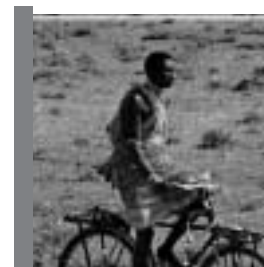


# 9 POLICY IMPLICATIONS



## 9.1 Policy context

Presently, Kenya's land policy context is in flux, owing in large measure to the recent work of the Constitution of Kenya Review Commission (CKRC). In September 2002, the CKRC issued its draft Constitution. Chapter 11 on 'Land and Property' sets out core principles and a framework for land policy, but also prescribes the ambit of a large amount of work yet to be done, including the creation of a national land policy which will be subject to perpetual review, and which will ensure, *inter alia*, tenure security, proper land administration, and 'socially acceptable management and resolution of land disputes' (Section 232[2]).

Parallel to the CKRC process has been that of the Commission of Inquiry into the Land Law System in Kenya (Njonjo Commission), which submitted its report to the Presidency in late 2002. The brief of the Njonjo Commission was, as the title suggests, to examine the main laws having a bearing on land rights and land administration, and to recommend a course of legislative reform. The Njonjo Commission's report was made public in May 2003, generally to the approval of progressive civil society organisations with an interest in land. The concern that the Njonjo Commission may not entirely have fulfilled its terms of reference is counterbalanced by the fact that it clearly spelled out guiding principles for formulating a National Land Policy Framework, taking into account: 'the importance of efficiency, productivity, sustainability, equity, transparency, accountability and participation in the use and management of land and land-based resources' (Kenya Land Alliance 2003).

Assuming that something like the CKRC's present draft constitution will be adopted in due course, and that this will provide the framework for a programme of land policy and land law reform, the recommendations that follow are directed mainly towards these developments. However, where possible, recommendations of shorter-term relevance will also be made. It should also be pointed out that the recommendations pertain only to areas under private tenure, though some may well be more generally applicable.

Although the focus of the report, and thus the onus of the recommendations, is to do with the impact of HIV/AIDS on land tenure for women, it should be pointed out that the conditions that favour tenure insecurity are very broad indeed. Mounting land pressure, absence of sufficient off-farm economic opportunities, cultural change, and of course the HIV/AIDS epidemic itself, combine to form a situation in which different sub-groups are affected in various and complex ways. While the tenure security of widows and orphans is the most visibly affected by HIV/AIDS, different types of widows have different degrees and types of vulnerabilities, and other sub-groups also have distinct experiences that must not be ignored, for example, separated and divorced women, especially those with children, and young men from land-poor households whose prospects of acquiring sufficient land to support their own families are poor. Only emphasising the impact of HIV/AIDS on widows and orphans without taking into account other sub-groups or people and households that are not directly affected by HIV/AIDS, may prove unfair or even counter-productive. Thus some of the recommendations that follow also cater to these other sub-groups, and also address key weaknesses in the land sector that should be addressed, even in the absence of HIV/AIDS, but which arguably the HIV/AIDS epidemic has made more conspicuous.

The policy implications of the research findings are grouped under three headings:

i) legislative considerations;

- ii) land administration; and
- iii) consciousness raising.

### 9.2 Legislative considerations

A key concern raised in this and other reports is the vulnerability of widows and orphans to being deprived of their land rights. This vulnerability can exist regardless of the cause of the husband's or parents' death, but under certain circumstances the fact that the death was caused by AIDS makes that vulnerability greater.

As pointed out by the Kenya Land Alliance (2002), the *Law of Succession Act* of 1972 provides no support to widows and children, whether in monogamous or polygamous unions, in terms of agricultural land, livestock, and crops. Although the courts have used the 1882 *Married Women's Property Act* of England to recognise married women's contribution to matrimonial property and thus arbitrate the inheritance or division of that property, Kyalo-Ngugi (n.d.) asserts that new legislation 'needs to be enacted to cover such issues in a manner that is relevant to current realities'. Presently, the main forms of protection available to widows and orphans appear to be: firstly, an administrative directive 'to ameliorate the discrimination against women's land acquisition, inheritance, and rights over land alienation' (Wanjama *et al.* 1995, paraphrased in Gray & Kevane 2000: 15); and, secondly and perhaps more importantly, appeals to local leaders such as elders, sub-chiefs, and so on, who act more out of sympathy or in terms of what they consider right, than for the sake of upholding any law or directive.

Although some people have expressed reservations about ambitious attempts to introduce rules governing inheritance,<sup>1</sup> the weight of opinion appears to be that women's land rights in general, and the right of inheritance in particular, need to be written unambiguously into any new national land policy and associated legislation. The Kenya Land Alliance proposes that:

- Men and women are entitled to equal rights in marriage, during marriage and at its dissolution.
- Upon marriage, the husband and wife shall enjoy common ownership of spouse land as long as such land is the principal residence of the family or is the principal source of income or sustenance of the family.
- No citizen may be deprived of property on the basis of gender, marital status or age or any other reason created by history, tradition or custom (Kenya Land Alliance 2002: 12).

Chapter 11 of the CKRC's draft Constitution provides for the enactment within two years of law that will provide for, *inter alia*:<sup>2</sup>

- (iv) the protection of dependants of deceased persons holding interests in any land including interests of spouses in actual occupation of land;
- (v) the recognition and protection of matrimonial property and in particular the matrimonial home during and at the termination of marriage;
- (vi) the establishment of an efficient and cost-effective land administration system including the management and expeditious settlement of land disputes....

<sup>1</sup> 'This however, is a challenge that needs to be tackled with caution since inheritance rules form part and parcel of the social construction of land holding in most indigenous communities' (Okoth-Ogendo 1999: 20).

<sup>2</sup> §235 (4)(a). More generally, this section provides for '(i) the revision, consolidation, and rationalization of existing land laws' and '(ii) the revision of all sectoral land use laws in accordance with the national land policy.'

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The scope of the provisions indicated in the draft Constitution is sufficiently broad to cover the situation of most widows and orphans. The question is how they would be developed and applied. A key issue is the extent to which any future legislation would specifically offer protection to those residing on informally subdivided land. As shown in this report, one of the most vulnerable groups is younger widows residing at the marital homestead on land that has not been formally subdivided, and thus to which the adult son never had real rights. This situation is common and will likely become increasingly so with time. It is not immediately obvious whether the operative term is appropriately 'dependant', which is typically taken to mean a person who by virtue of age or disability is unable to be economically independent. Moreover, how does one achieve a balance between the need to protect rights of occupiers, and the wish to respect the status of title holders?

One possible route would be to enact legislation that establishes the rights of beneficial occupiers generally and without specific regard to their relationship to the title holder. This would be broadly consistent with §232(2)(b) of the draft Constitution, directing that the new national land policy shall seek to ensure 'security of land rights for all land holders, users and occupiers in good faith,' as well as with §235(4)(a)(iv) quoted above. For this to take effect, 'beneficial occupiers' would have to be defined in law, and, as is the case elsewhere, would probably incorporate two elements, namely that the occupier has been in undisputed possession of the plot for a minimum defined period of time (for example, three years). This proposal is also consistent with what the Kenya Land Alliance has suggested in respect of those dwelling on commercial farms where they are or have been employed (Kenya Land Alliance 2002: 7); however, it would be somewhat odd in that it would specifically seek to pertain as well to relatives of the legal land owner, for example, on smaller homesteads. A key advantage of a sweeping approach such as this is that it would apply to women related through marriage as well as unmarried partners, provided they meet the other minimal qualifications. As is also typical with statutory protection of beneficial occupiers, that protection would be maintained in spite of the owner selling the property to someone else.<sup>3</sup>

What this proposal does not do is provide private ownership to such occupiers, whether the adult sons, their wives, or children. The manifold problems associated with inter-generational competition and informal subdivision require other, more far-reaching and inter-sectoral solutions. Moreover, the proposed measure does not confer a right of inheritance upon a widow who resided with (or without) her husband on land informally subdivided from the family's land. It would however protect her right to occupy that land, and that of her children. Notwithstanding its limited power, legislating protected status for beneficial occupiers across the board (regardless of their deemed dependent status) may have wide-ranging ramifications that are difficult to anticipate. It is not inconceivable that in some instances such a measure could aggravate tensions rather than reduce them.

Returning to the issue of inheritance rights of women whose husbands have title (as distinct from women whose husbands do not), progressive opinion favours establishing these rights unambiguously in law, notwithstanding the fact that in many places this

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<sup>3</sup> The *Limitations of Action Act* exists, which allows beneficial occupiers in occupation of a plot for a minimum of 12 years to demand a title deed to that plot in court. The two shortcomings of the Act as it stands are, first, the 12-year minimum period, which is excessively long; and second, the fact that the protection is not presumed but is rather contingent upon acquiring a title deed in court, which in many instances is neither practicable nor necessary. Another issue is whether and how the Act provides protection to those who occupy a portion of a plot as opposed to an entire plot.

contradicts customary practice. The vulnerability of widows in this category varies by area, more or less in proportion to the degree of antipathy towards the idea of vesting land rights in women. Nonetheless, it is clear that even in these latter areas perceptions are evolving rapidly, and asserting wives' right to inherit property will tend to accelerate a trend that is already underway. We therefore support the proposals to legislate wives' right to inherit land. The implications are twofold: firstly, where a land title is written in a husband's name, in cases of intestacy the widow has an automatic right to take the title in her name; and secondly, a will which denies a title holder's wife the inheritance of land will be considered invalid. In cases of polygyny the same principles would apply, but the property would be apportioned according to each wife's homestead. The inheritance rights of orphans, by whom we mean specifically minors who have lost both parents, can be legislated in the same manner. In this regard the issue that must be addressed is whether such a provision should and could be gender-neutral, meaning that girl orphans and boy orphans would be guaranteed the same inheritance rights. While this is appropriate in principle, it would certainly meet serious opposition given that at present in Kenya the provision of land to daughters is not considered a right but, rather, an indulgence.

A more radical alternative to legislating rights of inheritance for wives is to require that titles be converted into joint titles of wife and husband, or extending the principle one step further, into 'family title' (presumably taken to mean the nuclear family). This approach would have advantages both in terms of equity and efficiency, but would likely meet stiff resistance. An intermediate approach would be to require that new titles be joint titles, but not attempt to convert existing titles. Either approach would pertain to land on which the household is economically dependent and/or is its prime residential site.<sup>4</sup>

In the short term, these issues must be placed on the agenda of the ongoing work to draft a new Constitution. The medium-term goal is to develop a National Land Policy document, within the framework provided by the new Constitution, which spells out guiding principles for the legislative review. The medium- to longer-term goal is a programme to review and presumably revise the legislative and regulatory framework governing land. This will require looking not only at land legislation but also at laws dealing with, *inter alia*, matrimonial property, succession and child welfare. While the Ministry of Lands and Settlement is the main driver, it needs to consult with civil society and co-ordinate its work with that of other government ministries and task forces working in related areas. In the meantime, the Ministry of Lands and Settlement should initiate the preliminary aspects of its review process to lay down the groundwork for the legislative programme that will follow.

Apart from legislative measures that are directed at addressing tenure insecurity of vulnerable groups, there are two areas where legislative changes could improve the situation of affected as well as non-affected households.

First, there is evidence that ever more agricultural land is being left under-utilised in areas that are badly hit by HIV/AIDS. This is the case despite continued land pressure in those

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<sup>4</sup> After years of deliberation, in June 2003 the government of Uganda adopted an amendment to the *Uganda Land Act* of 1998 establishing joint ownership and joint tenancy. This owes in no smaller measure to the pressure exerted by the Uganda Land Alliance. The proposal put forward by the Uganda Land Alliance read, 'It is important for people to understand that the land that can be co-owned is that land where a family derives its livelihood or the principle place of abode. If parties in a marriage have any other land they are not obliged to co-own it. But that if that other land becomes the source of income for the family then it would fall under co-ownership.'

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same areas. Although people do rent land, and have apparently done so for some time, the land rental market is still under-developed, and in particular is not having as much impact as it might in allowing households with too little land to rent from those with more than they can use. Those least likely to rent out land are those who would benefit most from doing so, that is, AIDS-affected households who would benefit from the rental income, but who fear losing their land rights to unscrupulous renters. Facilitating the rental market is in part a matter of clarifying the rights of lessees and lessors, and devising cost-effective means of enabling people to realise these rights, for example, through the development of standard forms for rental transactions in conjunction with appropriate administrative systems.

It also appears that many landowners are constrained from making better use of their land by the *Coffee Act*, which forbids them from removing coffee trees. Given changes in the coffee market, and the fact that much of this tree stock is aged, it would be to the advantage of farmers to allow them to turn the use of their land over to crops that they find more remunerative. This would require amending the *Coffee Act*.

### 9.3 Land administration

The study found that the land registration system, Land Control Boards, and the dispute resolution system, do serve to protect the land rights of vulnerable members of society, but have the potential to do so more efficaciously than they do now. A number of shortcomings need to be addressed, and administrative systems have to be established to provide for the protection of orphans. The steps required include:

- Review all user fees to ensure affordability and fiscal relevance, and identify possible solutions to the problem of high surveying costs.
- Review application procedures with a view to making them less onerous, in particular for those of modest means or low literacy levels.
- Review and improve the current land information systems.
- Review and reform the operations of the Land Control Boards (LCBs), including making them more accessible and accountable.
- Establish cheap, accessible mechanisms for legal recourse for the public in land disputes and for appeals against mal-administration.
- Institute mechanisms for monitoring and enforcing proper trusteeship of land for orphans.

Numerous respondents complained of the prohibitive fees charged and complex procedures required for effecting land transfers through the formal land administration system. This affects, for example, widows wishing to transfer title into their own names, families wishing to subdivide land and transfer title to their children, people wishing to engage in land sales, and in some cases those who merely wish to retrieve their title deeds from the land office. A common observation, however, is that many people complain of high fees (or complicated procedures) without being able to state what they are, while at the same time other people report very different fees for the same service, with some suggestion that practices in some land offices are irregular. It is therefore critical to first review: on the one hand, the actual structure of fees against people's ability to pay; and on the other hand, whether the fees make a meaningful contribution to the functioning of the land administration system; and second, to institute a policy of posting fees publicly and clearly so that there is no ambiguity as to what the fees actually are.

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Similarly, there is likely some scope for simplifying application procedures for members of the public, not least the procedures required of widows to effect a transfer of title into their own names. For example, the requirement that the intention to transfer title into a widow's name be gazetted for 90 days so as to provide an opportunity to receive objections also seems excessive, though this matter requires further investigation. The evidence is that many widows do not pursue the title transfer because of the nuisance involved, but often also because they do not perceive the value of doing so or feel hampered by lack of education and illiteracy. The result is that land registries become increasingly out-of-date. It should be incumbent upon local officials to inform widows proactively of the procedures and the advantages of pursuing change of title, and perhaps to act as intermediaries, so that the procedures are less burdensome.

There are two kinds of costs associated with land transfers that do not have to do with fees or procedures, and these must be considered as well. The one is the travel costs to the nearest land office, which in some cases is unreasonably far. Bondo District is a case in point, in that it has neither its own land office nor its own divisional Land Control Boards. This was found to be disempowering for residents of Lwak Atemo, for whom the Siaya land office was felt to be remote and inaccessible. Different options could be explored for bringing land administration closer to the people, for example, with pared down and/or rotational land offices situated in areas that otherwise are relatively far from any land office, or by combining certain routine land administration functions with other public institutions, for example, the post office. A related area where land administration could be improved to be more client-oriented is in respect of the land information system (LIS). Notwithstanding existing proposals to introduce a sophisticated computerised LIS linking land offices across the country, the equally urgent and challenging task is to make certain that land information is more readily available in district or even sub-district offices and that land information systems, whether paper or electronic, are properly managed and kept up to date.

The other important non-fee cost is that of surveys, which are necessary for those wishing to formally subdivide land. Although it is understandable that government decided that it cannot provide free survey services to all members of the public, it needs to think creatively so that survey costs do not remain such a significant barrier to families that would otherwise choose to undertake formal subdivision.<sup>5</sup> There are two main avenues that can be explored. The one is to provide government assistance for surveys but to ration it according to need. The other is to modify the survey standards so that surveys can be undertaken more cheaply. Numerous innovations along these lines have been introduced around the world.<sup>6</sup>

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<sup>5</sup> Some people voice the concern that excessive subdivision of land has negative consequences, for instance when it results in the creation of excessively small, 'sub-economic' plots. A common suggestion following from this concern is that minimum land sizes should be promulgated so that no subdivision of land will be allowed below this threshold without special permission. Although repeated subdivision is indeed cause for concern, the act of forbidding it will not likely be positive, because informal subdivision will continue in any event. Moreover, it is virtually impossible to come up with standards of 'economic size' that are not arbitrary and inappropriate. This is particularly the case in light of the fact that many 'peasants' are in fact part-time farmers pursuing a mixed livelihoods strategy with both on-farm and off-farm components. Indeed, the prevention of excessive subdivision was one of the goals of the colonial government's Registration Ordinance, but this was quickly subverted by the tacit acceptance by the government that 'political security' was better served by trying to cater to all those who have a legitimate claim to land, which in effect meant allowing subdivision and 'refragmentation' (Mackenzie 1989: 92).

<sup>6</sup> An example is the 'qualified lease' introduced in Malaysia, which allows a lower standard of survey which is much less costly to have done, and which many people consider suitable depending on the circumstances

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Land Control Boards play an important role in protecting family members against ill-considered land sales. The research team is therefore of the opinion that the Boards should remain – indeed, one can predict that their role will become all the more important over time – but that they would benefit from better supervision to ensure that they are truly safeguarding the interests of the public. A review should be conducted which examines, *inter alia*, the selection and profile of Land Control Board members, the criteria to which the Boards subscribe in making their decisions, and options for subjecting them to efficient, ongoing monitoring.

Submissions to the CKRC reflect dissatisfaction with dispute resolution mechanisms in respect of land. In particular, the costs of pursuing a land dispute beyond the level of the District Officers – that is, in land tribunals and courts – are prohibitive for most households, and tend to take many years to resolve. In defence of the existing system, the majority of land disputes can be and are resolved at District Officer level and below, at relatively low cost, and in large measure, because the system is thoroughly decentralised. The fact that most land disputes go initially to the elders also ensures that, in the first instance, there is an effort to resolve disputes in a manner that is consistent with local norms and with the larger community interest taken to heart. However, the relative informality of the local mechanisms for dealing with land disputes is also a potential weakness, especially in an era of changing mores and in particular the household-level crises wrought by AIDS. As this research has shown, the fate of an individual who finds her land rights threatened owing to the economic or social effects of AIDS depends in large measure on the personal disposition of local leaders. In instances where local leaders are unsympathetic to an infected/affected person, for example, because they ‘buy in’ to the stigma associated with AIDS or do not appreciate the economic predicament faced by AIDS widows or other affected parties, that person is far less likely to receive support in defending her rights, and owing to the economic and social effects of AIDS, is particularly unlikely to be able to move up the chain in the dispute resolution system. On the other hand, sympathetic local leaders can make an enormous difference. What is therefore proposed is that a system be devised to ensure accountability and transparency among local-level dispute resolution bodies. This could involve, for example, on-going monitoring by District Officers of all land-related dispute resolution processes within their areas to ensure that they conform to the principles enshrined in the Constitution, in particular that of gender equity.

Even supposing the system of lower-level dispute resolution is improved, there will remain a need to accommodate those whose cases are not satisfactorily resolved at that level. The problem presently is that it is costly to take land-related disputes to court, and having done so, cases tend to take many years to be concluded. On the other hand, it is all very well to propose district or sub-district level land courts, but as is presently the case in Uganda, this can prove too great a burden for the fiscus. What is therefore needed as part of the broader land policy review is a review of alternative experiences and models from around the world, perhaps with an emphasis on alternative dispute resolution approaches.

Finally, a major concern arising from the AIDS epidemic is the growing number of orphans, in particular those who have lost both parents. The research found little direct evidence of orphans being taken advantage of by relatives or others, either by usurping their land rights or by taking responsibility for them for the sake of accessing their land.

In the first place, most orphans are cared for by grandparents whose motive is more typically compassionate responsibility; and, secondly, the land in question most commonly belongs to the grandparents already. In addition, depriving orphans of rights in land is more difficult when that land is titled as the would-be usurper is forced to either effect a transfer of title through the formal channels, and/or to attempt to effect that transfer through corrupt means.

For situations that do not meet this description, however, mechanisms must be put in place to safeguard underage orphans' interests, both as children and as heirs. Most communities have recognised rules governing who in the extended family assumes the role of guardian of orphans and administrator of their land. The problem from the perspective of protecting orphans' rights is to ensure that whoever assumes the role of administrator is accountable to somebody and that orphans are aware of their rights. One possibility is that, under the advice of village elders, sub-chiefs and/or chiefs be responsible for approving the legal status of relatives or others who are designated to fulfil the role of guardian and land administrator, and to monitor the situation over time, for example, through annual home visits and interviews with the guardian and the children. Another possibility is that the institution of Public Trustee could be decentralised to divisional level, where it would perform the supervisory role otherwise assumed by local authority figures.

### 9.4 Consciousness raising

Many of the problems observed on the ground in respect of land tenure relate to the public's lack of awareness as to some of the basic principles of land administration. A case in point are the wildly different opinions in Bondo as to the costs of retrieving one's title deed, as well as the vulnerability experienced by community members who believe that if they arrive at the land office and are not able to produce their registration number, then effectively they have no formal land rights.

Particularly on the protection of vulnerable groups in the context of HIV/AIDS, it is especially important that local-level authorities, from village elders up to division-level District Officers, are sensitive to issues around women's and orphans' land rights, and aware of their duties as public officers to protect these and anybody else who may be discriminated against on the basis of being (or suspected of being) AIDS-affected. Mechanisms should be put in place by which the performance of officials dealing with land matters can be monitored.

The low level of awareness on the part of both government officials and the public concerning land policy and HIV/AIDS needs to be addressed. Mechanisms to do that include:

- Put in place a proactive communications policy to create public awareness about policies, rights, procedures and means of recourse.
- Institute training of officials and local level leaders around land policy, procedures, rights, gender equality, HIV/AIDS and stigma.
- Develop regulations to guide and monitor land officials' performance.
- Review the performance and composition of the CACCs within districts.



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Most of this work must go hand-in-hand with the rest of the land policy review, so that information is not publicly disseminated and then changed shortly thereafter as policy shifts. However, work can start more or less immediately on training/sensitising local level officials as to land rights, gender equality and HIV/AIDS. The Ministry of Land and Settlement's ACU could take a lead role in developing these messages and in devising a strategy for disseminating them, whether directly or through related structures such as the DACCs and CACCs. Given their proximity to people on the ground, the possible role of CACCs in particular must be examined, but bearing in mind that at the time of the field visits the respective CACCs were not functioning up to expectations.

