

Property Rights Adjudication in Kisii, Kenya

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Introduction

Scholars have argued that clearly defined and enforced private property rights to land contribute significantly to economic development (Acemoglu, Johnson, and Robinson 2004; De Soto 2000; Libecap 2003; Norton 2000). Anthropologists (Berry 1992; Chanock 1991; Platteau 1996) and political scientists (Fukuyama 2004; Weimer 1997) have also noted the importance of property rights to both economic and political development. Secure property rights encourage people to invest in their resources and protect those investments against expropriation. Scholars have argued that economic efficiency requires a clear definition of the rights of ownership, contract and transfer of land (Johnson 1972). Ambiguity in the definition or enforcement of any of these rights leads to an increase in transaction costs in the exchange and transfer of land as well as a residual uncertainty after any land contract. In this paper we will be highlighting the issue of enforcement of rights to immovable property in Kisii, Kenya, where land is in high demand and property disputes can be considered in multiple legal fora.

The disjuncture between public and customary law regulating property rights is a problem for capital formation across Africa. In Kenya government efforts at establishing clearly defined property rights and adjudication mechanisms have been plagued by the existence of alternative processes for the adjudication of disputes. This paper will compare the costs and processes of the formal and informal methods of property rights adjudication and address which groups of people use which system. The research results suggest that legal attempts at property rights reform, now common across Africa and many other parts of the world, face difficulty in enforcement and often only affect the property rights of a privileged elite.

Two claims will be made in this paper which will advance the state of knowledge regarding the enforcement of property rights in areas with overlapping legal systems. First,

women are particularly constrained by customary systems which govern the allocation of land; and second, the adjudication of property rights disputes within customary or traditional systems of conflict resolution has a monetary cost so high that it is beyond the means of many citizens.

Customary Law and Traditional Dispute Resolution

Colonization has left a complex legal arena in Sub-Saharan Africa in which customary law, public or statute law and constitutional law combine and sometimes conflict in their definition of legal rights to moveable and immovable property. Customary law is a body of rules governing personal status, communal resources and local organization in many parts of Africa. It has been defined by various ethnic groups for their internal organization and administration. Customary law is recognized by the courts and exists as a second body of law (in addition to statutory law) governing citizens in countries of Sub-Saharan Africa. It has the greatest control over people in rural areas, but also affects urbanites in so far as it regulates issues such as marriage and inheritance.² There is a divide in the literature between those who view customary law as invented by colonial powers (Ranger 1983; Chanock 1991a) and a more moderate position that, through its ambiguities, customary law created a realm of struggle over power and the allocation of resources (Nyambara 2001; Berry 1992). Regardless of the position that one takes regarding the origins of customary law, it provides a system of rules for the allocation and adjudication of property rights. Typically, it is used as a tool through which traditional leaders (chiefs, elders or headmen) can evaluate claims to property and resolve disputes regarding land.

² See for example the much-discussed Otieno case in Kenya in which an urban, wealthy, Kikuyu woman wanted to bury her husband, a Luo on his farm outside of Nairobi as per his wishes. His family insisted that he must be buried in Western Kenya, his home area. Since his family and not his wife were viewed as the next of kin, their wishes won out. For more detail regarding the case see (Gordon 1995)

Literature regarding the use of customary dispute resolution systems tends to be laudatory: praising its accessibility; local knowledge; low cost; and speed when contrasted with national court systems and public law (Connolly 2005; Kane et al. 2005; Nyambu-Musembi 2003; Penal Reform International 2000). However, there is also a caution in the literature regarding the difficulty of ensuring women's access to land through customary institutions of dispute resolution (Nyambara 2001; Kasanga 2002; Turner 2005; Human Rights Watch 2003; Lastarria-Cornhiel 1997).

In the following sections we will examine the issue of dispute resolution regarding land in Kisii, Kenya. The research was conducted over a six month period in 2006 and 2007 through the use of structured interviews with women's groups, community leaders, lawyers and public servants. Women are the focus of the study because 1) women in Kisii have less social capital than men and are therefore more likely to have conflicts regarding land and 2) women's property rights in East Africa have been identified as particularly vulnerable to infringement and expropriation (Human Rights Watch 2003; Joireman 2007; Strickland 2004).

This introductory section will be followed by a description of the region and the methodology used in the field research. Then the issue of insecurity of property rights in land for women in Kisii will be addressed with a focus on the types of land disputes that arise. This will be followed by a description of the costs that are incurred by use of the formal and the informal methods of dispute resolution in the Kisii region. A concluding section emphasizing the findings of the paper will follow.

Kisii Region

Kisii region, named after the ethnic group Kisii or Gusii, is located in the fertile highlands of Nyanza province in Southwestern Kenya. The Kisii area is one of the most densely populated in Kenya as it covers 2204 km² and sustains 1.6 million people (Central Bureau of Statistics 2001). This population is almost exclusively Kisii by ethnicity and comprises one sixth of Kenya's population (CIA 2007).

Most of the population engages in subsistence farming, supplementing with cash-crops as acreage allows. The main food crops, raised on farms between 1 and 4 acres, are maize, beans, bananas, sorghum and millet. Cash crops include tea and coffee (Waithaka et al. 2000). The average household size is five people (Central Bureau of Statistics 2001). The average monthly income per capita is 2000 KSHs (\$28)³ (*The Third Welfare Monitoring Survey* 2002) and the average monthly expenditure per household is 3250 KSHs (\$46), 86% of which is spent on food (*The Third Welfare Monitoring Survey* 2002). There is enormous pressure on the land from a growing population. The customary inheritance system requires each son to receive an equal share of the land; consequently the land available for a given family is becoming smaller with each generation.

Kisii region contains three political districts: Kisii Central, Nyamira and Gucha. The administrative hierarchy in each district is made up of a District Commissioner, several District Officers, chiefs and elders (Okuro 2002).

Methodology

As the study was conducted in a rural area and deals with traditional systems of dispute resolution, the research methods employed were qualitative in nature. Care was taken

³ The exchange rate used was 1 USD to 70 Kenyan Shillings.

to conduct interviews in each of the three districts that comprise Kisii so as to make them representative, but complete consistency in this area was not insisted upon.

The initial interviews included semi-structured interviews with various groups and individuals. Sixteen women's groups were interviewed, ranging in size from 15 to 20 people.⁴ The purpose of these interviews was to determine the kinds of land disputes facing Kisii women, the variables that make them vulnerable to such disputes as well as the path they would generally follow in seeking resolution.⁵ Nine interviews were conducted with chiefs and 10 interviews with elders, determining their perceived role in handling land disputes in general. In addition, 30 women who had personally experienced and sought resolution to a land dispute were interviewed in order to understand how the general trends discussed in the women's groups played out in concrete examples. Lastly, three District Officers, two lawyers, and an NGO worker were interviewed in order to gain an understanding of the formal structures that exist for land disputes as well as the informal structures that exist along side these. Throughout this initial period, secondary sources were collected, including the Succession Act and the Chief's Authorities Act.

⁴ Four of these were widow's groups, two were HIV support groups, and two were single mother's groups.

⁵ In order to more fully grasp the demographic of the women in a typical Kisii community, an exercise was conducted with groups of women selected from churches and women's groups from each of the three districts. The women were asked to divide 200 beans into the proportion of women in their community who were widowed, single mothers, polygamous or married to a woman. This exercise provided a general picture of the proportion of women who are in vulnerable categories in terms of land security and access to resources. Traditionally in Kisii, a woman who has not borne a son is allowed to bring a woman with children into her household as the wife of her imaginary son in order to provide heirs for her husband's land. This is generally referred to as woman-to-woman marriage.

The interviews clearly revealed the existence of two distinct paths for dispute resolution. Both initially rely on traditional mechanisms – the intervention of elders and chiefs- but then diverge into two channels, one being the informal channel (A) and the other, (B) the official, formal procedure. In order to determine the women's, elder's and chief's knowledge and perception of these channels, diagrams were introduced, tracing each channel.

Interviewees were asked which channel was officially correct, which best represented reality and the amount of money required at each step of each process. This exercise, with the addition of questions concerning source of income and level of education, was conducted with five women's groups ranging in size between ten and thirty people. These groups were selected from communities representing each district – two of the groups were from Kisii Central, two from Nyamira and one from Gucha. The exercise was also added to the remaining interviews with elders and chiefs, resulting in input from six elders and five chiefs. In an attempt to trace the steps and fees required in the formal channel, lawyers were consulted as well as the Land Registrar's office in Nyamira District.

Women and Land in Kisii

Women in Kisii have use rights to their husband's land and occasionally, if they are unmarried with a child, they will have use rights to their father's land. According to one women's group "that's our land with the husband. You can feel free to use it in matters of cultivating it. But you cannot do any major thing. I cannot decide to sell it" (CA 2006). Women do not have any formal claims on this land, as the title deed is likely to be in the name of the husband, the father or the father-in-law (Nyaundi 2006). Only one woman during the sixteen group interviews claimed to possess the title deed for her land, exclaiming "Yes, myself I have mine!" (Nyamira 2006b). The overwhelming majority of women are then unable to use their land as collateral for a loan or to rent it out. According to all women's groups, they are the ones who do most of the work on the land both for subsistence crops and for cash crops. Only four women's groups stated that they negotiate with their husband about how to spend the money from cash crops (Enyoni 2006; Itogio 2006; Church 2006; Trinity 2006), the remaining eleven affirmed that their husband or father controls the household resources.

Interviews with women, individually and in groups, revealed a preoccupation with inheritance. This particular concern can be understood in light of the large number of widows in the community. However, inheritance issues are multifaceted and in the following section we will be considering women's articulation of their perceived insecurity of property rights due to widowhood, inheritance from parents and polygamy.

The expressed concerns about widowhood reflected challenges to women's property rights from relatives after the death of a spouse. This characteristically takes the form of moving the boundary of the widow's land by planting crops on its fringes or removing the widow from the land and taking her fields. A widow's degree of vulnerability to these

pressures is determined by an interplay of several factors including the gender and age of her children, the payment of bride price,⁶ her character, and her HIV status. Surprisingly, considering the ethnic homogeneity of Kisii, ethnic identity appeared to have no affect on a widow's level of vulnerability.⁷

One of the most salient factors affecting a widow's land insecurity is the age and gender of her children. A woman's value as a wife is largely based on her ability to bear children. Should a woman be widowed before bearing children she is likely to face stigmatization as well as pressure on her land. One woman's group asserted that "according to Kisii tradition, she's useless without children"(Itogio 2006). Much the same pressure, to a lesser degree results in cases when a widow has only given birth to daughters (CA 2006; Trinity 2006). In both of these cases, traditional practices exist to legitimize the widow's presence on the land. These traditional practices involve acquiring heirs through other means such as "marrying" a woman with children⁸ or adopting children (CA 2006; Global Health Reporting 2006; Nyamira 2006a). If these methods are followed a widow's use of the land is legitimized by the presence of heirs. Women's groups agreed that should a widow without sons lack the resources or the will to pursue either of these traditional practices, she would be "chased" from the land - forced to leave by relatives.

A widow's character is also a factor determining her vulnerability to land expropriation. A woman can be considered of bad character for a variety of reasons. She could be suspected of practicing witchcraft, of being sexually promiscuous ("moving around"), drinking to much or being rude or stubborn, particularly toward her in-laws"

⁶ In Kenya, bride price is paid to a woman's family in exchange for her labor which is going to her husband's family. Although, the payment of bride price is increasingly being negotiated within families and relationships it is still seen as a significant indicator of the legitimacy and even legality of a marriage under customary law.

⁷ All women groups as well as chiefs and elders responded that this factor did not contribute to land disputes. Ester Nyanchira, a Luhya, described her conflict with land as pertaining only to her questionable association with the deceased husband, and specifically not to her ethnic identity.

⁸ A widow can pay bride-price for a woman with children so that those children are considered the heirs of the widow. It is as if the widow has paid the bride-price for the wife of an imaginary son whose children are now considered her grand-children and therefore the rightful heirs of her deceased husband. Such a woman-to-woman marriage legitimizes the widow's stay on the land. This practice was mentioned by all women's groups.

(Nyamira 2006b). A widow of bad character is very likely to have difficulty holding on to her land. A study of women's land rights in sub-Saharan Africa notes local level land-management fora make moral and material evaluations of inputs and behavior between male and female household members over a very wide spectrum when adjudicating land claims" (Whitehead and Tsikata 2003). The addition of this factor to the absence of sons or payment of bride price adds significantly to the insecurity of a widow's property rights. The family of the widow's husband will weigh her 'bad character' against the age and gender of her children in making the decision about whether or not she is able to stay (PO 2006; Trinity 2006). District Officer Mawera Monganya affirmed this trend when he stated that "someone might marry a lady who is not accepted by the family. So once the husband dies they are very fast in chasing that lady" (Monganya 2006).

Another concern for women is their ability to inherit from their parents and to retain control over anything they inherit. Traditionally, land was divided solely between the sons. Despite public law allowing daughters to inherit ("The Law of Succession Act" 1981), this practice has remained strong in Kisii. Because of the increasingly irregular marriage patterns, many women have had children but remain unattached to the household of her husband (Hakansson 1994). Such a woman is in a very precarious situation because she needs land to grow food for her children, yet she cannot claim it from her husband. According to all women's groups, a woman cannot inherit land from her father: "the place for the parents is for the boys, you, you are supposed to leave" (Tabaka 2006).⁹ . There was some indication that this tradition may be changing. One group stated that "we don't know in future, because now we have seen differences. Maybe in future we don't know" (Obotaka Self-Help 2006).

⁹ This is the case whether or not the woman has children out of wed-lock. The women in Tabaka Single Mother's Group rented land as a result. The women in Nyosia Single Mother's Group on the other hand, were allowed to live with their parents as part of the household but could expect to be forced to leave when the land is divided among the sons (Nyosia 2006)

The last category of women who are at high risk for land insecurity are women in polygamous marriages. These women face the same factors as those in monogamous marriages concerning children, character, bride-price and HIV/AIDS, but in polygamous marriages, these factors take on comparative value and the women face competitive pressure. Previously, the first wife would be given more land than the second wife due to her senior status. There is some evidence that this custom is still practiced in localized areas of Kisii. According to one women's group "it's obvious that the first wife gets a bigger share" (Tabaka 2006). According to other women's groups however, the practice has now changed: "long ago is when they used to give the elder wife a bigger portion of land, like they had the respect" (Geonseri 2006). Today it is generally expected that each wife is given an equal share of the land. However, a husband can give the wife he favors more land. This favor may be derived from children, character, or simply affection. One women's group stated that "there are instances where this husband loves one wife more than the others" (Geonseri 2006). The number and gender of children also plays a role (Trinity 2006). When a man dies these factors continue to affect the land security of his wives. Women with sons are favored over women with daughters and barren women will have difficulty holding onto their land (Naomi 2006; Obotaka Self-Help 2006).

All of the issues above make women's property rights vulnerable. Women who lose their land to relatives or whose land is encroached upon by neighbors appear to have a choice in terms of which type of adjudicatory structure they can use to pursue their complaint, the formal court system or the informal use of elders and chiefs, what has been the traditional forum for dispute resolution of conflicts over 'family' or customary land.

Dispute Resolution Regarding Land Conflicts

The dispute resolution channels available in Kisii are ambiguous and overlapping. There are both formal and informal/traditional processes of dispute resolution. According to both women's groups and government officials, the first steps in the process include elders and chiefs. However, there is a lack of clarity with regards to what the specific legal role of these local leaders are in handling the disputes.

The structure of the provincial administration is a vestige of British colonial rule. The British government appointed elders and chiefs and above these local leaders they appointed District Officers and District Commissioners. This hierarchical structure was put in place with the intention that the elders and chiefs would deal with local matters and disputes. This "traditional" structure was often imposed upon ethnic groups who had not previously had such a hierarchical system of governance (Chanock 1991b). Instead many had been led by groups of elders from the households making up the community. Traditionally in Kisii, the elders of the household and the surrounding households would handle land disputes. They would come to the place where the dispute was taking place to discuss and reach the best solution while they ate a meal prepared by the women of the household (Botara 2006; Elders group 2006). After independence, Kenya retained this organization of the provincial administration (Okuro 2002), appointing District Officers and District Commissioners from any region, but requiring that the chiefs come from the area in which they work and that they be allowed to carry out their duties through the elders of the community ("The Chief's Act" 1988; SK 2006). The exact nature of these duties as concerns land disputes have however become ambiguous.

Until recently, the provincial administration, and then mostly the chiefs and elders, have carried out their roles as arbitrators in land disputes. According to an assistant chief

from Nyamira “Some days back we used to handle land disputes (Onyego 2006). One of the District Officers explained that “it is a question of using the machinery that is there. The machinery there is the elders. ... [they deal with it] in a customary way. (Gisangau 2006). The policy of the Kenyan government was that land disputes should be solved by the leaders in each community according to the customs of that particular ethnic group or clan. These leaders, although directly employed by the government, do not however have official jurisdiction over these disputes. Their role as arbitrators is legitimated by their duty to maintain peace, order and security in their location ("The Chief's Act" 1988). According to a District Officer, “we want to keep that harmony. That peace and harmony between the communities concerned” (Gisangau 2006).

The role of sustaining peace and harmony extends beyond the chiefs to the District Officers and District Commissioner who also act as arbitrators should the chief and elders fail to reach an agreement between the disputing parties. However, according to an advocate in Kisii town,

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

Similarly, FIDA lawyer Patricia Nyaundi states that a chief or an elder cannot take a decision in a dispute “with any conclusiveness. His decision is not enforceable” (Nyaundi 2006). Nonetheless, this informal system has until recently persisted as the government’s attempt to empower local leaders in dealing with local affairs and disputes.

The court system has, since independence, existed alongside this arbitration system as the only institution with official jurisdiction over land disputes. However, during the presidential tenure of Daniel Arap Moi, the courts were discouraged from carrying out their

jurisdiction over land issues as Moi maintained a patronage system through land allocation (Okuro 2002). A District Officer from Gucha explained that only “where parties cannot listen to one another, we refer them to the court, now for what we call the real litigation” (Monganya 2006).

The courts in Kenya are notoriously inefficient and expensive. Advocate Otieno stated that “the justice system is expensive. ... You’ll find you require a lot of money. First to file your case, secondly to pay your lawyer, and thirdly, the courts are overworked. ... A case can take as long as five years for it to be heard and finished. Even ten years sometimes” (Otieno 2006). Furthermore, the courts are not located in all communities and there is a lack of awareness about their function in land disputes. As a result of this inaccessibility of the courts, until recently, the provincial administration’s arbitration system figured below was the most prominent one in Kisii.

A change has recently taken place in the structure of land dispute resolution channels in Kisii. As previously discussed, the elders traditionally eat a meal in the household where they have gone to solve a dispute. However, this practice has since been replaced by the custom of giving money to the elders when they come to solve your land dispute (SS 2006). Furthermore, it appears that customary law is being increasingly delegitimized as a form of dispute resolution because of perceived abuses (Obarie 2006). The government attempted to change the system by creating local Land Tribunals. A District Officer explained that

it reached a time when the government felt that land issues specifically were getting too technical and there is some kind of misuse of office. You know, even the elders we consider that they are in an office. So, they became too corrupt. ... You go there, even if you are a poor kind of mama, they want to sit together, and before they sit, they want you to give them something small. So the complaints kept on rising until the government decided to start another section of tribunal – something like a local court.” (SK 2006).

The Land Tribunal Act was passed in 1990, during the Moi regime, but has only recently been implemented in Kisii. According to Margret Kajuju from the Land Registrar's Office in Nyamira, the Tribunals were established in Nyamira in 2004 (Kajuju 2006); in Kisii Central it has been “hardly a year now” since they were established (SK 2006); and in Gucha they have been in place since 2003 (SS 2006). These tribunals were given jurisdiction over land disputes and were to replace the provincial administration's role of arbitration, and to provide a more efficient and less costly alternative to the court (Nyamu-Musembi 2003). Like the elders and chiefs, the members of the tribunal are chosen from the local community so that they are familiar with the local customs, but unlike the provincial administration, they have been given jurisdiction over land disputes and are bound by statutory law (Kajuju 2006).

Thus officially, the elders and chiefs no longer have an arbitration role but are only to refer those who have cases to the land tribunal. Chief Jane Botara stated that “because of the government policy, I have to advise the people to go and see what we call the Land Tribunal Board” (Botara 2006). Similarly, a group of elders in Kisii Central explained that they no

longer hear many land dispute cases because people are referred to the land tribunal (Elders group 2006). If traditional authorities should fail in solving a land conflict, the court remains the only avenue for dispute resolution. According to an assistant chief from Nyamira, “they changed, now they said the chiefs, they should recommend the tribunal. Then if the tribunal fails ... it has to go to court” (FO 2006). The current, official dispute resolution channel, where elders and chiefs serve only the role of referral, is depicted below.

Neither of these systems appear to be representative of the path that most women take in order to solve their land disputes. Although most of the chiefs and many of the elders acknowledged that they no longer had an official sanction to provide arbitration in land dispute cases, almost all asserted that they would still hear “small cases” if they were able to solve them (MO 2006a; PO 2006; SS 2006; ZN 2006). Only should they fail to reach an agreement between the parties do they refer them to the Land Tribunal. In other words, they

have retained their arbitration roles. According to a study of the Land Tribunals, “the involvement of the Provincial administration in land issues continue to work against the aims of the Tribunals” (Okuro 2002). This attitude on the grass-roots level seems to suggest that the official structures have little effect on the community level. This seems to suggest the existence of a dispute resolution system, confined to the local leadership of elders and chiefs pictured below.

Perceptions of Accessibility of Dispute Resolution Channels

The diagram exercise was designed to ascertain which dispute resolution mechanism should be used for conflicts over land. It revealed great inconsistencies with regard to which dispute resolution channel was the correct one to follow. Of the five women’s groups, two selected channel B as the correct path, two selected channel A and one selected channel B with the modification of removing the Land Tribunal. The former two groups included women who were employed while the latter three were comprised exclusively of subsistence farmers. This suggests that those who are of a higher socio-economic status are well informed of the systems in place and recent changes that have taken place in the structures; while those who are of a lower socio-economic status have limited awareness of the channels

available to them and the changes taking place within them. Of the eight elders and chiefs who participated in the exercise, six selected channel B as the correct path but combined it with channel A. Chief Jane Botara explained

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

The change in the official dispute resolution channel seems to be perceived by the provincial administration as an addition, rather than a change. Where the intention was to change the arbitration role of the provincial administration into one of referral, the result has been simply an addition to the judicial role following the failure of arbitration. The remaining elder and assistant chief selected channel A as the correct path suggesting a delay in the dissemination of information within the provincial administration. The answers from women, chiefs and elders concerning the correct dispute resolution path revealed ambiguity and inconsistency in the understanding of the official dispute resolution channel among not only the women who might use the dispute resolution systems, but those who were to advise people regarding appropriate procedure.

All who participated in the exercise held that C was the only accessible channel for women with land disputes. The overwhelming reason given was the financial requirements of all resolution forums beyond the chief. Each women's group as well as each chief and elder were asked to estimate the cost of the steps in their chosen correct resolution channel. The average amount for the Land Tribunal was 3700 KSHs (appr. \$53). The average monthly income per capita in Kisii is 2000 KSHs (\$30) for 2006 (Kisii.com 2000). In other words, more than a month's income would be spent on the land dispute. Officially, to file a claim at the Tribunal costs 1000 KSHs (\$14) and should the tribunal members visit the land that is

being disputed, there is an additional cost of 500 KSHs (\$7) (Kajuju 2006). However, according to Margret Kajuju from the Land Registrars in Nyamira and FIDA lawyer Patricia Nyaundi, the disputing parties are also requested to pay for lunch and transport for the tribunal members since their salary of 500 KSHs per case does not suffice (Kajuju 2006; Nyaundi 2006). The women's groups as well as chiefs and elders who chose some variation of resolution path B, claimed that taking a dispute to court would cost at least 10,000 KSHs (\$142). This was confirmed by FIDA lawyer Patricia Nyaundi who estimated that a court case would cost between 10,000-30,000 KSHs (\$142-\$428) and would sometimes take years to settle (Nyaundi 2006). Again, for a woman who is likely to earn 2000 KSHs (\$28) or less, these costs are completely insurmountable.

Those women's groups who chose dispute resolution path A, estimated that taking a case to the District Officer or District Commissioner would cost 70,000 KSHs (\$1000)¹⁰. Rather than an accurate estimate, this appears to be an indication that none of these women have approached the District Officer or District Commissioner with a case and have the perception that doing so would cost a sum of money far too large for them. The elder and assistant chief who chose dispute resolution channel A claimed that there were no costs involved for the District Officer or the District Commissioner.

Pursuit of a case to the Land Tribunal and Court or District Officer and District Commissioner appears closed to a Kisii woman with a land dispute since she is likely to have very limited resources. She would have difficulty paying the official fees as well as lunch and transportation for the tribunal members of the Land Tribunal, nor would she be able to pay 10,000 KSHs (\$142) to start a lengthy court process. Finally, she is likely to perceive the District Officer and District Commissioner as financially inaccessible to her. As a result, she

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

is left to pursue dispute resolution path C, chosen by all participants in the diagram exercise as the one most accessible to women.

Dispute resolution path C is the one that appears to be least costly for a woman with a land dispute and yet it too remains too expensive for many of the most vulnerable women. The women's groups as well as the elders and chiefs were in agreement that there is no cost at the initial family level. At the level of the elder however, a woman bringing a land dispute must pay some money. As discussed earlier, this custom of paying the clan elder has replaced the previous tradition of providing a meal for the elders who come to the household to solve the dispute (PO 2006). The amount of money varies in each case. An elder from Gucha explained that they don't "have a fixed amount that you pay, but you pay what you can afford" (AO 2006). This then starts to suggest that if one party is able to pay more money than the other, the elder may be compromised in his ability to handle the dispute. There is no accountability for this payment, as an elder from Kisii Central admitted that "they usually ask for this informally. ... But they are not supposed to ask for anything" (ZN 2006). During the diagram exercise, the elders and chiefs estimated that a woman would on average pay 140 KSHs (\$2) to have the elders resolve a dispute. The women's groups on the other hand estimated that taking a dispute to the elder would on average cost 980 KSHs (\$14). It is then perceived, that even going to an elder is too costly for a woman subsisting on 2000 KSHs (\$28) a month or less, the first step might require half her monthly earnings. The elders and chiefs claimed that there were no costs at the chief's level but the women's groups estimated that woman would on average pay 2500 KSHs (\$35) to the assistant chief and then to the chief. Again, this kind of cost is too high for an average woman in Kisii.

The existence of this informal payment was the most consistent factor in the personal accounts of land disputes. In observing the trends of their answers, it became apparent that in order to win a case, a complainant must be able to pay more money than their opponent. For

example, SM approached the elder concerning a dispute in which her son had sold her land. She gave the chief 200 KSHs (\$3) but the chief did not rule in her favor “because the chief had been paid money by the buyer. ... they paid enough money” (SM 2006). In another case, a widow had been promised by the chief that her land would be given back to her. However, when they met with the disputing party to give her the land, the chief asked her for 7000 KSHs (\$100), knowing that she would not be able to pay him the money. She attributed this demand to the fact that her opponent had paid him more money than she had. The chief then confirmed, through this request, that she could not pay him more than the other party, and thus passed his judgment that she would not be given the land (MO 2006b).

The average estimated costs required to approach the elders and chiefs, although lower than those required for the Land Tribunal and the Court, remain an obstacle for women with severely limited resources, which are also those who are most vulnerable to land insecurity and disputes. In conclusion then, both the formal and the informal dispute resolution channels are inaccessible to the women who are likely to have land disputes because their cost is too high.

Conclusion

Many women in Kisii have insecure property rights. Widows, women in polygamous marriages and unmarried women with children are particularly vulnerable to being driven off their land or having their land encroached upon by their in-laws, sons or fathers. The women facing the greatest insecurity are also the women who are likely to have very little access to resources. The formal dispute resolution channels available to them in the form of the Land Tribunal and the Court are far too expensive relative to their income. However, even the informal dispute resolution channel in the form of elders and chiefs are too costly for the most vulnerable women. These difficulties in accessing informal dispute resolution mechanisms

are present for men in the society as well, although their access to family resources is less limited and their vulnerability to property rights disputes is attenuated by the fact that they have control over land rather than just use rights to land.

Contrary to the assumptions in the literature regarding informal dispute resolution systems they are not always more accessible because of their local knowledge, proximity and lack of expense (Connolly 2005; Kane et al. 2005; Nyambu-Musembi 2003; Penal Reform International 2000). In Kenya we observe a monetization of the traditional role of the elders with all of the attendant rent-seeking possibilities that entails. Moreover, despite changes in law at the national level that are designed to limit the role of chiefs and elders, people in rural areas far from the center of power still seek their intervention in the resolution of all property rights disputes and chiefs and elders are still willing to fulfill that role. This is consistent with the work of Fitzpatrick who suggests that property rights failures in the Third World can be best described in terms of enforcement mechanisms (Fitzpatrick 2006). In this particular case, women have difficulty defending their use rights to land (and note that this is a far weaker claim to land than title or even autonomous possession) enforced through state channels and have difficulty using traditional mechanisms. Women were chosen as the focal point of analysis for this study because of their perceived lack of social power, yet we can be certain that the issues of legal channels and the cost of dispute resolution through the customary system would be the same for both men and women.

The effectiveness of municipal administrations in rural areas far from the center of power has been questioned in the literature on the state and development (Boone 2003; Herbst 2000) and in recent work on public administration in Africa (Olowu and Wunsch 2004). In this particular paper we have documented the causes of property rights disputes for women in the Kisii area of Kenya and their choice of legal forum for the resolution of their disputes. Kisii is far from Nairobi and it is clear that women do not perceive the formal/legal dispute

resolution method as open to them. We have also captured the costs of pursuing the customary and the formal methods of dispute resolution with regard to land rights and noted that both of them appear to be beyond the means of rural women seeking to defend their limited, use rights to land.

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