

Women, Land Rights and the Environment: The Kenyan experience

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ABSTRACT *Gender neutral statutory law on land and environment and its interplay with customary, religious and other social norms has impacted significantly on women's rights to access land and environmental resources. To change the prevailing conditions, innovative and radical approaches to land and environmental resources' stewardship are required. Rather than focusing on ownership of land for its own sake, we suggest here that roles that individuals play with regard to the land and environmental resources should determine rights to land and environmental resources. Such a focus would shift the locus of land and environmental resources' control from titular male household heads to the labourers and tenders of land who are mainly women.*

KEYWORDS *Access; control; ownership; law; gender; property; sustainable development*

Introduction

Concerns about women's access to, control over and ownership of land and resources have been raised over the years at different but inter-related levels. Land and environmental resources are central to the lives of people living in countries whose economic development and subsistence depends on the resources. With regard to environmental resources, women's access to and control over forests, water and wildlife has come into sharp focus as it has become clear that the performance of women's day to day chores is anchored on these resources. Making access to land and environmental resources equitable is one way to achieve development. The Millennium Development Goals recognize the need to promote gender equality and empower women, the need to alleviate poverty and ensure sustainable environmental management. Feminist critiques of development have identified the marginalization of women from the means of production as a critical factor in the subordination of women. (Boserup, 1970)

The context within which access to land and environmental resources occurs is nuanced by diverse factors. *First*, the conceptualization of gender as a social construct where roles and realms of operation of men and women are set and translated into power relationships where masculinity and femininity denote differentiated entitlements to resources. *Second*, there are different legal orders used to allocate resources. Law can empower or disempower its subjects in the quest for access to resources. Legal

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equality may result in substantive inequality where the prevailing situation of legal subjects is not taken into account. *Third*, the patriarchal social ordering of many societies in African countries makes access to resources tilted in favour of male members of society. In this regard, laws intended to grant equal access for men and women yield very different outcomes upon application in a much gendered context (Dahl, 1987; Mackinnon, 2005).

Fourth, globalization and technological development impact on access, ownership and control of land and resources. For instance, as new technologies are adopted, women's ways of managing resources such as saving seed are sidelined even as the technologies are not made readily available to women (Shiva, 1989). The net effect is the alienation of environmental managers from the environmental resources (Mies and Shiva, 1993). This impacts on both food security and sustainable environmental management.

Access may be limited by the owner or controller of land and environmental resources. This is critical because these resources constitute an essential validation of social and political autonomy. For women, it is a means of moving from reproductive roles to production (Mies, 2003) It is noteworthy that gender-neutral laws on land and environmental resources have not resulted in more women owning these resources because of structural barriers such as access to credit and the prevalence of the myth that women cannot own land. Women are under-represented in institutions that deal with land and environmental resources, their rights under communal ownerships and ranches are not defined and this allows men to dispose of family land freely. Few women have land registered in their names. Similarly, state control of environmental resources has not resulted in equitable access to the resources for all. In instances where resources such as grazing areas and forests are vested in communities, equal access for all members of the community is not always guaranteed.

In Kenya, women's ownership of property is governed by statutory law, customary laws and religious law. The marital status of women is also critical to owning or accessing property. In a study

carried out by the Women and Law in East Africa Research group on inheritance laws and practices, it was clear that women tended to own moveable property or chattels but not land (Mitulla, 2002). Most women have access/possession of land but do not legally own it. Such access is also predicated on the relationship of the woman to the legal owner. Unmarried women are considered to be in a transition stage and while there are no legal barriers to their ownership of property, they do not own major forms of property in their own right.

Women's rights to property

The Convention on the Elimination of all Forms of Discrimination against Women, the Beijing Platform for Action and the Nairobi Forward looking Strategies all underscore the need to secure women's rights to land and resources. Paragraph 62 of the Nairobi Forward Looking Strategies specifically points out that

agrarian reform measures have not always ensured women's rights even in countries where women predominate in the agricultural labour force. Such reforms should guarantee women's constitutional and legal rights in terms of access to land and other means of production.

Similarly, the Optional Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa pays particular attention to the rights of women to land and environmental resources. At Article 15, the right to land is linked to food security while Article 19 dealing with sustainable development exhorts states' parties to promote 'women's access to and control over productive resources such as land and guarantee their right to property'.

Under the Kenyan Constitution, women can acquire, own and dispose of property. Section 82 (1) and (2) proscribe discrimination which is defined under Section 82 (3) as 'affording different treatment to different persons attributable wholly or mainly to their ...race, tribe, place of origin or other local connexion, political opinions, colour, creed or sex ...'. The laws of adoption, marriage, divorce, burial devolution of property on death and personal law matters; laws affecting members

of a particular tribe or race in matters exclusively concerning them and such an action is seen as justifiable in a democratic society are exempted by Section 82 (4) from the provisions against discrimination. These exemptions directly affect women's access to land and environmental resources and legitimize the traditional position, which accorded women fewer privileges than men, in matters concerning their families, marriage, divorce and succession. This presents problems in the application of progressive statutes such as the Law of Succession Act (Cap. 160) that seeks to give both men and women equal rights in matters of succession. Additionally, Kenya has no local legislation on matrimonial property and courts apply the 1882 Married Women's Property Act. While judicial decisions on the matter have increasingly recognized spouses' rights to matrimonial property, the absence of firm anchorage for the positive provisions has resulted in conflicting decisions.

Women's rights to land

Land in Kenya is vested in individuals, the government and groups or communities. Each has implications for women's rights to own, access and use. In Chapters 283 and 284 of the Laws of Kenya individual ownership of land ensues after the process of consolidation and adjudication. The Registered Land Act in Chapter 300 provides for absolute proprietorship of land under Sections 27 and 28. Upon registration, the registered proprietor becomes the absolute owner of the land together with all rights and privileges belonging or appurtenant thereto and not liable to be defeated except as provided for in Section 30 of the Act. It is notable that customary rights are excluded and are therefore not capable of qualifying the absolute proprietor's rights as stated in 11(4) Chapter 300 of the Laws of Kenya. The High Court has held in some cases that customary law claims should be recognized and is capable of qualifying an individual's rights (Mwangi Muguthu V. Maina Muguthu, Civil Case No. 377 of 1968; Samuel Thata Misheck & Ors. v. Priscilla Wambui & Anor H. C. C. No. 1400 of 1973; Edward Limuli v Marko Sabayi H. C. C. No. 22 of 1978 and Alan Kiama v

Ndia Muthunya & Ors C. A. No 46 of 1978) and in others that they are not overriding interests and should therefore be ignored. (Selah Obiero v. Oren-go Opiyo (1972) East African Law Reports 227; Esiroyo v. Esiroyo 1973 East African Law Reports 388 and Belinda Murai & Ors v. Amos Wainaina C. A. No. 46 of 1977).

The provisions of the Act are gender neutral but the application is gendered. Most land is registered in the name of the eldest male head of the household. The registration process thus excludes most women from property ownership and weakens the position of women because it frees the title holder from the interference of other parties whose interests are not shown on the register. The rights of use which women have are not registrable and women cannot therefore interfere with acts of the title holder. (Benschop, 2002; Ikdahl *et al.*, 2005) The Transfer of Property Act that provides for a fee simple estate over land contains an interesting provision limiting the rights of a married woman to own property individually. This provision achieves quite some significance when one considers the role of women in resource management in Kenya (Thomas Slayter and Rocheleau, 1995; Khasiani, 1992).

Government owned land is regulated by the Government Lands Act, which was originally passed to make provision for regulating the leasing and other disposal of crown lands. Section 3 of the Act gives the President power to make grants or dispositions of any estates, interests or rights in or over unalienated government lands (Odhiambo, 1996; Government of Kenya, 2003). Ownership of land by the government does not assure women access to such land. Government land has been passed on to individuals indiscriminately over the years (Kameri-Mbote, 2002). There is no gender disaggregated data on the beneficiaries of government land grants are in terms.

Group ownership is dealt with as trust land and group ranches. 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 individuals' or group names and native land that have not been taken over by the government as stated in Section 115 of the Constitution of Kenya It is governed by the

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Trust Lands Act and is vested in local authorities designated as councils as stated in Section 114 of the Constitution of Kenya (1983) and Chapter 288 of the Laws of Kenya. Tenure to trust land is increasingly changing from the trust status to ownership by individuals, legally constituted groups and the state.

The group ranch status in Kenya is granted to a group of herders that is shown to have customary rights over the range or pastureland in question. The operative statute in this regard is the Land (Group Representatives Act).¹ A group for the purposes of the Act is a 'tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner' where such person has, under recognized customary law exercised rights in or over land which should be recognized as ownership.

While community ownership is promoted as egalitarian and more likely to guarantee disadvantaged groups rights to resources such as land, there is no literature illustrating whether this is the case in trust land and group ranches in Kenya. With regard to trustland, it is worth noting that the governance institutions, County Councils, have very few women. Given the patriarchal social ordering, it would be surprising if indeed women have greater rights in these areas. In a study carried out among the Samburu, Rendille and Maasai where group ranches are the norm, it was noted that most fora for making decisions were dominated by men and that most of these cultures excluded women from such fora (Kameri-Mbote and Kamau Mubuu October 2004).

Women's rights to environmental resources

The link between women and environmental resources has been well documented. There is for instance a growing body of literature on ecofeminism, which seeks to combine different feminist theories and relates them to environmental issues. Ecofeminists explore gender oppression and environmental degradation, mainly caused by men,

and hold that women have a responsibility to stop this male domination over both. Ecofeminism has not informed women's quest for access and control of natural resources. There is a school of thought that holds that the framing of the ecofeminist debate is so abstract that it ceases to be the grassroots movement that it ought to be. This school of thought considers the Women, Environment and Development (WED) movement as more relevant to women in developing countries such as Kenya (Braidotti *et al.*, 1995).²

The WED approach postulates that women have an affinity to the environment and puts women out as victims of environmental degradation. It advocates for a bottom-up, people-oriented development approach in order to reach sustainable development where women are prominent actors (Agarwal, 1994; Braidotti *et al.*, 1995). The role of women in environmental management is now widely recognized, especially in developing countries where obtaining food and medicines, gathering water and fuel wood and making clothing and shelter are women's chores. International instruments such as Agenda 21 outline the role of women in environmental management (UNCED, 1992).³ National environmental laws have, however, not underscored this linkage between women and the environment and women are less likely than men to be major stakeholders in environmental matters given its linkage to land. Indeed, land tenure reform processes that marginalized certain sections of the population, such as women and younger men in Kenya, have impacts on the implementation of environment management policies and laws (Kanogo, 1992). As providers of food for their families, women interact very closely with the environment (Chiuri and Nzioki, 1992; UNRISD and Agarwal, 1995). In pre-colonial Kenya for instance, women used their knowledge to maintain a workable balance between drawing sustenance from land and allowing for the regeneration of that land within the limits of their defined rights of access and utilization. The creation of reserves and the migration of male members of native communities to plantations and urban areas to seek paid employment, while redefining the mode of production, deeply entrenched the role of women as managers of the

local environment. However, after the processes of consolidation, adjudication and registration, women lost control over the resources that they looked after and depended upon to sustain their families. Further, the individualization of property rights in land and the vesting of those rights in men alienated the women as managers from the ownership of the managed property. The role of women as tenders of the environment however, continued undisturbed notwithstanding the fact that their claims to the land which they managed became more precarious and tenuous. (Thomas Slayter and Rocheleau, 1995)

Today women perform many tasks associated with environmental management and play a major role in the agricultural sector, which forms the economic mainstay of the country. (Boserup 1970) They provide the bulk of the labour required for day to day management of farms including planting, weeding, harvesting and processing agricultural produce. In times of drought, it is incumbent upon the women to provide food for their families (Thomas Slayter, 1988). They are also responsible for saving seeds for the planting season.

Further, women's groups continue to form the major drive behind environmental management initiatives at the grassroots level (Chiuri and Nzioki, 1992; Khasiani, 1992a; Thomas Slayter and Rocheleau, 1995; Wangari, 1996). Women are involved in reforestation programmes and soil conservation projects. Any attempt to address the issue of sustainable management of any aspect of the environment thus needs to take into account the roles played by women. Environmental laws do not recognize the roles of women and facilitate

their performance thereof. Indeed wildlife, forest, water and agriculture laws are gender neutral. The only innovation that has recently been introduced in a bid to decentralize natural resource management is the involvement of communities in resource management as stated by Government of Kenya in the 2005 Forests Act. This, however, does not guarantee women either access to environmental resources or involvement in their management.

The way forward

Gender neutral land and environmental law have not facilitated women's access to resources. Gender neutral laws operate in gendered contexts. For law and policy to engender women's rights, there is need to move from state and individual ownership of land and natural resources and design a regime that gives access predicated on the relationship that an entity has with the resource. This requires movement from formal equality to substantive equality through addressing the structural barriers that hinder women's access to land and resources. More significantly, there is need for innovative approaches in determining access to land and environmental resources for sustainable development. The roles that diverse actors play in land and environmental management should be the key in determining rights to be allocated. In this way the workers on the land and the *de facto* managers of the environment will be the holders of the rights. Women have a chance of being rights' holders through such an approach.

Notes

- 1 See Chapter 287 of the Laws of Kenya, No. 36 of 1978 introduced as an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.
- 2 WED emerged in the early seventies, in the context of the debate on Southern women's roles in economic development. The accelerating global economic problems started off a debate on the specific and cumulative effects of these processes on the poor, and especially on women. The WED approach was informed by the increased awareness of the effects of environmental degradation worldwide.
- 3 See also The United Nations Conference on Environment and Development: Convention on Biological Diversity – Done at Rio de Janeiro, June 5, 1992, reprinted in 31 I.L.M. 818 (1992) Preamble, Art 8j & 10c and United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, Adopted at Rio de Janeiro, June 14, 1992 – Principle 20 also outline the role of women in environmental management.

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- Kanogo, Tabitha (1992) 'Women and Environment in History', in Shanyisa Anota Khasiani, (ed.) *Groundwork: African Women as Environmental Managers*, Nairobi: ACTS Press. In the process of consolidation, adjudication and registration, the major targets were heads of households (invariably male) who got absolute rights to the land in total disregard of the rights enjoyed by other members of the population. Some of the environmental management projects that women are involved in include reforestation, afforestation, and soil and water conservation.
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