



## Women's Land Rights: Cultural Dynamism and Decentralized Land Administration in Kenya

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### Abstract

Beginning the early 1990's Kenya has placed a lot of emphasis on alternative mechanisms for addressing local level land issues. However, despite the legal, policy and institutional measures taken, women still lag behind in securing their land rights. This study focuses on the role played by the decentralized land administration systems at the local level. The study examines what these institutions are doing to the cultural terrain within which women's land rights are negotiated. Reference is also made on the cultural knowledge that is being invoked in dealing with women's land rights. The findings indicate that women's inclusion in these devolved institutions is positively influencing women's stature at the local level. It is also evident that legal and policy reforms alone cannot guarantee women's land rights. However, economic empowerment of women through education holds the key in enhancing their access and control over the land resource.

**Key words:** Women, land rights, Kenya, culture, land administration

### Introduction

Women constitute slightly more than half of the Kenyan population, but face considerable challenges in accessing and controlling productive resources (ROK, 2010). Whether in education, employment, land rights or seeking health care, women tend to be disadvantaged (SID, 2004). At the heart of these challenges are customs and ethnic-based traditions that have the propensity of being applied by men as need arises. Under the customary law, society has defined what a woman should own and what she should not. For instance, under most African traditions, it was assumed that women should not inherit land, because once they get married, they gain access to land through their husbands. To paraphrase Ngone and Mohamadou, (2003) "*Depending on whether a woman is married, divorced or a widow, she is assigned the duty and even the obligation to cultivate the land belonging to her husband or his family. Yet she is denied the right of possession.*" This means that women were not a priority concern over family land and especially the element of "ownership". This is a customary practice that has refused to fade even in the context of increasing phenomenon of single mothers and the challenges facing the institution of marriage. In the past, marriage was the norm and was easy to achieve. This is no longer the case, yet, this custom-based discriminatory practice against women is still upheld.

Apart from the unfavorable cultural context, the legal and policy milieu in Kenya has in the past been constraining with regard to women's land rights. Although the new constitution provides for women's participation in public decision making, previously no constitutional legal framework existed to provide for women's participation. The old Kenyan constitution did recognize customary law and in several instances, this may be harmful to women's land rights. For instance, the application of the 1972 Law of Succession Act, excludes women from inheriting agricultural land and livestock. However, the change of regime in 2002 in Kenya occasioned a renewed fight towards gender equity and representation. During this period, a lot of emphasis was given to strengthening land administration systems at the local level and taking deliberate measures to promote women's participation in those bodies. This study seeks to deepen understanding on what decentralization of land administration is doing on the cultural terrain under which women claim their land rights.

### An Overview of Literature

#### *Decentralized Land Administration in Kenya*

Decentralization refers to the transfer of certain responsibilities by the central government to more localized institutions. This involves varying degrees of transfer of authority and may take the form of delegation to local level government line agencies (or deconcentration) or some limited local regional autonomy (devolution) (Meinzen-Dick et al., 2008). Under deconcentration there is limited room for autonomous decision as the overall policy direction is directed from the centre. However, under devolution the local level institutions (e.g. counties) are allowed to exercise some power and authority (e.g. over finances and development choices for a limited number of sectors). Decentralization is aimed at improving efficiency; promote local level participation and democracy (Ng'ethe and Karuti, 1994). Decentralization further aims at countering centralization of state functions.

Land administration is the process of determining, recording and disseminating information about ownership, value and use of land when implementing land management policies, and includes among other issues land registration (UN-ECE, 1996). Other definitions on land administration suffice (e.g. Burns, 2007; Dale and McLaughlin, 1999). Key in these definitions is the element of "determining, recording and disseminating information about ownership". A review of literature shows that four components can be discerned in the definition of land administration. These include the juridical component (land ownership); fiscal component (land values); regulatory component (land use) and finally information management component. The juridical component is especially important for this study.

The evolution of land administration system in Kenya can be situated in three major phases. These phases are: pre-colonial, colonial and post-colonial phase. During the first and the second phases, women's land rights did not represent a major policy issue given the abundance of the land resource and the strict adherence to the traditions and customs governing issues of access to land among different communities at the time. It is in the third phase that we witness concerted efforts aimed at the inclusion of women's land rights.

The three phases are largely characterized by the emergence and the consolidation of a highly centralized system of land administration in the country. All land transactions in Kenya are managed through a centrally located Ministry of Land Office in Nairobi as well as the National Land Commission. The land offices in the lower administrative units (e.g. counties) execute the policies made by the Ministry headquarters in Nairobi. Even under the much touted case of decentralization in Kenya (the District Focus for Rural Development) nothing much was achieved in fostering local level decision making as the process became highly patronized with the district officers often acting as proxies to the centre. Thus the Nairobi headquarters of the various line ministries continued to direct even local level decision making.

Still in the early 1980's the Laws of Kenya provided for the establishment of Land Control Areas and Boards. These Boards control transactions in agricultural land. Other local level mechanisms in land administration in Kenya relates to the Land Disputes Tribunal which came into effect in the early 1990's. These were deliberate efforts by the government to address administrative bottlenecks in enhancing land administration in the country. Some of the legislations that govern land administration in Kenya include: Registered Land Act (Cap 300); Land Adjudication Act (Cap 284); the Land (Group Representatives) Act (Cap 287); Land Titles Act (Cap 282); Government Lands Act (Cap 280) and Registration of Title Act (Cap 281).

Stemming from two of these legislations, are two institutions that have maintained their visibility at the local level in the areas under study (division and district level). These are the Land Control Boards established under the Land Control Act, and the Land Disputes Tribunal established under the Land Disputes Tribunal Act. The respective Acts specifies the establishment, composition as well as the functions for each body. This analysis will heavily draw from community's experiences with these two bodies in an attempt to examine their impact on the cultural terrain in which women's land rights are negotiated. On the flipside, the study also makes reference to what the local cultures are doing to these decentralized land administration bodies.

#### *Women, Culture and Decentralized Land Administration*

Cultures are dynamic and are constantly being refined into new forms. Hence cultures are not static. People make and remake their culture through daily interactions amongst themselves and with others outside that cultural domain. This process can be termed as a process of cultural refinement. Some studies show that decentralized land administration system brings greater equity for rural women (Diarra and Monimart, 2006). The inclusion of women in decision making domains where it was hitherto anathema is one potential way through which gender equity is enhanced.

Customary law, stemming from local customs and traditions, has been associated with abetting the insubordination of women in land ownership as well as reducing their decision making space over land. Borrowing from the property rights paradigm, owning land confers rights and responsibilities to the owner to till (or not to till) the soil, to mine the soil, to offer those rights for sale, to rent out etc. (Alchian and Demsetz, 1973). Traditional African customs conferred to the community members certain rights over a piece of land. The rules for exclusion were also clear although non-written. Traditionally, land inheritance patterns followed the patrilineal norms. In most instances, women's rights to land were restricted to "user rights" but not the whole bundle of rights.

A discussion on "women, culture and decentralized land administration" is incomplete in the absence of a land tenure context. Land tenure refers to the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed off, or transmitted. Land tenure can therefore be taken to be a right, term or mode of holding land. Land tenure defines the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land (Ogolla and Mugabe, 1996). Further, Bruce (1998) defines land tenure as the terms on which something is held: the rights and obligations of the holder. These rights may be transferred or transmitted at the discretion of the holder and depending on the tenure system. Cross and Friedman (1997) note that land tenure is best understood as a social and political process rather than a system of laws or rules.

The argument by Cross and Friedman is that since tenure's base is unspoken social assumptions, then it is not easy to attack gender disadvantages in tenure through legal process. Over and above the law, women are disadvantaged by social assumptions and informal land practices that are not controlled by law. For women to enjoy their right to land it is imperative that there be a societal change of attitude on the various assumptions that deny them their rights.

Land tenure is both culture-specific and dynamic. It is culture specific since it determined by the history, social organization and land use patterns of a given society. This can be influenced by, amongst other things, the ecological characteristics of a given region. Land tenure is also a dynamic system which responds to social change. This is best exemplified by the visible evolution of land tenure in Kenya through the pre-colonial, colonial and post-colonial period (Ogolla and Mugabe, 1996).

In Kenya small scale agriculture is normally family based. Thus the family controls the basic means of production and the disposal of whatever surplus is generated from the economic activity. This is to mean that the family controls access to the use of available land. In the pre colonial communities in Kenya, women controlled the processes of production and disposition of surplus even if they did not possess the power of land allocation in indigenous tenure systems (Okoth-Ogendo, 1978). What this implies is that security of tenure was based on the usage of land alone and would therefore imply that women possessed a measure of real power in the economic organization of pre colonial societies. The advent of colonialism, Okoth-Ogendo (1978) adds, brought with it the process of land consolidation and registration. During this process, the power of allocation was interpreted as the registrable interest. This meant that women lost many of the guarantees that they had enjoyed in the indigenous

tenure arrangements. In addition, colonialism contributed to increased roles for women as men were engaged as labourers in settler farms.

The post colonial period saw the introduction of individualization of all land. This process began in the 1950s and continues. Currently, interests in land broadly fall into two groups. Rights that are held through traditional African systems and rights that derive from the English system introduced and maintained through laws enacted by colonial and then the national parliament. The former is loosely known as customary tenure bound through traditional rules (customary law). The latter body of law is referred to as statutory tenure, secured and expressed through national law, in various Acts of parliament e.g. Government Land Act (cap 280), Registered Land Act (cap 300), Registration of Titles Act (cap 281), Trust Land Act (cap 288) of the Laws of Kenya (Waiganjo and Ngugi 2001). However, the process of land registration, although with good intention, may have unintentionally contributed to gender inequality (Kameri-Mbote, 2006).

Traditionally, access to land is normally through either marriage or inheritance. Many communities in Kenya limit land rights to married couples with children. Neither single men nor women are allowed to hold land, so that only married couples have full social citizenship through land rights (Cross and Friedman 1997). In most ethnic groups, a married woman does not own property during marriage. In some communities, all her property even that acquired before marriage is under the control of her husband. Although the wife has the right of use over property, such control must be exercised with her husband's consent. Most control exercised by women on land is over use rather than control and ownership. Customary land registration systems require a husband's authorization for a woman to acquire title independently, and single women and single mothers are obstructed from acquiring title altogether. Under customary law, widowed women traditionally do not inherit land, but are allowed to remain on the matrimonial land and home until death or remarriage.

Land inheritance in majority of Kenyan communities is rooted in patriarchal culture. Patriarchal culture is the institutional power relations that give men power over women. It is a male hierarchical ordering of society whereby in matters such as decision making, access to resources, control over resources and control of reproduction, men have an upper hand. For example, inheritance under Kikuyu is patrilineal. The pattern of inheritance is based on the equal distribution of man's property among his sons. The eldest son may get a slightly larger share, however. Daughters are normally excluded, but may also receive a share if they remain unmarried. In the absence of a son, the heirs are the nearest patrilineal relatives of the deceased, namely father, full brothers, half brothers and paternal uncles.

Access to and ownership of land among most ethnic groups in Kenya is governed by customary law. Under this legal regime, socio-cultural values and institutions of local communities come into play (Odhiambo and Nyangito, 2002). This is true for the major communities inhabiting the study areas. These are the Agikuyu in Nyeri District, Mijikenda in Kwale District, and Akamba in Kitui district. However, this is not to say that population in these districts is homogenous in terms of ethnicity. There are traces of other tribes in each of these districts. For instance, in Kwale there are Kamba and the Agikuyu. Nevertheless, even in the context of these other ethnics, the rules governing access to and ownership of the land resources still gravitates towards men.

In the three districts, women traditionally gained access to land through their relationship with men. This was largely through the marriage institution. In other instances, a non-married woman would be allocated some portion of land by the clan for cultivation purposes. In this case, a woman obtained only usufruct rights. Upon marriage the usufruct rights could be terminated and the woman acquires land for cultivation from the new home. Hence among the traditional Agikuyu, Mijikenda and Kamba, women's land rights were severely limited to usufruct rights and not ownership. Even the nature of user rights was limited. For instance, it is not uncommon to find that control of permanent crops like coffee, cashew nuts and other trees in the farm were associated more with men than men.

In terms of representation in decentralized land administration institutions women are not sufficiently represented (ROK, 2009). The Land Control Act and the Land Disputes Tribunal do not make reference to women's representation (ROK, 1990). One of the key provisions of the new legal framework on land administration in Kenya is ensuring gender equity (ROK, 2009). Among other provisions, the legislation seeks to repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land. The legislation further seeks to ensure proportionate representation of women in institutions dealing with land.

## Research Questions

This study investigates the emerging cultural trends (if any) under decentralization of land administration in Kenya and how these impact on women's land rights. Specifically, the study seeks to examine what decentralization has done to the rules of belonging and entitlement as regards women's land rights. The study focuses on the following research questions:

- (a) What symbolic cultural compositions (e.g. values, words, and beliefs) have been eroded with the decentralization of land administration?
- (b) What cultural knowledge is being invoked in dealing with women's land rights?

## Methodology

This study covers three counties in Kenya that have contrasting cultural and agro-ecological positioning. The three counties are Kitui, Nyeri and Kwale. The three have a differing land tenure system with both Kitui and Kwale dominated by customary land tenure system while in Nyeri the land tenure is highly individualized through a titling regime. Geographically, Kitui County is situated in the Lower Eastern part of Kenya, while Kwale is located at the Coastal region. Nyeri County is situated in Central Kenya. Further, the population in these counties is largely rural (Table 1) and this poses certain challenges in the construction of women's livelihoods as well as their citizenship. This diverse context helps us dissect the terrain of decentralization of land administration system and its implications on women's land rights and their citizenship.

**Table 1: Study Counties by Selected Background Characteristics**

County	Population	Percent Female	Percent Rural	Land Area (KM <sup>2</sup> )	Level of Poverty (%)
Kwale	649,931	51.4	70.0	8,270.3	74.9
Kitui	1,012,709	52.5	86.2	24,385.1	63.7
Nyeri	693,558	51.0	75.5	2,361.0	32.7
<b>Kenya</b>	<b>38,610,097</b>	<b>50.3</b>	<b>67.7</b>	<b>582,650</b>	<b>43.4</b>

Source: <https://opendata.go.ke>

This study combines data from key informants, focus group discussions and a household awareness survey in deepening understanding on women's land rights in the context of decentralized land administration in Kenya. The choice of the key informants as well as the participants in the focus group discussions was pegged on the person's expertise on the subject matter, position in the society and or a combination of these attributes. This selection was purposive and included: government officers in charge of departments or government agencies that have a bearing on gender and land issues Kenya; members of the land control boards and land disputes tribunal and representatives of the provincial administration at the local level in the study areas, and representatives of relevant civil society organizations in the study counties. The provincial administration has however been abolished following the adoption of a new constitution in 2010.

To supplement the qualitative data, an awareness survey was also carried in randomly selected households in each of the study counties. The awareness survey was further aimed at shedding light on the level of knowledge; actual engagement with devolved land administration structures as well as other devolved structures in each of the study sites. In each district, around 50 households were targeted, resulting in approximately 160 household level interviews. Table 2 illustrates the coverage of the household survey. The study also benefited from a systematic review of the records of the land control boards and the land disputes tribunal in each of the counties to track the gender dynamics in the transactions.

**Table 2: Distribution of the Sample for the Household Survey**

County	Division	Location	Sub-location	No. of interviews
Kitui	Kitui Central	Mulango	Mutune	26
	Mutonguni	Kauwi	Kivani	25
	Othaya	Mahiga	Gikoe	22
Nyeri	Kieni West	Mweiga	Bondeni	35
	Msambweni	Msambweni	Milalani	26
Kwale	Matuga	Tiwi	Mkoyo	26
<b>Total</b>				<b>160</b>

Both the interview guide and the household survey tool contained information on gender dynamics in ownership and control of household assets; system of land inheritance in the community; main values and attitudes that affect women's land rights in the area; institutions that handle land issues in the community including women's representation in those institutions. There were also questions on the effect of land titling on women's land rights; knowledge on how women gain or lose land rights in the community; nature of cultural knowledge that is invoked when dealing with women's land rights and finally the kind of civil society organizations that help women address land issues in the study sites. The study was undertaken over a period of time beginning May 2010 through mid 2014.

## Findings and Discussion

### *Women's Representation in Decentralized Land Administration Institutions*

As initially enacted, the Land Control Board Act and the Land Disputes Tribunal Act were silent on women's representation on their functional membership. While the Land Control Act, uses the word 'persons' as being appointed to the Land Control Board, the Land Disputes Tribunals Article 4 (2b) on the composition of the provides that: "either two or four elders selected by the District Commissioner from a panel of elders appointed under Section 5". The use of "elders" in the Act, makes it possible to exclude women from the Tribunal, since "elders" is heavily tilted towards men under local customs and traditions. However, the study found out that in the three counties, women were included in the operations of these two decentralized land administration institutions. In both Kitui and Kwale, the maximum number of women in each of these bodies was three, while for Nyeri the tendency was towards gender balance.

In Kwale, each of the newly created districts had an established Land Control Board. The districts include: Matuga, Msambweni, Kubo and Lunga Lunga. In the Matuga district Land Control Board there were 2 women, and 8 men (with 2 councillors and the local District Commissioner). In Msambweni district, the membership included 9 men (2 Councillors and the District Commissioner) and 1 woman; while there were 2 women and 9 men in the Lunga Lunga district Land Control Board. In Kubo district all the Land Control Board members are men. Taken together women account for a paltry 12.5 per cent of the representation in the Land Control Board in Kwale. In Othaya district, the figure is slightly higher with a representation of 35.7 per cent. The marginal level of representation in Kwale masks greater challenges that women continue to face in the community.

The relative variations in women's representation in the LCBs and LDTs in the three counties can partly be attributed to education levels in the community in general. Data shows that in Nyeri, the gender variations in education indicators (e.g. enrollment rates, completion rates as well as general literacy level) are marginal. These indicators are highly pronounced in the two other districts and are disproportionately in favor of men. Education provides pathways through which women's representation in the devolved land administration units is enhanced. One potential pathway is

the evolution of a generally well informed local community in which women are easily accepted as leaders. Away from changing community perceptions, education also provides a critical mass of women from which to draw representatives. Secondly, drawing from Nyeri County, it is indicative that the inclusion of women in the Land Control Boards and the Land Disputes Tribunals offers women presence, and voice hence slowly thawing the male domination over land decision making at the local level. In addition, this has the potential of contributing to enhancing women's capacity to become more involved in decision making at the local level in other community domains besides land. While for Nyeri County, women representation was a norm, in Kitui and Kwale counties, it was an exception.

Thirdly, in both Kitui and Kwale counties there are deeply entrenched cultural perceptions on the role of women in the community. Thus in their cultural lens, the sphere of public decision making rests with the male gender. This is especially so for land, where women are often treated as "outsiders" who cannot be trusted with secrets over family land. For instance among the Digo of Kwale County there are certain sayings that have a bearing on public decision making and hence affect women's participation in making decisions over land issues. Such sayings include: "*Sikiro ta ritsapa chitswa*" which means that women cannot be equal to men. When such a saying is cited, it has connotations of discouraging women from competing with men. When cited in meetings deliberating over a land issue, it implies that women's interest over that piece of land has to take a backseat. Data shows that the Digo women in Kwale have got accustomed to being relegated to a marginal status compared to men. They often use disparaging language against their ilk even when handling family property. For instance, to most rural Digo women, marriages are a highly temporal affair and have resigned to the view that family property belongs to men. A Digo woman will just refer to the family goats as "*mbuzi ngwa*" which implies other people's goats. It should be borne in mind that the goats being referred to are family goats under her care. Despite the advocacy campaigns, most women in Kwale have accepted this as the way of life.

The inclusion of women in the Land Control Boards and Land Disputes Tribunals follows the emphasis placed on gender equity by the National Rainbow Coalition (NARC) regime when it took over power from KANU in December 2002. During the 2002 general election campaigns NARC had campaigned on a platform of change, of which addressing gender inequalities was a key issue. Gender equity was also a key theme in the struggles for constitutional reform in Kenya, a platform from which NARC galvanized their national support. Representation of women in the LCBs and LDTs could also be linked to a directive in 2007 by the then President of Kenya that women occupy a third of all offices in public institutions. Hence nomination of women was not an option but a quasi-legal requirement. In this context, quasi-legal implies that the framework for including women in decentralized land administration institutions stems not from any existing legal statutes at that time, but derived its legitimacy from a Presidential directive. Thus representation of women is one of the visible achievements of the decentralized land administration in Kenya.

The Constitution of Kenya 2010 makes the inclusion of women in public decision making organs not an administrative favour but a legal requirement. Article 27(3) of the Kenya Constitution provides for right to equal opportunities in political, economic, cultural and social spheres, while Article 81(b) provides that "not more than two-thirds of the members of elective public bodies shall be of the same gender". The same principle is emphasized in the composition of the National Assembly, the Senate and the County governments. The same clause is replicated in Article 175 (c) on the "principles of devolved government". Articles 97 (1b) and 98 (1b, c and d) also make reference to gender equity in peoples representation. At the operational level, the National Land Policy provides for proportionate representation of women in institutions dealing with land at all levels (ROK, 2009b). According to the National Land Policy, the composition of the District Land Boards, Community Land Boards and the Land Disputes Tribunals shall reflect the gender rule.

#### *Framing Legal and Policy Provisions and the Cultural Context*

Although the current legal framework in Kenya provides for the inclusion of women in public decision making, the cultural context under which this legal provision operates is instrumental in the realization of the spirit of this ideal. In most of ethnic communities in Kenya, women were never active participants in forums charged with making public decisions. Although this is changing, there are still pockets of discontent on the role of women in public decision making. This is however not widespread and cannot be linked to one particular ethnic group, but isolated segments of the various ethnics in the country.

There are notable limitations as to what local responsibilities local cultures bestow upon women on issues related to land. In Kwale and Kitui, the local traditional cultures are still largely intact. In these two districts literacy is low, while the belief in the traditions and magic is widespread. In Kitui, data portrays a community under siege of magic and witchcraft. These are sometimes applied in resolving land related disputes in several parts of Kitui district. A similar phenomenon is replicated in Kwale. In both counties, people turn to witchcraft as a last resort in their pursuit to justice. Previously, when alternative justice mechanisms were not available, seeking justice in land related cases was an expensive undertaking and people often resulted to easy but culturally sanctioned options such as oathing. In Kitui county, an aggrieved person may take part in a custom sanctioned oathing ceremony locally known as *ngeta* or *nthenge*. This is one of the most serious form of oathing in most Kenyan communities. Although there are variations in the actual procedures involved, part of the process involves the two feuding parts oathing while naked. It is assumed that whoever is not speaking the truth, will be befallen by severe misfortunes.

Table 3 shows that across the three counties women play a subsidiary role with regard to making decisions that affect family land. The situation is worse for key decisions that involve reporting land related cases or disputes to government authorities or actual participation in land related cases or disputes in government institutions. While a substantial portion of the respondents in all the three districts are in favour of both men and women handling these two concerns, an overwhelming majority (more than 60 per cent) favour men's participation. Un-packaging the reasons behind enormous support of men in making decisions over reporting land cases or actual participation in the land cases reveals some of the deep seated attitudes and perceptions that can be food for thought for gender advocacy. Broadly these simple descriptives provide a mental frame of the community attitudes and perception attached to women as an identity in the

community. The same attitudes have the likelihood of informing women's participation in land decision making as well as the community's perception towards their participation.

**Table 3: Gender Dimensions and Key Household Land Decisions**

	Total	Kwale	Kitui	Nyeri
<b>Who is responsible for the sale and/or disposal of household land?</b>				
<i>Man</i>	59%	76%	57%	45%
<i>Woman</i>	2%	2%	2%	2%
<i>Both</i>	39%	22%	41%	53%
<b>Who is responsible for the renting out household land?</b>				
<i>Man</i>	47%	63%	31%	47%
<i>Woman</i>	2%	2%	2%	2%
<i>Both</i>	51%	35%	67%	52%
<b>Who is responsible for authorizing the usage of household land?</b>				
<i>Man</i>	47%	61%	49%	33%
<i>Woman</i>	6%	2%	6%	9%
<i>Both</i>	48%	37%	45%	59%
<b>Who is responsible for authorizing subdivision of household land?</b>				
<i>Man</i>	68%	69%	69%	66%
<i>Woman</i>	1%	2%	2%	0%
<i>Both</i>	31%	29%	29%	34%
<b>Who is responsible for reporting land related cases/disputes to government authorities?</b>				
<i>Man</i>	63%	59%	69%	60%
<i>Woman</i>	1%	0%	2%	0%
<i>Both</i>	37%	41%	29%	40%
<b>Who is required to participate in land related cases/disputes in government institutions?</b>				
<i>Man</i>	67%	69%	71%	62%
<i>Woman</i>	1%	0%	2%	0%
<i>Both</i>	33%	31%	27%	38%

*Source: Survey Data*

In areas where literacy levels are low and customs reign supreme, women are largely taken as subordinate to men and with a significant proportion of community members having reservations for women's leadership. Even where the law of the land requires that a certain quota of the members be women, this is rarely taken as the position. In such communities, women are seen as less knowledgeable especially on land matters and their presence in land committees is not well received. Women are also seen as strangers and cannot be entrusted with making decisions over community land. Again; being "strangers" accord women less familiarity with the history of the family land in question.

In the three counties, traditional customs allowed a limited role of women in the community's public life. Culturally, women played primarily a homemaking and other domestic based roles. However, as formal education and other forms of foreign influences permeate the communities' cultures, the cultural landscape has changed a great deal in the three communities. This development has shifted the way the community perceives participation of women in public decision making. In all the three counties, women's participation is appreciated although with differentiation from one county to another. In the traditions inclined Kwale and Kitui counties women's participation seems imposed to an unwilling community. This is amplified by remarks from some of the male colleagues from the respective land disputes tribunal and land control boards. In these two districts women are perceived as "strangers" and entrusting the power to make decisions over land to women is akin to men abdicating their culturally sanctioned role expectations.

Community perception with regard to women's participation in the decentralized land administration institutions across the three counties varies. In Kitui, the presence of women in the Land Control Board and the Land Disputes Tribunal is seen a mere formality: to shore up numbers and rubber stamp what men agree on. This is aptly manifested by the nature of their contribution to such meetings. For instance, some female members will just vote and not utter a word on the deliberations. They have to wait for men to talk first. Data from the group interviews and the key informants illustrates the misgivings that community members have for women as leaders especially in the context of their participation in land decision making. While a small portion of those interviewed supports their participation, it is indicative that a significant proportion of those interviewed harbor negative perceptions. This could be partly linked to the local customs where they have been socialized into gender differentiated roles.

In Nyeri, women have managed to create reasonable space that guarantees their participation in public decision making forums. Although there are isolated voices of dissent from men, data shows that women representatives in the Land Control Boards and Land Disputes Tribunal operate on a different plane culturally. In addition, the local traditions that limited women's participation have been largely eroded and is slowly paving way to a more gender responsive society. However, it is possible that other factors may have precipitated to the rise and rise of Nyeri women into active participation in public decision making. The collapse of the male dominated coffee sector in the wider Nyeri, gave rise to a class of aggressively enterprising women. This is potentially one factor that may have weakened men's control over the local household economy. In one of the group discussions participants alluded to this proposition. Hence as the coffee sector collapsed, women have been gaining footage on the household economy through numerous communities based groupings and other income generating activities. As women mobilized, men's hold into the local household economy has been nose-diving. The loss over control of the local household economy has made it easier for the Nyeri women to gain a footing in asserting their influence in community life. As one key informants observed, local women in Nyeri are in charge of most of the community committees (e.g. burials, fundraising, weddings etc). This makes it easier for them to be easily accepted and play a role in the devolved land units.

#### *Women, Land Ownership and Local Customs*

Data further shows that the value and durability of production domains in land determines whether the woman has control over that production domain. The focus groups in Kitui and Nyeri revealed that if the value of maize in the family land is high (e.g. of commercial value) then a woman's control is not guaranteed. Durable items in the family land such as trees and cash crops are closely linked with men. This is despite the fact that women provide the bulk of the labor for tending the crops or plants in question. Women are often associated with household items that have little value. Some of the assets included in this category include poultry as long as it is not does not have commercial connotations. Thus women's ownership of household assets is highly temporal and subject to appropriation by men as the item premium goes up.

Comparing the three counties, data shows that the scenario is slightly different for women in Nyeri County. A close scrutiny of the transactions of the Land Control Board reveals that a significant number of women are acquiring land. This is either through buying or inheritance from parents. Data shows that as more women get formal education and get jobs, this provides them with an opportunity to buy their own land as a form of security. Running a business is yet another avenue through which women are sourcing funds to buy land. While the effect of education and business is highly felt in Nyeri, the same cannot be said for Kitui and Kwale. In Nyeri, women buy land openly without the fear of community stigma associated with the rising class of women land owners. In Kitui, some of the women who buy land end up doing so in complete secrecy, for fear of being detected by their husbands. This exposes such women to the real possibility of even losing the land once a misfortune strikes.

As new rules emerge, the society culture is being made and remade, opening new frontiers in the cultural transformation. What was a taboo subject is now becoming openly discussed and embraced. Where women were not allowed by cultural chains not to own land, these chains are now being broken. The Land Control Boards as well as Land Dispute Tribunals are two alternative legal avenues through which women are ascertaining their claims to land. However, although these avenues are providing an alternative redress system for women to claim their land rights, relatives such as own brothers and in laws remain a stumbling block for women's land rights. When a husband dies, the agonizing journey for the wife begins. This is especially so where the husband passes on without a written will or non-titled land. The wife is largely treated as an outsider by the in-laws and the passing of the husband provides an opportunity for the dissatisfied in-laws to cash on. However, the revitalization of the Land Control Boards and Land Disputes Tribunal in the last eight years, have provided an important forum for such disinherited women to have a voice. Data reveals that men, especially male in laws and sometimes own brothers use all the tricks to grab and take land from the widows or sisters. Individualization of tenure is still grounded on community's norms, values or practices that tend to favour men. Thus titling may not have been progressive as desired, although it looks gender neutral

Another element that is slowly changing in all the three communities is the view that women should not inherit family land. For Nyeri, sub-division of family land largely takes into consideration females in the household. This is not to say that there are no setbacks. Culturally, women's claim to land in the three communities has been defined by their relationship with men in the community. This is largely in the form of being a wife. In Kitui, women who do not get married, are given a small portion of family land, to cultivate but not own.

Compared with the trend before, there is a remarkable difference in the right to access of land for women. Traditionally once a girl got married, there was no recourse in case they separated from their husbands. Women experienced great challenges as they had nowhere to turn to. Among the Kikuyu, it usually was said that '*Wahika ni wahika*' (once married always married). This meant that when a girl got married she ceased being part of the members of the household and joined the family of the husband. She could therefore not be considered during succession. Today a provision is always made for the unmarried and those who have returned from their families. Lands board are very instrumental in enhancing this process by insisting that women are actively involved in land matters in Othaya. Children over 18 years are also consulted before any transfer is effected.

In all the three counties family land is mostly registered under the man's name. Data further shows that families have not be so keen in transferring land titles from their original owners once, they pass on. Hence, most of the land in Kitui and Nyeri for instance is registered in grandparent's name. When a land dispute arises out of such land, women are heavily disadvantaged. A woman has the burden of proving her linkage to the family land in dispute, and when it is registered under a grandparent's name the situation is much more complex. The costs involved are also overwhelming as illustrated by one of the respondents in Kitui district:

"My husband passed away before he had transferred his land under my name. When I went to the land office in Kitui, I was required to pay KES 5,000. I did not have this amount of money. When I went back to the office, I was now required to pay KES 13,000 to get the land transferred under my name.

Since I did not have the money, I kept off. My brother in law tells me that I have no rights over that piece of land. As of now, I have no idea how to get this land registered under my name since it is under my late husband's name, but the cost and the process is discouraging."

According to traditional Kamba customs, one old age tradition that worked for women is the *Kagweto* phenomenon. This practice involved a culturally sanctioned marital arrangement where a woman *married* another woman. The woman who got married was referred to as the *Kagweto* and was expected to get children on behalf of the woman who *married* her. All the children that the *Kagweto* got under the *marriage* arrangement culturally belonged to the woman who married her. In the olden days, *Kagweto*'s were respected and their children assured of a portion of the family land where their mother was married. However, this is no longer the practice, at least in most of the cases. Part of the problem lies with the increasing land scarcity in the community. In some instances, *Kagweto*'s and their children are often chased away from the family land and find abode in the market centers. This is one area where the Land Disputes Tribunal has been key in helping assert the cultural rights of *Kagweto*'s and their children to lay claim to family land.

In one of the group discussions in Kitui, one of the participants was a child of a *Kagweto*. Although her mother in law has a big farm, she only allows her a small portion that can only accommodate the house. This has forced her to rent a farm for cultivation elsewhere. She derives support from the local women's group. The group has given her some cash to start a small business in the local market:

"I am a squatter where I am married. I have a small portion of land where my house stands, and can only accommodate a cooking place and a small place to sleep at night. I have nothing else. My mother had been married as a *Kagweto*. I only sleep there but have rented a small farm elsewhere for cultivation despite the fact that my mother in law has a big farm. I do not know what the future holds for me."

Note that the primary responsibility of a *Kagweto* is to have a son, and when this goal is not attained, *Kagweto*'s future in that homestead is not assured. Such cases are many in Kitui and the Land Disputes Tribunal is playing a key role in resolving them. Under the Land Disputes Tribunal *Kagweto*'s can find some solace since the members easily understand the cultural background of the *Kagweto* phenomenon and are better placed in resolving some of the land related disputes involving this group. Knowledge of the local customs (e.g. how to ascertain a genuine *Kagweto*) gives the members of a Land Disputes Tribunal an upper hand in resolving such disputes. In resolving family land disputes the Tribunal also takes into account the issue of the first wife, (in case the deceased husband had more than one wife), and what she may have brought to the relationship so that a fair share is determined. Other considerations include the issue of dowry payment, with prove of dowry non-payment nullifying the union and hence denying the woman a chance to inherit family land. Since the Tribunal draws its membership from the immediate community, this equips the members with the requisite cultural knowledge that makes it possible to amicably resolve some of the land disputes.

Although at varying degrees of community acceptance, results show that culture has succeeded in socializing people into believing that "women own nothing in the community". This is true for the three districts, even though it's much more pronounced in Kwale and Kitui than is the case in Nyeri. According to the Kikuyu culture, all property belonged to the man, hence a local popular saying: *indo ni cia muthuri*. In the three districts, it is also not uncommon to find that in the old days, land was always held in trust of the male children. Even where a mother inherited family land, the community did not treat this as ownership, but holding in trust for the sons. In one of the interviews in Nyeri, the struggles by women are vividly captured, thus:

"Many men do not think a woman or a girl has a right to inherit family land. In case a husband dies before sub-dividing his land or leaving a will, the wife is mostly left to sort out land related problems. This is especially so in cases where the land had not been transferred from the parents name to the husband's name. Worse still, if a woman lacks a legally recognizable union or marriage, she is dispossessed easily. Such cases are increasing in this area. It is also annoying that even in families that have only one son and lots of land, the daughters will not get anything: they are not considered. It is also strange that even if a lady from such a family was to experience a marital problem, hence get separated from her husband, the "single" son will not be willing to surrender part of the land to the sister."

In some instances, family members have used loopholes in the Registered Land Act (Cap 300) Section 143 (1) to lock out others and especially women off the family land. This section puts family members who are registered as trustees to an advantage and can easily disinherit other family members. This legal loophole was one of the key issues addressed by the Njonjo Commission (ROK, 2002) that found out that adversely affected members have found it almost impossible to challenge a first registration where the registered trustee proprietor is a trustee under Section 126 (1) of the Registered Land Act. Hence adversely affected members are subjected to a rigorous judicial process of establishing the nature of relationship that exists between the trustee and the other family members. Here again the burden of prove is disproportionately higher for women than male family members. As a corrective measure to the possibility of abuse of the issue of trusteeship by dishonest family members, the Njonjo Commission made provisions for repeal of Section 126 (1) of the Registered Land Act, so that the restrictions provided are amended. This would make it difficult for the registered trustee to deal with trust property as is he or she were the sole beneficial owner.

The old Kikuyu customs provided that if a woman wanted to inherit family land, such a woman had to perform a ritual and become a *family son*. This is still practiced in some parts of Central Kenya although not a common practice. This is especially so for women who for some reason do not get married. The rituals involved payment of a dowry and were meant to appease the spirits and avoid a curse. It was assumed that when a woman inherits family land, it is like inviting a misfortune. During the interviews, it was revealed that a lady had been advised to sell off land that she had inherited from her family, as a way of averting a curse to her family since a daughter according to the Kikuyu customs, a daughter was not allowed to inherit land. The lady was advised to sell the inherited piece of land and buy land elsewhere. What the Land Control Boards and Land Disputes Tribunals are doing is lending an interpretation into some of these cultural practices that tend to insubordinate women.



Among the Muslim families, the Land Disputes Tribunal also draws from the provisions of the Quran in settling claims to disputed family land. The influence of the religious discourse in the decisions of the Land Disputes Tribunal is evident in Kwale district. This region is predominantly Muslim hence drawing most of their norms and the value system from Islam. The Quran is very clear on what goes to who with regard to family property. The law is explicit on what fraction goes to the wife, children and attaches conditions that go with each of the shares. These provisions are contained in Surah Four of the Quran. Surah Four, Part 7 of the Quran provides that: "From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large – a determinate share". In Kwale, the members of the Land Disputes Tribunal noted that they draw from the Quran in delivering a verdict especially where a woman has been disinherited.

Although the new decentralized institutions of land administration are slowly re-asserting women's land rights, many obstacles lay their way. The group discussions point to skewed socialization process where sons' are brought up to think that they are superior to their sisters, hence the right over the family land. This creates tension and can be felt even in modern day Nyeri, Kitui and Kwale although at varying degrees of influence. In Nyeri and Kitui, incidences of brothers burning the sisters' houses so that she may leave family land were reported. In other instances, women buy into the cultural trap and decline to grant their daughters land even where the husband is willing. Hence some of the decisions by the Land Control Board and the Land Disputes Tribunal find open resistance from sons and end up creating tensions between sons and daughters in the family. The cultural notion that girls are supposed to get married is a key contributing factor. However as mounting evidence shows, marriage is no longer assured and even where one gets married, whether it works out well or not is increasingly becoming a point of concern.

Marriage institution is key in asserting a woman's land rights. However, it is also the key institution through which many women's land rights get contested. This is particularly so when marital problems occur; a husband marries another wife or a wife differs with the in laws. In addition, if a household lives in an urban area for a long period of time, this is also likely to create tension in case the husband passes away without leaving a written will. Finally, is the issue of being in unrecognized marital unions. These are some of the issues that are currently being resolved by the Land Disputes Tribunal in the three districts.

## Conclusion and Recommendations

These findings point at a process of change in view of women's land rights that can be partly attributed to decentralized land administration institutions. Although the change is slow in Kitui and Kwale, in Nyeri, the pace is taking root faster. There is an emergence of increasingly emancipated rural woman who are ready to take charge and claim their rights. The increasing role of women's organizing across the three districts further gives credence to the rising women voices in community affairs.

Across the three districts, women are inheriting land, a phenomenon that was anathema a decade ago. Equally important, women are buying and trading land. Women are also increasingly resulting to formal mechanisms of justice as they assert their claims to family land. Although a variety of factors are facilitating this transformation, (e.g. education, religion, rising marital problems, post election violence etc) supportive government legislation is opening up cultural elements that discriminated against women. As a legislated mechanism for alternative justice system, the Land Dispute Tribunals and the Land Control Boards are playing a largely transformative role in creating a new community and especially empowering communities to have women in mind when sharing family land.

The debate on women's land rights has intensified over the last decade. Whether in public offices or community meetings, inclusion of women has taken the centre stage. The provisions of the new constitution on gender equity and especially in representation is providing an additional impetus towards a more gender equitable society. As we close the gender gap in public decision making, women's identity is slowly getting transformed with women gradually taking their rightful place in the society. As the interrogation of the decentralized land administration institutions shows: a women no longer belong to the kitchen, but women are buying their own land; inheriting their family land and sitting side by side with men in negotiating claims to contested land rights. This is the emergence of a new woman and a clear reflection of cultural dynamism.

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## References

- Burns, T. (2007). "Land Administration Reform: Indicators of Success and Future Challenges", Agriculture and Rural Development Paper 37, Washington DC: The World Bank.
- Cross, C. & M. Friedman. (1997). Women and Tenure: Marginality and the left-hand Power. In Meer, Shamin, (ed.), *Women, Land and Authority: Perspectives from South Africa*, pp17-34. Claremont: David Philip Publishers.
- Dale, P. and McLaughlin, J.D. 1999. Land Administration Systems. Oxford: Oxford University Press.
- Diarra M., & Monimart, M. (2006). Landless Women, Hopeless Women?: Gender, Land and Decentralization in Niger. International Institute for Environment and Development, Issue Paper No. 143.
- Kameri, M.P. 2006. "Women, Land Rights and the Environment: The Kenyan Experience." *Development* 49(3):43-48.
- Meinzen-Dick et al. 2008. Pro-Poor Land Tenure Reform and Democratic Governance. Discussion Paper 3, Oslo Governance Centre.
- Ng'ethe, N. & Karuti, K. (1994). 'Decentralization and Democratization in Sub-Saharan Africa: The Kenyan Experience.' Institute for Development Studies, Nairobi.
- Ngone, D.T. & Mohamadou, S. (2003). Women and Land in Africa: A Case Study from Senegal. In Wanyeki, L.M. (ed.), *Women and Land in Africa: Cultures, Religion and Realizing Women's Rights*, pp. 207 – 231. London: Zed Books.

- Odhiambo, W. & Nyangito, H. (2002). Land Laws and Land Use in Kenya: Implications for Agricultural Development. Kenya Institute for Public Policy Research and Analysis, Discussion Paper No. 15, 2002.
- Ogolla, B. & J. Mugabe. (1996). 'Land Tenure Systems and Natural Resource Management.' In Juma, C and J.B. Ojwang (eds.), *In Land We Trust: Environment, Private Property and Constitutional Change*, pp 85-116. Nairobi: Initiative Publishers.
- Republic of Kenya, 2010. (2009). National Population and Housing Census. Nairobi: Government Printer.
- Republic of Kenya, (2009). Sessional Paper No. 3 of 2009 on "National Land Policy", Ministry of Lands, Kenya.
- Republic of Kenya, (1990). Land Control Act, (Cap 302) and Land Disputes Tribunals Act. Nairobi: Government Printer.
- Society for International Development (2004). Pulling Apart: Facts and Figures on Inequality in Kenya. Nairobi: Society for International Development.
- UN-ECE, 1996. Land Administration Guidelines. New York and Geneva: United Nations.