

**OPPORTUNITIES AND CHALLENGES FOR WOMEN IN THE NEW STATUTORY  
LAND TENURE SYSTEMS IN KISUMU COUNTY, WESTERN KENYA**

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**A THESIS SUBMITTED TO THE INSTITUTE OF ANTHROPOLOGY, GENDER AND  
AFRICAN STUDIES IN FULFILLMENT OF THE REQUIREMENTS FOR THE  
DEGREE OF MASTER OF ARTS IN DEVELOPMENT ANTHROPOLOGY OF THE  
UNIVERSITY OF NAIROBI**

**2014**

## DECLARATION

This thesis is my original work and has not been submitted for a degree in any other University.

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This thesis has been submitted with my approval as the University Supervisor.

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## **DEDICATION**

To my father Michael Ochieng Odhiambo, for his wisdom and guidance; my mother Elizabeth Atieno Ochieng, for her constant support and love; and my siblings John Ocheche, Sophie Adhiambo and Ulda Nereah, for their encouragement.

## TABLE OF CONTENTS

List of Tables	v
List of Figures	vii
List of Abbreviations and Acronyms	viii
Acknowledgement	ix
Abstract	x
<b>CHAPTER ONE</b>	
<b>BACKGROUND OF STUDY</b>	
1.1 Introduction	1
1.2 Problem Statement	4
1.3 Objectives	6
1.3.1 General Objective	6
1.3.2 Specific Objectives	6
1.4 Assumptions of the Study	6
1.5 Justification of the Study	7
1.6 Scope and Limitations of the Study	7
1.7 Definition of Key Terms	7
<b>CHAPTER TWO</b>	
<b>LITERATURE REVIEW</b>	
2.1 Introduction	9
2.2 Context	9
2.3 Women Land Rights	11
2.4 Land Reforms	17
2.5 Tenure Security	20
2.6 Customary Land Tenure Systems	23
2.6.1 Luo Customary Land Tenure Systems	24
2.7 Statutory Land Tenure Systems in Kenya	28
2.7.1 The Old Dispensation	28
2.7.2 Gender Gaps in the Old Dispensation	30
2.7.3 The New Dispensation	31
2.7.4 Gender Gaps in the New Dispensation	32
2.8 Conceptual Framework	33
2.8.1 Relevance of the Conceptual Framework to the Study	34
<b>CHAPTER THREE</b>	
<b>METHODOLOGY</b>	
3.1 Introduction	37
3.2 Research Site	37
3.2.1 Location	38
3.2.2 The People and their Culture	39
3.2.3 Major Economic Activities	39
3.2.4 Customary Land Tenure	40
3.3 Research Design	40
3.4 Study Population and Unit of Analysis	41
3.5 Sample Population and Sampling Procedure	41
3.6 Entry into the Field	42
3.7 Data Collection Methods	42
3.7.1 Semi-Structured Interviews	42
3.7.2 Key Informant Interviews	42
3.7.3 Focused Group Discussions	43
3.7.4 Key Informant Interviews	43

3.7.5 Secondary Sources	43
3.8 Data Processing and Analysis	44
3.9 Ethical Issues	44

**CHAPTER FOUR  
OPPORTUNITIES AND CHALLENGES FORWOMEN IN THE NEW STATUTORY LAND TENURE  
SYSTEMS IN KISUMU COUNTY**

4.1 Introduction	45
4.2 Socio-demographics of the Respondents	45
4.2.1 Age	45
4.2.2 Marital Status	46
4.2.3 Number of Children	46
4.2.4 Level of Formal Education	47
4.2.5 Occupation	48
4.2.6 Group Membership and Leadership Positions	49
4.3 Opportunities for Women in the New Statutory Land Tenure Systems	49
4.3.1 Women Land Rights	49
4.3.2 Opportunities for Women in the New Legislations	55
4.4 Challenges for Women in the New Statutory Land Tenure Systems	57
4.5 Ways of Overcoming Challenges in the New Legislations	60

**CHAPTER FIVE  
DISCUSSION AND CONCLUSIONS**

5.1 Introduction	62
5.2 Discussion	62
5.3 Opportunities for Women in the New Statutory Land Tenure Systems	63
5.4 Challenges for Women in the New Statutory Land Tenure Systems	65
5.5 Conclusions	67
5.6 Recommendations	69

## **LIST OF TABLES**

4.1 Age of the Respondents	45
4.2 a Number of Male Children	47
4.2 b Number of Female Children	47
4.3 Occupation of the Respondents	48
4.4 Registration of Land	53

## **LIST OF FIGURES**

2.1 Conceptual Framework of the SWOT Analysis	36
3.1 Map: Kisumu West District	38
4.1 Marital Status of the Respondents	46
4.2 Level of Education	48
4.3 Cross-tabulation of Women's Group Membership and Leadership Positions	49
4.4 Opportunities for Women in the New Legislations	56

## **LIST OF ABBREVIATION AND ACRONYMS**

<b>AIDs</b>	Acquired Immunodeficiency Syndrome
<b>CBOs</b>	Community Based Organizations
<b>CSO</b>	Civil Society Organizations
<b>FAO</b>	Food and Agriculture Organization
<b>FBOs</b>	Faith Based Organizations
<b>GOK</b>	Government of Kenya
<b>HIV</b>	Human Immunodeficiency Virus
<b>NGOs</b>	Non Government Organizations
<b>NLC</b>	National Land Commission
<b>RECONCILE</b>	Resource Conflict Institute
<b>SPSS</b>	Statistical Package for Social Sciences
<b>SWOT</b>	Strengths, Weaknesses, Opportunities and Threats



## **ACKNOWLEDGEMENTS**

I would like to express my sincere gratitude to my supervisor Professor Simiyu Wandibba, who has tirelessly worked with me in preparing this thesis. I also want to thank my father Michael Ochieng Odhiambo and Dr. Akinyi Nzioki, for their mentorship and intellectual contributions.

I would also like to express my gratitude to the women of Katieno West Sub-location for taking time out of their work to fill in my questionnaires and join in the group discussions. I am also grateful to the elders and community leaders of Katieno West Sub-location who went into great lengths to explain to me Luo customs, traditions, practices and issues around women land rights.

I also thank my mother, Elizabeth Atieno Ochieng, my siblings, John Ocheche, Sophie Adhiambo and Ulda Nereah, and my dear friend, Joseph Weke, for their encouragement and constant moral support throughout the process of writing this thesis.

## ABSTRACT

This study set out to identify opportunities and challenges for women in the new statutory land tenure systems. The study was conducted among rural women farmers in Katiemo West Sub-location, Kisumu County. The main objective of the study was to explore the opportunities for women's access, use, control and ownership of land in the new dispensation and find out why rural women are not exploiting these opportunities. Specifically, the study set out to: Identify the opportunities for women in the new legislations; and determine the challenges facing the women in exploiting these opportunities.

Data was collected using semi-structured questionnaires, focused group discussions and key informant interviews. Data from the semi-structured questionnaires were analyzed using SPSS version 17.0 and the findings presented in tables of frequencies and percentages, and graphs, while data from the focused group discussions and key informant interviews were analyzed according to emerging themes. The SWOT analysis was the framework used to conceptualize the study.

The study findings indicate that there are various opportunities for women in the new statutory land tenure systems including ownership and inheritance. The findings also suggest that the study subjects are aware of these opportunities but the opportunities are not being actualized on the ground due to a variety of challenges, including: predominant use of cultural land tenure systems in the rural areas; customs and traditional practices that are dominantly patriarchal and largely discriminate against women; the lack of both an enabling environment and adequate structures that facilitate the enforcement of these opportunities; and the existence of two parallel tenure systems regulating land, statutory and customary. The constitution tries to address some of these challenges by bridging the gap between the statutory and customary land tenure systems. However, the process of dismantling these inappropriate structures will take time. Devolution as well as intensive civic education and awareness creation among rural communities is bound to address patriarchy which will in turn create an enabling environment for women to demand their rights.

The study, therefore, recommends that activities including workshops and conferences be organized to educate rural women and make them aware of the available avenues that they can use to actualize their rights; encourage cultural leaders and elders to support women land rights; and carry out further research on ways in which statutory and customary land tenure systems can exist and work together for the benefit of the communities, more than just in the implementation of the constitution.

## CHAPTER ONE

### BACKGROUND TO THE STUDY

#### 1.1 Introduction

Land is a very critical and vital resource in Kenya not only because of the country's largely agricultural-based economy (Government of Kenya, 2007: 21), but also because of the role that it plays in the country's social, cultural and political development. For that reason a large percentage of Kenyans (both men and women) derive their livelihoods in one way or another from agriculture with women said to interact more directly with land and other natural resources as opposed to men. It is estimated that women produce between 60 and 80 per cent of all food grown in African countries (Englert and Daley, 2008: 1). In Sub-Saharan Africa and the Caribbean women produce up to 80 per cent of basic food stuff and they are almost entirely responsible for its storage, handling, stocking, and marketing and processing (FAO, 2002: 26).

Rights to land and associated resources entail: control rights, the right to make decisions about how the land should be used, including what should be planted on it; transfer rights, the right to sell, mortgage or convey the land to others; and use rights, the right to use the land for grazing, growing subsistence crops and gathering minor forestry products. Tenure security for women within statutory land tenure includes these rights as well as 'ownership, spousal co-ownership of land and protection of widows and orphans from eviction or dispossession (Nzioki, 2006: 93).

The Oxford Advanced Learners Dictionary defines tenure systems as "the legal right to live in a house or use a piece of land" (Hornby, 2010: 1540). Land tenure systems are processes through which individuals or groups secure legal rights to live in an area of ground and use it for specific purposes such as farming or building. On the other hand, FAO (2002: 7) defines land tenure as "the relationship, whether legally or customarily defined, among peoples, as individuals or

groups, with respect to land...an institution; rules invented by societies to regulate behaviours”. Rules of tenure define how property rights to land are allocated within societies and how access is granted to rights to use, control, and transfer land.

Ogolla and Mugabe (1996, cited in Waiganjo and Ngugi, 1996: 2), on the other hand, define land tenure “as the social relations between people in respect to land”. According to them land tenure defines the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land, including the right to build, use, transfer and mine. Land tenure is in this case not restricted to agricultural production but it also includes the management of natural and environmental resources, soil conservation, water resources and wildlife management. Additionally, Article 52 of Sessional Paper No. 3 of 2009 on National Land Policy defines land tenure as “the terms and conditions under which rights to land and land-based resources are acquired, retained, used, disposed of or transmitted” (Government of Kenya, 2009 a: 15).

Land tenure can be administered formally (statutory land tenure) or informally (customary land tenure). In Kenya, statutory land tenure is expressed and maintained through the national law in various legislations and policies including the Constitution of Kenya, 2010, Sessional Paper No. 3 of 2009 on National Land Policy, the National Land Commission Act of 2012, the Land Act of 2012 and the Land Registration Act of 2012. It is therefore developed and acknowledged by the state and protected using legal means. Customary land tenure, on the other hand, is expressed through traditional and cultural norms and maintained by community elders or the community’s political authority (Government of Kenya, 2009 a: 7).

In the past, there were no constitutional or legislative frameworks in Kenya that mandated women to own land. Recently, however, legislative reforms governing opportunities for women

in land including ownership of land have been undertaken starting with the Kenya Constitution, 2010. These include the National Land Commission Act of 2012, the Land Act of 2012 and the Land Registration Act of 2012, which offer the legal framework for the implementation of policies that provide for opportunities for women in land. The Acts proscribe management of land in Kenya using the following principles: equitable access to land; security of land rights; and elimination of gender discrimination in laws, customs and practices related to land and property in land (Government of Kenya, 2010: 43). They further undertake to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage; and to protect the dependants of the deceased persons holding interest in any land, including the interests of spouses in actual occupation of land (Government of Kenya, 2010: 49).

These new policies and acts have been formulated to ensure effective land administration, registration and provision of opportunities for women after the revision and consolidation of former land laws. These include the Land Registration Act of 2012 which recognizes and protects all legitimate rights and interests in land. Article 93 (1) (a) and (b) of the Act states that “subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or all spouses-there shall be a presumption that the spouses shall hold the land as joint tenants unless-a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only” (Government of Kenya, 2012: 73).

Furthermore, Article 93 (2) of the Act states that “if land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep or improvement of the land, that spouse or those spouses shall be deemed by virtue of

that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered” (Government of Kenya, 2012: 73).

With the above stated legislative reforms on land it is evident that a lot of opportunities are available for women in land in the new dispensation which provides tenure security for them. It can be argued that some of these opportunities were available for women in the old dispensation whereas others are totally new. For that reason women in the new dispensation are expected to contribute more effectively to the economic, political and social development of Kenya. However, even with this positive legislative environment there are likely challenges that women, most especially rural women, will encounter in trying to exploit these opportunities, including the disparities between statutory and customary land tenure systems with the assumption that a majority of rural folk still practise customary land tenure, a lack of awareness of these opportunities by the public and people’s negative attitudes towards women’s land rights.

## **1.2 Problem Statement**

One of the promises that the new dispensation ushered in is a better placement for women in terms of their positions and contributions to the nation’s development and welfare. A critical element in these promises was land given that land is not only at the core of the nation’s development but also because of the many contentious issues that have arisen around it over the years including women land rights. Many reforms have taken place to this end in Kenya in the recent past starting with the promulgation of a new constitution in August 2010 which provided the framework for all other legislative reforms including those on land. Land reforms, as

indicated above, have acknowledged women's land rights and provided great opportunities for them to exercise these rights.

However, there is the risk now, as there was in the past, that these opportunities will be inscribed in legislations at the national level but will not be implemented at the community level, which is where they actually matter most. And if this happens then rural women will continue to toil the land without the right to control or own it which is contrary to the new legislations that give them these rights individually or together with their spouses. Where women are not able to exercise their land rights they remain marginalized, vulnerable and dependent on their male counterparts. They cannot make decisions about the land that they toil and the produce that they generate from this land (Bernstein, cited in Moyo and Yeros, 2005: 71).

For that reason the new legislations regarding land ought to be translated into practice at the community level in order to change the attitudes and practices held by most communities and deeply embedded in customary law that disregards or undermines women land rights creating great irregularities in law and between practices at the national and community levels. This study therefore, sought to answer these questions:

1. What opportunities are there for women to access, use, control and own land in the new legislative dispensation?
2. What are the challenges that hinder women from exploiting these opportunities?
3. What should be done to ensure that these challenges are overcome and that women are able to exploit the opportunities available for them in the new land dispensation?

## **1.3 Objectives**

### **1.3.1 General Objective**

To explore the opportunities for women's access, use, control and ownership of land in the new dispensation and establish the reasons why rural women are not able to exploit these opportunities.

### **1.3.2 Specific Objectives**

- 1 To identify opportunities for women's access, use, control and ownership of land in the new dispensation.
- 2 To determine the challenges to women exploiting the opportunities available for them to access, use, control and own land as provided for in the new dispensation.
- 3 To establish the best way to overcome the identified challenges in order to ensure that women are able to exploit those opportunities available to them in the new dispensation.

### **1.4 Assumptions of the Study**

- 1 There are various provisions for women land rights, including access to, use, control and ownership, in the new legal frameworks.
- 2 The patriarchal nature of the rural societies in Kenya denies rural women the opportunity to exercise their statutory rights.
- 3 The Constitution promises women's access to, use, control and ownership of land as part of land reforms in the new dispensation in Kenya.

### **1.5 Justification of the Study**



This study provides anthropological information on the opportunities and challenges spelt out for women in the new legislative dispensation. This knowledge can be used by professional anthropologists and other stakeholders including the National and County Governments to ensure that what is contained in the new legislative frameworks is actually implemented on the ground. The study also provides information that can be used to challenge land tenure systems that discriminate against women. Various stakeholders can, therefore, use these findings to come up with appropriate strategies to actualize the provisions of the new legislative frameworks.

### **1.6 Scope and Limitations of the Study**

This research focused on the opportunities availed for rural women in Kenya to exercise their land rights in the new legislative dispensation and the challenges that deter them from exploiting these opportunities. The study therefore lays emphasis on women land rights, customary land tenure systems and statutory land tenure systems.

There were two factors that limited the generalization of the research findings. First, since the study was explorative the researcher was not able to deal with all the variables that go into access, ownership and utilization of land. Secondly, the study only looked at a specific community whose culture is different from the cultures of other communities in Kenya.

### **1.7 Definition of Key Terms**

#### **Land tenure**

This refers to the methods by which individuals or groups acquire, hold, transfer or transmit property rights in land (Ogolla and Mugabe, cited in Juma and Ojwang, 1996: 94). In this study the sample population was asked to provide their understanding of land tenure.

#### **Customary tenure system**

This refers to the process through which individuals and groups claim their land rights by virtue of their affiliation to a group or community through the political authority of that group or community such as clan elders (Ogolla and Mugabe, cited in Juma and Ojwang 1996: 97). In this study the sample population was asked to provide their understanding of customary tenure systems.

### **Statutory tenure system**

Individuals and groups claim their land rights using land titles issued to them after adjudication and registration of their land. This is done in accordance to the law of the state and protected by the same law (Ogolla and Mugabe, cited in Juma and Ojwang 1996: 99). In this study the sample population was asked to provide their understanding of statutory tenure systems.

### **Women land rights**

Encompass various property rights including the right to access, use, control, own, transfer, build on and mine land (Ogolla and Mugabe, cited in Juma and Ojwang 1996: 94). In this study the sample population was asked to provide their understanding of women land rights.

## **CHAPTER TWO**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

This chapter reviews current and past literature on the importance of land to Kenyan women, their customary and statutory land rights, and the importance of the same within the context of the new dispensation. The chapter ends with a discussion of the theory that guided the study.

#### **2.2 Context**

In Kenya, like in all other agricultural-based economies in the world, women perform the vast majority of agricultural activities. In Africa alone women are estimated to produce between 60 and 80 per cent of all the agricultural produce (Englert and Daley, 2008: 1). Yet they have limited control of land resources and can only access it by virtue of their positions as daughters, sisters, mothers and wives. In this way there is always the looming risk of losing their land and as such their ability to engage in agricultural investments and access financial resources is greatly limited (Kibwana, 1995: 35).

This lack of secure rights to land coupled with the various demands placed on women by both their families and the community and the small size of their farms explains why women are more inclined to carry out subsistence farming only, which leaves them very little surplus for sale. Thus, they do not exercise their rights to land nor enjoy the benefits that are derived from it (Kibwana, 1995: 35).

In this way rural women only farm small holdings of land which dominate the Kenyan landscape with a majority of them lacking title deeds yet having security under customary tenure systems. Peter Ondiege (cited in Juma and Ojwang, 1996: 124) argues that these small holdings ensure

that everyone has access to land which is more or less owned communally but does not give them an incentive to maintain, improve or invest in it. Agarwal (1994), on the other hand, argues that small-sized farms actually have a higher value of annual output per unit of cultivated area than large-sized ones. This is because they tend to have higher cropping intensities, higher value crop mix and they are more labour intensive (Agarwal, 1994: 34).

The introduction of statutory land tenure systems by colonialists in Kenya meant that rural communities needed to individualize land and obtain title deeds to them. This was contrary to the aforementioned customary system and resulted not only in the breakdown of communal land and its benefits but also to further marginalization of women from land given that the titles were issued in the names of men. However, Migot-Adholla (cited in Juma and Ojwang, 1996: 125) argues that customary tenure, just like statutory tenure, recognizes private rights 'particularly in cultivated land'. Therefore both customary and statutory land tenure systems seek to provide security of tenure for rural people and ensure that they are able to meet their livelihoods.

The difference is that customary land tenure systems have the advantage of unifying communities whereas statutory land tenure systems tend to divide them in the sense that they give rights to land only to those who can afford it. On the other hand, the similarity is that both of them marginalize rural women in offering them limited tenure security in spite of the fact that they are primary farmers in agrarian communities, thereby negatively affecting their livelihoods as well as those of their dependants (Englert and Daley, 2008: 1). This is part of the problem that this thesis looked at.

### **2.3 Women Land Rights**

Women are generally disadvantaged, compared with men of the same race and class, in access to and control over land. They have little authority and involvement in decision-making in the home, community and nation (Meer, 1997: 1). This position is similar for women in the urban and rural areas and is usually determined with regard to the gender division of labour; where women take responsibility for cleaning, fuel and water collection, the care of children, even though these responsibilities are experienced differently according to specific local situations.

Chambers (1983) argues that this classification makes women vulnerable and powerless. They are vulnerable in the sense that they ‘lack buffers against contingencies, disasters, physical incapacity, unproductive expenditure and exploitation’ and powerless in that they lack the capacity to bargain and demand for their rights, allowing leaders and men to exploit and undermine them (Chambers, 1983: 103).

Women have a multi-faceted relationship with land. It is the most important means of production for rural women as they rely on it to feed their families. It is an investment and tends to have a durability and permanence that no other asset has, and can therefore be sold in times of financial distress. Land gives rural women a sense of identity and rootedness within the village, defines social status and political power in the village, and structures relationships both within and outside the household (Agarwal, 1994: 2).

Additionally, land holds symbolic significance as family members who have passed away are buried on it creating a link with the ancestors (Tsikata and Golah, 2010: 173). In this way inherited land tends to be valued more highly than purchased land as it has symbolic significance in terms kinship ties, ritual importance and linking the present generations with their ancestors.

Rights are defined as 'claims that are legally and socially recognized and enforceable by an external legitimized authority'. Rights in land encompass access, use, control and ownership with the ability to lease, mortgage, bequeath or sell. 'Land rights can stem from inheritance (as an individual or jointly as a family), from community membership, from transfers by the state, from tenancy arrangements or from purchase' (Agarwal, 1994: 19). In the rural areas rights to land include residential rights, rights to arable land, rights to communal grazing land and rights to use common resources like thatching grass, wood and water (Meer, 1997: 45).

Women land rights, therefore, include ownership, control and use. For rural women to be able to exercise these rights, it is necessary to enforce them both legally and socially. In this way women's rights will be widely recognized and accepted as legitimate by the families in the rural communities hence creating an enabling environment for women to be able to demand them and enjoy the benefits that these rights offer them and their dependants (Meer, 1997:45).

Agarwal (1994) gives three advantages for women in exercising their land rights. First, if women exercise their land rights then their welfare will be greatly improved. This is because land serves as security against poverty and women's direct access to land and other productive assets will significantly decrease their risk of poverty and help ensure their well-being as well as that of their children. Additionally, women will be able to use land as a bargaining tool both within the family and in outside institutions thus improving their welfare. Second, land makes women more efficient since they become more economically productive and so are able to access credit, technology and information. Third, by owning land women become economically empowered and so acquire the capacity to negotiate for more equitable relations with men and strengthen their ability to challenge existing social and political gender inequalities. In addition to this, when women are able to own land their self-confidence, status and power improve as they have a

platform on which they can bargain with their spouses, relatives, in-laws, employers and even government agents (Argawal, 1994: 27).

African customary law viewed women's relationship to land differently from that of men (Tsikata and Golah, 2010: 150). In patrilineal societies it treated women land rights as secondary in nature and allowed women to only acquire land through their husbands or male relatives. This is based on the assumption that 'all women will be married throughout their lives' (Van den Berg, 1997: 18). Thus, they do not need land in their homes of birth as they will receive it from their homes of marriage. However, they will offer services in the land at their home of birth and continue doing the same at their homes of marriage without any control or right to the land. Friedrich Engels (1972, cited in Tsikata and Golah, 2010: 150) noted that this lack of control of land by women in patrilineal societies as an important means of production, has largely contributed to their marginalization.

In contrast, matrilineal societies such as Garos, Khasis and Lalungs from northeast India allowed women to inherit land from their fathers. Nonetheless this was done under certain confinements so that the land inherited would remain under their families' access, ownership and control, for instance, by forcing or encouraging a daughter to marry a close kin (Agarwal, 1994: 83). Interestingly, men in matrilineal societies enjoyed unlimited access, managed and controlled their wives or mothers' land as opposed to the limited privileges regarding land that women enjoy in patrilineal societies.

Muslim women also enjoyed some rights regarding land accorded to them by the Koran which was regarded more highly than customary law. They were entitled to inherit land although these rights were inherently unequal to those of men. Daughters and widows could inherit land in the presence of sons and were entitled to an absolute estate although the daughters share was half

that of the sons. A widow, on the other hand, was entitled to one-fourth of her husbands' estate if childless or one-eighth if she had sons (Agarwal, 1994: 98).

Among the South Africans customary law does not give women inheritance rights; daughters are marginalized in relation to their brothers, younger or older alike, while widows and divorcees are marginalized in relation to their in-laws and sons. If a man dies, then depending on the amount of property that he had and the degree of interest that his brothers and uncles have in it, there is competition for his property between his wife/wives, their son(s) and their in-laws. Furthermore, if a man divorces his wife her parents, brothers and even sons are reluctant to take her in and give her permanent rights to plots of land. However, they give her access to a plot of land that she can use to meet her needs and that of her children (Agarwal, 1994: 98).

In some African cultures a young African widow would be married by her deceased husband's brother and would either be allocated a different piece of land or allowed to continue cultivating the one that she had. An old African widow, on the other hand, would not be subjected to marry her deceased husband's brother and would either be given a different plot of land or allowed to stay and cultivate the one that she had (Van den Berg, 1997: 161). This was done on the assumption that she held the land in trust for her son(s), who would take it over either upon her death or when they were of age (Meer, 1997: 39). In many instances the eldest son would usually make decisions regarding the land and the family after the death of his father with the support of the paternal family even in the presence of his mother. In the case of polygyny the first wife's son would take charge of the property upon his death and would administer it to the other sons when they became of age. However, in a situation where the first wife did not have a son, the eldest son in the home (among all the wives) would take charge of the land and property (Meer, 1997: 39).



In the rare case where a young widow or divorcee refuses to remarry and returns to her parent's home, she is either given a separate plot of land or forced to merge her household with that of her parents or brothers. This way she gives up her land rights and shares the family's fields informally (Meer, 1997: 31). It is therefore evident that African women rarely inherited land and in the unusual case where one did, one would be forced to sell it before any of one's male relatives claimed it. However, customary law had structures in place to protect women's access to and use of land. It may have been ambiguous but because of various factors including the abundance of land, the strength and orderliness of kinship systems, these rights were sufficient for women. However, over the years land scarcity, soil degradation, commercializations of agriculture, the breakdown of kinship systems, and out-migration have resulted in these rights becoming insufficient (Van den Berg, 1997: 19).

For instance, a majority of the widows and divorcees in Africa lack access to land largely because their in-laws evict them from their land. They are therefore forced to either return to their parents homes or relocate to small informal market settlements. But even within the parents home there is a lot of resistance from their agnatic kin and as such many of them have chosen to settle in the informal markets. Here they seek alternative means of survival mainly in the form of small trade such as beer brewing or selling food stuffs and crops such as *chapati*, *mandazi*, bread, milk, soap, oil and vegetables, which is not sufficient or sustainable (Van den Berg, 1997: 19).

Formal law in Africa introduced land titles which led to the division of land into small parcels that were individually owned. The titles were in the name of men on the assumption that this was unitary with that of the household contrary to practice, thereby leading to further marginalizing of women from land. Unlike the case in the past where land was owned virtually on the basis of

use, the introduction of titles meant that one owned land by inheritance, lease or purchase, all of which were not accessible to women. Thus, formal law worked to further isolate women from land (Benjaminsen and Lund, 2003: 78). Furthermore, formal law vested a lot of power in men since administrative posts including the chieftaincy that it created were only occupied by men. In this way men are the ones who made decisions at both the communal and national levels increasing the alienation of women from decision-making bodies, and further diminishing their already minimal land rights (Meer, 1997: 2).

Over time, with land reforms, formal law in Africa has come to embrace women land rights thereby enabling women to access, use, inherit, control and own land jointly with their spouses or independently. The World Bank (2002, cited in Tsikata and Golah, 2010: 157) states that joint ownership allows both men and women to take advantage of the land as a resource or resources accruing from it for the well-being of the rural economy. It leads to the equality and welfare of women, better performance in tending the land and better productivity. This ownership also protects the family from the unilateral decisions of the husband such as selling or leasing the land out without the consent of the wife leading to the detriment of the whole family.

Thus, women's independent land rights enable them to have more control over the land that they till and their produce. It gives them the incentive to not only work harder on their plots of land but also to invest more in it using mechanization and structures, as the profits gained from such investments will go to them and their heirs. They could even diversify their activities on their plots of land such that instead of just carrying out subsistence farming they would be involved in rearing livestock, chicken and bee keeping.

## **2.4 Land Reforms**

Manji (2006: 16) defines land reforms as ‘the formalization of property rights and the promotion of the rule of law’. Land reforms entail a process of formulation of policy and laws regarding land which are gender-sensitive and take into account differences in the needs of men and women. Land reforms also look at the restitution and redistribution of land with the aim of rectifying historical injustices. But they go further to include changes in attitudes and customs to ensure that women claim their rights and that law is translated into practice (Manji, 2006: 16).

In addition, land reforms encourage the participation of women in the various bodies formed to address land issues at the global, national and community levels. They also encourage joint property rights that seek to increase women’s participation in decision-making at the family level, increase women’s access to knowledge and information about public matters, increase their sense of security and self-esteem, and also the respect they receive from their spouses (Tsikata and Golah, 2010: 126). However, rural women usually have no time to spare out of their reproductive roles to organize themselves in order to air their problems, needs and priorities let alone become active members of the bodies. A large number of them are also illiterate, ignorant of their legal rights and would not want to be seen as going against their kin or husbands. As such they isolate themselves and desist from participating in the public arena (Manji, 2006: 130). This way decisions made at the community level and taken to the national level exclude them and tend to favour men who are not only present in the various discussions but are confident enough to actively participate in them. For that reason, policies formulated at the national level are skewed towards men as they generalize the needs and opinions of men for the whole community leading to further marginalization of women.

Customary practices are, however, not static and are constantly changing and evolving to accommodate changes taking place in society. Thus, policies and laws regarding women land rights must be made taking into account the traditional influences in the various rural communities because these traditional practices are not backward nor are they an impediment to formal law but they greatly influence the implementation of formal law in terms of acceptance and compliance by the communities (World Bank, 2003: 61). Both traditional and formal systems have strengths as well as weaknesses and as such the new land policies should capitalize on the strengths of each law while eliminating the weaknesses and limitations therein.

There are two forms of land reforms, redistributive and tenurial. Redistributive land reform is the transfer of land from those with large holdings to the landless or wage labourers whereas tenurial land reform has to do with the modification of the ways in which land is controlled and worked in order to increase its investments and efficiency (Manji, 2006: 35). Redistributive land reforms took place in Kenya after independence through the 'Million Acre Scheme' where 300,000 hectares of farm land formerly owned by white farmers were distributed to African farmers. There was a lot of economic gain made by local farmers from this process in spite of it being discontinued later by the government (World Bank, 2003: 145). The good news, however, is that the government has stated its intent in the new legislations to once again delve into redistribution and restitution. This it hopes to achieve by developing a legal and institutional framework to address the circumstances that give rise to lack of access to land including historical injustices (Government of Kenya, 2009 a: 43).

In addition to distributing land to small farmer's distributive reforms also includes giving them relevant resources such as mechanization, access to credit and training, so that they are able to use the land given to them beneficially. Otherwise, as has been the case in countries like

Nicaragua, Zimbabwe and Kenya in the past, the small farmers will either sell the land, lease it back to the large farmers for long periods like 30-50 years at very low prices, or underutilize the farms leaving them either in a worse off situation than they were initially in or not improving their status much. Both situations are contrary to the aim of redistribution (World Bank, 2003: 153).

Additionally, land reforms take into account the shift that rural economies have made over the years from subsistence to cash economies with the means to acquire cash incomes placed mainly in the hands of men and cemented by having their names in land titles (Meer, 1997: 94). This has drastically affected the reproductive role of women in such a way that men can take over an activity that is the domain of women and turn it to a cash activity such as commercialization of farming. In so doing, this activity is given importance unlike when it is carried out by women solely for subsistence. In addition, women are expected to carry out their own household duties besides assisting their husbands in their commercial activities without pay.

Finally, land reform in any country does not take place in a vacuum and as such it has to take into consideration the global perspective and its effects. This is evident in Kenya as the new legislations have tended to move away from the patriarchal assumptions that past legislations had regarding women and land to more neutral and objective ones taking into consideration the effects of commercialization, out-migration, high mortality rate of adults as a result of HIV/AIDS, the acceptance over time of foreign practices like divorce and the rejection of cultural practices like wife inheritance (Wanjiku and Wanjira, 1994: 18).

Article 3.6, 171 (b) of Sessional Paper No. 3 of 2009 on the National Land Policy states that land rights of women deserve special attention. This can be attributed to the discrimination of women

in relation to land ownership and inheritance by various cultures and traditions in Kenya. Additionally, Kenyan women are not sufficiently represented in institutions that deal with land, thus allowing men to dispose of family land without consulting them. Furthermore, women land rights have not been sufficiently translated into policies and laws. Few women may have land registered in their names but lack financial resources restricting their entry into the land market (Government of Kenya, 2009 a: 42).

In terms of matrimonial property Article 3.6.10.4, (224) of Sessional Paper No. 3 of 2009 on National Land Policy indicates that the government needs to secure the rights of spouses by taking into account the indirect contribution to the acquisition of property, not capable of valuation in monetary terms. It admits that in the past the courts have been inconsistent in determining what amounts to such contribution with the result that some spouses have unfairly been denied of their rights to land (Government of Kenya, 2009 a: 54).

Article 3.6.10.4, (225) of the same paper states that the government shall: (a) Review succession, matrimonial property and any other related laws to ensure that they conform to the principle of gender equity; (b) Enact law on co-ownership of matrimonial property to protect the rights of widows, widowers and divorcees; (c) Ensure that men and women are entitled to equal rights to matrimonial property; and (d) Curb the selling and mortgaging of family land without the involvement of spouses (Government of Kenya, 2009 a: 54). These are dealt with in more detail under the sub-title new dispensation.

## **2.5 Tenure Security**

Meer (1997: 17) defines tenure as the ‘the social and political process of the community determined by their values, prevailing power relations and by unspoken assumptions about how

they ought to act'. In this way tenure is not static as the community's social assumptions are constantly changing in response to urbanization and economic changes taking place not only nationally but globally. The only problem is that many times these assumptions do not support women land rights as stipulated by law (Meer, 1997: 17).

Security of tenure is perceived as the right by the possessor of a parcel of land to manage and use the parcel, dispose of its produce and engage in transactions, including temporary or permanent transfers, without hindrance or interference from any person or corporate entity (Bruce and Migot-Adholla, 1994: 3). Tenure security for farmers is the right of the farmers to maintain ownership over the farms until the investments that they made in terms of labour, fertilizers and irrigation systems yields returns. These rights should be recognized by others and protected either by the rule of law or political authority in the community. Customary law provides this security through social pressure whilst statutory law provides it through land registration and titles.

Lawry et al. (1992, cited in Van den Berg, 1997: 218) define land tenure security as "the individual's perception of his/her rights to a piece of land...free from imposition or interference from outside sources, as well as his/her ability to reap the benefits of the labor and capital investments in land, either in its use or upon its alienation". In this way land security is realized at two levels, the formal level that offers legal security through the registration of title and the informal level that gives security through marriage and membership of kin groups. Therefore, tenure security is not synonymous with land titling. It is the process of ensuring that people's rights to land are exercised.

In Kenya this is evident in the rural areas as the introduction of land titles did not result in a large number of rural people obtaining them. A large percentage of people in the rural areas still use informal methods to secure their tenure. This is because they are cheap, easily accessible and viable. The methods include land demarcations using trees, having plot numbers, and assurance by the family and community that one can use a specific plot of land for a given period of time (World Bank, 2003: 39).

Besides, land titles do not guarantee farmers in the rural areas access to credit because with the poor infrastructure there are many instances where banking facilities are not available to them. Yet again in cases where banking facilities are present the plot of land that the rural poor possess is either too small or of poor quality thus not being able to guarantee stable production and as such not viable to be used as collateral for credit because in case of defaulting the bank will not be able to gain much in selling it. And, finally, the provision of credit by banks is associated with fixed transaction costs that are related to the need to screen applicants and enforced repayment, among other things, which will force the bank to charge the rural poor's higher costs in order to recoup the expenses incurred (World Bank, 2003: 50).

Given the above discussions about tenure security, it is evident that rural Kenyan women have tenure security. However, they are not able to enjoy it due to various social changes that have taken place in the rural areas over the past century that have resulted in the breakdown of kinship systems, family structures and customary structures. This has created a gap that has led to further marginalization of women with regard to land because there are now no accountability structures. Unlike in the past, rural women now have no protection of the few rights that they had in land such as access and use. Many of them are disinherited by their in-laws on the death of their spouses or divorce and by their brothers on the death of their parents. This makes the need



for land reforms more pressing in Kenya as this is the only way to guarantee tenure security for rural women.

## **2.6 Customary Land Tenure Systems**

Customary land tenure systems are traditional and cultural methods maintained by community elders, which are used by individuals and groups in a community to hold, transfer or transmit property rights in land (Ogolla and Mugabe, cited in Waiganjo and Ngugi, 1996: 2). According to Allott (cited in Cotran, 1995: xi) customary tenure is derived from traditional customary laws and religious laws and is practised mainly in the domain of marriage, the family and succession. In Kenya, therefore, one may expect differences in customary law given that there are different ethnic groups but incidentally there are some similarities especially concerning women's land rights.

Odgaard (1999, cited in Benjaminsen and Lund, 2003: 83) states that rural women are more accustomed to customary law as opposed to formal law because 'customary rules strongly link the ability to exercise a right with the fulfillment of obligations' which plays a major part in family decisions related to inheritance rights. Customary law is also more practical for rural women as opposed to formal law as it is easy to access those in charge of enforcing it because they are members of the community; one is not charged when one is seeking redress and there is familiarity with the process.

Gender ideologies are based on patriarchal notions about women's needs, work, roles and capacities (Agarwal, 1994: 15). Rural women's lack of information, confidence and experience in organizing for formal networks (Meer, 1997: 94) further encourage rural women's adherence to customary laws that greatly undermine their land rights.

### **2.6.1 Luo Customary Land Tenure systems**

In the past the Luo used to live in concentrated residential units (*gundni bur*) and they farmed various plants including sesame and millet in large social units with special resources and specialized production (Cohen and Atieno-Odhiambo, 1989: 10). There were two classes of intra-familial relationships among them those which existed within the homesteads and immediate locality (*kakwaro*) or lineage and those which existed with those outside the locality, that is, with the matrilineal kin and with affines of a man. These relationships were seen in the context of the relationship between their ancestors. The Luo community was traditionally homogenous in set-up with an egalitarian social system which rested on mutual social responsibility (Nyambedha, 2000: 3). Mbuya (1965, cited in Nyambedha, 2000: 26) even argues that people ate together in groups at the court (*duol*).

Colonization affected this by introducing individual homesteads and farms on which individuals grew staple monotonous plants like maize and cassava for subsistence (Cohen and Atieno-Odhiambo, 1989: 10). There was a proliferation of homesteads with plots of land formerly used to grow crops being converted into homesteads and individual farms. Ultimately, this led to a deterioration of land increasing the competition for the little land that was left, rapid soil degradation and the out-migration of men from the rural areas to the towns and cities for labour (Cohen and Atieno-Odhiambo, 1989: 10).

Colonization brought about a change in the domestic economy of the Luo which broke down their interdependence nature and developed an individualistic system that replaced family obligations and kinship accountability (Whison, 1964, cited in Nyambedha, 2000: 27). With time, some traditional practices became impractical forcing the people to do things differently as

their kinship values were reworked and reinforced as they came into contact with the ways of the colonialists and those of other ethnic groups in Kenya as a result of nationalism before and after independence (Cohen and Atieno-Odhiambo, 1989: 29). For instance, out-migration resulted in the homes being named after women and women taking up roles that had initially been open only to men. However, the lineage remained patrilineal and women still only held land in trust for their husbands while they were away and their sons until they came of age (Cohen and Atieno-Odhiambo, 1989: 13). This illustrates the effects that material demands and/or needs can have over culture resulting in the transformation of cultural practices.

However, even among the men there were structures that guided inheritance of land. The genealogical rule stated that the eldest son had power over the junior ones and was given priority by his parents in terms of material assistance, including land, in order to gain economic independence (Nyambedha, 2000: 4).

Among the Luo customary law women had no rights to land except through marriage (Cohen and Atieno-Odhiambo, 1989: 88). This practice was similar to that of the Agikuyu where daughters could not inherit their fathers land and only had access to plough it until they were married. Once they got married they would lose even this right as they were now expected to go and plough their husbands land. Interestingly, sons would only be given land once they were married and the boundaries of this land would be shown to their wives by their mothers. This is because women are the ones who knew the boundaries to the land and not the men as farming was strictly viewed as the domain of women. Land was not formally divided among sons until the death of their father at which point it would be equally divided among the sons including those of other wives in the case of polygyny (Sorrenson, 1967: 214).

Polygyny was common among the Luo and was viewed as a part of the wider kinship ideology of sibling duty, co-wife cooperation and male economic provider capability (Kilbride and Kilbride, 1993, cited in Nyambedha, 2000: 13). It was expected to reinforce the spirit of communal solidarity which was essential for the controlled exploitation of local resources, including land, to improve the welfare of its members (Whisson, 1964, cited in Nyambedha, 2000: 17).

Female-headed households were very rare among the Luo. Even in the case of divorce a woman was expected to eventually return to her husband, especially if she had children because this is the only home upon which she could be buried: a sign that she belonged there. This was the case even if the woman got married a second time because bride wealth could only be paid once and it was usually paid by the first husband. Thus, her family would not consent to divorce and she would only be seen to stay with the second husband until she went back to her first (Cohen and Atieno-Odhiambo, 1989: 88).

A widow, on the other hand, was expected to remarry her husband's brother, real or classificatory. This was done so that she and her children would continue to get the support of her husband's family even after his death. It was also done so that her children would continue her husband's legacy by inheriting his land, marrying and getting children that would, in turn, inherit it from them (Cohen and Atieno-Odhiambo, 1989: 88). However, the widow's husband's brother was allowed to use the widow's husband's land, which the widow had rights to. But he could not pass it to his children as it belonged to the widow's children (Nyambedha, 2000: 4). In case the widow's husband passed away before he got any children then in marrying her brother-in-law, the widow would be able to get children who would be named after her deceased husband and so continue his legacy (Cohen and Atieno-Odhiambo, 1989: 88).

Thus, children, especially sons, were fundamental for Luo women because they guaranteed them access to land during and after marriage in case of the death of their spouses. Therefore, in case a Luo woman was not able to bear children as a result of health problems she would, like a Gikuyu woman (mainly from Murang'a), marry another woman for her husband with the understanding that the children that she bore would be hers and so give her access to her husband's land even after his death. This practice was done not only to allow childless women access to land after the death of their spouses but also to stop their brothers-in-law from disinheriting or displacing them and to allow the continuation of their spouses' names and legacies (MacKenzie, 1996: 76).

This was even practised among the Gusii who also potentially practised polygyny. They allocated all family land to the father who then passed it on to the different houses of the family through the wives. In this way, land held by a woman became the birthright of her sons (Were and Nyamwaya, 1986: 45). A childless widow would, therefore, after the death of her husband, marry a wife of her own. These women are allowed to have relations with other men with the understanding that children born out of such relations are those of the widow they are married to (their 'husbands'). Such children take the name of the widow's husband and continue his legacy. This practice is common among the Gusii even now and is taken very seriously to the extent that the 'husband' pays dowry for the wife she marries (Daily Nation, 27<sup>th</sup> August'2013: 9).

However, amongst the Luo a son born out of wedlock or born to ancestors who are subordinate (*misumba*) would not guarantee the mother access to land as he had no claims to patrimony (Cohen and Atieno-Odhiambo, 1989: 30) and would be the first to be disinherited by in-laws after the death of his mother's husband. More often than not such sons would move to towns and cities to look for work and stay there until their death at which point they would be buried in

their fathers' home but outside the compound. In the rare case that the son stays in his mother's home he would upon death be buried there.

## **2.7 Statutory Land Tenure Systems in Kenya**

Statutory land tenure systems are the terms and conditions under which rights to land are acquired and retained through national law in the legislations and policies regarding land (Government of Kenya, 2009 a: 15). In the old dispensation this was done with the aim of increasing tenure security and the effectiveness of the land market (Tsikata and Golah, 2010: 68), and start an agricultural revolution by ending the uncertainty created by customary tenure. It was also done to introduce a system of registered titles that was not liable to be undone and was guaranteed by the State (Sorrenson, 1967: 201). The intentions in the new dispensation remain the same but with the addition of ensuring that minority and marginalized groups, including women, are also able to benefit from this, in exercising their rights and benefiting from them.

### **2.7.1 The Old Dispensation**

Statutory land tenure was introduced in Kenya by the British after the declaration of Kenya as a British colony. It was based on the principles of English property law including land adjudication and registration. Statutory land tenure was mainly introduced in the country to allow individual British settlers to own land for settlement, large-scale commercial agriculture and provide land for infrastructural development including railway construction. Therefore it was evidently for the benefit of the European settlers (Syagga, nd: 5) and largely overlooked the dominant African customary property law in place at the time.

The Crown Lands Ordinance of 1915 stated that any land in Kenya that was not occupied became Crown land and was reserved for European settlement. Furthermore, fertile land within

what later became known as the 'White Highlands' was regarded as too good for Africans and so they were evacuated from it and huddled together in 'Native Reserves' to allow European settlers to take possession of it (Okoth-Ogendo, 1991: 59).

The Native Land Trust Ordinance of 1938 stated that the natives were free to practise customary law within the reserves. However, this proved to be very difficult given the fact that the colonial administration used chiefs, the police and courts to inject English values into the substantive norms of customary laws. In addition, district law panels were later introduced into the reserves to transform customary law into statutory law (Okoth-Ogendo, 1991: 59).

The Swynnerton plan of 1954, on the other hand, aimed at improving agriculture amongst Africans. This was to be done through the individualization of titles and the technology of production. It argued that traditional tenure systems mainly practised within the 'Native Reserves' encouraged fragmentation of land holdings into small uneconomical units and led to incessant disputes which were haphazard to long-term capital investment. The report recommended consolidation, adjudication and registration of land in the native reserves. This led to individualization which has resulted in land concentration, increased marginalization and landlessness as people in positions of economic and political power took advantage of the less powerful (Okoth-Ogendo, 1991: 69).

The Swynnerton plan marked the beginning of land titles amongst Africans which perpetuated patriarchal practices as these were registered in the name of the male head of the household. This gave men exclusive rights of ownership which in turn diminished women's ownership and control rights (Syagga, nd: 8). Statutory land tenure largely undermined traditional resource management institutions and ignored customary land rights that were not deemed to amount to

ownership (Odhiambo, 2012: 8). These policies led to inequality in land ownership and use, landlessness, squatting, land degradation and resultant poverty most especially amongst women and children (Syagga, nd: 9).

### **2.7.2 Gender Gaps in the Old Dispensation**

The Kenyan law in the old dispensation was developed by the colonialists based on the British law, practices and lifestyle, all of which were foreign to the African culture and more often than not contradictory to it. It was patriarchal and assumed that the needs of men were the same as those of the household. In which case, by securing the rights of men those of women and children would also be secured. It was also assumed that in places where this was not true then it was because women and children did not require such rights. Yet this was not the case given that the British lifestyle was very different from that of Africans. For instance, British men were the ones involved in agriculture mainly because it was commercial but in Africa farming was the domain of women and it was done mainly for subsistence rather than commercial purposes.

The Law of Succession Act did not entitle daughters to inherit land/property from their fathers (Kibwana, 1995: 20). Matrimonial property, on the other hand, was controlled under the Married Women Property Act borrowed entirely from the Married Women Property Act used in England developed in 1882 that stated that married women acquired an interest in property only if they contributed financially to its acquisition (Wanjiku and Wanjira, 1994: 25). Kibwana (1995) argues that in this way a woman's role was to simply maintain, tend and improve property that was independently owned and controlled by the husband. Thus, in case of divorce she was likely not to get any portion of the property (Kibwana, 1995: 20).



According to Article 37 of Sessional Paper No. 3 of 2009 on National Land Policy the old Constitution of Kenya failed to establish an efficient, accountable and equitable institutional framework for land ownership, administration and management. This failure has resulted in the following: (a) centralization of state responsibility over land matters, with the effect that government decisions have not been responsive to the citizenry, especially at the local level; (b) lack of governmental accountability in land governance leading to irregular allocations of public land; (c) constitutional protection of private property rights even where they are acquired in an illegitimate manner; (d) mass disinheritance of communities and individuals from their land; (e) inequitable access to land, particularly for women, children, minority groups and persons with disabilities; and (f) ineffective regulation of private property rights, as a result of which unplanned settlements and environmental degradation have become commonplace (Government of Kenya, 2009 a: 12).

### **2.7.3 The New Dispensation**

The Constitution of Kenya, 2010 recognizes customary law and intends to integrate it into policies governing land use and management. It also seeks to eradicate any laws, policies and even customary practices that discriminate on the basis of gender (HAKIJAMII, 2012: 21). Furthermore, it acknowledges community land which is the main category of land within customary land tenure (RECONCILE, 2012: 9). The rationale behind this is that the current government of Kenya, unlike the former governments and colonial administration, acknowledges the existence and broad practice of customary law at the community level and so intends to integrate it within the law such that no discrepancies arise in the implementation of the law.

#### **2.7.4 Gender Gaps in the New Dispensation**

The problem with the new dispensation is not with the legislations since these clearly state the rights of women regarding land and the intention of the government in ensuring that they are implemented, but rather the translation of these legislations into practice at the community level. The constitution states in Chapter 1 Article 2 that any law including customary law that is inconsistent with it is void to the extent of the inconsistency (Kenya Land Alliance, 2011: 24). However, customary law is deeply embedded in people's practices making it very difficult for people to accept new ways of doing things and turn away from their traditional ways.

Some of the major reasons why a lot of rural women did not exercise their land rights in the past are their low-esteem, lack of confidence and lack of awareness regarding them. Therefore, in order to ensure that this does not happen in the new dispensation the government must invest a lot of time and resources in creating awareness among women, especially rural women, about their land rights and build their capacity. In this way they will be able to make demands for their rights and seek redress in cases where these have been denied them.

The new constitution provides for the establishment of a National Land Commission, as an independent body, to carry out efficient, equitable and sustainable land administration and management (Kenya Land Alliance, 2011: 13). The National Land Commission Act, 2012 states that the functions of the NLC are: in Article 5 (1) (b) to recommend a national land policy to the national government; (c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; and, in Article 5 (2) (b) monitor the registration of all rights and interests in land; and (d) develop and maintain an effective land information management system at national and county levels (Government of Kenya, 2012: 5, 6).

These are very relevant functions that will ensure that land reforms take place effectively and efficiently in the new dispensation. However, the negative political environment in the country is hindering the process given that the NLC was gazetted 2 years after the promulgation of the Constitution, which means that they have already lost a lot of time since the constitution only gives it 6 years to complete its work. In addition to this, there is already a lot of conflict between the NLC and the Ministry of Land, Housing and Urban Development. This can be attributed to lack of a clearly spelt out mandate for the NLC that is understood by them and other line ministries so as to give them the space, support and resources to carry out their mandate. This situation is further exacerbated by the new political processes put in place by devolution which is new in the country and is taking some time to implement.

## **2.8 Conceptual Framework**

This study was guided by SWOT analysis. SWOT is an acronym for strengths, weaknesses, opportunities and threats (Mullins, 2002: 142). SWOT analysis is a technique credited to Albert Humphrey who pioneered it in the 1960s. The first prototype was tested and published in 1966. Modifications were made to this prototype in 1973 and used in an operational programme to merge the CWS milling and baking operations with those of J.W. French Ltd. The process was a success and the framework has been widely used since.

It is commonly used in management to determine the effectiveness or efficiency of an organization or product (Mullins, 2002: 142). However, in this study the researcher used the technique to determine the effectiveness of the legislations in the new dispensation in addressing women land rights. The researcher identified factors in the current environment in Kenya,

including the political atmosphere and social structures, which hinder women from exercising their land rights as provided for in the legislations in the new dispensation.

### **2.8.1 Relevance of the Conceptual Framework to the Study**

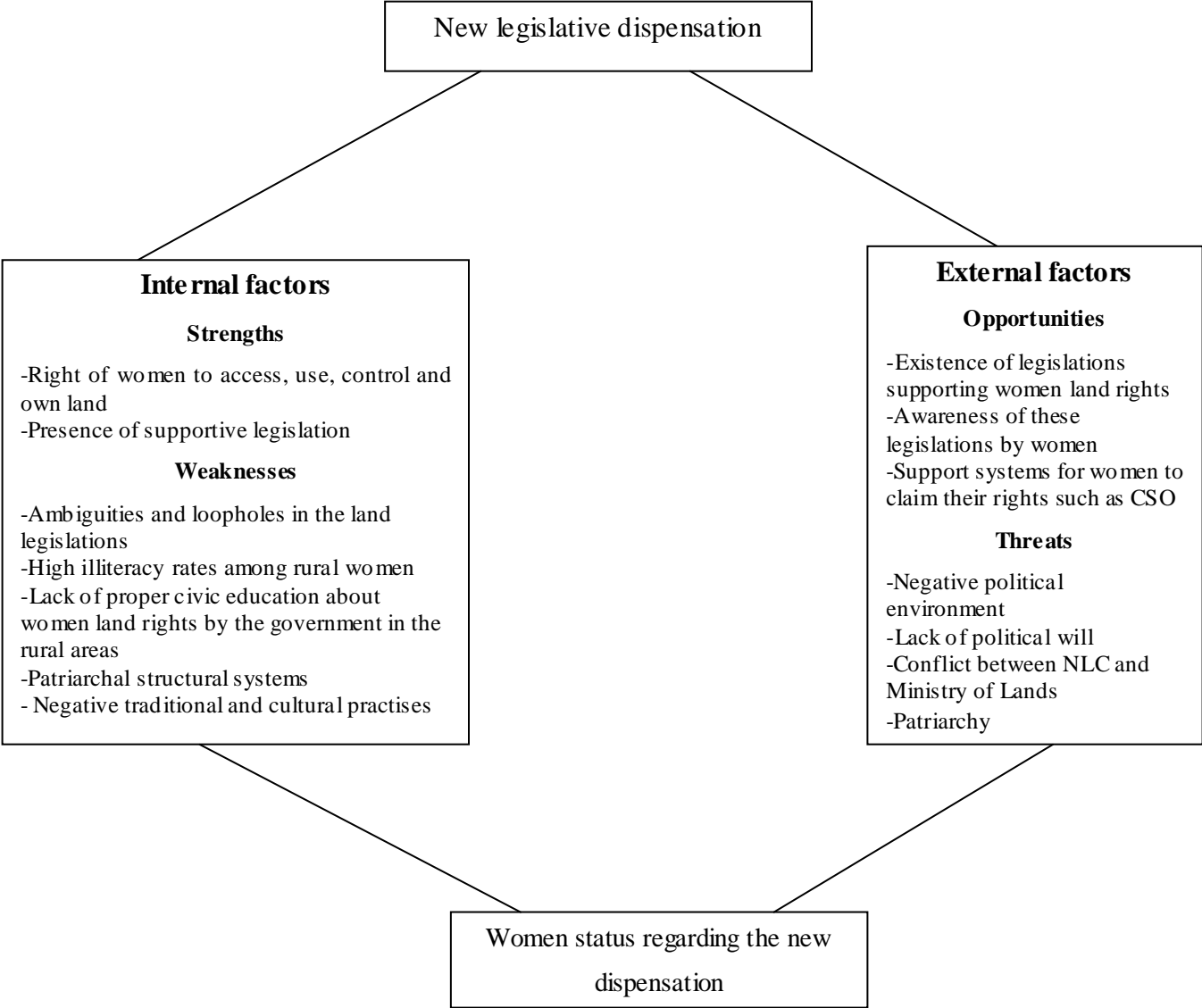
The framework was effective in enabling the researcher to wholly and deeply analyse the strengths and weaknesses of the new legislations, and measure them against the opportunities and threats in the environment within which they are to be implemented. The external factors determine whether or not the provisions of the new legislations will be implemented and translated into practice at the community.

The researcher used the SWOT analysis to identify key internal and external factors that are important for women to exercise their land rights. Internal factors include the strengths and weaknesses of the legislations in the new dispensation whereas external factors include opportunities and threats presented by the environment or community against the implementation of the legislations (Fig. 2.1).

Strengths are the positive aspects, characteristics or distinctive attributes or competencies which provide a significant advantage (Mullins, 2002:142). In assessing the strengths of the legislations in the new dispensation regarding women's land rights the researcher explored the legislations and listed these strengths, including the right of women to access, use, control and own land. Weaknesses are negative aspects, characteristics or deficiencies in the legislations including the Land Acts and the National Land Policy. These include ambiguities and loopholes in the Acts which the public or any interested parties can use to circumvent the Acts. Weaknesses limit the effectiveness of these legislations and they need to be either corrected or actions taken to minimize their effects (Mullins, 2002: 142).

Opportunities are the favourable conditions that arise from the nature of changes in the external environment (Mullins, 2002: 142). In identifying opportunities for women to exercise their land rights within the stated community as provided for in the legislations in the new dispensation, the researcher was sensitive to the problems arising from the community as a response to this. Opportunities include awareness of the legislations by women in the community, the active implementation of the legislation by the National Land Commission which is constituted by the government, the level of education of women in the community and their occupations, with those having a higher level of education assumed to be in a position to demand and exercise their land rights.

Threats, on the other hand, refer to unfavourable situations, factors or challenges which arise from the external environment and hinder the implementation or operationalisation of the legislations. Threats are likely to endanger the operations and effectiveness of the legislations. They include patriarchy that is bound to create a lot of resistance to women exercising their land rights, the socialization of rural women which has led them to believe that land can only be owned by men and the lack of will on the part of the National Land Commission to implement the Acts to the full. Threats also include the current political and economic unrest that the country has not recovered from given the past elections and terrorist attacks (Mullins, 2002: 142). These may be conceptualized as shown in Figure 2.1 below.



**Fig. 2.1: Conceptual Model of the SWOT Analysis**

## **CHAPTER THREE**

### **METHODOLOGY**

#### **3.1 Introduction**

This chapter describes the research site, research design, study population and units of analysis. It also describes the sample population and sampling procedure, methods of data collection and analysis, problems encountered in the field as well as ethical considerations.

#### **3.2 Research Site**

##### **3.2.1 Location**

This study was carried out in Katiemo west sub-location of Kisumu West Sub-County of Kisumu County. The Sub-County borders Kisumu East to the East, Vihiga to the Northeast, Emuhaya to the North, Siaya to the Northwest and Lake Victoria to the South (Map 3.1). It lies within Longitudes 33° 20' East and 34° 10' East and Latitudes 0.20 South and 0.50' South (Government of Kenya, 2009 b: 1).





the homestead and his wives' houses around his. The first wife's house is at the top middle of the compound with the door facing the main gate and the gate to the kraal. The second wife's house is built on the right-hand side of the house of the first wife while the third wife's house is built on the left hand side (Achieng, 2001: 54).

### **3.2.3 Major Economic Activities**

The main economic activities of the Luo residing in Kisumu West Sub-County are rearing cattle, fishing and agriculture. The people cultivate millet, sorghum, maize, groundnuts, vegetables, sweet potatoes and cassava for subsistence and sugar cane for commercial use. The large numbers of mangoes and avocados produced in the area are also sold to neighbouring communities in their due season (Hauge, 1974:10). Women do most of the agricultural work such as sowing, weeding and harvesting (Hauge, 1974: 10). In the past cotton harvesting was also a major economic activity in this area. However, in recent times it has declined due to the lack of markets.

### **3.2.4 Customary Land Tenure**

In the past the Luo could lay claim to any land that was considered to be lying bare as long as they were tilling it (Hauge, 1974: 10). But today all land seems to be occupied and for someone to lay claim over any piece of land they must either buy it or lease it from the owner, who is the one with the title. In the case of boundary disputes clan elders placed boundaries or land marks to separate the fields or plots of land. This was done in a ceremony where the disputing parties would drink cleansing medicine known as *manyasi mar riwo lowo*, in readiness for the mixing of the soil. It was only after the soil was mixed in a new season that the boundaries were placed by clan elders (Achieng', 2001: 8). Boundaries were well respected by community members and it

was a serious offence or taboo (*kwer*), for anyone to move or overlook them. In a case where someone's homestead tampered with a boundary set by clan elders their homes would be moved to the centre of the community so that they can stay under the watchful eye of the whole community and not cause any further problems (Achieng', 2001: 9)

### **3.3 Research Design**

This study was exploratory and the researcher collected both qualitative and quantitative data. The research was conducted in two phases; in the first phase, the researcher used secondary data to formulate the research problem, identify the research gaps and generate qualitative data. In the second phase, the researcher went to the field and used semi-structured questionnaires with both open-ended and closed-ended questions to collect quantitative and qualitative data from the sample population in Seme K'atiemo west sub-location. Data were collected on issues such as age, family size, education levels and evidence of ownership of land. After this the researcher carried out focused group discussions and key informant interviews to collect qualitative data.

The study was cross-sectional as the researcher analyzed data collected from the study population at one specific point in time. The data was analyzed using the Statistical Package for the Social Sciences (SPSS) version 17.0 and presented in the form of tables of frequencies and percentages, as well as graphs.

### **3.4 Study Population and Unit of Analysis**

The study population consisted of adult women physically living in Katiemo west sub-location. The unit of analysis was, therefore, an individual woman in the study site.

### **3.5 Sample Population and Sampling Procedure**

The study sample consisted of 50 respondents who were purposively selected by the researcher. The respondents were handpicked because they had the required information that the researcher was looking for with respect to the study objectives and fitted the criteria for selection. The criteria included age, marital status, number of children, level of education, occupation, and group membership and leadership positions.

### **3.6 Entry into the Field**

In preparing to go to the field the researcher had a meeting with the community leaders and elders and explained to them what the research was about, the type of data to be collected, the methods to be used for data collection and the criteria of the sample to be interviewed.

The community leaders and elders assigned a community gate keeper to the researcher who would take her around the community, help her to develop good rapport with them and direct her in hand picking the sample to be interviewed given the criteria she was using and also translate key terms and information to the sample so that the researcher gathers the correct information. Having the community gatekeeper enabled the researcher to gain the trust of the community and conduct open and effective interviews and discussions with them.

### **3.7 Data Collection Methods**

#### **3.7.1 Semi-Structured Interviews**

This method of data collection was central to this research. The researcher conducted one-on-one interviews with women from Seme K'atieno west sub-location using a semi-structured questionnaire with both closed-ended and open-ended questions (Appendix 1). The open-ended questions enabled the researcher to generate qualitative data and probe the respondents' responses whereas the closed-ended questions enabled her to generate quantitative data. Most of the interviews were conducted in Dholuo and recorded in English given that a large number of the sample were illiterate and did not understand English. However, given that the researcher is a native Luo-speaker, she was able to interpret key terms and phrases without losing their meaning or context.

#### **3.7.2 Key Informant Interviews**

The key informants in this study were people who were knowledgeable about women land rights and occupy some influential positions in the study area. These included 2 community leaders, 2 elders and 2 experts who have done research in the study area. The researcher carried out 6 key informant interviews by herself using a key interview guide (Appendix 2). Two of the interviews done with the community elders were conducted in Dholuo and recorded in English while the four done with the experts and community leaders were conducted and recorded in English.

#### **3.7.3 Focused Group Discussions**

The researcher conducted 3 focused group discussions each consisting of 6-12 discussants where she collected qualitative data. The 3 groups were composed of the following categories of participants: young women, elderly women and elderly men respectively. The reason why the

researcher set up these groups in this way was because she was paying attention to the homogeneity of the participants in order to create a conducive environment in which they could freely carry out their discussions. The researcher used a focused group discussion guide (Appendix 3) that was generated from the issues that had arisen in the semi-structured interviews. She was able to collect qualitative data on various themes on opportunities and challenges for women in the new statutory land tenure systems.

#### **3.7.4 Informal Interviews**

The researcher stayed at the research site for one week after conducting the semi-structured interviews, key informant interviews and focused group discussions. During this time she was able to interact with the study population informally in the farms, at the markets, by the river and during meals. She gathered a lot of qualitative data on various themes of the study which helped to build on and verify the data she had already gathered in the formal interviews and also generate new information.

#### **3.7.5 Secondary Sources**

The researcher used documentary sources to formulate the research problem and identify research gaps. However, she also used government publications and reports to shape her arguments and the study at large.

### **3.8 Data Processing and Analysis**

Data analysis was done in two stages, before, during and after data collection. The researcher first verified the validity of the data she collected by checking the collected data using the three methods of data collection against each other. In this way she was able to determine whether there were any contradictions or inconsistencies in the data collected. The researcher also

checked data validity by comparing data collected with the semi-structured interviews from that collected in the focused group discussions.

Quantitative data obtained from the semi-structured questionnaires was directly entered into Statistical Package for the Social Sciences (SPSS) version 17.0 and analyzed. On the other hand, qualitative data obtained from the semi-structured questionnaires, key informant interviews, focused group discussions and informal interviews were analysed in themes (opportunities for women's access to, use, control and ownership of land in the new legislations, challenges for rural women to exploiting these opportunities and ways of overcoming these challenges).

### **3.9 Ethical Issues**

This study adhered to the code of ethics in conducting anthropological research. The researcher obtained informed consent (Appendix 4) and voluntary participation of all the respondents before she proceeded with the interviews. The researcher also upheld confidentiality with all the information that she obtained from the study subjects. This was done by not including the names and identities of the respondents. This ensured that the research did not harm the safety, dignity or privacy of the respondents.

## CHAPTER FOUR

### OPPORTUNITIES AND CHALLENGES FOR KISUMU WOMEN IN THE NEW STATUTORY LAND TENURE SYSTEMS

#### 4.1 Introduction

This chapter presents the research findings. The chapter starts by outlining the socio-demographic profiles of the respondents. It then discusses the findings on the following: opportunities for women in the new statutory land tenure systems; challenges for women in the new statutory land tenure systems; and ways of overcoming challenges in the new legislations. These are presented using tables of frequencies, graphs and narratives.

#### 4.2 Socio-Demographics of the Respondents

##### 4.2.1 Age

A total of 50 respondents were interviewed. There were no respondents aged below 18 years, while eight per cent were aged between 18 and 22 years. Thirty-eight per cent of the respondents were in the 49 and above age category while the 28-32 and 33-38 age categories had each fourteen per cent of the respondents (Table 4.1).

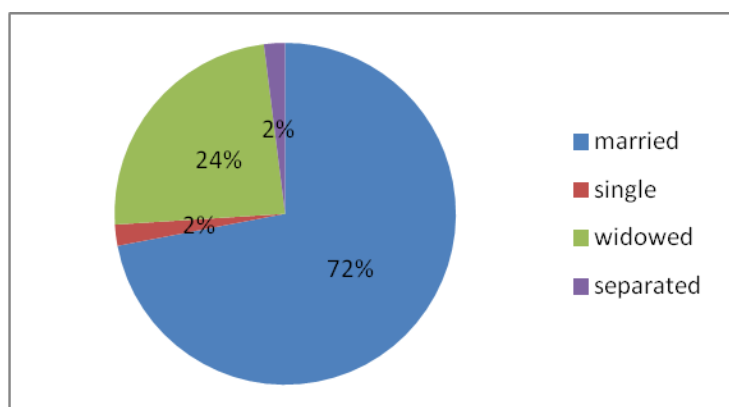
**Table 4.1: Age of the respondents**

Age	Frequency	Percentage
18 - 22	4	8
23 - 27	6	12
28 - 32	7	14
33 - 38	7	14
39 - 43	3	6
44 - 48	4	8
49 +	19	38
<b>Total</b>	<b>50</b>	<b>100</b>

### 4.2.2 Marital Status

The marital status of the respondents was also considered as an important variable in determining the opportunities and challenges for women in the new statutory land tenure systems. Seventy-two per cent of the respondents were married, 24% were widowed, 2% were single and another 2% were separated (Figure 4.1).

**Figure 4.1: Marital status of the respondents**



### 4.2.3 Number of Children

The number of children that each respondent had was investigated to explore the significance of having children, especially male children, in matters of opportunities and challenges for women in land. Of the 50 women, 20% did not have any male children while 30% had 2 male children. Twenty-eight per cent had no female children while 26% had two female children. Finally, 2% of the respondents had either 1 male child or 1 female child (Tables 4.2 a & b).



**Table 4.2a: Number of male children**

<b>No. of male children</b>	<b>Frequency</b>	<b>Percentage</b>
<b>0</b>	10	20
<b>1</b>	10	20
<b>2</b>	15	30
<b>3</b>	10	20
<b>4</b>	2	4
<b>5</b>	1	2
<b>6</b>	1	2
<b>7</b>	1	2
<b>Total</b>	<b>50</b>	<b>100</b>

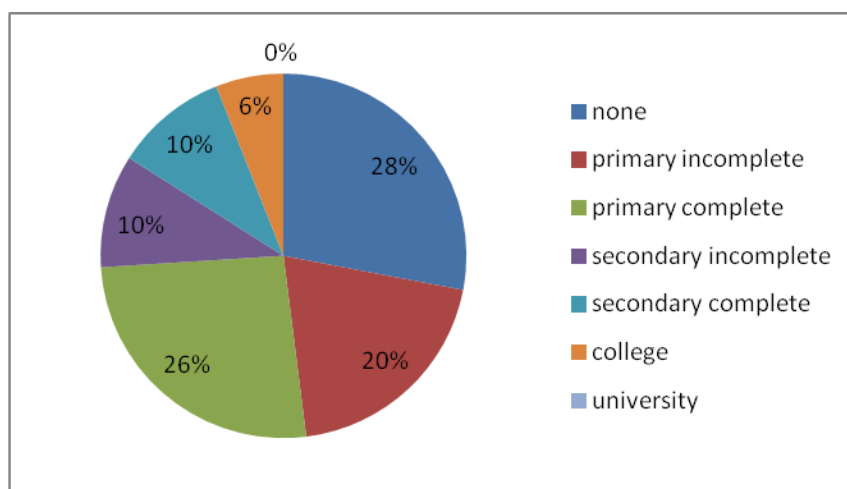
**Table 4.2 b: Number of female children**

<b>No. of female children</b>	<b>Frequency</b>	<b>Percentage</b>
<b>0</b>	14	28
<b>1</b>	11	22
<b>2</b>	13	26
<b>3</b>	9	18
<b>4</b>	2	4
<b>5</b>	0	0
<b>6</b>	0	0
<b>7</b>	1	2
<b>Total</b>	<b>50</b>	<b>100</b>

#### **4.2.4 Level of Formal Education**

The sample population's level of education was generally low with 28% having attained no primary education. Only 26% of the respondents had completed primary education, 10% had completed secondary education, and a mere 6% had gone to college (Figure 4.2). None of the respondents had attained a university degree. The general low level of education among the respondents is an indication of the community's low commitment to the girl child's education. This has resulted in a large number of girls engaging in early marriages and, thus, making them highly vulnerable. In turn, this has allowed their male counterparts to undermine their rights.

**Figure 4.2: Level of education**



#### 4.2.5 Occupation

Most of the respondents were farmers with 42% strictly subsistence farming. Thirty-eight per cent were both farmers and business women, while 2% were offering farm labour (Table 4.3). A large percentage of the respondents, therefore, have no regular sources of income. They are dependent on their spouses and relatives and, therefore, cannot make independent choices and decisions, a situation that greatly undermines their rights.

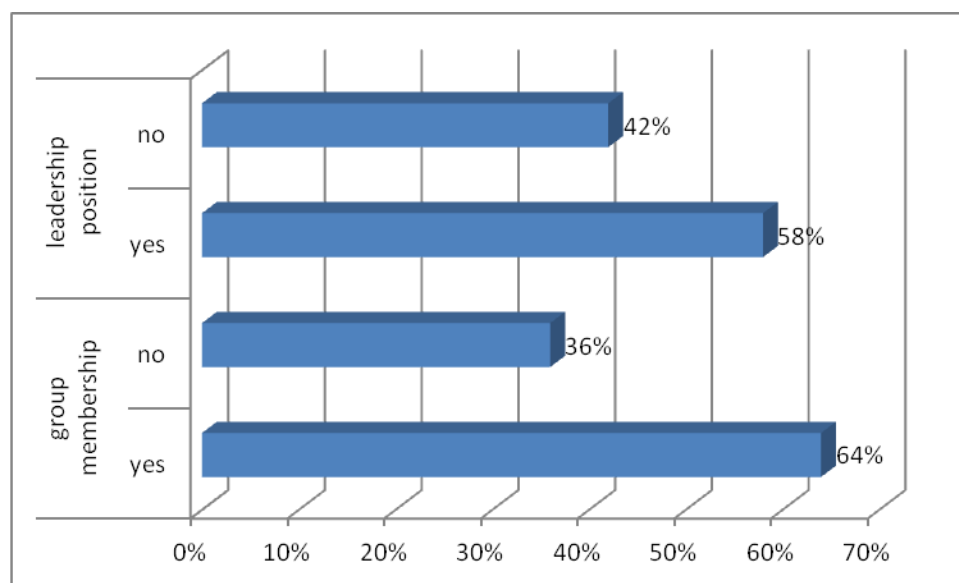
**Table 4.3: Occupations of the respondents**

Occupation	Frequency	Percentage
Community health worker	2	4
Cooks in a hotel	1	2
Farmer	20	40
Farmer and business woman	19	38
Manual farming labourer	1	2
Salonist	1	2
Tailor	1	2
Teacher	3	6
Assistant Chief	1	2
House help	1	2
<b>Total</b>	<b>50</b>	<b>100</b>

#### 4.2.6 Group Membership and Leadership Positions

Since one of the study objectives was to determine the challenges to women exploiting the opportunities available for them to access, use, control and own land as provided for in the new dispensation, women's access to information was measured by determining their involvement in groups and leadership within the community. Of the 50 respondents, sixty-four per cent were active members of groups and twenty-nine per cent held leadership positions either in the groups, in churches or within the community (Figure 4.3).

**Figure 4.3: Cross-tabulation of women's group membership and leadership positions**



### 4.3 Opportunities for women in the New Statutory Land Tenure Systems

#### 4.3.1 Women Land Rights

The study findings indicate that the respondents define their land rights as 'unlimited access to and use of land'. Ownership of land is entirely in the hands of men. Most of the land is inherited

by sons upon marriage who, in turn, divide it among their own sons upon marriage. Land was mainly given to sons for their wives to cultivate and it was named after their wives. This was because Luo men were polygynous and had many homes. Polygynous men would ensure that each of their wives got a piece of land from the original piece of land that they inherited from their fathers.

There are some instances, though few, where a man upon marriage buys land and builds his own home away from his father's land. In such instances the land is not very far away from his father's home and his wife still farms the plot of land that was given to him by his father upon marriage.

The study findings suggest that women have very limited roles to play with regard to land administration, adjudication, subdivision and inheritance. Upon marriage they are the ones who are shown the land boundaries by their mothers-in-law, and are called upon when there are land boundary disputes to show the land boundaries. Other than that, they are not in any way involved in land management and administration.

This customary practice indicates that women are the ones in charge of tilling land and providing food for the households. Ownership of land is therefore not significant for the respondents because it is not imperative to their role in farming and producing food. The Luo custom gives them unlimited access to and use of land, both in their father's home and in their marital homes. As one respondent put it:

**Female Respondent 1, 70 years**

Land and everything in it (livestock, grains and property) belong to men. Women take care of it on behalf of their husbands for their children. They cannot sell land, livestock or property without their husbands' consent. And in the case of death the husbands' brothers', *anyuola*, are

the ones authorized to sell the land, livestock and property for the widow. Having a male child is therefore very important for a woman because then she is guaranteed land in which she will be buried. In case a woman has no son, *migumba*, she cannot take a relative's son to come and inherit her husband's land. It is given to her co-wife's son. If she has no co-wife then the land is taken over by her husband's brothers, *anyuola*. In case the woman is inherited by an outsider, *ja-ter*, he has no say in the land that belongs to the widow's husband even though the sons that he bears with the widow are named after her late husband and inherit his land.

The respondents, therefore, have a complex relationship with land because they heavily rely on it for their livelihoods but they have no say in any major decisions regarding it. But this does not in any way undermine their land rights.

The focused group discussions revealed that a large proportion of the families in this community do not have title deeds to their land. They have plot numbers that were given to them by the government in an exercise carried out in 2000. They were supposed to follow up with the Lands office in Kisumu but none of them have, given that their land is secured by their kinship, including land that has been bought. This is illustrated in the following comments:

### **Male Elders Focused Group Discussions**

One of the elders said that title deeds are important in securing land tenure in cosmopolitan areas where land is bought but here land is inherited and is protected by kinship. Therefore, most people do not have title deeds nor know their value.

They all agreed that title deeds are registered in Kisumu town which is far from the research site and one requires money to obtain it. Furthermore, the procedure is long and tedious, especially since most of them have small parcels of land in different parts of the sub-location that are difficult to reconcile and the land is in the name of their great grandfathers and has been subdivided for up to 4 generations now. Some of them have gone to Kisumu to try and obtain title deeds but they have been frustrated by the processes. Therefore, there is little recourse for the

others to try.

### **Female Elders Focused Group Discussions**

The elderly women agreed that they were not concerned with tittle deeds. According to them: tittle deeds are for men simply because they are the ones who own land by either inheritance or buying. In any case, men are the ones who can subdivide land to their sons and sell it when there is need to. Women are only concerned about land which they can till and this is usually available for them both at their homes of birth and marriage. In fact, if the land given to them to till is not adequate they can request for more land and this is allocated to them from any kin's piece of land.

### **Young Women Focused Group Discussions**

The young women agreed that tittle deeds are important to them just like they are to men because they are used as security for land. According to them: in the past women were not concerned about land ownership but nowadays they are. This is because of two things: one, most men work away from the rural areas in the towns and cities and it is the women who live in the rural areas; and, two, there have been a lot of deaths in the community due to HIV/AIDS. Hence the women need to know how much land the family has and where the land boundaries are. And in order to do this they need the tittle deeds. The search numbers may help them when their husbands are still alive but in case they pass away only the tittle deeds will help. Otherwise, their husbands' kin will disinherit them from the land that belongs to their husbands' when they pass away.

They also agreed that the elderly people in this community disregard the importance of tittle deeds. But as young women they know how important a tittle deed is in securing ownership over land. They know that with a tittle deed it is so much easier to lay claim over land. They also argued that with the new constitution and devolution, people from outside their community will start to come into it and will want to buy land and settle here. Without tittle deeds it will not only be difficult to sell land to outsiders but also to protect it from encroachment. They have advised the older people to get tittle deeds but the later are adamant about using search numbers.

The key informants interviewed agreed that a large percentage of the population in the area do not have tittle deeds. They attributed this to the fact that kinship provided tenure security; land is

hereditary and is not seen to belong to an individual but rather to the clan. This is best captured by these comments from key informants:

#### **Male Expert, 56 years**

The reason why people in this community do not have title deeds is because there is no need for individual land ownership in rural land use. Most of these people use the land to graze their cattle and grow subsistence crops. They share resources such as grazing fields and water sources. In fact, these are identified as communal resources.

#### **Female Community Leader, 50 years**

In rural land use individual ownership is only considered in divorce or succession. Divorce is very rare in the Luo community and even when a woman was considered divorced she would be returned by her kin for burial at her husband's home and her children would inherit land from this home. Succession, on the other hand, was until recently done through the subdivision of land inherited by a father to his sons. However, continuous sub-division and sale of land has resulted in land becoming scarce. Sons are, therefore, forced to farm their father's land or buy their own land usually far away from home. This is the type of land that requires title deeds.

Out of the 50 respondents, twenty-six per cent stated that their land was registered, sixty per cent stated that their land was not registered and fourteen per cent did not know whether or not their land was registered (Table 4.4).

**Table 4.4: Registration of Land**

<b>Land registration</b>	<b>Frequency</b>	<b>Percentage</b>
Yes	13	26
No	30	60
Not aware	7	14
<b>Total</b>	<b>50</b>	<b>100</b>

A lot of the young men interviewed informally stated that the opportunities for women in the new legislations can actually be implemented especially joint ownership of land with their spouses. This is because a lot of the young men from the sub-location have moved to the towns and cities in search of employment while those that have stayed behind have no vested interest in land with most of them involved in either politics or gold mining. Women are therefore the ones taking care of the land and making gains out of it.

The men indicated various reasons for not being interested in the land including the fact that land in the sub-location is hereditary and has been sub-divided over and over again to the extent that they are now small pieces that can only be used effectively for subsistence agriculture. The area is also very stony, the land has become infertile with constant farming, and the market centres are very far away hence the costs of transporting produce and buying inputs is not profitable. Furthermore, the alternative livelihood options that most of these men are pursuing, such as gold mining, gives them far much better returns than farming and they redeem these benefits almost immediately unlike farming where they have to wait for the seasons not to mention that they also run the risks of making losses.

The elders expressed concern for the young men from the sub-location stating that those in the area are not engaged in any productive work. Those mining earn a lot of money from it which they waste on alcohol and do not use to bring any development into the area. on the other hand, those in employment in the towns and cities stay there and also do not contribute to any development in the area. This is illustrated by conversations from the women elders focused group discussions:



## **Women Elders Focused Group Discussions**

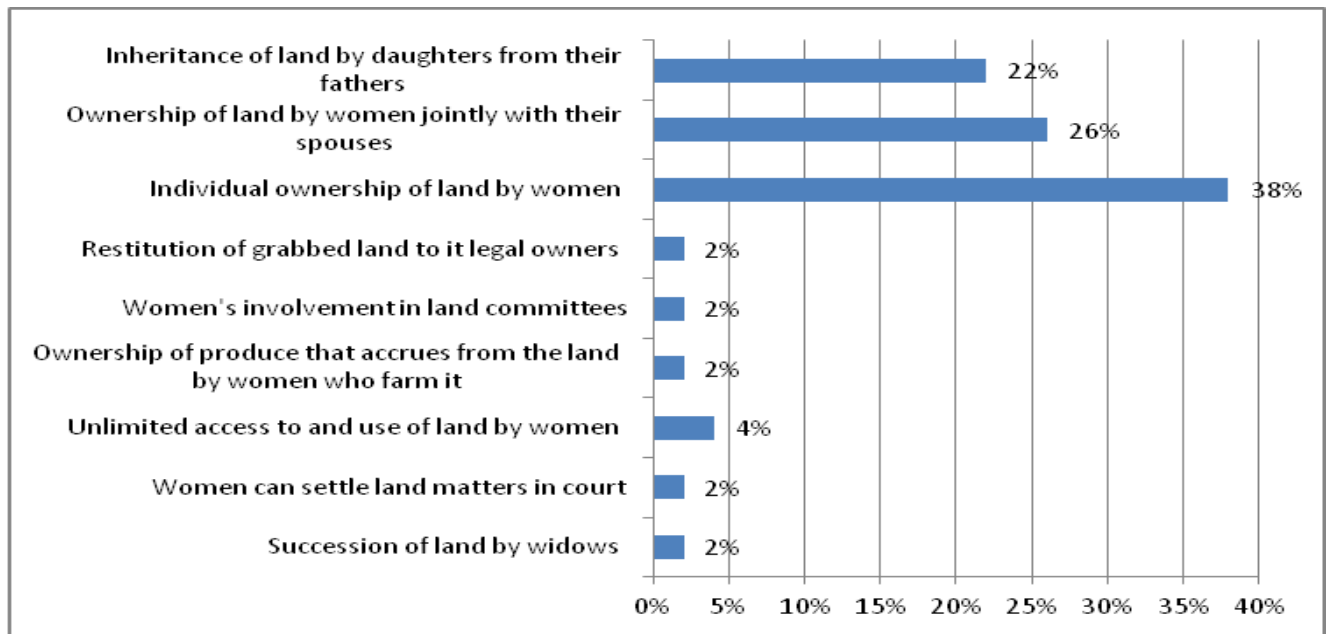
Many of our young men are lost. They do not contribute in their homes or in the development of the sub-location. A lot of them do 'non-jobs' like politics and gold mining which gives them a lot of money but they use this money just to drink alcohol and cause chaos in the area. The chief is always following after them charging them with public disturbance.

The ones in the towns and cities stay there and we only see them at Christmas when they come over for a few days and then they are gone. Most of them are married to women who prefer to stay in the towns and cities leaving us (the older women) to care for the land. Yet we are old and they should be assisting us.

The few young women who are in the area are overburdened with work as most of them have to take care of their children and those of their deceased relatives. Yet the land has become infertile with very little produce. In order to supplement their produce a lot of them sell goods and food stuff in their homes and nearby markets.

### **4.3.2 Opportunities for Women in the New Legislations**

Out of the 50 respondents, fifty-two per cent were aware of the opportunities for women in the new legislations while forty-eight per cent were not aware. These opportunities are listed in Figure 4.4, below. Most of the respondents who were aware of the opportunities for women in the new legislations were young women between the ages of 18 and 38 who became aware through programmes aired by vernacular radio stations including Ramogi FM, having discussions with their kin and friends from other communities and towns, presentations made on civic education by outsiders who visit their women groups and in the chief's *barazas*.



**Figure 4.4: Opportunities for women in the new legislations**

These younger women are pretty well informed about national issues and most of them are registered voters and voted in the general elections and in the referendum. However, their husbands have a great influence on their vote and most of them voted for the new constitution not because it highlighted their rights but because their husbands convinced them to do so. Therefore, it is not surprising that none of them has read the new constitution or any land legislations and the information they have has been given to them by others. In this way some of it is distorted and not entirely true.

The older women, on the other hand, attribute their lack of awareness to not attending the chief's barazas or listening to radios. Most of them do not have national identity cards and are not registered voters. However, they have some insights into the land legislations and they are very pessimistic about the opportunities that these give to women. According to them, these rights have no value addition to women's lives because the rights that women need with regard to land

have sufficiently been given to them by the Luo customs. The customs state that land belongs to men and women are its stewards; they tend it, use it to feed their families and will one day get buried in it. The land rights introduced by the new legislations will only destroy their customs, practices and way of life.

This view is contrary to that of the younger women who are optimistic about the opportunities for them in the new legislations. They stated that land ownership will give them more incentives to tend and care for the land and allow them to participate in decision-making within the household and on the benefits accruing from their produce, hence, raising their self-esteem and confidence. Inheriting land from their fathers will also give them a right in their homes of birth even after marriage and they will feel that they are still part of their families. As another respondent put it:

**Female Respondent 2, 30 years**

If women are allowed to inherit land from their fathers then when they return to their father's home, *migogo*, alive as a result of divorce, separation or death then they can still be treated with respect and not given land on the left hand side of their father's home far off, *kor acham*. Or if they return dead then they can be buried within the home and not outside like strangers.

**4.4 Challenges for Women in the New Statutory Land Tenure Systems**

According to the respondents the greatest challenge for women in the new legislations is culture. Many of the Kenyans cultures, including Luo customs, undermine the rights of women. Luo customs identify the relationship that women have with land because of their reproductive roles but do not confer on her any right of land ownership. Ownership of resources such as land, the

produce that the women accrue from the land, livestock and structures within the home is restricted to men. This is because the woman is a foreigner and, therefore, everything that she uses or makes belongs to the man who is a member of the community.

In addition to this, land in the Luo tradition, cannot be inherited by daughters because when they do their children will marry from their birth community which will lead to incest and taboo, *ketho wat*. In the focused group discussion with the male elders they gave an example of this case within the community.

### **Male Elders Focused Group Discussion**

One woman from this community returned home with 3 children (2 girls and 1 boy) after having problems with her husband. Her father gave her land within the community but away from his home. One of her daughters got pregnant with someone from the area and gave birth to a male child. She was not allowed to marry the man because the act was taboo. The woman's family has had a lot of problems since and it is believed that a lot of these problems are as a result of the daughter's relation with someone from her own kin. The problems include her other daughter not being able to marry while her son who managed to marry has not been able to get any children.

Many of the rural dwellers, both men and women, still adhere to these traditions and would not allow the new legislations to change or alter them. In support of this, the in-depth interviews revealed that patriarchy is a key challenge to women's tenure security. This is well illustrated in the following comment by a male expert:

### **Male Expert, 56 years**

Both the statutory and cultural tenure systems in Kenya were developed and approved by men who secured their rights at the expense of that of women. The colonial British developed the statutory land tenure systems to secure their right to farm large tracts of land for agricultural exports whereas the cultural elders sought to secure their reign and rule over the masses. These two systems created large disparities for women in terms of ownership and control of land.

Another challenge stated by the respondents is illiteracy and lack of awareness of the new legislations. A large percentage of Kenyans, most of them women, live in rural areas and are not aware of the opportunities that the new legislations offer them. In the few cases where women are aware of these opportunities the information that they have is limited and distorted, hence, they cannot challenge the status quo.

A large percentage of rural women have a very low self-esteem and are very complacent about their rights. This was evident in the research findings. Thus, even though some of them are leaders within the community, they only take up positions that are either handed over to them by the men or are exclusively reserved for women such as secretaries and choir members. Hence, they do not substantively contribute to community issues.

Lack of political will observed by the researcher in the systems and structures governing land in that rural area is also a challenge in implementing the opportunities for women in the new legislations. These systems are disorganized; at the community level the chief, elders and the land committees are ineffective in resolving land matters and adjudicating land. There is only one land officer for this community and his office is in a centre 5 hours' walk away at a centre called Kombewa. Additionally, there is only one land registrar who sits in the Lands office in

Kisumu town, 2 hours' drive from the sub-location. These officers are greatly overworked making them ineffective in addressing people's issues and resolving land matters.

There is also a disconnect between the lands office at the national level who make legislations and those at the county level who implement these legislations. This is creating a lot of problems with land issues and the situation is being further exacerbated by devolution as many more services are devolved to the counties which have inadequate structures and resources in place.

#### **4.5 Ways of Overcoming Challenges in the New Legislations**

The respondents suggested various ways of overcoming the challenges in the new legislations such as sufficient civic education for women, men, as well as cultural leaders and the youth in the community, to try and align the opportunities for women in the new legislation with Luo customs and cultural practices.

The younger women stressed that they should be empowered with information and resources in order to build their self-esteem and confidence and enable them to demand their rights and be able to stand up for themselves. They should also be encouraged to take up more meaningful leadership positions to be able to effect changes in their lives.

The government should also determine ways in which to involve people at the grassroots in developing legislations because legislations are implemented at the grassroots and will not bring effective changes if people living in here are not in agreement with them. This point was supported by the male expert key informant as captured by the following comment:

**Male Expert, 56 years**

The constitution is a platform that is trying to bridge the gap between statutory and cultural systems. But beyond the constitution actors from both the statutory and cultural systems should work hand in hand to ensure that these systems are not working parallel to each other but in tandem with each other.

It is therefore evident that land is a very sensitive matter in this rural area and Kenya at large and so the government needs to develop more effective structures right from the grassroots at the county level to the national level to deal with land matters.

## **CHAPTER FIVE**

### **DISCUSSION AND CONCLUSIONS**

#### **5.1 Introduction**

The objectives of this study were to identify the opportunities for women's access, use, control and ownership of land in the new dispensation; determine the challenges to women exploiting these opportunities; and make recommendations on the best way to overcome these challenges. This chapter, therefore, discusses the study findings and draws conclusions in relation to the above objectives.

#### **5.2 Discussion**

The new statutory land tenure systems offer women rights to land beyond that which the cultural systems and the old statutory land tenure systems offered them. These rights include ownership and inheritance of land. However, the women whom these rights appeal to are elite women living in towns and cities who desire to use land for commercial purposes. The rural women who use land regularly mainly use it for subsistence and are not conversant with these legislations; hence, they are not compelled to demand the rights they offer them. There is, therefore, a glaring gap in the implementation of these new statutory land tenure systems amongst the urban and rural communities.

In addition to this, rural communities are inclined to adhere more to cultural systems as opposed to statutory ones. Yet, these are largely patriarchal and undermine the rights of women. Rural women are, therefore, entangled in a system which may not necessarily appeal to them but with which they feel they have no way of opposing or seeking recourse. In this way, the new statutory land tenure systems are not being actualized in the rural communities.



The SWOT analysis carried out on the new legislations identified various opportunities for women within them whereas the study findings identified the challenges in implementing these opportunities. It was evident that these legislations create a very high standard for women and offer them the opportunity to enhance their economic and agricultural potential, thereby enabling them to make independent choices and decisions. However, public opinion and perceptions on the ground are contrary to these legislations, hence the enforcement of these rights will be greatly delayed. The perceptions and opinions of the masses, individual men and women, leaders and cultural elders, will have to be influenced in order not only to understand the relevance of women's rights but also embrace land reforms. This process will take time and a lot of effort from both the government and the cultural leaders.

### **5.2.1 Opportunities for Women in the New Statutory Land Tenure Systems**

The women of Katieno West sub-location in Kisumu County described the opportunities for women in the new statutory land tenure systems as women's access to land and the ability to use the land and dispose off the produce and benefits that they accrue from the land in whichever way they want. Currently, they cannot sell land, livestock or property without their husbands consent even though they are the primary care takers. Their husbands and male relatives control all the resources including the income that they generate from farming and livestock. This greatly limits their abilities and potentials. Some of them confessed that they can generate a lot more income from cultivating their land but they lack the adequate inputs, resources and motivation. Access to and use of land without control and ownership has in the past greatly undermined the ability of women to demand, use and even benefit from the fruits of their labour. Therefore, it is only when these rights are enforced legally and socially that women will be able to exercise these rights (Meer, 1997: 45).

A large percentage of the respondents perceived the right to inherit land after the death of their husbands as one of the greatest opportunities in the new legislations. There have been many incidents in the past not only of brothers-in-law disinheriting widows but also sons disinheriting them. In the case of co-ownership of land the widow will be fully protected by the law against such abuses.

The men and women of Katieno west sub-location agree that the opportunities for women as stated in the new statutory land tenure systems include inheritance of land by daughters from their fathers, co-ownership of land by a husband and wife, the right of women to own and sell land alone or jointly with their husband and the right of women to be involved in the land tribunals and land committees formed to resolve land conflicts or adjudicate land (Government of Kenya, 2009 a: 54).

The research findings indicate that women are aware of their land rights as stipulated in the new legislations. However, there are variations between the elderly and younger women on whether to exercise these rights or not. The elderly women tend to feel helpless despite their awareness of the violations of their rights. This is because they have been socialized to suffer silently and put the needs of others, especially their male counterparts, before their own (Mwangudza, 1983: 11). They, therefore, shy away from anything that would distort this status quo. According to Foster et al. (cited in Ahlberg, 1991: 34), these social organizations, cultural values and beliefs can be blamed for elderly women's opposition, to change. In addition, the study findings suggest that elderly women are also generally unfamiliar with the systems of the law which offer recourse beyond the village elders which are male dominated and have been socialized to undermine women.

Younger women, on the other hand, feel the need to change and improve their situations. They are aware of the inequities that their mothers and grand-mothers have faced due to patriarchal customs and practices and are determined to change this for themselves and their children. This conflict is more internal and is instigated by their exposure to information through radios, involvement in women's groups, friendship with women in other villages and regular visits to the markets places, towns and cities. However, their greatest resistance is perpetrated by elderly women who would rather have peace within the community as opposed to their own liberation.

The study findings also indicate that the men perceive the opportunities for women in the new legislations as contrary to the Luo customs and bound to bring conflict within the community. According to them, Luo women have always had access to and use of land, opportunities that are vital for their livelihood. In fact, the homes are named after the women because they are the permanent occupants of the home unlike the men who have the tendency to go and marry outside the home.

### **5.2.2 Challenges for Women in the New Statutory Land Tenure Systems**

The study findings indicate that the greatest challenge for women in the new legislations is that the rights that they give women are contrary to the customs and practices of many communities in Kenya. Among the Luo, for example, land is subdivided and inherited by men. Sons and not daughters have the right to inherit land upon marriage. Women are temporary custodians of land for their sons and in cases where a woman has no male child, *migumba*, her co-wife's son inherits the land. If she has no co-wife then she can marry a wife of her own whose son will inherit the land. Women have no right to sell land and any other livestock within the household without their husband's consent.

Daughters do not inherit land in their places of birth or marriage; divorces are rare but in case of one the woman would upon death return to be buried in her husband's home. It was feared that in case a girl inherited land from her father she would settle there and her children would marry their own kin, *ketho wat*, and in cases where a daughter returned to her father's home due to the failure of her marriage, she would be given land to farm and settle far away from her father's home, *kor acham*, to avoid, *ketho wat*.

A large percentage of the people in the research site stated that they do not have title deeds. This is mainly because the land is inherited, is protected by the kin and there are rarely any land disputes. Land boundaries are better known by women who farm the land and are respected by all and marked by sisal and wild trees. There are no physical fences to mark land boundaries. In cases of land disputes the husband, elders, family members and relatives would resolve the matter with the help of women. These were common in polygynous families where ideally each wife was supposed to have her own piece of land but continuous subdivision of land has led to irregularities and disputes.

The study findings suggest that men generally do not trust women especially with great investments such as land and property. Women are, therefore, viewed as outsiders in their places of birth as they are bound to get married and move to their husbands' homes whereas at their places of marriage they are not entirely entrusted with the land and property, to the extent that a large percentage of the men are not willing to have title deeds registered jointly with their spouses. Women are likely to have title deeds only to the land that they have bought. However, they are more willing to have that land registered jointly.

### **5.3 Conclusions**

The study findings indicate that the statutory land tenure systems in the new dispensation offer women various opportunities with regard to land including ownership and inheritance that they did not have in the past. The findings further indicate that a large percentage of rural women in Kisumu County are aware of these opportunities. However, there are many adverse challenges affecting their ability to exploit and demand them including culture, negative perceptions, lack of an enabling environment and lack of adequate structures to facilitate the process.

The Luo customs greatly undermine women. Subordination of women is a social and historical phenomenon that needs to be addressed for women to exploit the opportunities availed to them in the new legislations. Social actors, in this case men and women, interact within the constraints and opportunities of existing structures at the same time as they act upon and restructure the system. They continuously make their own history carrying along past experiences, knowledge and cultural traits (Ahlberg, 1991: 32). It is, therefore, imperative that subordination of women is addressed by addressing cultural injustices that undermine women so that women are treated with equal respect and dignity like their male counterparts. This will create an enabling environment in which women can demand and exploit their rights.

The negative perceptions are not exclusively held by men but as indicated in the study findings women too, especially elderly women, do not encourage these opportunities. Nevertheless, men tend to dwell on the negative perceptions more as they derive more benefits from it. However, younger women are set to ensure that their plight is taken into consideration and not undermined as has been in the past. They believe that the new legislations, including the constitution, create an enabling environment for them. They now have neutral structures other than the village elders such as the courts to determine their case with regards to land.

In conclusion the findings suggest that it will take time before rural women are able to enjoy these opportunities but eventually they will. The inappropriate structures of the past will be dismantled in devolution as the government moves closer to the people. Exposed and educated community members living in towns and cities are bound to return and settle within the communities in devolution. This process will strengthen the structures of devolution and ensure that community members enjoy its benefits, including opportunities for women in the new statutory land tenure systems.

Additionally, the opportunities for women in the new statutory land tenure systems may not necessarily be imperative to the livelihoods of rural women, since they already enjoy unlimited access to and use of land. However, these opportunities will motivate them in cultivating land and keeping livestock as they will have a share in the benefits that accrue from them. Women will also have a sense of belonging both in their places of birth and marriage. This will greatly improve their self-esteem and confidence and allow them to compete not only with their male counterparts but with other women nationally in building the nation's primary source of production, that is, agriculture.

It is important to note that the new legislations define ownership of land as tantamount to securing the rights of land users. This may be the case in urban areas where land is purchased for commercial purposes but not in rural areas. Ownership of land in rural areas will inevitably translate to men having title deeds to land further alienating women from it. This will encourage patriarchy which is already a hindering factor in the enforcement of women's land rights. In order to secure women's land rights it is therefore necessary to address patriarchy by empowering women with both information and resources to be able to acquire title deeds and demand their rights.

In addition to this, the research findings indicate that the new statutory land tenure systems and cultural land tenure systems exist parallel from each other creating gaps in the enforcement of women land rights. The constitution is trying to bridge this gap by offering a platform in which the two can be used in tandem. Notwithstanding, public opinion will take time to address and a lot more will need to be done for women to actualize their land rights including dissemination workshops, training workshops, campaigns, media briefings, efforts in bridging the gaps between statutory and customary land tenure systems and efforts to expose rural communities to alternative recourse structures such as the courts.

#### **5.4 Recommendations**

From the above findings and conclusions the study makes the following recommendations:

- There is need a to create an enabling environment in the rural areas in order for women to demand, exploit and enjoy the land rights given to them by the new legislations. This needs to be done through a joint effort involving line Ministries of government, NGOs, CBOs FBOs, churches, community elders, opinion leaders and politicians. It can be done through:
  - i. Awareness creation among rural women about these legislations in activities such as dissemination workshops, training workshops, campaigns, regular meetings and media briefings using both vernacular and national radio stations.
  - ii. Summarizing the women land rights as stipulated in the new legislations into pamphlets or brochures that have been translated into vernacular languages.
  - iii. Empowering women with both information and resources to enable them to demand their rights with regard to land and acquire title deeds.

- iv. Monitoring rural women's actions and highlight them through the media in order to encourage and support them.
  - v. Addressing cultural intonations that undermine women and treat them as inferior and subordinate which largely form public opinions and hinder the spirit of the new legislations. This can be done through anthropological research that will interrogate these negative perceptions and then recommend ways of addressing them.
- There is need to formally recognize and adopt customary land tenure systems that support women's rights such as unlimited access to and use of land, rather than seeking to override, dismantle or ignore them. This can be done through an anthropological study that first identifies women's rights in the customary land tenure systems and then aligns them with those in the new legislations.
  - The National Land Commission and the Ministry of Land, Housing and Urban Development are at loggerheads with each other and this is greatly slowing down land reforms in Kenya. The government ought to take action that will enable the two agencies to work together for the benefit of Kenyans and the actualization of the spirit of the constitution and the new land legislations including highlighting their separate and combined tasks.
  - Finally, the government, cultural elders and community leaders need to work together in order to support devolution as this is a process that if implemented well, will bring together the state and the grass-root people for the benefit of the entire nation.



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## Appendices

### Appendix 1: Semi-Structured Questionnaire

Questionnaire number: \_\_\_\_\_ Date of the interview: \_\_\_\_\_

Name: \_\_\_\_\_ Cell phone no.: \_\_\_\_\_

#### I. Bio data

1. Age (in years) (tick appropriately)

- (i) Below 18 \_\_\_\_\_
- (ii) 18-22 \_\_\_\_\_
- (iii) 23-27 \_\_\_\_\_
- (iv) 28-32 \_\_\_\_\_
- (v) 33-38 \_\_\_\_\_
- (vi) 39-43 \_\_\_\_\_
- (vii) 44-48 \_\_\_\_\_
- (viii) 49+ \_\_\_\_\_

2. What is your marital status (tick appropriately)

- (i) Married \_\_\_\_\_
- (ii) Single \_\_\_\_\_
- (iii) Divorced \_\_\_\_\_
- (iv) Widowed \_\_\_\_\_
- (v) Separated \_\_\_\_\_

3. How many children do you have? (Aggregate them by gender)

Female		Male	
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4. What is your highest level of formal education? (tick appropriately)

- (i) None \_\_\_\_\_
- (ii) Primary school (incomplete) \_\_\_\_\_
- (iii) Primary school (complete) \_\_\_\_\_
- (iv) Secondary school (complete) \_\_\_\_\_
- (v) Secondary school (incomplete) \_\_\_\_\_
- (vi) College (TTC, Polytechnics, KMTC) \_\_\_\_\_
- (vii) University \_\_\_\_\_

5. What is your occupation? (tick and specify)

- (i) Formal
- (ii) Informal

6. Are you a member of any group in the community (i.e., women group)? If yes, specify the name of the group.

Yes		No	
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7. Do you hold any leadership position in the community? If yes, state the position.

Yes		No	
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**II. Women land rights**

8. The land upon which you live and/or farm has it been registered? If yes, please indicate whose name it is registered under.

(i) Yes \_\_\_\_\_

(ii) No \_\_\_\_\_

9. If the land is registered under the name of the respondent's spouse, how does that affect their position with regards to land and decisions made about the same?

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10. What in your opinion do women land rights constitute?

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11. Please state women land rights as you understand them provided by both the Luo culture and the Kenyan legislations?

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12. Are you aware of the opportunities for women as regards their land rights in the new legislations? (tick appropriately)

(i) Yes \_\_\_\_\_

(ii) No \_\_\_\_\_

13. If yes in 12 above please state them?

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14. Do you think that women in this area are aware of the opportunities available for them with regards to their land rights in the new legislations?

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15. Do they, in your opinion, exploit these opportunities? (tick appropriately)

- (i) Yes \_\_\_\_\_
- (ii) No \_\_\_\_\_

16. If no in 14 above please state why they don't?

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17. What in your view are the challenges to women exploiting the opportunities available for them as regards their land rights in the legislations in the new dispensation?

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18. What in your view can be done to overcome these challenges so that women can exploit the opportunities available for them in the new legislations as regards their land rights?

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## Appendix 2: Key Informant Interview Guide

Name: \_\_\_\_\_

Cell phone no.: \_\_\_\_\_

Date of the interview: \_\_\_\_\_

### I. Bio data

Gender: \_\_\_\_\_

Age: \_\_\_\_\_

Level of education: \_\_\_\_\_

Occupation: \_\_\_\_\_

Level at which you are involved in women land rights issues: \_\_\_\_\_

Are you involved with the community at Katieno west sub-location? If yes for how long have you been involved with them and at what capacity \_\_\_\_\_

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### II. Women land rights

1. What is the Luo historical perspective of women and land?
2. What did women land rights entail in the past?
3. How different is that from what it entails now?
4. What is the general understanding of women in the area concerning their land rights with regards to the legislations in the new dispensation?
5. How does this understanding affect their ability to exploit the opportunities available for them with regards to land in the legislations in the new dispensation?

### III. Opportunities

1. What are the opportunities available for women in the legislations in the new dispensation as regards land?



2. Do women in this area know about these opportunities?
3. Do they exploit these opportunities?

#### **IV. Challenges**

1. Why don't women exploit the opportunities available for them with regards to land in the legislations in the new dispensation?
2. What in your opinion is the greatest hindrance to women exploiting these opportunities?
3. What in your opinion can be done to overcome these challenges within this community?
4. What in your opinion can be done to overcome these challenges at a national level (including at the policy level)?

### **Appendix 3: Focused Group Discussions Guide**

Type of group: \_\_\_\_\_

No. of people: \_\_\_\_\_

Date: \_\_\_\_\_

1. State the women's land rights as stipulate in the legislations in the new dispensation?
2. State the women's land rights as understood by women in the community?
3. If they are different why is it so or what has caused the difference in interpretation?
4. What are the ramifications of the differences in women exploiting the opportunities available for them with regards to land in the legislations in the new dispensation?
5. What opportunities are there for women with regards to land in the legislations in the new dispensation?
6. What are the challenges to women exploiting these opportunities?
7. How can these challenges be overcome?

#### **Appendix 4: Informed Consent Form**

Rose Otieno Ochieng  
P. O. Box 3790 - 40100  
Kisumu,  
Kenya.

My name is Rose Otieno Ochieng I am a Masters student at the University of Nairobi pursuing an M.A in Development Anthropology. In order to attain my degree I am required to do a thesis of my choice and I have chosen to carry out a study on women land rights.

The study intends to identify the provisions for women land rights, including women's access to, use, control and ownership of land in the legal policies, acts and the constitution within the new dispensation. In order to do this I will be doing field work in Katieno west sub-location.

I would highly appreciate your assistance and cooperation and hereby assure you that any information that you relay to me will be handled with utmost confidentiality and will strictly be used only for the study. It will not be used against you in any way both now and in the future.

By signing this document, you ratify that you have read, or have had read to you, the above consent and agree to have the above named student interview you and thereafter use the data that you have given her accordingly.

Respondent's signature: \_\_\_\_\_

Date: \_\_\_\_\_