

WOMEN LAND RIGHTS; AN ANALYSIS OF KENYA'S COMMUNITY LAND ACT 2016

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Abstract

The paper is aimed at establishing whether or not the law in Kenya secures and guarantees women's access, control and ownership to land in community land; one of the three tenure systems in Kenya. The background reviews the legal, policy and institutional frameworks that exist in the country relevant to women land rights within communal lands. This paper used qualitative methods by reviewing literature based on materials sourced from internet and books.

The Constitution of Kenya, National land Policy and the Community land Act are among the key legislations reviewed in this paper. The author reviewed various papers and journal articles that have been written on the issues of women's land and property rights in Kenya in the context of the research topic. To answer whether or not the law guarantees protects, secures and upholds women's land rights in community land, the author analysed the Community land Act of 2016 and made policy recommendation on how to secure women land rights in community land in Kenya. The paper in its analysis found that despite existence of legal and policy frameworks, gaps exist that would otherwise jeopardize women's ownership of land in communal lands. Such gaps include among others neutrality in legal provisions that fail to specifically spell out requirements that ensures both women and men are protected in matters land ownership.

Additionally, effective and efficient implementation of existing laws is still a challenge; thus women continue to be discriminated even with the existence of law. The author recommends among other things the need for Civil Society Organizations to hold the government and the relevant ministries to account in ensuring implementation of the law to the letter. Additionally, the need for civic and public awareness is recommended to ensure that women are aware of the existing laws that protect them and where to seek redress in case of violation. The author further recommends the need to build and strengthen capacity of religious and traditional platforms as custodians of culture and as key stakeholders in resolving land related disputes in the community.

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Introduction

The Constitution of Kenya, 2010 is celebrated as being among the most progressive Constitutions in the Continent. Guided by the National Land Policy, 2009 the Constitution dedicates a chapter on Land and natural resources. The NLP notes that individualization of tenure has undermined traditional resource management institutions; ignored customary land rights; and led to widespread abuse of trust in the context of the Trust Land Act. (NLP, 2009) It adopts the position that individual tenure and customary tenure should co-exist and benefit from equal security guarantees. The Land Policy further states that benefit sharing should be mandatory where land based resources of communities are managed by national authorities in order to protect the communities. The NLP identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land based resources; participation in decision making over land and land based resources; and protection of their land rights from unjust and illegal expropriation.

Communal ownership of land has been an essential aspect of majority of rural livelihoods in Kenya since pre-colonial times (Mbote & Odote, 2016) However, after independence, Kenya like many other states adopted a theory of individualization of land tenure. The Constitution of Kenya defines Community land as land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.

Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments, but not including any public land held in trust by the county government. Community land in Kenya accounts for freehold, leasehold and any other tenure form recognized in written law and includes trust land which is administered on behalf of the country government (estimated at 73.8% of Kenya's land in 2001) but also collective freeholds such as group ranches that were formerly classified under Private Land (Wily & Mbaya 2001; Doshi et al. 2014) This means that governance and administration of community land is critical in the quest to secure land rights for women as it forms a big chunk of land in Kenya. In the past, in the process of enjoying community rights to land, women and children often were disadvantaged. Inheritance laws and practices and even rights of access favoured the male and older members of society. (Odote & Mbote, 2016)

(Musangi, 2017) urges however that it is evident that even with laws and policies that provide for equality and non-discrimination it is still possible that inequalities can persist and thrive in the given society. She furtherstates that despite progressive laws concerning land and matrimonial property, in practice women continue to face discrimination through biased customary norms that are skewed towards giving men more rights as compared to women.(Huggins & Clover, 2005) see women's customary rights to occupy or use land are relational and not always solely dependent on marriage. This does not mean that they are necessarily weak, but relational rights can be problematic because they are less stable as relations change. The reality of the critical role that women play in agricultural production which is the biggest contributor to Kenyan's Gross Domestic Product cannot be underscored. Evidence from FIDA indicate that Kenyan women are the main agricultural producers and food providers (FIDA 2009)

The Constitution of Kenya, 2010 anchors the principles of the NLP and designates three tenure regimes: public, community and private. It recognizes community land vesting its ownership to the communities identified on the basis of ethnicity, culture or similar community of interest. It provides that any unregistered community land be held in trust by county governments on behalf of the communities for which it is held. The constitution also predicates any disposition or use of community land on legislation specifying the nature and extent of the rights of members of each community individually and collectively. To give effect to the recognition of Community land and the Constitutional demands in Article 63(5) the Parliament of Kenya passed the Community land Act in 2016.

Study Questions

1. Does the Kenya law guarantee the acquisition, control and access of women land rights in the community land?
2. How can the legal policy and framework in the Community Land Act be implemented to uphold and secure women land rights?

Research Methodology

This study was conducted through qualitative methods by reviewing legal and academic literature based on materials sourced from internet and books. The author reviewed various papers and journal articles that have been written on the issues of women's land and property rights in Kenya and beyond. Using the literature reviewed, the author analyses the Community land Act of 2016 and makes policy recommendation on how to secure women land rights in community land in Kenya.

Analysis of women land rights in the Community Land Act, 2016

In conformity of the Constitution of Kenya, Parliament enacted the Community Land Act, 2016 to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes

The Act requires communities with an interest in community land to register as legal entities but does not provide any details about the form of legal entity that must be created. The Act provides that Community land may be registered in the name of “communities”, “a clan or family”, or a “community association. The provision is silent to the power and gender dynamics and thus is gender neutral. Landesa, (2012) state that gender-neutral formal land laws may have a discriminatory impact on women. Additionally, the form of registration that the Act seems to be embracing need to take cognizance of the merits and demerits of land registration for women and men. De Schutter, (2013) highlight show land titling can produce a harmful situation, with the creation of “market for land rights” that do not necessarily favour those who need land the most. The responsibility and procedure for dealing with community land needs clarification to avoid elite capture as previously witnessed in group ranches, where officials registered in trust turned against the community members in dealing with such lands which further puts women in a disadvantaged position.

In the administration of community land, Section 15 (1) of the Act states that registered community shall have a community assembly which shall consist of all adult members of the

community. This provision fails to take cognizance of the importance of ensuring that both women and men are part of decision making processes in the community. It blankly speaks of adults forming part of the community assembly but does not specify the gender composition of the adult. This could see community assembly of adult men only make key decisions that then affect all community members. The community Assembly is a critical decision making body since all decisions must be ratified by the assembly thus the need to ensure that it is representative of all community members; women and men.

In matters benefit sharing, section 31 (3&4) moves away from being gender neutral to at least specifically eliminating any discrimination in dealings in community land for women and men. This set a good precedent in addressing the complexities of gender neutral laws that fail to adequately faceguard the rights of women and men over land and land based resources.

The Act does not further provide for mandatory participation of women in the boundary marking process, names of all the spouses be put on any formal registration of family property within community land and dispute resolution mechanism to be accessible to all irrespective of gender. Transactions in community land ought to be regulated by explicit protection in the form of spousal consent to be given when a family member seeks to alter family land. Women and men should have equal say in what happens to land used and occupied by their family and deliberate efforts must be made to ensure that this happens. This is considering the fact that majority of women in Kenya have minimal awareness of their rights and seldom have the means to enforce them, women have 67 percent literacy level as compared to men 78 percent.

Conclusions and Recommendations

It's undisputed fact that land is a key resource in ensuring secure livelihoods for women and men globally. Kenya, like many Africa nations has made strides in enacting legislative, policy and institutional frameworks to protect women's land rights, however, women continue to be disadvantaged in access, control and ownership of land and land based resources. This further entrenches inequality, pushing women in abject poverty. The existence of gender neutral laws and policies in many instances further perpetuates inequality among women and men in land and property ownership.

The realization of women's land rights in community land can only be achieved through ensuring that the laws enacted are implemented to the letter. Political and social will is necessary to make this happen.

The passing of the Community land law is a good step in the right direction of protecting and securing women's land rights; however, the good intentions must be accompanied by appropriate actions to translate and implement the good intention to practice.

To secure women land rights in community land in Kenya, this paper recommends that:

Participation and consultation during any process related to land should include women and men. Deliberate efforts should be made to ensure that women participate and voice out their concerns. Further, ideal time and location should be identified taking into consideration gender roles and responsibilities that may otherwise hinder women from actively participating in such avenues.

Civil society organizations must push to hold implementing institutions to account to facilitate and ensure implementation of all provision that would secure women's access to land in communal land. This should involve all key actors including relevant ministries, National Land Commission, researchers, relevant county government ministries and departments among others.

Religious and traditional institutions should actively be involved in ensuring the implementation of legal and policy reforms. This considering the fact that both religion and culture plays a critical role in shaping up values and community principles. Capacity building and strengthening should be done to both the religious and tradition institutions to deconstruct existing gender stereotypes that discriminate women in societies. Further, public education and awareness creation of existing legal and policy frameworks should be done to ensure that the public are aware of policy, legislative and institutional frameworks to protect women's rights to land.

To address cases of corruption in land related ministries and departments both at the national and county governments, advocacy efforts should be directed to ensuring transparency and integrity in land governance while protecting the interests of women.

In supporting constitutional provision of the use of Alternative dispute resolution Mechanisms, training opportunities should target key cultural platforms such as the village elders, chiefs among others who play a key role in resolving land related disputes.

There is need to support the creation of more women-led groups and formations to create a platform for women to further their agenda and engage on strategies of securing their land and property rights

With the enactment of the Community Land Act, there is need to push for comprehensive regulations that addresses the identified gaps and ensures that women's land rights are protected and upheld.

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