

# What Would it Take to Realise the Promises? Protecting Women's Rights in the Kenya National Land Policy of 2009

Patricia Kameri-Mbote

Land is a critical resource in Kenya, having economic, social, political, environmental and cultural significance. Kenya's population continues to rely on land for both subsistence and economic activities. In fact, the increase of the population from about 20 million people in the 1960s to about 40 million currently, has put enormous pressure on land. Only a third of Kenya's land is arable while the rest is arid and semi-arid. With most Kenyans still living off the land, contestations over access to, control over and ownership of land are prevalent. In the broader Kenya context, the land question has emerged as a major political issue that can erupt anytime and threaten the existence of the state, as was witnessed in the post-election violence in December 2007 (Kameri-Mbote and Kindiki, 2009).

Within this context, women's rights to land have remained at the core of the quest for gender equality in Kenya. Among various Kenyan communities, women do not traditionally own land or other immovable property. They have use rights which are anchored in their relationships with men as husbands, fathers, brothers or uncles. Such access is tenuous and can be denied by the male benefactors. This situation affects the survival and livelihoods of women and also stifles their effective role in, and contribution to, national development. This is despite the fact that women provide the bulk of agricultural labour.

Further, gender-neutral laws on property ownership have not resulted in more women owning land because of structural barriers such as access to credit and a general lack of resources to purchase land. Women are under-represented in institutions that deal with land and their rights under communal ownerships and ranches (groups established in pastoral areas to own land under the Land [Group Representatives] Act)<sup>1</sup> are not defined. This allows men to dispose of family land freely. Few women have land registered in their names and lack of financial resources restricts them from accessing

land markets. Women want legal provision for their right to own land and capital assistance to purchase land and other property. In matrimonial contexts, women have argued for a presumption of spousal co-ownership of matrimonial property and specific provisions protecting spouses from sale of jointly occupied land without their knowledge and consent. Women have also demanded that laws regulating the registration of land and other property rights be amended to simplify the procedures and make land more accessible to women. Significantly, when the proposed draft national constitution was defeated in a referendum in 2005, women's rights to land emerged as one of the nine most contentious issues (Kiplagat Commission, 2006).

The existing laws on land provide for individual, group and government ownership. The Registered Land Act provides for registration of land rights in an individual's name after the process of consolidation and adjudication. However, registration was bound to exclude most women from acquiring titles to land since they only had use rights, while men retained those of ownership and allocation, and the tenure reform process only considered people with ownership rights. In most cases, families designated one member, usually the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that person would have. According to the registration statute, a right of occupation under customary law would be protected if registered, but few families saw the need to acquire this piece of paper. Cases of family representatives seeking to evict other family members from family land escalated<sup>2</sup>.

Not surprisingly, of the 17 per cent of land registered in individuals' names, less than one per cent belongs to women. On land owned by groups – over 60 per cent of the total land area – women's rights are determined by customary norms. While community ownership is promoted as egalitarian and more likely to guarantee disadvantaged groups rights to resources, there is no literature illustrating whether this is the case for trust land and group ranches in Kenya. In a study carried out among the Samburu, Rendille and Maasai, where group ranches are the norm, it was noted that most decision-making fora were dominated by men (Kameri-Mbote and Mubuu, 2004).

While the Law of Succession Act (Cap 160 of the Laws of Kenya) bestows rights on widows and children, including girls, to inherit the property of the deceased, there has been a need to protect spouses who invest time and energy to develop land, especially ancestral land, from eviction by relatives of the deceased. Similar protection is needed where customary rules of intestacy

prevent women from inheriting agricultural land and livestock, which comprise the main means of production in those areas.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which came into force in 2005, pays particular attention to the rights of women to property (see articles 6j, 7d, 15 and 19 for provisions promoting gender equality). Unfortunately, Kenya has not ratified the Women's Protocol. It is within this context that the Kenya National Land Policy of 2009 must be seen.

### **Context and processes leading up to the National Land Policy**

The National Land Policy arose from the draft constitutions generated in the Constitution Review Process – the Bomas Draft Constitution (2004) and the Proposed National Constitution (2005). Both documents articulate the principle of gender equality in access to, ownership and control of the benefits of land and other resources, and in inheritance and the administration and management of estates and other properties.

Provisions on gender equality in the bill of rights and among the national values, goals and principles amplify the provisions in the specific chapters on land and property. The principle of at least one third representation of women in elective and appointive bodies facilitates women's representation in land bodies from the National Land Commission to the lowest levels of land administration. The National Land Policy would be strengthened if these provisions were included in a final constitutional document. However, as noted, during the referendum on the Proposed National Constitution in 2005, the issue of women's ownership of land became a contentious issue. The quest for a new constitution is currently being steered by a Committee of Experts, who will harmonise previous drafts and address contentious issues.

The absence of a national land policy since independence has baffled many, given the importance of land in Kenya's history. This absence has given rise to the instrumentalist use of law to achieve political objectives and a plethora of land statutes, some contradictory, which have been cited as the cause of Kenya's land problems. In 1999, the Commission of Inquiry into the Land Law System of Kenya was appointed by the President (Njonjo Commission Report, 2002). It was charged with reviewing land issues with a view to recommending principles that would foster economically efficient, socially equitable and environmentally sustainable land tenure and use systems. The Commission recommended that gender issues in land access, control and ownership

should be addressed. This led to the launching of the National Land Policy Formulation Process (NLFPF) in 2004, drawing stakeholders from public and private sectors and civil society. The policy was developed by groups organised along six broad thematic areas: (a) Rural Land Use, Environment and Informal Sector; (b) Urban Land Use, Environment and Informal Sector; (c) Land Tenure and Social Cultural Equity; (d) Land Information Management Systems; (e) Legal Framework; and (f) Institutional and Financial Framework.

The groups, under the guidance of a national coordinator and a technical advisory committee, sought to come up with a national land policy to guide the country towards a sustainable and equitable use of land and to conduct an all-inclusive and participatory process that ensures positive land reforms through accessibility and beneficial use of land. Gender issues came up in each of the groups. For instance, in the Rural Land Use group, gender issues were identified in the management of communal, trust and pastoralist land; security of tenure to rural lands; land rights delivery (ascertainment of rights, registration, planning, demarcation and/or survey, the preparation of cadastres and land market regulation); and land rights of hunters and gatherers.

The National Land Policy formulation process was designed to be consultative, participatory, interactive, inclusive, consensus-based, timely and professional, transparent and gender-sensitive. Among the principles guiding the policy formulation process were the promotion of intra- and inter-generational and gender equity in access to land for subsistence, commercial productivity and settlement, and the need to achieve secure land rights and a sustainable balance between land uses. It is worth noting that women participated in the process both as technical resource persons and as stakeholders in the regional and national meetings held to deliberate on the policy.

## **Analysis of the National Land Policy**

The NLFPF set out to correct the defects of the existing land ownership system, among which is the disparity of ownership along gender lines. Addressing historical injustices is a major thrust of the policy. These are defined as:

...land grievances which stretch back to colonial land policies and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, treaties and agreements between local communities and the British.<sup>3</sup>

The policy notes that these grievances “remain unresolved because successive post-independence governments have failed to address them in a holistic manner”<sup>4</sup>. It explains a contributing factor to this state of affairs as the “lack of clear, relevant and comprehensive policies and laws”<sup>5</sup>. Among the solutions proposed for historical injustices are redistribution, restitution and resettlement.

Gender is considered as a cross-cutting issue requiring special intervention<sup>6</sup>. According to the policy, there exist “gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in land decision-making processes”<sup>7</sup>. Similarly, the need for “a comprehensive, efficient, user-friendly, accessible, affordable, transparent and gender-sensitive land information management system” is proposed in the section on Land Information<sup>8</sup>. Gender discrimination in land matters over the years is also cited as a factor justifying redistribution<sup>9</sup>.

Policy proposals include facilities to empower youth and women, as well as mainstreaming youth and gender concerns in anti-poverty programmes. On HIV/AIDS, the policy notes that “the HIV and AIDS pandemic underscores an urgent need to reform cultural and legal practices that discriminate against women and children with respect to access and ownership of land”<sup>10</sup>. The government is required to protect the land rights of people living with HIV/AIDS by ensuring that their land is not unfairly expropriated and to raise public awareness on the need to write wills to protect land rights of dependants in the event of death<sup>11</sup>.

Part 3.6.10.3 of the policy lays out gender and equity principles. It proceeds from the premise that family laws are not gender-sensitive and that culture and tradition continue to support male inheritance of family land, bringing about a conflict between constitutional and international provisions on gender equality on the one hand and customary practices that discriminate against women in relation to land ownership and inheritance on the other. To protect the rights of women, the government is required to:

- (a) Put in place appropriate legislation to ensure effective protection of women’s rights to land and related resources;
- (b) Repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land;
- (c) Enforce existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources;

- (d) Make provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure;
- (e) Secure inheritance rights of unmarried daughters and their children;
- (f) Facilitate public awareness campaigns on the need to write wills to protect dependants in the event of death;
- (g) Carry out public education campaigns to encourage the abandonment of cultural practices that bar women from inheriting family land; and
- (h) Ensure proportionate representation of women in institutions dealing with land at all levels.

With respect to matrimonial property, the policy proceeds from the premise that existing laws and practices governing matrimonial property discriminate against spouses whose contribution to the acquisition of property is indirect and not capable of valuation in monetary terms<sup>12</sup>. It also points to the inconsistency of Kenyan courts in determining spousal contribution to matrimonial property where some spouses have unfairly been denied of their rights to land<sup>13</sup>. To secure the rights of spouses to matrimonial property, the policy requires that the government take several measures including reforming existing legislation, passing new laws to protect married women, ensuring the equal rights of men and women in land-based resources before, during and after marriage and curbing land transactions occurring without spousal consent<sup>14</sup>. These provisions provide a useful basis for recognising matrimonial assets, spousal co-ownership and spousal non-financial contributions to the acquisition and development of such assets.

The removal of land governance matters from the President's office and their location in a proposed representative National Land Commission presents an entry point for women in land governance matters. The proposal comes amid widespread grabbing of public land and its conversion to private land without consultation (see Government of Kenya, 2004). Significantly, few women are among those allocated illegally and irregularly acquired land, pointing to the gender and power dynamics in the parcellation of public land. Part 4 of the policy requires the government to overhaul the existing institutional framework for land administration and management to facilitate the delivery of efficient, cost-effective and equitable services. It also requires access to land administration and management by the poor to achieve poverty

reduction, and participation and accountability in land administration and management. It proposes the creation of land boards to deal with land matters at district and community levels and requires that these bodies be representative of different groups.

## Conclusion

The National Land Policy contains provisions which, if implemented, would catapult women's access to, control over and ownership of land from the current dismal levels to a level where women would be able to leverage their labour investment in land and other reproductive duties. The challenge however, is translating these bold policy provisions into law. There is likely to be immense opposition from groups that have benefited from previous arrangements. Indeed, a group styling itself as the Kenya Large Landowners Association has vehemently opposed the policy. This group is likely to draw the sympathy of diverse people who believe that they would lose large amounts of land to restitution, redistribution and resettlement. The main argument advanced by this group is that, as title holders, they have constitutional protection of property. It will be interesting to see how the matter is handled. If, however, the handling of the grabbers of Mau forest<sup>15</sup> is indicative, the policy will not be implemented because of cost implications. Parliament voted to compensate these grabbers, costing the taxpayer billions of shillings.

Implementation of the land policy requires great political will. The women's movement should rally to get the government to implement it. The ongoing constitution review process as well as implementation of the Kenya National Reconciliation Accord, brokered by former United Nations Secretary-General Kofi Annan after the post-election violence in early 2008, present great lobbying opportunities for women. The accord identifies resolution of the land question as critical for durable peace in Kenya.

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## Endnotes

1. Chapter 287 of the Laws of Kenya, No. 36 of 1978 introduced as an Act of Parliament, provides for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.
2. See Obiero V. Opiyo (1972) East African Law Reports 227; Muguthu V. Muguthu Civil Case No. 377 of 1968 (Unreported) and Esiroyo V. Esiroyo (1973) East African Law Reports 388.
3. Part 3.6.2 Draft National Land Policy (2007).
4. Ibid.
5. Ibid.
6. Part 3.6.10 Draft National Land Policy (2006).
7. Part 2.3 Draft National Land Policy (2006).
8. Part 3.5.6 Draft National Land Policy (2006).
9. Part 3.6.1.1 Draft National Land Policy (2006).
10. Part 3.6.10.1 Draft National Land Policy (2006).
11. Ibid.
12. See Part 3.6.10.4.
13. See e.g. Echaria v. Echaria Civil Appeal No. 75 of 2001 (judgement issued on February 2nd 2007) where the Court of Appeal ruled that there is no legislative basis for taking non-financial contribution into account in a case involving division of matrimonial property.
14. See Part 3. 6.10.4.
15. Mau forest is a critical water catchment area parcelled out to powerful individuals who converted it from forest, thus contributing to reduced rainfall and water levels in major rivers and lakes in Kenya.