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3.1 The evolution of the land question in Kenya

Kenya's land question has roots in the colonial policies which were designed to establish a stable foundation for the colonial settler economy. The colonial authorities sought to woo settlers into the country by giving them the best land, and by moving local people away from land proximate to them (Okoth-Ogendo 1979, 1991; Wanjala 1996). The first step, from which others followed, was alienation and acquisition of land by the protectorate as a prelude to the establishment of a colonial state. The sequel to this was imposition of English property law and its acclamation of title and private property rights. This, together with other legislation, provided a juridical context for the appropriation of land that had already taken place and the land tenure reform that was to follow. These developments resulted in an inequitable land distribution as indigenous people were driven from the most productive lands to those with poorer soils and less favourable climatic conditions.

One of the most important early measures was the introduction of the *Crown Lands Ordinance* of 1915. This declared all 'waste and unoccupied' land in the protectorate 'Crown Land' and subject to the governor's powers of alienation. It created the reserves for 'natives' and located them away from areas scheduled for European settlement. Creation of what Mamdani (1996) refers to as 'citizens' (settlers) and 'subjects' (Africans) began in earnest, based on a dual system of land tenure and land administration seen as necessary conditions for the consolidation of colonial rule. Customary tenure governed Africans' relationship to land, and was enforced by chiefs who were appointed by the colonial state to help in their administration. By contrast, an individualised tenure regime, to which was attached a high level of rights, obtained for settlers (Mamdani 1996). The Ordinance took away all the rights of Africans and vested them in the Crown. The result was, as Okoth-Ogendo (1991) puts it, that African occupants became 'tenants of the Crown'.

In creating the reserves in areas deemed unsuitable for European settlement, the colonial authorities drew their boundaries along ethnic lines and ensured by law that subjects could not reside in any reserve other than the one allocated to their own ethnic group. This had the effect of reifying ethnic identities and divisions, and creating a legacy whereby control of ethnic groups and of land became two sides to the same coin. A clear process, which linked ethnicisation and politicisation of mechanisms for control of land, had begun in earnest.

In the long term, the problems in the reserves led to unrest and eventually to a political uprising – the Mau Mau resistance movement that organised around the issue of land. The colonial state's answer to the unrest was to initiate an ambitious project of land tenure reform in the reserves.

Land tenure reform

The land tenure reform program was introduced in the mid-1950s to arrest the political and economic crisis, of which the Mau Mau rebellion was the most threatening manifestation. The manner in which these reforms were effected had significant consequences for the control of land in the whole colony, and in particular for the nature of Kenyans' access to land. The essence of the tenure reform strategy was 'slow individualisation' which would mainly benefit those who were considered 'progressive farmers' – notably chiefs, other loyalists, and civil servants (Lamb 1974; Lonsdale 1992;

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Njonjo 1978; Sorrenson 1967). The strategy was largely devised by the then Assistant Director of Agriculture, RJM Swynnerton, to whom the responsibility for drawing up a programme for the Native Land Units was entrusted. Swynnerton came up with the *Plan to Intensify the Development of African Agriculture in Kenya*, thereafter known as the Swynnerton Plan. The Plan aimed to provide the African farmer with secure title to private property so as to encourage him to invest his labour and profits into the development of his farm. The hope was that by creating a prosperous African farming class, the threat of rebellion would be neutralised.

The procedure of individualisation provided for under the Swynnerton Plan was essentially one of systematic demarcation. When an area was declared a demarcation area, the procedure began with the adjudication of individuals' land rights – including within what until then had been regarded as clan land – whereby individuals would show an appointed Land Adjudication Officer and the local Land Committee what they considered to be their or their families' different fragments. A register of existing rights was compiled and opened to public scrutiny for 60 days, during which people could file objections. In the absence of objections, surveyors appointed by the Land Adjudication Officer would undertake the demarcation of new consolidated plots. An individual's consolidated plot was meant to be equivalent in extent to the total of his fragments, some or most of which would have to be relinquished. The new consolidated plot would then be registered.

The impact of the Swynnerton Plan is contested. There is general agreement that chiefs, loyalists and the wealthy acquired more land than others, while the lower social groups lost considerable amounts of land, especially if they did not participate in the adjudication of their rights (Lamb 1974; Sorrenson 1967). The land consolidation aspect of the Swynnerton Plan meant that some individuals were required to move from the land they had occupied for many years to new land elsewhere. This form of displacement, locally referred to as *songa songa*,¹ has been the source of incessant disputes, some of which have halted the reform programme in their respective areas. Partly for this reason, ongoing individualisation does not necessarily involve consolidation – adjudication on a 'where is basis' was introduced later to facilitate the reforms in areas where consolidation appeared unnecessary or too difficult.

Post-colonial land policy

Post-colonial Kenya inherited virtually unaltered the colonial legal framework for the reform of land tenure and of protection of private land rights. The state adopted all the ordinances relating to control of land and made them laws by which it was to regulate access to land. The *Crown Lands Ordinance* of 1915 became the *Government Lands Act* (Cap.280). Like the Ordinance, which gave the Governor all the powers regarding control of the Crown Lands, the Act vested in the state, through the President and the Commissioner of Lands, all the powers regarding disposition of government land or former Crown Lands. The Act constituted the state as the 'main landlord'. In other instances the use of the colonial land laws generally meant ratification of titles in favour of colonial settlers as absolute owners of expropriated land, thereby sealing the fate of the landless and squatters and intensifying their insecurity of tenure.

¹ KiSwahili for 'move a few paces'; it is used here to mean movement of households and their land holdings.

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Policies followed since independence have sought to confer absolute and indefeasible titles on the registered landholders regardless of the prevailing tenure arrangements. This has eroded the principle of multiple rights in land and enforced exclusivity, or at least accelerated a trend that of its own would probably have proceeded more gradually. The primacy of individualised ownership was even meant to be applied to the 'arid and semi-arid lands' (ASALs), which comprise two-thirds of Kenya's surface area. It was more the practical difficulties of imposing this form of tenure, rather than its evident inappropriateness for Kenya's pastoralist systems, that has prevented the large-scale application of private ownership to the ASALs as well:

In the ASALs, tenure reform has been slow mainly because of personnel shortages, hostile terrain and, recently, official doubts as to whether the Swynnerton prescription is really what is needed there. (Okoth-Ogendo 1999: 9)

3.2 Debates regarding tenure change and growing population density

There is an abiding debate as to whether the individualisation and registration of land rights is a worthy policy objective. This is quite apart from the objections raised to the ideological and strategic basis for its introduction, for example as with the Swynnerton Plan. Criticisms of Kenya's land titling process have included that it has resulted in an increase in the incidence of land disputes, diminished the amount of land available to some groups and thus threatened their food security, heightened inequalities between individuals and groups, and (further) disadvantaged women. On the other hand, it is recognised that some households did derive more tenure security by virtue of the process, and it is possible that secure title has contributed somewhat to agricultural productivity (Quan 2000). Hunt argues that one should not dismiss the case for anticipatory adjudication, for example, to prevent land degradation and take advantage of certain agricultural opportunities, but that ultimately much depends on the manner in which the adjudication process is undertaken, for example to 'strengthen the rights of underprivileged groups such as women' (2003: 8).

It is not our intention to enter this debate in depth; however it is impossible to avoid it entirely since what is at stake is intimately related to the salient issues investigated in this research, namely the vulnerability of some rights holders in the context of the land tenure systems that currently exist. Our point of departure is that, before deliberating the impact of land registration, it is important to consider the influence of population growth. Growing population density has the effect of increasing 'land pressure', which is generally construed to mean that as land becomes more scarce, competition for it rises. This has two important effects. First, it increases the likelihood of disputes over land, whether these occur at the frontier between tribes, clans, lineages, households or household members. And second, particularly in a context whereby land can be bought and sold, it implies that the perceived economic value of land rises. Kenya's rural population density increased by a factor of three between 1962 and 1999.

It is difficult to isolate the impact of population pressure from institutional changes, in particular the formal registration of land that started under the colonial regime and now covers 90% of all of Kenya's trust land areas excluding the ASALs (Okoth-Ogendo 1999: 9). However, the ascendant conventional wisdom since Boserup (1965) is that increasing population pressure, especially in conjunction with agricultural commercialisation, tends

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to lead to the individualisation of land ownership, whether this happens spontaneously at the local level in terms of innovations in local customs and institutions, or whether it is the motive force behind state-led initiatives introducing statutory tenure systems that either allow for, or give primacy to, privatised tenure.² Although it is clear that the 1954 Swynnerton Plan was not a reaction to developments on the ground so much as an attempt to counter the threat of the Mau Mau insurgency (Kanyinga 2000), and took the form of the imposition of a European recipe for agricultural development, in fact it did roughly parallel a process that was already underway in at least some of Kenya's arable zones. As one example, Brokensha (1971) demonstrates that before land adjudication began in Mbere Division of Embu District in the early 1970s, it was the case that individual land ownership was widely recognised and provided for in terms of local custom, and moreover that a land market already existed and operated according to local rules.³ This occurred by virtue of rapid population growth and increased opportunities to market agricultural commodities, and notwithstanding the fact that Mbere Division was relatively isolated and neglected by the government. While individual ownership co-existed with forms of group ownership (particularly by the clan and lineage), 'collective land' as such was absent, except for some areas that were suitable only for grazing. This observation suggests two critical conclusions. First, the indigenous tenure system of the Mbere (and many other groups) could be described as 'customary,' but certainly not strictly as 'communal'.^{4,5} Second, 'customary' tenure should not be assumed to be fixed and stagnant, and indeed there is evidence to suggest that customary tenure is often more dynamic than statutory tenure, because customs can in many instances evolve more fluidly and appropriately than systems prescribed in law.

In some places, the land registration drive pursued, first by the colonial administration and then by the independent state, left the indigenous customary tenure system largely untouched, at least for a while. Shipton (1988) argued that in Southern Nyanza people did not perceive any advantages to engaging with the land administration system,

2 The concept of 'ownership' is not straightforward, as it can embrace various 'bundles of rights' depending on the circumstances, often with a discrepancy between *de jure* and *de facto* understandings (see for example, Bruce & Migot-Adholla [1994]). For our purposes, we generally take 'ownership' – whether in terms of statutory or customary law – to imply largely exclusive use rights and right to bequeath, but not necessarily the right to alienate. Customary tenure systems are sometimes portrayed as inherently antithetical to exclusive use rights, but the evidence suggests rather that acceptance of secondary rights is likely to diminish as land scarcity sharpens. The overall tenet that increased population density and favours the emergence of individualised tenure, albeit in fits and starts, is commonly known as the Evolutionary Theory of Land Rights (ETLR), though this is not to suggest that the theory is not controversial (for example, see discussion in Platteau [1996]). The somewhat different idea that formal institutions adapt or are introduced in reaction to local developments is captured in the so-called 'induced institutional innovation hypothesis' (see for example, Hayami & Ruttan [1985]), which is not strictly about land tenure but has been applied in a manner complementary to the ETLR.

3 Brokensha points out, furthermore, that the majority of buyers were not outsiders, as one might suspect, but rather people from the same area and belonging to the same clan as the seller.

4 'Communal tenure', properly speaking, is a regime whereby land is held and/or used collectively by members of a community. Communal tenure is likely to obtain where there is no interest or advantage in asserting individual (or family) ownership over land, i.e. because land is so abundant. This is the case with swidden agricultural systems, which are efficient so long as land is in copious supply, but impractical when it is not. In contrast to cultivation, pastoralism is usually much better suited to communal tenure systems. Except where elites attempt to extend exclusive control over 'ranches' in order to accommodate large herds, greater population pressure tends to place more importance on the rules and controls over use of communal grazing, rather than inspire individualisation.

5 Mackenzie (1989) stresses that in Murang'a District of Central Province (more or less midway between Thika and Embu Districts) the emergence of a land market was in the first instance related to community members' growing access to non-farm income in the colonial economy, but for a long while 'sales' effectively remained a form of indefinite lease in that the 'seller' was deemed to have the right to 'redeem' (take back) the land upon demand. In the 1930s and 1940s, the spiralling of land disputes associated with land redeeming led the colonial government to narrow the conditions under which sellers could seek to redeem their land. One interpretation of this gradual and conflictual process is that the numbers of buyers who wished to consider their purchases final grew in influence if not in numbers.

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especially since it was not costless to do so. Even today in Bondo District some households have not bothered to 'collect their titles,' the existence of which is of little interest to them. The fact that Kenya's title registries are hugely out of date (Okoth-Ogendo 1999) is often taken as an indication that this is still the case, not just in Nyanza, but across the country. However, the extent to which this interpretation is correct – even if it used to be and even if it still is in some areas – turns out to be an important theme in this research. In contemporary Nyanza, as elsewhere, a possibly more up-to-date interpretation is that the customary and the statutory systems co-exist and operate within somewhat distinct domains. Statutory ownership through titles plays a significant role in defining which family or clan owns land, and also offers a mechanism through which senior family members can exert control over land. Meanwhile, questions of succession and alienation are governed by customary rules, and enforced by those who traditionally controlled the land, but who now also control it by means of controlling titles.

What can safely be said is that the situation varies greatly by region, and will likely continue to change over time. Moreover, even where the imposition of statutory tenure was not wholly foreign or incongruous with spontaneous developments on the ground, it had far reaching influences on how people and communities related to land. One important aspect of the land registration drive in the highlands was the land consolidation that was imposed as an essential ingredient of the process. The need for land consolidation was premised on the argument that 'correcting' for land fragmentation would enable farmers to achieve economies of size and thus progress more rapidly as commercial agriculturists. The economic argument for consolidation has since been tempered by the countervailing argument in which the risk-diffusing value of dispersed land holdings is acknowledged (see for example, Ellis 1993). By having plots in different areas, a smallholder (even one who is commercially oriented) is able to mitigate both production and market risk, because different plots have different soil and micro-climate conditions, often making them suitable for the production of different crops. What was construed as a process of fragmentation was often in fact a deliberate strategy to diversify, as is amply supported by the fieldwork conducted for this study.

Another important consequence of the state-led registration drive and the statutory tenure system it imposed, was 'rigiditisation.' Brokensha states that: 'land adjudication inevitably introduces finiteness and rigidity and thus harshly disrupts the old flexible system...' (1971: 3).

The introduction of statutory tenure and women's land rights

A complex debate exists as to the consequences for women of the introduction of statutory, individualised tenure. On the one hand, it is claimed that the 'rigiditisation' mentioned above has been especially to the disadvantage of women. Shipton's study of land tenure in Nyanza province concluded that: 'registration has effected a hardening on men's land rights into absolute legal ownership, to the exclusion of women and children' (1988: 119) – meaning not that it introduced the bias in favour of men's rights, but that it reinforced the bias that existed already and, arguably, made it more resistant to forces of change that might otherwise have redressed the imbalance.⁶ Mackenzie (1989) reports how the individualisation of land rights in the highlands tended to weaken or extinguish women's usufruct rights to land. As it stands, it was not until 1990 that the male bias

⁶ It must be stressed that this is not a statement to the effect that, left alone, customary law would necessarily evolve in a manner favourable to women's rights in land. However, there is some evidence, discussed in following chapters, that customary practice has evolved in this direction in welcome ways, notwithstanding its slow pace.

given statutory standing since the *Registered Land Act* of 1963 (and which can be traced back to the *Indian Transfer of Property Act* of 1882) was partially redressed through the issuing of an administrative directive, 'to ameliorate the discrimination against women's land acquisition, inheritance, and rights over land alienation' (Wanjama *et al.* 1995, paraphrased in Gray & Kevane 2000: 15).

On the other hand, a different perspective is that rigiditisation can occur due to population pressure itself irrespective of tenure formalisation:

As shifting cultivation is accompanied by growing population density and settlement stability, tendencies toward the regulated transmission of collective rights may give rise to unilineal kin groups A unilineal descent group can both reduce conflict over land among its members and secure cooperation beyond the nuclear family for the defence of scarce resources. (Netting 1993: 164).

In many if not most instances, the form assumed by unilineal descent is patrilineality.

Moreover, statutory systems, where they exist, can be and are used by women to protect their rights. Haugerud (1989) notes that, in Embu, by placing a 'complaint' with the land registrar's office, a woman could prohibit her husband from selling land unilaterally. Of the 1 100 plus titles registered in the Embu coffee and cotton areas, 2.5% had complaints registered against them by women. Evidence of women turning to statutory institutions to assert or defend their land rights emerges clearly in our study.

3.3 Demographic change in Kenya and the impact of the HIV/AIDS epidemic

Kenya's population increased from 5.4 million in 1948 to 28.7 million in 1999 (Central Bureau of Statistics 2002; Morgan & Shaffer 1966). Results of the 1999 census indicate that the inter-censal population growth rate for Kenya is 2.98% per annum. This represents a decline from the growth rate of 3.8% recorded in the 1979 census, at that time the highest in the world. Between 1993 and 1999, the annual population growth rate was 1.66%. It is therefore little wonder that Kenya's population failed to reach, by a wide margin, the 35 to 38 million in the year 2000 that was projected in the early 1980s (Central Bureau of Statistics 1983).

The declining population growth has been caused by both declining fertility rates and increases in mortality associated with the HIV/AIDS epidemic. The crude birth rate increased from 50 per 1 000 in 1969 to 54 per 1 000 in 1979 but declined to 48 per 1 000 in 1989 and 29 per 1 000 in 2000. Some observers suggest that this dramatic decline in the crude birth rate during the 1970s and 1980s is indicative of Kenya entering the 'demographic transition' over this period, with the most dramatic impact being on the 'reduction in the "demand" for children' (Kelley & Nobbe 1990: xv). Simultaneous with these dramatic declines in the crude birth rate, and to some extent contributing to it, this same period is associated with significant change in cultural norms in respect of marriage and reproduction. Among the changes that have been noted are: a decline in polygynous marriages; an increase in pre-marital sex and teenage pregnancies; an increase in the frequency of divorce and separation; and an increase in the incidence of children born to single women (Acholla-Ayayo 1988).

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The crude death rate declined from 17 to 11 per 1 000 between 1969 and 1989 but has since increased to 14 deaths per 1 000 population by the year 2000. Similarly, the infant mortality rate declined from 119 deaths per 1 000 live births in 1969 to 88 and 66 in 1979 and 1989 respectively, but increased to 69 per 1 000 by the year 2000. The reversal of the trend of declining death rates can be largely attributed to the HIV/AIDS epidemic. Presently, it is estimated that 1.5 million Kenyans have already died from the virus, while about 2.2 million Kenyans are currently infected with HIV (Ministry of Health 2001). Approximately 500 to 700 AIDS-related deaths occur per day. In general, for women the highest incidence of AIDS is among those 25 to 29 years, while for men it is those who are 30 to 34 years old (Gathenya & Asanga n.d.).

Kenya's pattern of demographic change therefore appears to be a function of two trends: first of all, declining fertility due to people's choices to have fewer children; and second, the dramatic impact of HIV/AIDS on the country's population. It is likely that both of these trends will continue, and that the rate of population growth will continue to decline. However, population growth is still expected to remain positive: from a value of 1.53% for 1989–1999, the rate of annual population growth is expected to fall to 1.06% for 2010–2015 and to 0.72% for 2020–2025 (UN Population Division 2003). Thus overall population densities will continue to mount, albeit at a greatly reduced pace.

The main socio-economic impact of HIV/AIDS is its decimation of the labour force and the level and allocation of savings and investment, which portends a humanitarian crisis with far-reaching social consequences. As elsewhere, the HIV/AIDS epidemic in Kenya is primarily concentrated in the working-age population (ages 15 to 49), placing a disproportionate burden on the economically active population that remains, and/or elderly people who would not otherwise be responsible for the upkeep of themselves and their grandchildren. The epidemic also places a particularly great burden on women who bear more responsibility for the care of ailing family members, and who experience more infections at an earlier age than men.

One of the most worrying developments is the severe impact of the epidemic on education, worsening the performance of an already under-performing sector. Most children infected with HIV/AIDS at birth do not live to enrol in school. Many children have to drop out from school when they become orphans or to tend sick family members. Many teachers are dying from AIDS thus depleting the sector of manpower. The cost of schooling in poor households additionally burdened with HIV/AIDS is another factor.

In the informal sector, which accounts for the majority of workers, especially in agriculture, it is evident that sickness and mortality due to AIDS result in the depletion of savings, and the loss of key skills and organisational capacity in food production in households where one or more members are sick with AIDS.

