitted are nuanced by gender relations. Gender is indeed a critical variable in culture, power and property discourses<sup>19</sup> and colours interactions between people in their public and private spaces.

## E. Legal Pluralism Versus Legal Centralism

Studies on gender and legal change in former African colonies have to take into account that the lives of women and men are affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks that provide different understandings of the law. While the former denotes a unified system of rules which are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system. Legal centralism starts from the standpoint that state law or state recognized and enforced law is the most important normative order and all other norm-creating and enforcing social fields, institutions and mechanisms are either illegal, insignificant or irrelevant.<sup>20</sup>

Legal pluralism may be divided into two namely, juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of certain religious or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which is common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from state law.

### I. State Law

State law denotes rules promulgated by the state. It postulates law as a coherent and unified system of rules enforced through the state court machinery, uniform for all persons, exclusive of other law and administered by a

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14 See Krishan M. Maini, *Land Law in East Africa* (1967).

15 See N. A. Ollennu, *Customary Land Law in Ghana* (1962).

16 See FORTMANN & RIDDELL, *supra* note 12.

17 H. W. O. Okoth-Ogendo, 'Some Issues of Theory in the Study of Tenure Relations in African Agriculture', 59 *Africa* 6 (1989). The system gained its name from its originator Sir Robert Torrens.

18 Kwamena Bentsi-Enchill, 'Do African Systems of Land Tenure require a Special Terminology?', 9 *J. Afr. L.* 114-139 (1966).

19 Sara Berry, *No Condition is Permanent* (University of Wisconsin Press, 1993).

20 Agnete Weis Bentzon et al., *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law* (Oslo: Tano-Aschehoug – Harare: Mond Books, 1998).

single set of institutions.<sup>21</sup> Laws being applied by post-colonial state comprise of imported European substantive and procedural law and customary law as interpreted by the courts. For many women, the fact that they are trapped within the state's interpretation of the construction of families, its assumptions about the status of women in customary law has been a barrier to advancement even when the broader areas of the law have been reformed for the benefit of women.<sup>22</sup>

## 2. Customary Law

Customary law is the law of small scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders who to get any account of it have to either be told about it or read about it.<sup>23</sup> Whether read about or narrated, customary law is once removed from the source. Thus the written accounts there are of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule brings to bear on the subject his/her preconceptions and biases. It would be easy to understand the ramifications of customary law if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.<sup>24</sup>

The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions. An outsider looking at these societies' structures may aver that women have no rights under customary law. It has, however been contended that women were better off under customary law than they currently are because they were accorded great protection as mothers and assured of a share of and access to resources even where they did not exercise political leadership of the community.<sup>25</sup> The women-unfriendly customary law has gradually developed as African societies have undergone change most of which can be seen arising from colonisation and privatisation. The battle of the sexes at customary law is in one sense therefore a struggle over scarce resources and power as overlords in the form of colonial powers and states in modern African states have assumed control over all aspects of the lives of Africans, prompting the African males to consolidate the one bastion of their authority, namely customary law. In some cases, notions of customary law such as the concern for women have been dropped making women very vulnerable. The removal of protection has not been accompanied with fewer roles for women within the community. Their roles of reproduction and production have remained intact (rural women in Africa contribute substantially to food production).

## 3. Religious Law

Most religious laws do not define how land and related resources are managed. However, owing to the fact that most property norms are exercised within a family context and the role of religion in family law, there tends to be links between land ownership and religious law. This may be difficult to identify except in Islam but it is there especially where traditional religious norms overlap with customary law tenets.

## 4. Intersections between different laws and normative orders

Women find themselves situated in the intersection between different systems of laws and a plethora of normative orders that influence the choices that they can make and the decisions that are reached about their lives by others. Thus legal pluralism takes on a new meaning, recognising that there are regulatory and normative systems other than formal law that affect and control people's lives. The consequences of these for tenure relations need to be mapped and studied with a view to identifying possible points of intervention with regard to gender relations.

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21 Anne Griffiths, *In the Shadows of Marriage: Gender and Justice in an African Community* (Chicago: Univ. of Chicago Press, 1997).

22 Welshman Neube et al, *Paradigms of Exclusion: Women's Access to Resources in Zimbabwe* (Harare: WLSA, 1997).

23 T.W. Bennett, *Human Rights and African Customary LAW UNDER the South African Constitution* (1995).

24 At about the end of the nineteenth century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See D.T. Arap Moi, *Kenya African Nationalism* (1986).

25 See Alice Armstrong, *Customary Law in Southern Africa: What Relevance for Action*.

### III. ACCESS, CONTROL & OWNERSHIP

Access to property in many traditional societies as pointed out above is predicated on three things namely, membership to a given society, functions relating to the property and the performance of reciprocal obligations owed to others in the society. The socially constructed roles of men and women are integral to the delineation of access rights. Control for its part entails the power to distribute and redistribute access rights to members of the society. This power is determined by the power relations between members of the community. In patriarchal settings, the role is vested in the older male members of a community.

Ownership which constitutes the overall right to land is a factor of social relations in the community even though theoretically it is vested in the entire community. While the perception is that the entire community owns the land, it is clear that the entity that has control can exercise rights akin to ownership to the detriment of other members of the community. The rights of access may be limited by the person that has control over the land. In this way, ownership and control of land constitutes essential validation of social, economic and political autonomy for individuals as well as communities. Land constitutes the condition *sine qua non* of the identity of the community polity and is akin to territorial sovereignty for states.

Access to, control over and ownership of land is influenced by diverse factors which include gender, age and marital status. Land is mainly controlled by male household heads on the assumption that the rights are held in trust for all in the household. We pointed out above that women have access/usufruct rights to land in many African countries. To that extent, their autonomy in the social, political and economic realms is circumscribed by their lack of control over land. This is significant taking into account that land represents the vehicle through which women can move from the reproductive (private and non-work) realm to the productive (public and work) realm.

### IV. WOMEN'S LAND RIGHTS UNDER AFRICAN CUSTOMARY LAW

Customary law, as pointed out above constitutes the unwritten social rules and structures based on the tradition of communities. It is not uniform across regions and nations but common factors can be elicited. One is that customary law tends not to be codified, it is the unwritten social rules and structures of a community derived from a shared community values and based on tradition. Some scholars have argued that customary law has come to be defined by men and does not reflect women's interpretation of custom.<sup>26</sup> Customary law pertaining to women's land tenure like statutory law is based on social relations between men and women and more specifically husband and wives. Customary law seems to have few provisions for divorced women and even fewer for single women.

#### A. General status

In Africa most systems of customary law, women regardless of their marital status cannot own or inherit land. Women are assumed to be transient within the polity and therefore not strategic as grantees of rights to land which constitutes the core of a community's existence. Besides, there is the perception that women are part of the wealth of the community and cannot therefore be the locus of land rights' grants. Men control household land because community authorities who are predominantly male have allocated the land to male household heads and these lands are passed down to male heirs. For most women, access to land depends on their relation to male relatives. A husband, for instance, has an obligation to provide arable land to his wife to farm but decides which piece of land the woman can use and for how long.<sup>27</sup> Also under customary law, 'all the property acquired by the spouses, except personal goods, belongs to the husband who is entitled to retain all of it at the dissolution of the marriage'.<sup>28</sup>

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26 O. Acetous, African Women's Economic Social & Cultural Rights, in R. Cook ed., *Human Rights of Women: National & International Perspectives* (1994).

27 S. Lasterria-Cornhiel, 'Impact of Privatisation on Gender and Property Rights in Africa', 25(8) *World Development* 1317-1333 (1997).

28 Implementation in Africa of the Convention on the Elimination of all forms of discrimination against women. (UN Doc. E/ACA/CM. 13/27).

Women's access to land is only via a system of vicarious ownership, through men as husbands, fathers, uncles, brothers and sometimes sons.<sup>29</sup> In Rwanda for example, a daughter rejected by her husband or his family could be given a portion of land in the centre and south or in the northwest from lands held in reserve by the patrilineage for such emergencies.<sup>30</sup> Similarly, a woman who never married and did not bear children could also receive an allocation of land from the lineage holdings<sup>31</sup> According to Pottier<sup>32</sup>, a woman would have access to it for as long as she was deemed in need, if necessary, for life. After her death however, the land would be reclaimed by her late husband's nearest patrikin.

Thus customary rules have the effect of excluding females from the clan or communal entity, which rules then serve to exclude females from ownership. Attempts by women to control property, especially land, are considered by the community as misbehavior. A woman who buys land is seen as having 'sinister' intentions either to run away from her marital home, or use it as a place to 'entertain' other men. The threat of women gaining power through property ownership makes society frown upon women who go ahead to acquire property of their own. 'Proper' women are satisfied with males being the providers in their lives, and they take whatever is given to them with gratitude, and teach their daughters to do the same.<sup>33</sup>

In several African countries, customary land registration systems require proof of a husband's authorization for a woman to acquire title independently of her husband and single women or single parent women are obstructed from acquiring these on the basis that there are risks in lending outside of marriage or without the support of their husbands or male relations.<sup>34</sup>

Under customary law, widowed women do not inherit land, but traditionally they were allowed to remain on the matrimonial land and in the matrimonial home until death or remarriage. Over the past decade or so, however, this social safety net has eroded with male heirs tending to sell off the land for their own economic gain leaving widows landless and homeless. Unmarried daughters' needs are perceived as emergencies provided for the life of such daughters on the basis of need not right on the understanding that they revert to close male relatives upon the death of the daughter. The Islamic law has been integral to customary law and under this Islamic Law while women are not precluded from owning and inheriting land, they are not granted equality with men. Looking at the shares widows and daughters receive under the Islamic Law of inheritance reveals the privileged position of men with respect to land. A widow is entitled to a fixed share of 1/8th of her late husband's estate if he had children (not necessarily by her) and 1/4 if they had no children. If there is more than one widow they divide this share. A widower in a similar situation would take twice as much: 1/4 if he and his deceased wife had children and 1/2 if they were childless. Daughters inherit a fixed share of 1/2 of the estate if the deceased has no sons. If there are two or more daughters they share 2/3rds of the estate. If there are sons, they are the first heirs and daughters then receive only 1/2 of the share of the son.<sup>35</sup> Even though women are granted some ownership and inheritance rights under Islamic Law, social norms pressure women to renounce these rights.

In those countries where women have the statutory right to own land like Kenya, tradition prohibits these rights from being claimed or enforced ensuring that very few women are able to claim these legal rights. Similarly, in Nigeria, the Land Use Act which codifies the system of land ownership does not exclude women. However, women's socio-economic position within Nigeria bars them from claiming land.

## B. Property Rights within Marriage

In most ethnic groups, a married woman does not own property during marriage. In some communities, all her property, whether acquired before or after marriage, is in the sole control of her husband during the subsistence of the marriage. He has the power to use and dispose of it as he wishes. Although the wife has the right of use over

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29 UNHCS, Women's Rights to Land, Housing & Property in Post Conflict Situations & During Reconstruction: A Global Overview (Land Management Series No.9, 1999).

30 J. Pottier, *Social Dynamics of Land reform in Rwanda, Past, Present & Future* (1997).

31 Jennie Burnet, Women's Rights in Rwanda (RISD).

32 See Pottier, *supra* note 30.

33 Anonymous, 'Our Laws do not Help Women on Land', *The Monitor*, 6 May 2003.

34 *Ibid* pg 5.

35 See Winnie Mitullah et al., *Women Inheritance Laws & Practices* (Nairobi: WLEA, 2002).

property, for example, cultivation of land allocated to her, such control must be exercised with the consent of the husband. She may not sell or otherwise dispose of such property without her husband's consent. For instance, once married, a Nigerian woman loses her identity as it is subsumed under that of her husband. Therefore, only her husband's name is expected to appear on land titles. Most married women, who understand and accept this 'cultural trap', lose interest in the acquisition of property.<sup>36</sup>

Most of the control exercised by women on land is biased towards use rather than control and ownership. In marital contexts, men assume a superior position as they have control over their wives' property regardless of whether it is separate or not. This subordination of women socially and economically weakens their position in society since their economic power, limited to use only in most cases, does not make them as competitive as they should be under the current economic structuring of society.

### 1. Property rights at Separation and Dissolution

There is little to indicate what the exact distribution of property at separation is. At dissolution, distribution of property depends on whether such property is land or otherwise and whether it has been acquired before or after marriage. Generally, a divorced wife has a right to take her personal effects, presents given to her by her husband and gifts given to her by her family. All other property - the house, furniture and land given by the husband or his family, remain with the husband.

Among the Taita of Kenya, the wife is entitled to property acquired during the subsistence of the marriage provided it is the husband who divorces her. A divorced wife is not entitled to maintenance in any form. In some cases, however, for example among the Luhya, Kisii, Masaai and Taveta of Kenya, the wife is not to take anything out of the matrimonial home even though acquired by her personal efforts.<sup>37</sup>

### 2. Effects of Formalisation of Land Rights on Customary Rights: An Example of the Registered Land Act of Kenya

The Registered Land Act (RLA) was passed for the main purpose of enabling the title-holder to deal with the land in any way he sees fit subject to certain limitations. The Act therefore embodies the principle of individualisation of land under an indefeasible title. Section 27 states

Subject to the provision of this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.

Registration frees the registered proprietor from claims of other parties. The power of allocation is what is considered a registrable interest. Right from the beginning, registration was bound to exclude most women from acquiring titles to land since they only had rights of use while men retained those of allocation. The tenure reform process only took into consideration the rights of people who had land and not the landless or those who had rights that did not amount to ownership.

In most cases families designated one of themselves, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom. Cases of such family representatives seeking to evict the other family members from the family land escalated.<sup>38</sup>

The process of consolidation as understood by native Kenyans was the vesting of trusteeship in the family head and not the expropriation of family rights by an individual as the registration process turned out to be. The

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<sup>36</sup> Jadesola Akande. Untitled paper presented at the International Workshop, Sweden (*supra* note 31).

<sup>37</sup> The main source of information on women's property rights under customary law is E. Cotran, *Restatement of African Law, The Law of Marriage and Divorce* (Sweet and Maxwell 1968). However in *Yawe v Public Trustee* E.A.C.A. Civil Appeal No. 13 of 1976 (unreported) the high court cautioned that Cotran's restatements should not be followed like scriptures.

<sup>38</sup> See *Obiero V. Opiyo* (1972) East African Law Reports 227; *Muguthu V. Muguthu* Civil Case No. 377 of 1968 (Unreported) and *Esiroyo V. Esiroyo* 1973) East African Law Reports 388.

registration process thus excluded most women from property ownership and the benefits accruing from such ownership.

The RLA does not recognise customary rights of use and women are therefore left at the mercy of the title-holder. Section 30 states that registered land is subject to overriding interests but it does not include customary law rights as one of such interests and thus excludes customary rights of use. In *Obiero v. Opiyo*,<sup>39</sup> the Court indicated that the legislature did not intend to recognise customary law rights. The judge said,

Had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so.

The decision was followed in *Esiroyo v. Esiroyo*.<sup>40</sup> The effect is that a woman has no interest in registered land and unless she claims and proves that the land in question is held and registered as trust property, for the benefit of members of the family, she has no way of claiming a right to the land.

The RLA limits the number of people who can be registered as common or joint owners, of property to five,<sup>41</sup> in order to control subdivision coupled with the Land Control Act<sup>42</sup> which controls transactions in agricultural land and generally discourages fragmentation, the Act affects succession rights of women especially in polygamous households where the property of the deceased husband has to be subdivided according to households.

Sections 120 and 121 of the RLA empower the courts to determine succession of registered land in accordance with the tribal custom of the deceased. Subdivision into uneconomic units will not be upheld by the courts and this has the indirect effect of excluding some widows (if widows are many and land is small) from ownership of the land.

The RLA therefore has the effect of weakening the position of women, in that registration has been monopolised by men and a large proportion of women do not therefore have title to land. Registration confers certain powers which strengthen one's economic power. Lack of title means that one cannot exploit the powers thus resulting.

Registration places one in a position free from the interference of parties whose interests are not shown on the register. The right of use is not registrable therefore many women have no interest in the registered land and cannot interfere with acts of the title-holder, even though he may be dealing with it unscrupulously *prior* to registration, such property was family property in which members of the family could claim rights and consequently, in which women could claim rights of use.

The position of women in relation to matrimonial property is extremely weak. Customary law in relation to property rights of women seems to be out of step with the present economic structure and this has the effect of weakening the economic power of women.

### 3. The Interface between Customary & Statutory Land Rights for Women

As is clear from the above, there is convergence between the English doctrine of coverture and customary and statutory law on property relations especially where women are in a marriage situation. Patriarchy exacerbates this situation and impacts on unmarried women as well since male heads of households constitute the exclusive locus of landholding when individual tenure is introduced. The effect of this is the extinction of women's land rights, including rights to access land under customary law. Moreover, gender neutral laws on land rights apply in contexts that are much gendered. The application of statutory provisions in these contexts is mediated by customary perceptions of masculinity and femininity and the association of land and related resources with males.

Countries have sought to use of human rights norms entrenched in national constitutions as way of dealing with gender discriminatory customary law. They do these through proscribing discrimination generally except in personal law matters; providing for both gender equality and the application of customary and religious laws and leaving the courts to arbitrate on what rights should prevail on a case by case basis; and making customary law subject to the right to equality. These three approaches have their limitations. First, Allowing for customary law application

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39 (1972) E.A. 227.

40 (1973) E.A. 388.

41 Section 101.

42 Chapter 302, of the Laws of Kenya.

in personal law matters maintains biases against women as are. Secondly, leaving the issue for courts to decide on presupposes that the arbiters will not be influenced by prevailing gendered perceptions. Courts may be progressive or retrogressive. There is also the assumption that people will take matters to court which is fallacious as many land disputes are solved at local levels where people are more sympathetic to and familiar with customary norms.

## V. CONCLUSION

Gender and tenure in African customary law will continue to engage policy and law makers for a long time. The approaches taken to customary law have so far proved ineffective in addressing the problems. The predominance of patriarchy in law, policy and practice ensures that the land has its owners and these are not women. For law and policy to influence gender relations in the tenure realm, there is need to engage custom. Such engagement should aim at deconstructing, reconstructing and reconceptualising customary law notions around the issues of access, control and ownership with a view to intervening at points that make most difference for women. It is important to debunk the notion that all customary law is retrogressive and capture positive 'living' customary law aspects.

In this process, it is also important to recast the approach of law and policy to give women what men have had but women have not had. If men have been owners and controllers of property, it does not follow that women should get ownership and control. A thorough analysis of the impacts of locating exclusive rights in an entity must be conducted in the search for sustainable management of land. The statement of Nana Ofori above should inform our engagement with customary law in the quest for tenure law and policy change for improved gender relations. More significantly, there is need for innovative and proactive approaches which must of essence be radical. We propose that in determining tenure to land, land rights should be earned or deduced from an entity's relationship with the land. Tenorial rights should be anchored on use and subjected to greater public good resident in the trusteeship over land for posterity. Given women's roles in land management and husbandry, such an approach will identify them as loci for rights' grants and thus address the skewed gender and land relations under customary law which have been further entrenched by statutory laws.

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