

Women's Land Rights & Privatization in Eastern Africa

Edited by

BIRGIT ENGLERT

Assistant Professor at the Department of African Studies University of Vienna

&

ELIZABETH DALEY

Independent consultant

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Notes on Contributors

Judy Adoko is a lawyer who is working as the co-ordinator of the Land and Equity Movement of Uganda (LEMU), an NGO working especially on land rights in customary tenure in Northern and Eastern Uganda. She has previously worked for Oxfam GB in Uganda, Burundi and Tanzania.

Email: judyadoko@yahoo.co.uk, judyadoko@utlonline.co.ug and lemu@utlonline.co.ug

An Ansoms is working as an assistant in political economy at the Institute of Development Policy and Management and is a PhD candidate in the Department of Economic Sciences, both at the University of Antwerp, Belgium.

Email: an.ansoms@ua.ac.be

Elizabeth Daley is an independent land and gender consultant working in Rwanda and the UK. She has a PhD in development studies on land tenure and social change in Tanzania from the School of Oriental and African Studies, University of London, UK.

Email: lizdaley@mafinga.demon.co.uk and lizdaley2@yahoo.co.uk

Birgit Englert is Assistant Professor in the Department of African Studies at the University of Vienna, Austria from where she also received her PhD.

Email: birgit.englert@univie.ac.at and birgitenglert@yahoo.com

Nathalie Holvoet is a lecturer and researcher in the Institute of Development Policy and Management (IDPM) at the University of Antwerp, Belgium. She holds a PhD in Economics.

Email: nathalie.holvoet@ua.ac.be

Notes on Contributors

Ingunn Ikdahl is a jurist with specialization in international law and women's rights. She is working as a research fellow in the Institute of Women's Law at the University of Oslo, Norway.

Email: ingunn.ikdahl@jus.uio.no

Simon Levine is working as an independent land consultant in Uganda. Email: slc@utlonline.co.ug

Celestine Nyamu-Musembi is a Kenyan lawyer with training in legal anthropology. She is currently a Fellow at the Institute of Development Studies, University of Sussex. She received her doctorate in Juridical Science (SJD) from the Harvard Law School, Cambridge, MA.

Email: c.nyamu@ids.ac.uk

Samwel Ong'wen Okuro is a lecturer at the History department at Maseno University, Kenya, where he is also working on his PhD on land rights in Kenya. During 2006 he was based in Hamburg, Germany, at the Institute for Global and Area Studies (GIGA).

Email: okuroh@yahoo.com

Robin Palmer is the land adviser for Mokoro Ltd., based in Oxford, UK. He previously worked as the global land adviser of Oxfam GB where he built up the land rights website:

http://www.oxfam.org.uk/what_we_do/issues/livelihoods/landrights/index.htm

Email: rpalmer@mokoro.co.uk



Foreword

ROBIN PALMER

Property and a piece of land give women peace of mind.1

This is an exciting new collection from an impressive generation of young scholars. Their Eastern African focus makes geographical, historical and thematical sense, for the countries discussed in this volume have all undergone similar land reform and privatization processes in recent years.

It is a source of great personal pleasure that the book has drawn its inspiration from a 2003 workshop on women's land rights in Southern and Eastern Africa which I organized with the redoubtable Kaori Izumi of FAO. Participants there asserted that women's already fragile land rights were being further eroded in a global context of privatization, of World Bank-sponsored land reforms, of HIV/AIDS, and of changing global employment and trade patterns (Englert & Palmer 2003). This volume will help test that hypothesis further.

The struggle for women's land rights across the globe has both a long history and an extensive and distinguished literature.² Both the history and the literature illustrate how difficult that struggle has been and, as yet, how few have been the concrete gains. This is nicely encapsulated in this recollection from Bina Agarwal: 'In 1979 in West Bengal, India, a group of poor women told their elected village council: "Please go and ask the government why, when it distributes land, we don't get a title. Are we not peasants? If my husband throws me out, what is my security?"' (Agarwal 2002, 2).

Everywhere women who have struggled for security have been confronted by resistance and by patriarchy in its many forms. This is because in many parts of the world land is so often regarded as a symbol of male dominance, and for women to challenge the status quo is to

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challenge patriarchal control – and thus other social and political inequalities. One of the complexities of gender and land issues, as has been frequently stressed, is that women's and men's interests within marriages and households are both joint and separate (UNRISD 2006, 3).

However, many land reform and administration programmes over more than 60 years have been premised on the notion of a unitary household in which resources (including title to land) were seen as benefiting the whole family in a fairly unproblematic way (UNRISD 2006, 1). Such programmes also regularly ignored the different meanings and values of land and how different rights to land are allocated, distributed, used and passed on. So women almost always lost out – with the secondary rights that they previously enjoyed being extinguished.

Something very similar happened earlier, when colonial rulers across Africa found it convenient to make alliances with chiefs. In the codification of customary law that followed, custom was generally interpreted in ways that strengthened the rights of men over women and men's control over women's labour (Chanock 1985).

Today, as this new volume on privatization amply demonstrates, new land market opportunities have also tended to disadvantage women (ActionAid International 2006, 6), as men find it easier than women to avail themselves of the new openings implicit in, for example, the striking slogan that greets arrivals at Lusaka International Airport – 'Zambia, a paradise for investors!'

There have of course been advances, for example in parts of India and Latin America. These have generally come about either as a result of long political struggles involving both women and men, or from radical political change, such as India's independence in 1947, which led to strong and ultimately successful pressure for gender equity in inheritance laws (Agarwal 2002, 14). Traditional practices of female seclusion – of not allowing women to be in certain places – have been successfully challenged by women activists in India. (ibid., 26). In Latin America, a relatively enlightened legal tradition has enabled many women to acquire land through inheritance (Palmer 2002, 3), though even within supposedly progressive social movements women have had to battle hard for recognition of their land and property rights. (Razavi 2003, 10). New gender sensitive constitutions in Brazil and South Africa have been helpful from both a legal and, to a degree, a practical point of view (Razavi 2006, 3).

Africa lags far behind both Latin America and Asia in terms of social organisation and political mobilisation. It is also suffering immensely from the HIV/AIDS pandemic, with wide implications for

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land rights. Both factors make already difficult issues even more daunting.

Women and men are embedded in a variety of social relations, networks and institutions. These can be absolutely critical for women in being able to lay claims on people. But as pressure on land increases, as society becomes more individualised and the economy more privatised, notions of reciprocity and social safety nets within extended families are breaking down, again to the disadvantage of women. Clearly, HIV/AIDS is exacerbating this situation still further with the disturbing consequence of property grabbing from widows and orphans.

Gender and land issues are hugely complex and difficult the world over. There are no easy, painless, single solutions. The issues are complex because they operate and require responses on many different levels. Most critically perhaps they operate at the domestic level of the household, in the complex relationships between women and men, and also at the level of 'traditional' institutions which remain strong across much of Eastern Africa. Amartya Sen once noted that gender struggles are even more difficult than class struggles because, unlike women and men, the capitalist and the worker do not normally live under the same roof! (cited in Razavi 2006, 3).

In Eastern Africa, as elsewhere on the continent, there is a major challenge to accept that many traditional attitudes and customs are now highly inappropriate and need to change, and change rapidly, in the new realities resulting from HIV/AIDS. Ways must urgently be found to help people acknowledge and face up to the painful realities of HIV/AIDS. It really is time to get rid of stigma and shame, while the attitude of blaming the widow for infecting the deceased husband and using this as an excuse for property grabbing should be stigmatised for what it is – a gross violation of human rights. Eastern Africa may well be ahead of Southern Africa in this respect.

To confront these difficult, highly sensitive issues requires many things. It requires social mobilisation and collective action of the kind described in India by Bina Agarwal (2003). It requires raising awareness of rights that women may possess in theory but do not enjoy in practice. It requires that gender be addressed seriously and integrally in all land policy, administration and reform initiatives, as even the World Bank has come to acknowledge, at least in theory (World Bank 2005a, 2005b). It requires political and legal will. It requires serious alliance building so that advances can be made on many fronts. It also requires the kind of detailed, local level research so ably represented in this fine and well-edited collection; research that can help both to challenge the status quo and to demonstrate that another world is possible.

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Notes

- 1 This is the slogan emblazoned on the striking T-shirts distributed at a series of four workshops in Southern Africa on property-grabbing from widows and orphans in an HIV/AIDS context organized by Kaori Izumi of FAO. Reports of these workshops have been posted on the Oxfam GB Land Rights in Africa website.
- 2 My own very modest four-page contribution was targeted at Oxfam staff and partners. It concluded sombrely: 'Latin American experience would suggest that there is no serious alternative to political struggle to achieve rights that are so fiercely resisted at so many levels.' (Palmer 2002, 4).

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Introduction

Women's land rights & privatization in Eastern Africa

BIRGIT ENGLERT & ELIZABETH DALEY

Aims of the Book

Land is the main resource from which millions of people in rural Africa derive their livelihoods. That women do the vast majority of work in agricultural smallholder production, producing between 60 and 80 per cent of all food grown in African countries, has become a common observation – and with it the concern that most women on the continent do not hold secure rights to the land from which they derive their own and their family's livelihood. In most African societies, a woman's right to access and control land is still tied to her status as a daughter, sister, mother or wife.

At an FAO/OXFAM GB Workshop on 'Women's Land Rights in Eastern and Southern Africa' held in Pretoria in June 2003, it was noted that women's already relatively more fragile land rights were being further eroded in the context of various contemporary processes of change, such as commoditization, economic and rural—urban change, conflict (and post-conflict reconstruction and reconciliation), the spread of HIV/AIDS, and the increasing 'privatization' of land tenure (Englert & Palmer 2003, 1). Among these processes of change, the privatization of land tenure — by which is meant the formulation and implementation of land tenure reforms which aim primarily at the private registration of land — has the most direct impact on women's land rights. Moreover, as tenure reforms can be shaped and influenced by those who are concerned to protect women's land rights, in both formulation and implementation phases, they are also distinct by their very nature from other contextual processes of change.

The Pretoria Workshop identified an urgent need for further

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research into both the dynamics of tenure systems based on custom and the impact of land tenure privatization policies on women's rights to land. This volume owes its inspiration to this, and aims to contribute to the debate with specific reference to Eastern Africa. At the Workshop it was repeatedly noted that contexts are very heterogeneous, that the different geographical, historical, political, socio-economic, cultural and legal realities which shape land rights in any given country are of the utmost importance, and that gender is only one differentiating factor among many, intersecting in critical ways with others such as age, marital status, education and economic situation - challenges which this volume also attempts to address. However, this volume does not attempt to offer a comprehensive overview of women's rights to land in each country of the Eastern African region; rather, it takes a thematic approach. All the chapters reflect an overall appreciation of the importance of contemporary processes of change for women's rights to land - not only the increasing privatization of land tenure through reforms emphasizing land registration, but also the realities of the spread of HIV/AIDS, of conflict and post-conflict situations, of internal processes of cultural change, and of broader processes of commoditization and economic and rural-urban change. These various processes of change thus set the context for the different chapters in the volume. The contributors offer different perspectives and different foci, but always on the basis of solid and empirically-grounded research; the majority of chapters are the result of in-depth qualitative studies and give voice to individuals in the text. By going down to the local level in this way, it is hoped that this volume can offer a deeper understanding of the complexities at stake and a more accurate picture of the realities on the ground - a picture, however, which must remain partial, as it would be impossible to fully capture the great diversity of this part of Africa within a single book.

The first two chapters discuss the broader policy context within which the debate on women's land rights is situated, drawing also from insights gained during field research in Kenya (Nyamu-Musembi, Chapter 1) and Tanzania (Ikdhal, Chapter 2) respectively. Nyamu-Musembi critiques the current policy emphasis on private land registration, while Ikdahl analyses women's land rights from a human-rights based perspective. The following two chapters then provide insights into the micro-politics of gendered struggles over land within changing customary systems (patrilineal and matrilineal respectively) in different regions of Tanzania – Iringa (Daley, Chapter 3) and Morogoro (Englert, Chapter 4). These accounts of the local changes that are taking place under the influence of broader processes of commoditiza-

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tion and economic and rural—urban change, including notably the increasing commercialization of land, are followed by a chapter assessing the impact of new land legislation in Uganda on women's land rights in the north of the country and its articulation with the changing customary system there (Adoko & Levine, Chapter 5). The next chapter examines the impact on widows' and orphans' land rights of the increased spread of HIV/AIDS in Eastern Kenya (Okuro, Chapter 6), while the last of these five case-study chapters addresses women's land rights in the post-conflict context of extreme resource scarcity in Rwanda (Ansoms & Holvoet, Chapter 7).

Women in Eastern Africa are not powerless actors but find creative means to claim and ensure their rights to land, as all five case-study chapters in particular illustrate. One of the broader aims of this book is therefore to offer suggestions as to how women can best be supported in their struggles over land; this is the main focus of the Afterword that has been co-authored by all the contributors. What all authors share is their commitment to women's land rights, with each individual chapter contributing a detailed and differentiated analysis to the debate on how women's rights can best be secured in the overarching context of the increasing privatization of land tenure. For while all the contemporary processes of change identified herein have an impact on women's rights to land, as the different chapters of this book clearly show, it is the formulation and implementation of land tenure reforms which aim primarily at the private registration of land that should be the central concern of all those committed to securing women's land rights, as it is this which offers the most direct scope for effective action. As the title of this volume deliberately suggests, we are indeed living in an era of privatization; it is therefore in the policy arena itself that we must seek to engage with and influence the gendered impact on land rights of all these processes of change.

Land Tenure in Africa

In all African countries, land is still predominantly held under different forms of informal indigenous or customary tenure. Such customary tenure exists alongside the formal systems of common and statute law which were imported by Africa's former colonial regimes. As Adams and Turner (2006, 6) point out, 'this legal and tenure dualism tended to reinforce settler interests, simplify and strengthen the roles of traditional authorities, and suppress women's land rights'. For a long time customary tenure was regarded by researchers – and even more

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so by policy-makers – as being both static and a hindrance to development. These negative perceptions contributed to policies which, throughout the nineteenth and twentieth centuries, 'failed to accord indigenous and customary occupancy their deserved status as private property interests' (Alden Wily 2006, 2), thereby helping to establish and maintain a second-class status for customary tenure. Only in the 1990s did customary tenure begin to be recognized as 'one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law; indeed, received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa' (McAuslan 2006, 9).

Customary tenure is often wrongly referred to as a system, yet so-called 'customary tenure systems' have changed substantially over time and are neither static, harmonious nor coherent structures. Thus, while the distinguishing feature of African customary tenure – that it is everywhere socially- and politically-referenced and based – is an unchanging template, customary rules or laws are inherently flexible and dynamic and are better described as indigenous (or local) tenure practices that are subject to change (cf. Alden Wily 2006, pers. comms; Berry 1993; Bruce 1988; 1993; Bruce & Migot-Adholla 1994; Chauveau 1998; Lavigne Delville 1998; Mackenzie 1990; 1998; Peters 1994). These caveats aside, however, the term 'customary tenure' is retained in this volume because it is the term that is generally used in African land law and administration.

Throughout the twentieth century, customary tenure has responded to a changing environment characterised mainly by population pressure and increasing competition for land (cf. Platteau 2000). Increasing individualization and commoditization of land rights has occurred, and private rights of use and occupancy within customary tenure have become increasingly the norm; such private rights can be very strong and in many societies are definitely able to be held in perpetuity and be traded (e.g. Daley 2005a; 2005b). These processes of commoditization and change have in many cases weakened women's land rights in Eastern Africa; opportunities for them to buy land are very limited because, as Lastarria-Cornhiel (1997, 1326) has observed, most women enter the market with 'no property, little cash income, minimal political power, and a family to maintain'. All women are not necessarily losing out from the increasing commoditization of land, but certain groups of women, such as widows, are certainly among those most vulnerable to such processes of change (compare Daley in this volume). On top of this, the HIV/AIDS pandemic leaves growing numbers of women and children behind whose husbands and fathers

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have sold off family land, frequently without their knowledge, while conflict and post-conflict situations often have negative impacts on women's land rights too (compare Okuro and Ansoms & Holvoet in this volume respectively).

As well as these socio-economic processes of change, women's rights to land in Eastern Africa have also been negatively affected during the twentieth century by land tenure reforms 'designed to convert existing customary occupancy into European-derived forms of land holding and to register these on the basis of formal survey' (Alden Wily 2006, 7). This was pursued most systematically in Kenya, where privatization of land tenure through individual registration and titling was advocated in the 1954 Plan to Intensify the Development of African Agriculture and introduced by British officials in the late 1950s (Swynnerton 1954). However, the goals of agricultural transformation that were set there were not achieved (Palmer 1997, 3) and '[F]ifty years on, and with still under half the rural domain titled, it is apparent that conversion has not done away with customary norms in those areas, that titling has not prompted significant mortgaging, and that the security of tenure that widely exists in the farm sector does not derive from the often corrupted registration or the holding of title deeds' (Alden Wily 2006,

Instead, land concentration and landlessness have increased, while the practice of registering land in the name of the predominantly male household head caused a further erosion of the marginal land rights many women held under customary tenure (Davison 1987; Mackenzie 1990; Pala 1980; compare Nyamu-Musembi in this volume). Evidence from other parts of Africa has also demonstrated that formal land titling does not necessarily provide greater security of tenure (e.g. Atwood 1990; Barrows & Roth 1990; Platteau 1996; Yngstrom 1999). To the contrary, where there are multiple and/or derivative rights over land held under customary tenure, titling land to individual household heads is more likely to provide security of land tenure for fewer people, and insecurity of land tenure for more (Lund 2000, 15-18). Titling may also be a source of insecurity if people become liable to pay for services, taxes etc. and 'distress sales' increase as a result (Cousins et al. 2006, 28; 'compare Englert in this volume').

LAND TENURE PRIVATIZATION

Unfortunately, as Daley and Hobley (2005) relate, it has taken a long time for policy-makers to realize the shortcomings of past attempts to privatize land tenure. Although interest in individual registration and

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titling waned a little after the early Kenyan experiment, this was due more to a growing policy emphasis on land redistribution during the 1960s and 1970s, and, by the early 1980s, when Structural Adjustment Programmes (SAPs) came onto the development agenda in Africa, development officials were again enthusiastically promoting the ideas that had guided Kenyan land tenure privatization in the 1950s. The assumption of a linear connection between the introduction of title deeds, higher rates of investment and increased agricultural productivity was renewed with vigour, based on the belief that registered titles and individual private property rights were an essential prerequisite for a dynamic rural sector. Land tenure privatization as the private registration of land – and, more particularly, the narrowing of recognized rights to a single (usually male) person – has thus long been the dominant approach to African land law and administration (Daley & Hobley 2005, 8–13).

However, this is only one possible understanding of land tenure privatization. During the 1990s the meaning of the term broadened considerably, such that while titling and registration remain key components of the privatization process, privatization is now no longer considered just as a matter of individualization. Instead, it refers more broadly to the formalization or regularization of land rights via the registration of land interests in whichever context they customarily occur – allowing for spouses, family, clan, village, community or any other customary social formation to be recognized as owners of private land rights (Alden Wily 2006, pers. comms.). As Alden Wily puts it, the basis of land tenure reforms has thus shifted dramatically in that '...what actually was to be titled has changed: rights are less to be converted into statutory forms than statutory support given to customary property in its own right' (2006, 25–6, original italics).

Most post-1990 land legislation in Eastern Africa emphasizes the formalization and regularization of land tenure through the titling and registration of existing rights to land, whether those rights be held individually, jointly or collectively; such formalization was the main purpose of titling in both Tanzania's Land Act and Village Land Act (1999) and in Uganda's Land Act (1998), although the latter is arguably less effective in recognizing multiple owners of private land rights (Alden Wily 2006, pers. comms). In addition, the Uganda Land Act, and to a lesser extent the Organic Law Determining the Use and Management of Land in Rwanda (2005), include another form of land tenure privatization which is that from the state to citizens (compare Adoko & Levine on Uganda in this volume); this involves the surrender by the state of any tenure interest in the land itself, and specifically of