
On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya

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Scholars have argued that economic efficiency requires a clear definition of the rights of ownership, contract, and transfer of land. Ambiguity in the definition or enforcement of any of these rights leads to an increase in transaction costs in the exchange and transfer of land as well as a residual uncertainty after any land contract. In Kenya, government efforts at establishing clearly defined property rights and adjudication mechanisms have been plagued by the existence of alternative processes for the adjudication of disputes. Customary dispute resolution has been praised as an inexpensive alternative to official judicial processes in a legally pluralistic environment. However, our research demonstrates that customary processes may also carry a monetary cost that puts them beyond the means of many citizens. This article compares the costs and processes of the formal and informal methods of property rights adjudication for women in the Kisii region of Kenya. The research results suggest that women have weak property rights overall, they have limited access to formal dispute resolution systems because of costs involved, and even the informal systems of conflict resolution are beyond the means of many citizens.

Secure property rights are important, even in traditional or customary systems where formal title is not available or widely used. They encourage people to invest in their resources and protect those investments against expropriation. Security of property rights rest on their clear definition and defense (Acemoglu et al. 2004; De Soto 2000; Fukuyama 2004; Libecap 2003; Norton 2000; Weimer 1997). Yet in many parts of the world, property dispute resolution processes are unclear or inaccessible due to lack of facilities, education, or public sensitization. In much of sub-Saharan Africa, the presence of multiple and overlapping legal systems further complicates the process of dispute resolution. Moreover,

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the legal systems that exist, customary and public, may not always recognize or enforce the same set of property rights. Ambiguity in the definition or enforcement of property rights leads to an increase in transaction costs in the exchange and transfer of land as well as a residual uncertainty after any land contract. The issue of dispute resolution with regard to property rights has been largely neglected in the academic literature, in part, because many of those writing on property rights live in countries where adjudication is neither a mystery nor a particular problem (although it may become so if one has the misfortune of becoming involved in a legal dispute).

The disjuncture between public and customary law regulating property rights is a problem for capital formation across Africa (Joireman 2008). In Kenya, government efforts to establish formally defined property rights and adjudication mechanisms have been plagued by the existence of competing customary processes for the resolution of disputes. Seeking to advance the state of knowledge regarding the enforcement of property rights in areas with legal pluralism, this article compares the nature and costs of the formal and customary methods of property rights adjudication. Customary dispute resolution has been praised as an inexpensive alternative to official judicial settlements in a legally pluralistic environment. However, our research demonstrates that customary processes may also carry a monetary cost that puts them beyond the means of many citizens. Rent-seeking, the use of public office to extract personal payments at all levels of both the formal and informal adjudication processes, make the settling of land disputes prohibitively expensive.

Customary Law and Traditional Dispute Resolution

Colonization left a complex legal arena in sub-Saharan Africa in which customary and public law coexist and sometimes conflict. Customary law is a body of rules in many parts of Africa governing personal status, communal resources, and local organization. It has been used by various ethnic groups for their internal organization and administration. Customary law is recognized by the courts and exists as a second body of law (in addition to statutory law) governing citizens in countries of sub-Saharan Africa. It has the greatest control over people in rural areas, but it also affects urban dwellers through the regulation of marriage and inheritance.¹ While in some areas it is clear that customary law pre-dated

¹ See for example the much-discussed Otieno case in Kenya in which a wealthy, urban, Kikuyu woman wanted to bury her husband, a Luo, on his farm outside of Nairobi as per his wishes. His family insisted that he must be buried in Western Kenya, his home area. Since his natal family and not his wife was viewed as the next of kin, their wishes won out. For more detail regarding the case see Gordon (1995).

colonial contact (Gluckman 1965, 1955; Nadel 1947), in other areas customary law developed in tandem with colonization, at times facilitating the process of domination (Ghai & McAuslan 1970). Some scholars would go so far as to argue that customary law was *invented* by colonial powers, rather than simply being codified or recognized by the colonial regime (Ranger 1983; Chanock 1991). Chanock notes that “[t]he enormous multiplication of miniscule African Monarchies, which created the setting for customary courts, customary judges and customary law, was more a feature of the colonial period than a continuation of pre-colonial life” (Chanock 1998:34). Other scholars emphasize customary law as an alternative realm of struggle over power and the allocation of resources (Nyambara 2001; Berry 1992).

Customary law provides a system of rules for the allocation and adjudication of property rights. Typically, it is used as a tool through which traditional leaders (chiefs, elders, or headmen) can evaluate claims to property and resolve disputes regarding land. The logic of customary law focuses on the well-being of the community, rather than the rights of the individual. In practice this means that customary legal decisions tend to be compromises rather than clear decisions for one party against another. Anyone making a claim to land in a customary legal system will be making it in the context of the relationships that construct the social system of their community. The vitality of that social system may take precedent over individual rights.

Literature regarding customary systems of resource management (land, water, and forests) values their flexibility and protected access for members of traditional communities (Benjaminsen & Lund 2002; Ribot 1999; Toulmin et al. 2002). Similarly, customary dispute resolution systems are praised for their accessibility, local knowledge, low cost, and speed when contrasted with national court systems and public law (Connolly 2005; de Sousa Santos 2006; Kane et al. 2005; Nyambu-Musembi 2003; Penal Reform International 2000).² Customary systems may also appear to be a better venue for women’s legal disputes given women’s negative experiences with formal dispute resolution systems (Manji 1999). However, the most positive assessments of women’s property rights in customary tenure systems note the necessity for women to negotiate their social relationships in order to sustain access to land through changing life circumstances (Griffiths 1998; Rose 2002). Difficulties in ensuring women’s access to land have been noted as a

² Although often customary systems of law are grouped under the rubric of informal systems, a category that captures a variety of dispute resolution mechanisms, some of which may be far less entrenched culturally than customary law particularly as it is applied to property rights.

problematic feature of customary institutions of dispute resolution (Nyambara 2001; Kasanga 2002; Atuki Turner, interview, Kampala, 16 Sept. 2005; Lastarria-Cornhiel 1997).

In the following sections we examine the cost and clarity of dispute resolution regarding land in Kisii, Kenya. In so doing, we explicitly neglect a discussion of what both the formal and the customary systems might be intended to do (e.g., provide justice, preserve community interests) and an evaluation of the validity of these different intents. We instead choose to address the process of how people resolve property disputes to assess the accessibility and effectiveness of customary law.

This research was conducted over a six-month period in 2006, using structured interviews with women's groups, community leaders, lawyers, and civil servants. Women are the focus of the study because (1) women in Kisii have less social capital than men and are therefore more vulnerable to infringement upon or loss of their property rights in conflicts regarding land, and (2) women's property in East Africa has been identified in past literature as particularly vulnerable to expropriation (Joireman 2007; Strickland 2004). Throughout this article individual informants are identified by initials that are not their own to protect their confidentiality.

After describing the Kisii region and the methodology of the field research, this article addresses the issue of insecurity of property rights in land for women in Kisii with a focus on the types of land disputes that arise. This is followed by a description of the costs incurred in the formal and informal methods of dispute resolution. A concluding section emphasizing the findings of the article follows.

Kisii Region

Kisii region, named after the Kisii ethnic group (also known as Gusii), is located in the fertile highlands of Nyanza province in Western Kenya. The Kisii region contains three political districts: Kisii Central, Nyamira, and Gucha. The administrative hierarchy in each district is made up of a district commissioner, several district officers, chiefs, and elders (Okuro 2002). The Kisii area is one of the most densely populated in Kenya, as it covers 2,206 km² and sustains 1.6 million people (Central Bureau of Statistics 2001: n.p.; <http://www.cbs.go.ke/>), almost all of whom are ethnically Kisii.

Most of Kisii's population engages in subsistence farming of food crops (maize, beans, bananas, sorghum, and millet) supplemented by cash crops such as tea and coffee, as acreage allows (Waithaka et al. 2000). The average household size is five people, and farms are between one and four acres (Central Bureau of Statistics 2001: n.p.).

A growing population is putting enormous pressure on the land. The customary inheritance system requires that each son receive an equal share of the land; consequently the land available for each family is decreasing with each generation. The average monthly income per capita is 1,496 KSHs (\$21),³ and the average monthly expenditure per household is 3,250 KSHs (\$46), 86 percent of which is spent on food (Guyatt et al. 2002:847).

Women and Land in Kisii

Women in Kisii, like most African women in customary tenure systems, have only secondary or use rights to their husband's land. They have a customarily recognized right to farm the land but cannot own it or control its dispossession. Occasionally, if they are unmarried with a child, they will have use rights to their father's land, but these cases are exceptional. According to one women's group, "You can feel free to use [the land] in matters of cultivating it. But you cannot do any major thing. You cannot decide to sell it" (focus group, Kisii Central, 2006). Only one woman out of all the participants in 16 focus group interviews claimed to possess the title deed for her land (widow's group, Nyamira, 27 Aug. 2006). This is representative of what scholars have noted with regard to customary tenure across sub-Saharan Africa that "men and women have rarely, if ever, had identical; kinds of claims to land, largely because the genders have very differentiated positions within the kinship systems that are the primary organizing order for land access" (Whitehead & Tsikata 2003:77). The overwhelming majority of women are unable to rent out their land or use their land as collateral for a loan in spite of the fact that, according to all interviews conducted, women are the ones who work the land raising both subsistence and cash crops.

Not only do women lack control over the land they farm, but they also generally do not control the income from the crops they produce. Four of the Kisii women's groups we interviewed stated that women negotiate with their husband about how to spend the money from cash crops, while the remaining 12 expressed that a husband or father exercises exclusive control over household resources.

³ Per capita income was calculated based on information from three relevant districts (Kisii Central, Gucha, and Nyamira), published in the Kenya National Human Development Report (United Nations Development Programme 2006). Annual per capita income is KSHs 22,740 for Kisii Central; KSHs 16,831 for Gucha; and KSHs 14,293 for Nyamira. GDP per capita (US\$ PPP) is \$663, \$490, and \$416, respectively (United Nations Development Programme 2006:71). In order to arrive at an estimated monthly per capita income for the region, we averaged the annual per capita income of the three districts and divided by 12. $[(22,740 + 16,831 + 14,293)/3]/(12 \text{ months}) = 1,496$. The exchange rate used was 1 USD to 70 Kenyan shillings, which lead to a per capita monthly income of \$21.

Because women's access to land is mediated by familial relationships, issues of inheritance were raised frequently during the interviews. The following section focuses on how women's articulation of their perceived insecurity of property rights is affected by widowhood, inheritance from parents, and polygamy.

Women's Property Rights Insecurity

The Kisii community includes a high number of widows, due in part to the impact of HIV/AIDS. Widowhood results in challenges to women's property rights from relatives of a deceased spouse. This usually involves moving the boundary of the widow's land by planting crops on its fringes or simply removing the widow from the land and taking her fields. This practice is referred to locally as "chasing" a woman from her land, her home, or both. A widow's vulnerability to these pressures is determined by an interplay of several factors including the gender and age of her children, the payment of bride price,⁴ her character, and her HIV status. Surprisingly, considering the ethnic homogeneity of Kisii, ethnic identity appeared to have no effect on a widow's level of vulnerability.⁵

Women interviewed described their value as wives as based on their ability to bear children. The age and gender of children was reported to be one of the most salient factors affecting a widow's security of property. Should a woman be widowed before bearing children, she is likely to face stigmatization as well as pressure to abandon the land she farms. One women's group asserted that "according to Kisii tradition, [a woman is] useless without children" (Bomwanda focus group, Kisii Central, 15 Aug. 2006). A widow who has only given birth to daughters faces less pressure, although she is still more vulnerable than a woman with sons (focus group, Kisii Central, 2006; Trinity focus group, Gucha, 20 Sept. 2006). Sons are seen as members of the lineage while daughters, who will leave and marry into other lineages, do not have the same permanence of membership. Statements from women in Kisii regarding the importance of children are consistent with literature on women in customary land tenure systems (Wanyeki 2003).

A woman without sons has several traditional options to acquire heirs and thereby legitimize her presence on the land. She may

⁴ In Kenya, bride price is paid to a woman's family in exchange for her labor that is going to her husband's family. Although the payment of bride price is increasingly being negotiated within families and relationships, it is still seen as a significant indicator of the legitimacy and even legality of a marriage under customary law.

⁵ All women's groups as well as chiefs and elders responded that this factor did not contribute to land disputes. A Luhya widow living in the area described her conflict with land as pertaining only to her questionable association with her deceased husband, and specifically not to her ethnic identity.

adopt children or “marry” a woman with children by paying bride price for the wife of an imaginary son whose “children” become her grandchildren (focus group, Kisii Central, 2006; Global Health Reporting 2006; widow’s group, Nyamira, 27 Aug. 2006).⁶ Women’s groups agreed that should a widow without sons lack the resources or the will to pursue either of these traditional practices, she would be “chased” from the land—forced to leave by her in-laws. Again, we note that these statements from women in Kisii are consistent with literature on the importance of children in maintaining access to land in Kenyan customary systems.

Perceptions of a woman’s character determine her vulnerability to land expropriation. A woman can be accused of having “bad character” for practicing witchcraft, being sexually promiscuous, drinking too much, or being rude or stubborn, particularly toward her in-laws (widow’s group, Nyamira, 27 Aug. 2006). A widow of bad character is very likely to have difficulty holding on to her land. A Kisii district officer confirmed this trend, stating that “[s]omeone might marry a lady who is not accepted by the family. So once the husband dies they are very fast in chasing that lady [off the land]” (Mawera Monganya, district officer, Kisii Central, 19 Sept. 2006). One study of women’s land rights in sub-Saharan Africa noted that local level land-management fora “. . . make moral and material evaluations of inputs and behavior between male and female household members over a very wide spectrum when adjudicating land claims” (Whitehead & Tsikata 2003:78). Adding this factor to the absence of sons or incomplete payment of bride price significantly increases the insecurity of a widow’s property rights. Verma has noted that “[w]idows who are newly married, have small children, have bad reputations within their families are particularly vulnerable to being chased off their land” (Verma 2001:99).

Women interviewed expressed their desire to inherit property from their parents and to retain control over property they occupied. Traditionally, land was divided solely between the sons and although public law now allows daughters to inherit (The Law of Succession Act 1981), the practice of excluding women from the inheritance of land has remained strong in Kisii. According to all the women’s groups, a woman cannot inherit land from her father (Tabaka focus group, Gucha, 19 Sept. 2006).⁷ Increasingly irregular marriage patterns mean that many women have children with a man but remain formally unattached to his household (Hakann-

⁶ This practice was mentioned by all women’s groups.

⁷ The women in the Tabaka single mother’s group rented land as a result. The women in the Nyosia single mother’s group, on the other hand, were allowed to live with their parents as part of the household but could expect to be forced to leave when the land is divided among the sons (Nyosia focus group, Kisii Central, 19 Oct. 2006).

son 1994). Such women are in a very precarious position because they need land to grow food for their children, yet cannot claim land from the lineage of their children's father due to the absence of formalized ties.⁸

The last category of women who are at high risk for land insecurity are widows from polygamous marriages. These women face the same challenges as those in monogamous marriages concerning children, character, bride price, and HIV/AIDS, but in polygamous marriages these factors are compounded by competitive pressure. Traditionally, the first wife would be given more land than the second wife due to her senior status. According to one women's group, "it's obvious that the first wife gets a bigger share" (Tabaka focus group, Gucha, 19 Sept. 2006). However, other women's groups reported that the practice has now changed: "Long ago is when they used to give the elder wife a bigger portion of land, like they had the respect" (focus group, Geonseri, 28 Sept. 2006). Today it is generally expected that each wife will be given an equal share of the land. Yet a husband may still give more land to the wife he favors due to the number or gender of children, the woman's character, or simply spousal affection. In polygamous marriages women reported concerns regarding property rights analogous to those of women in monogamous marriages in that wives with sons are favored over wives with daughters, and barren women will have difficulty holding onto their land (Bomorenda focus group, Kisii Central, 2 Nov. 2006; Obotaka focus group, Kisii Central, 29 Sept. 2006).

The weakness of women's property rights in Kenya has been noted in the past as a problem rooted in both statute and customary law. "The position of women in relation to matrimonial property is also extremely weak. Customary law in relation to property rights of women seems to be out of step with the present economic structure and this has the effect of weakening the economic power of women" (Ikdahl et al. 2005:92).

All the issues noted above make women's property rights vulnerable. What strategies can they follow to try and prevent the loss of their use rights or regain them when taken? Women who lose their land or whose land is encroached upon by neighbors appear to have a choice in terms of which type of adjudicatory structure they can use to pursue their complaint, the formal court system (which incorporates some customary elements) or the informal use of elders and chiefs, which has been the forum of choice for dispute resolution of conflicts over "family" or customary land. These channels and their costs are discussed in the following section.

⁸ There was some indication that this tradition may be changing. One group stated, "We don't know in future, because now we have seen differences. Maybe in future we don't know" (Obotaka focus group, Kisii Central, 29 Sept. 2006).

Methodology

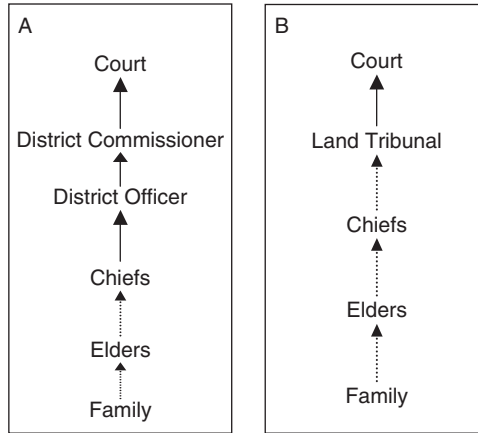
This study used interviews and focus groups to explore property disputes and perceptions of formal and customary systems of dispute resolution. Care was taken to conduct interviews in each of the three districts that Kisii comprises so as to make them as comprehensive and descriptive of the area as possible.

The initial interviews were structured and conducted with various groups and individuals. We interviewed 16 women's groups, ranging in size from 15 to 20 people.⁹ The purpose of these interviews was to determine the kinds of land disputes pursued by women in the Kisii area, the variables that make them vulnerable to disputes, and the path they would generally follow in seeking resolution. Nine interviews were conducted with chiefs and 10 with elders, to determine their perceived role in handling land disputes. In addition, we interviewed 30 women who had personally sought resolution to a land dispute in order to understand how the general trends discussed in the women's groups played out in concrete examples. Last, we interviewed three district officers, two lawyers, and several nongovernmental organization employees in order to gain an understanding of both the formal and customary structures that exist for resolving land disputes.

The interviews revealed the existence of two perceived paths for dispute resolution. Both initially rely on customary mechanisms—the intervention of elders and chiefs—but then diverge into two channels: channel A, an informal process based on the previous legal regime of arbitration of land disputes through the provincial administration, and channel B, which has the elements of the official, formal procedure along with the initial role of elders and chiefs. It is important to note that by law, elders and chiefs are excluded from resolving property disputes unless they are serving on a land tribunal. Yet from these first interviews it was apparent that for property disputes even the formal channels had a customary component, so there is no exclusively formal channel of dispute resolution. In order to determine the women's, elders', and chiefs' knowledge and perception of these channels, we showed the following diagrams tracing each channel. Interviewees were asked which channel was officially correct, which best represented reality, and the amount of money (both fees and side-payments) required at each step of each process (see Figure 1).

This exercise, with the addition of questions concerning the livelihood and education level of the interviewees, was conducted with five women's groups ranging in size from 10 to 30

⁹ Four of these were widow's groups, two were HIV support groups, and two were single mother's groups.



A dotted line indicates an informal link and a solid line a formal process.

Figure 1. Dispute Resolution Channels.

people. We selected groups from communities representing each district. In an attempt to trace the steps and fees required in the formal channel, we also consulted lawyers and the land registrar's office in Nyamira District.

Dispute Resolution Regarding Land Conflicts

The structure of the provincial administration is a vestige of British colonial rule. The British government retained the institutions of elders and chiefs but appointed the office holders, made them responsible for dealing with local disputes, and installed district officers and district commissioners to oversee the work of the local leaders. This "traditional" structure was often imposed on ethnic groups that had not previously had such a hierarchical system of governance (Chanock 1991). After independence, Kenya retained this form of provincial administration (Okuro 2002), appointing district officers and district commissioners from any region, but requiring that chiefs come from the area in which they work and that they carry out their duties through local elders (The Chief's Act 1988; district officer, Kisii Central, 25 Aug. 2006).

In Kisii, both processes of dispute resolution articulated by those living in the area begin with the local elders and chiefs who make up the lowest levels of the provincial administration. Traditionally, the elders of the household and the surrounding households would gather at the disputed area to resolve the dispute while they ate a meal prepared by the women of the household

(chief, Nyamira, 6 Nov. 2006; elders group, Kisii Central, 3 Nov. 2006). However, although chiefs and elders were incorporated into the provincial administration structure during the colonial era, their current legal role in dispute resolution is outside the law. The Land Disputes Tribunal Act of 1990 recognizes the role of elders *only* when empanelled on a land tribunal and in no other context.

In spite of the fact that elders and chiefs no longer have legal authority in a land dispute unless they are sitting on a land tribunal, they continue to act as mediators according to the customs of their ethnic group or clan. Instead of providing a meal for the elders as was the custom, those involved in the dispute are now expected to give money (chief, Gucha, 19 Sept. 2006). Land decisions made at any level within the provincial administration are nonenforceable and not binding. According to an advocate in Kisii,

[the elders and the chiefs] are not being encumbered by technicalities of law. Because you know the law we administer in court is very technical, but with them they administer it with a sense of justice. . . . They are not being governed by any rules and law. So sometimes they can administer justice or sometimes they can administer injustice. . . . The kind of justice you can get from the provincial administration is amorphous and is not binding. (advocate, Kisii Central, 21 Aug. 2006)

Since independence, the only source of legally binding land dispute arbitration has been the court system. However, the Kenyan court system has been hamstrung by corruption, inefficiency, and expense. During the Daniel Arap Moi era, courts were discouraged from making land allocation decisions, as this was a source of political patronage for the president (Okuro 2002). A local lawyer stated that “the justice system is expensive. . . . You’ll find you require a lot of money. First to file your case, secondly to pay your lawyer, and thirdly, the courts are overworked A case can take as long as five years for it to be heard and finished. Even ten years sometimes” (advocate, Kisii Central, 21 Aug. 2006). Furthermore, not all communities have a court, and there is a lack of awareness about their function in land disputes. As a result of this inaccessibility of the courts, the provincial administration’s arbitration system (the informal system) figured in Figure 2 was the most prominent one in Kisii until recently.

The customary law that operates within both dispute resolution tracks has become increasingly delegitimized due to perceived abuses (peace and justice commissioner, Kisii Central, 15 Aug. 2006). A district officer explained that

it reached a time when the government felt that land issues specifically were getting too technical and there is some kind of misuse of office. You know, even the elders . . . became too corrupt. . . . You go

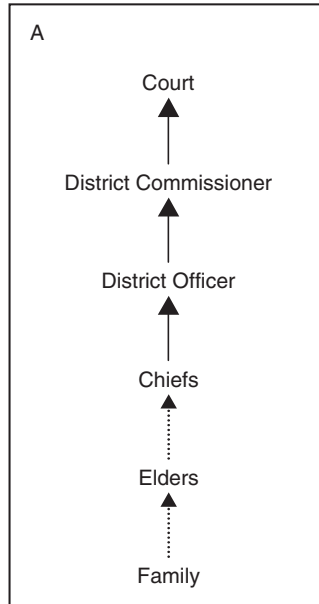


Figure 2. Land Dispute Resolution Process Prior to 1990.

there, even if you are a poor kind of mama, they want to sit together, and before they sit, they want you to give them something small. So the complaints kept on rising until the government decided to start another section of tribunal—something like a local court. (district officer, Kisii Central, 25 Aug. 2006)

In response to these issues of perceived corruption, the Kenyan government set up land tribunals through the Land Disputes Tribunal Act of 1990. This act created a system for selecting a group of elders from each district, from which the district commissioner would choose a panel to act as the land tribunal and hear cases regarding land, adjudicating them “in accordance with recognized customary law” (Land Disputes Tribunal Act 1990:3). The members of the tribunal are chosen from the local community so that they are familiar with the local customs but, unlike the provincial administration, they have been given jurisdiction over land disputes and are bound by statutory law (land registrar office official, Nyamira, 25 Nov. 2006). Although the Land Disputes Tribunal Act became law in 1990, implementation in Kisii did not begin until 2004 (land registrar office official, Nyamira, 25 Nov. 2006; district officer, Kisii Central, 25 Aug. 2006; chief, Gucha, 19 Sept. 2006).

Officially, the elders and chiefs are supposed to refer those with cases to the land tribunal. One Kisii chief correctly identified the formal process: “because of the government policy, I have to advise

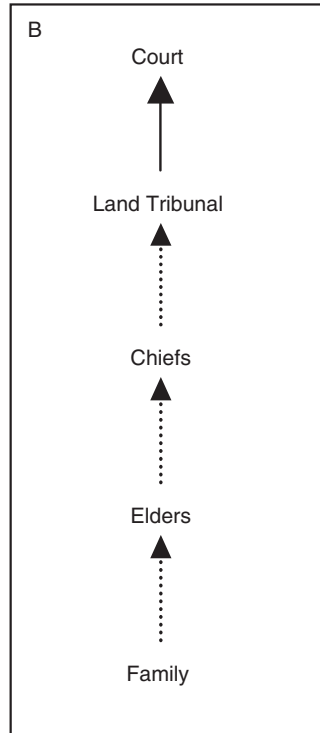


Figure 3. Land Dispute Resolution Process After 1990.

the people to go and see what we call the Land Tribunal Board” (chief, Nyamira, 6 Nov. 2006). Similarly, a group of elders in Kisii Central explained that they no longer hear many land dispute cases because people are referred to the land tribunal (elders group, Kisii Central, 3 Nov. 2006). According to an assistant chief from Nyamira, “they changed, now they said the chiefs, they should recommend the tribunal. Then if the tribunal fails . . . it has to go to court” (assistant chief, Nyamira, 6 Nov. 2006). The current, official dispute resolution channel, where elders and chiefs serve only the role of referral, is depicted in Figure 3.

Channels A and B roughly represent, respectively, the previous process of land dispute settlement (what was law prior to 1990) and the current process of land dispute settlement. However, in the interviews and focus groups it became apparent that most women would only follow the first three steps (the customary process) to solve their land disputes, going through family, elders, and chiefs who have no official legal role. Although most of the chiefs and many of the elders acknowledged that they no longer had official sanction to provide arbitration in land dispute cases, most asserted that they would still hear “small cases” if they believed they would

be able to solve them (elder, Kisii Central, 1 Oct. 2006a; elder, Nyamira, 5 Nov. 2006; chief, Gucha, 19 Sept. 2006; elder, Kisii Central, 23 Nov. 2006). Only should they fail to reach an agreement between the parties would chiefs and elders refer the parties to the land tribunal. Thus they have retained their arbitration roles, in spite of the 1990 law designed to circumscribe that function. According to a study of the land tribunals, “the involvement of the Provincial Administration [assistant chiefs, chiefs, district officers, and district commissioners] in land issues continues to work against the aims of the Tribunals” (Okuro 2002: n.p.).

Perceptions of Accessibility of Dispute Resolution Channels

The diagram exercise was designed to ascertain the knowledge of the women as to which dispute resolution mechanism should be used for conflicts over land. It revealed great inconsistencies with regard to perceptions of the correct dispute resolution channel. Of the five women’s groups, two selected channel A as the legally correct path, two chose channel B, and one picked a modified channel B (they removed the land tribunal!). The former two groups included women who were employed in waged positions, while the latter three comprised subsistence farmers exclusively. This suggests that regardless of socioeconomic status, women have limited awareness of the mechanisms of dispute resolution available to them. Of the eight elders and chiefs who participated in the exercise, six selected channel B as the correct path but combined it with channel A. One Kisii chief explained,

Initially we used to have this [A]. This was the first: family, elders, chiefs, DOs, and DCs: what has been happening for many years after independence. But what is happening now, it is now this [B]: family, elders, chiefs, tribunal, court. But somehow, even before they come to the tribunal, in between the chiefs it is the DOs. It is family, elders, chiefs, DOs, DC, tribunal, court. (chief, Nyamira, 6 Nov. 2006)

The remaining elder and assistant chief selected channel A as the correct path, suggesting a delay in the dissemination of information within the provincial administration.

The alteration of the official dispute resolution channel in 1990, though intended to change the arbitration role of the elders and provincial administration to one of referral, has resulted in the addition of the land tribunal to the previous arbitration path. The answers from women, chiefs, and elders concerning the correct dispute resolution path revealed ambiguity and inconsistency in the understanding of the official dispute resolution channel, not only among the women who might use the dispute resolution sys-

Cost Estimates for Adjudication in U.S. Dollars

	Women's Estimates	Official's Estimates
Elders	\$14	\$2
Chiefs	\$35	\$0
Land Tribunal	\$53	\$14–\$21
Courts	\$142	\$142–428

Figure 4. Cost Estimates for Adjudication in U.S. Dollars

tems but also among those who are responsible for advising them regarding appropriate procedure.

All who participated in the exercises agreed, however, that going to the elders and chiefs was the only option for women with land disputes due to the financial requirements of all resolution forums beyond the chief. Each women's group, as well as each chief and elder, was asked to estimate the cost of the steps in their chosen correct resolution channel. The results are shown in Figure 4. The average amount for the land tribunal was 3,700 KSHs (approximately \$53). The average monthly income per capita in Kisii is 1,496 KSHs (\$21) for 2006 (United Nations Development Programme 2006:71). In other words, more than two month's per capita income would be spent on a land dispute. Officially, filing a claim at the tribunal costs 1,000 KSHs (\$14), and should the tribunal members visit the land that is being disputed, there is an additional cost of 500 KSHs (\$7) (land registrar office official, Nyamira, 25 Nov. 2006). However, according to the land registrar's office in Nyamira and local lawyers, the disputing parties are also requested to pay for lunch and transport for the tribunal members because their salary of 500 KSHs per case is insufficient (land registrar office official, Nyamira, 25 Nov. 2006; advocate, Kisumu, 23 Oct. 2006). The women's groups as well as chiefs and elders who chose some variation of channel B claimed that taking a dispute to court would cost at least 10,000 KSHs (\$142). This was confirmed by a lawyer, who estimated that a court case would cost between 10,000 and 30,000 KSHs (\$142–428) and would sometimes take years to settle (advocate, Kisumu, 23 Oct. 2006). Again, for a woman in a household with a per capita monthly income of \$21, this is prohibitively expensive.

Those women's groups who chose dispute resolution channel A estimated that taking a case to the district officer or district commissioner would cost 70,000 KSHs (\$1,000).¹⁰ Rather than an accurate estimate, this appears to be an indication that none of these

¹⁰ All average figures from the diagram exercise were reached by finding the average. The estimated costs for the court and tribunal are the average of both the women's and the elder's and chief's responses, whereas the estimated costs for elders and chiefs were averaged separately, reaching one average figure from the perspective of the elders and chiefs and one from the women's groups.

women had approached the district officer or district commissioner with a case and expected that doing so would cost a sum of money far too large for them. The elder and assistant chief who chose dispute resolution channel A claimed that there were no costs involved in arbitration by the district officer or the district commissioner.

Pursuit of a case to the land tribunal and court or district officer and district commissioner appears closed to a Kisii woman with a land dispute since she is likely to have very limited resources. She would have difficulty paying the official fees as well as lunch and transportation for the members of the land tribunal, and she would not be able to pay 10,000 KSHs (\$142) to start a lengthy court process. Finally, she is likely to perceive the district officer and district commissioner as financially inaccessible to her. As a result, her only option is to pursue dispute resolution through the elders and chiefs.

Dispute resolution by the elders and chiefs appears to be the least costly option for a woman with a land dispute, yet it is still too expensive for many of the most vulnerable women. The women's groups as well as the elders and chiefs were in agreement that there is no cost at the initial family level. At the level of the elder, however, a woman bringing a land dispute must pay some money, though the amount varies. An elder from Gucha explained that they don't "have a fixed amount that you pay, but you pay what you can afford" (elder, Gucha, 15 Nov. 2006). This raises the possibility that if one party is able to pay more money than the other, the elder may be compromised in his ability to adjudicate the dispute. There is no accountability for this payment, as an elder from Kisii Central admitted that "they usually ask for this informally. . . . But they are not supposed to ask for anything" (elder, Kisii Central, 23 Nov. 2006). During the diagram exercise, the elders and chiefs estimated that a woman would on average pay 140 KSHs (\$2) to have the elders resolve a dispute. The women's groups, on the other hand, estimated that taking a dispute to the elder would on average cost 980 KSHs (\$14). It is perceived that even going to an elder is too costly for a woman, as the first step might require half her monthly income. The elders and chiefs claimed that there were no costs at the chief's level, but the women's groups estimated that a woman would on average pay 2,500 KSHs (\$35) to the assistant chief and the chief. Again, this kind of cost is too high for an average woman in Kisii.

The existence of payments in the customary as well as the formal system was the most consistent factor in the personal accounts of land disputes. It became apparent from interview responses that in order to win a case, a complainant must be able to pay more money than her opponent. For example, AS approached an elder concerning a dispute in which her son had sold her land. She gave the chief 200 KSHs (\$3) but the chief did not rule in her favor "because the chief had been paid money by the buyer . . . they paid

enough money” (AS, Kisii Central, 3 Oct. 2006). In another case, a widow had been promised by the chief that her land would be given back to her. However, when they met with the disputing party to hand over the land, the chief asked her for 7,000 KSHs (\$100), knowing that she would not be able to afford it. She suspected that her opponent had paid him more money than she had. The chief then confirmed, through this request, that she could not pay him more than the other party, and thus passed his judgment that her land would not be returned (MO, Kisii Central, 3 Oct. 2006b).

The average estimated costs required to approach the elders and chiefs, although lower than those required for the land tribunal and the court, remain an obstacle for women with severely limited resources, who are also the most vulnerable to land insecurity and disputes. Our findings mirror those of Chimhowu and Woodhouse, who find that increasing competition over land access belies the assumption that socially embedded systems of landholding guarantee access (Chimhowu & Woodhouse 2006).

Conclusion

In this study we have identified three findings that influence our understanding of the difficulties and the effects of legal pluralism on the resolution of conflicts regarding property. First, most women and many officials in the provincial administration do not know the appropriate formal process for property dispute resolution. Second, despite state law designed to undermine the role of elders and chiefs, their arbitration role in property disputes remains, and they are sought out by women with property disputes. Last, we have identified the costs to using the informal system, which, while less costly than the formal system, are still prohibitively expensive for most women in Kisii. The same costs of accessing informal dispute resolution mechanisms are present for men in the society as well, although they have greater access to family resources and their vulnerability to property rights disputes is attenuated by the fact that they have control over land (autonomous rights) rather than use rights. Peters observed that the “privileging of contingency: of customary land systems benefits some and harms others” (2004). In this case we observe not only the benefits of particular groups under customary land tenure systems, (men contrasted to women, married women to widows), but an analogous difference in the accessibility of dispute resolution systems.

We note a “cross-contamination” of legal systems (de Sousa Santos 2006). The customary legal system functions and feeds into the formal legal system, which itself both explicitly and implicitly adopts aspects of the traditional system, creating a legal hybrid. Moreover, it is clear that vestiges of the customary have become

embedded in Kenyan statute law, for example in the absence of legal guarantees of women's co-ownership of marital property. Legal pluralism can be helpful in allowing people to negotiate uncertainty through a variety of available channels of dispute resolution (Meinzen-Dick & Pradhan 2002). However, in this case it appears to increase uncertainty for women who are not aware of the formal legal processes available to them and who would have difficulty accessing those formal processes due to cost. Inaccessibility of dispute resolution processes for women undermines the security of their property rights.

The literature regarding informal dispute resolution systems assumes they are more accessible because of their reliance on local knowledge, their proximity, and their lower costs (Connolly 2005; Kane et al. 2005; Nyambu-Musembi 2003; Penal Reform International 2000). Our study challenges that assumption. In Kenya we observe a monetization of the traditional role of the elders with all the attendant rent-seeking possibilities that entails. Moreover, despite changes in law at the national level that are designed to limit the role of chiefs and elders, people in rural areas far from the center of power still seek their intervention in all property rights disputes, and the chiefs and elders are still willing to fulfill that role. In this particular case, women have difficulty defending their use rights to land (which are themselves inferior claims to land than title or even autonomous possession) both through state channels and traditional mechanisms. This is consistent with the work of Fitzpatrick, who suggests that property rights failures can be best described in terms of enforcement mechanisms (Fitzpatrick 2006).

Kenya is currently considering the adoption of the National Land Policy, which would supplant the Land Disputes Tribunal Act of 1990 and add district- and community-level land tribunals. There will be an effort to "maximize the opportunity to apply Alternative Dispute Resolution [ADR] mechanisms such as negotiation, mediation and arbitration to reduce the number of cases that end up in the court system" (Article 226, National Land Policy, before Parliament). If this does occur, the prospects for rural women receiving adequate access to dispute resolution are likely to be quite limited. As things stand, ADR is the only mechanism available to women, but it comes at too high a cost to be truly effective. Without efforts to keep the cost of dispute resolution down or subsidize costs through the state, women will face limited access to dispute resolution and continued insecurity of property rights.

The results of this study are important to hold in context. We do not believe that it is the case everywhere that traditional conflict resolution mechanisms have become monetized to the extent that they are beyond the reach of those most in need of ADR mechanisms. We also make no claims regarding the equity of traditional

dispute resolution, particularly for women and strangers to communities. Indeed, we recognize that the kinds of solutions that women are likely to get through traditional mechanisms are likely to be inferior to those provided in formal law, in terms of the bundle of property rights that can be defined and defended.

We conclude here by returning to where we began. Property rights are extremely important, and their security is dependent upon the ability to defend what rights exist. Women in Kisii do not have strong property rights, as they only have secondary or use rights to land; they do not have the ability to use their land as they wish or to control contracts relating to it. Moreover, they face challenges to their use rights to land when their husbands die or they are divorced. Attempts to maintain use rights over their land when widowed or divorced are not taken to the land tribunals because of the expense involved. Pursuing the resolution of disputes through the customary system is also prohibitively expensive. Thus, women in Kisii are in the unenviable position of having weak property rights under customary law that are difficult to enforce under any available legal system.

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