

11. 6. 3 Institutional encounters: European property rights in colonial contexts. Part II Africa

How European concepts of marriage and land ownership exclude rural women in Kenya from accessing and owning property

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ABSTRACT: *The British colonial land policy began when Kenya became a crown colony in 1920 and all the land was assumed to belong to the crown. The British were interested in the highland areas because of their favourable climatic conditions. Africans were displaced from the highland areas such as Central province and Rift Valley province and both quickly earned the name “The white highlands”. The acquisition of African lands took place through the Crown Land Ordinance of 1915 and imposed English tenure of land. In 1932, the Kenya Land Commission was appointed and charged with the responsibility of appropriating land to Kenyans and British settlers in accordance to the British colonial laws. By 1954, the Kenyan guerilla freedom army Mau Mau demanded for land back and many were killed by the British. In 1963, Kenya attained independence but continued with the policies left by the colonialists.*

Property concerns the organization and legitimating of rights and obligations with respect to goods that are regarded as valuable. Property is multi-functional. It is a major factor in constituting the identity of individuals and groups. In Kenya, the form of property that is important in shaping the identity of communities is land. Through inheritance, it also structures the continuity of such groups. It can have important religious connotations and it is a vital element in the political organization of society, the legitimate command over wealth being an important source of political power over people and their labour, no matter whether we think of domestic or kinship modes of production, capitalism or communism. (Beckmann, Beckmann and Wiber 2006:2).

Property in the most general sense concerns the ways in which the relations between members of a society with respect to valuables are given form and significance. Such relations are comprised of three major elements that include (i) the social units (i.e individuals, groups and lineages) that can hold property rights and obligations; the (ii) the construction of valuables as property objects and (iii) the different sets of rights and obligations social units can have with respect to such objects. All these three are set in time and space. In Kenya for example, matrimony becomes the space through which a woman can access land through her user rights as a wife but she has no ownership rights to that land. Although matrimony creates a convergence for women to access land, there is no law that recognizes the need for women to own Matrimonial Property. The institution of marriage has laws that govern it which are separate from laws that govern matrimonial property such as land.

The convergence of colonialisation and marriage law in Kenya

In most ethnic communities in Kenya, marriage was an institution that ensured security of land tenure for women because marriage was not just one 'European styled' civil ceremony at a church or at the Attorney General Chambers; it involved the community's participation through the various ceremonies performed. Ceremonies such as dowry negotiations, bride price and compensations in case of divorce. These ceremonies protected women's right to matrimonial property such as land.

Bride price or dowry is common among most ethnic communities of Kenya. In the most communities it symbolises compensation for the loss of a productive member who is acquired by her husband and his kin group. Among the dowry negotiations include the active participation of elderly women at the negotiating table. The dowry received is a form of bride price that is 'kept' for the bride so that in the event of a divorce, it would be used as maintenance. According to Droz (1999:165), 'La belle famille considérait que le prestige de donner sa fille comme épouse a un héros tenait lieu d'assurance – mariage: les deux familles étaient tout aussi solidement unies par le prestige que par un capital économique'. Also according to Gary Feraro(1976 : 104-105 *as cited in* Droz), 'the donors and recipients of *dowry* extended beyond the nuclear families of the groom and the bride respectively, thereby producing a visible involvement to two relatively wide groups of kin in the maintenance of their marital union. So because of the involvement of these groups of kin in traditional marriages, *dowry* functioned as a stabilizing agent of marriage and a general mechanism of 'social control'.

Gender differences in group membership and social identity are closely linked with patterns of inheritance and resource distribution. For many ethnic communities in Kenya, their major form of property is the land. A female child's membership of her father lineage is neither permanent nor complete. She is seen as someone born into such and such a family but is not seen as a member in perpetuity. Her rights to maintenance and residence must necessarily be transferred from her natal family to her husband's family. She is destined to change her social identity. If she remains unmarried or becomes divorced she continues to bear the name of her natal family. Kanogo (2005:43), states that women are more vulnerable to insecurity of land tenure when their access to land is limited through custom and or law. Cultural limitations generally operate to require that a woman remain in a viable marriage in order to enjoy access to agricultural land.

The modern Kenyan marriage which is based on the European model subscribes to the Married Women's Property Act of 1882 which in theory provides for the equal division of property between spouses upon divorce. This Act is still in existence today. The ability of a woman to claim property rights under, either the 1882 Married Women's Property Act, or succession laws depends on her ability to establish her marital status. According to Griffin (2003:62) during parliamentary debates in Britain between 1868 and 1880s, the striking feature was that little time was spent discussing the principle of sexual equality and in fact more time was spent discussing the idea that giving married women property rights would cause discord in the home. All this was against the background that it is the women from low classes with "drunken, wife beating husbands" who needed such protection from the law.

Between 1868 and 1880s, the concerns that British politicians had on household harmony formed part of a coherent pattern of thought that dominated the thinking of the educated classes that dominated the gender relations of the nineteenth century. Ben Griffin refers to this as the "Victorian domestic ideology". This ideology was promulgated not only in the political speeches but also in legal texts and judicial decisions, the vast marriage advice literature of the nineteenth century and also various religious texts. To explain the fear of household discord which had a strong effect on the Victorian educated masses, Griffin explains that the immediate cause of this was the American War of independence. The horror with which the British viewed this conflict was through images of unnatural family affair or domestic strife. (Griffin, 2012: 32).

The restoration of household harmony became a pressing cultural preoccupation. The result was therefore to reassert gender roles and root them in clear biological difference between the sexes that justified female submission. There was a national effort to set British house in order and establish the nation's virtue in the adherence of particular moral codes¹. The shock of the French revolution and the trauma that followed only reinforced these anxieties prompting the abandonment the codes of "politeness" and "sensibility" that had regulated the eighteenth century masculinities and replacing them with new discourses that emphasized "character" rather than "refinement" in the crucial component of manliness. Davidoff and Hall (*as cited in Griffin 1990:40*) argue that, consequently by 1840, this Victorian domestic ideology which had originally been linked to evangelicalism had become the common sense of the middle class. Victorian politicians were so concerned about household discord because the home needed to be a "peaceful place for a man to contemplate God" and to be able to provide him with the peace and quiet he required to build his character.

The law previously gave a husband two rights over his wife's property, the *jus mariti* by which the title to personal property vested in him and a right of administration over real property such as land. The 1881 Married women's Property Act simply removed the *jus mariti* giving a wife control over her personal property but leaving the husbands control over his wife's land intact. This law was passed because it was seen to give reforms to women rights. However this was possible only because the reform was assumed not to be able to significantly erode the power of the men and also because the Members of Parliament were satisfied that these reforms would not affect their household but only those of the poor. In parliament the debates were about the poor women and the need for their personal assets to be protected from their drunk and disorderly poor husbands. . (Griffin, 2012: 84).

Griffin states that arguments about the need for property rights could have been made about the needs of middleclass women working as teachers who found themselves without settlements or even the problems facing women with settlements. But to adopt such arguments would have been to require the

¹ Joanna Innes, Politics of Morals: the making of manners movement in later eighteenth century England. In Eckhart Hellmuth eds.Oxford 1990 {pgs 57-118}

men in parliament to engage with the idea that men of their own social class were neglecting or abusing their wives. It would also have altered the property holding practices. . (Griffin, 2012: 92).

Risseuw and Ganesh (1993:9) state that with the advent of colonialism, regional societies were confronted with new forms of resources and resource allocation. Apart from deeply destructive elements, colonialism also provided new avenues of social mobility which were implied in the notion of individual ownership, unencumbered by obligations to kin, which often contrasted to the-already existing –forms of property. These customary forms of property sometimes included individual ownership too, but the dominant structure regulating access to resources was connected to kinship and thus spread access to resources among its members.

The emergence colonialisation in 1908 in Kenya created a two tier society- at the top level sat the British settlers and the bottom level was the “African savages”. The British colonial empire set out to civilize the “savage” populations in the countries that they colonized. Civilization legitimated the need for imposing British laws on the community with or without their consent. The British attempted to civilize the communities through the church. As stated earlier, the 1840s was a time of evangelicalism and this was also spread to the colonies. The missionaries were strongly opposed to polygamy and encouraged men to marry one wife and obtain a certificate. This was the only marriage that would be recognized by the state. Although Kenyan men did marry a woman in the church, most men would still have another wife who would be recognized by the customs of the man’s ethnic community. The state law was not applied to women under polygamous unions nor to marriages by cohabitation, in which a man may have more than one wife. This forms that biggest type of marriage for women residing in rural areas such as Rift Valley.

The influence of colonial missionary work in Kenya through the formation of churches created a new stratum in the social structure of Kenyan life. Religion is a powerful source to justify reality because it draws on sacred or divine sources that are not human and are deemed more powerful. Religious references to something beyond human society-which may be called the supernatural, God Divinities or ancestors – create fear, awe and reverence. In the context of Kenya, to change the social order is to

challenge the gods or ancestors. The fear of challenging such powerful beings prevents many from trying to do so, a powerful factor in maintaining the social order. (Wangila, 2007:34).

To understand how religion shapes Kenyan norms and modes of ethical conduct, it is important to be aware of how it seeks to promote certain structures and values. Wangila (2007:37) argues that, unlike the western world that distinguish the sacred from the profane, Kenyans tend to seek religious explanations for everything that happens to them. It is also important to understand the concept of the individual, because the Kenyan understanding differs from most of Western definitions. Kenyans do not think of themselves in binary forms of either/or but rather in both/and categories.

In the lead up to Kenya's independence in early 1960s, members of Jomo Kenyatta's government promoted women's organisational efforts insofar as these contributed to the state's capitalist development policies. Praise of women often came couched in terms of production of proper housewives. In this *housewifization* process, there was no room for women's right to access what they needed directly. Rather they were expected to access the resources through the generosity of men. The government seemed content to deny women's land rights, to prejudice them in divorce and to construct necessary facilities only when women had organized enough pressure to make the cost of not providing those facilities greater than the cost of providing them. While the government allocated land to men, women were left to their own devices, to organize and pressure their husbands for what was rightfully theirs. (Brownhill 2009:223).

Way forward on land and matrimonial laws for women

The period before Kenya became a Crown Colony, dates before 1920, is adopted for this paper as pre-colonisation. During pre-colonisation period, most ethnic communities in Kenya practiced patriarchal system of land inheritance in which, sons inherited land from their fathers. Land was transmitted through the permanent members of the family - who were the men and therefore, it was patrilineal succession. Although indigenous property laws excluded women from owning or inheriting, Okoth-Ogendo (1982a:24 *as cited in* CICLES, 2000) argues that, this cannot be viewed as symbol of an inferior status or in any way, a form of chauvinism developed by one sex for the suppression of the other because rights over immovable property were trans-generational. The author further argues that although women were not treated as

permanent members of the societies in which they were married, the patriarchal societies had to control the process of allocation and transmission of its primary means of survival.

The pre-colonial tenure system benefited women whose role in agriculture and food production was recognized by customary rights of access to land and support from the family labour. Land formed the foci of social relations based on the principle of kinship, residence and allegiance and as long as these relations which gave rights to land were maintained, the question of having no land seldom became a live issue. The advent of European colonial capitalism drastically altered former patterns of land use and occupancy in many places. In this process, gender relations to land began to be modified overtime by a major intrusion, namely, colonial capitalist notions of male property ownership (EASSI, 2002:2).

The colonial land policy began when Kenya became a crown colony in 1920 and all the land was assumed to belong to the crown. This led to the acquisition of African lands through the Crown Land Ordinance of 1915, the imposition of English tenure through individualisation and the transformation of customary land tenure systems. The colonial era created new avenues of resource distribution, but also reallocated existing resources such as land and political influence, which in turn altered decision-making within family and kinship networks as well as the local community. For example, when land changes from shared forms of property to individual ownership, the conceptual shift can have drastic consequences for participants in that process. The cultural context where, for example, the wife “traditionally” has consolidated rights of access to her husband’s land, who in turn shares the land with his male kin, changes fundamentally when she becomes the wife of a man who has individual rights to land which he can put to commercial use or even sell. (Ganesh and Risseuw 1993: 2332).

The English customary law of the colonial state did not accommodate, at all, the idea of women as landowners. Claims by women in the name of custom, were viewed with impatience as an impediment to the development process. British officials in Kenya, thus, attempted to preserve existing native law, yet the substantive content of customary law was being altered, that is usufruct rights of women over family land (CICLS, 2000:20). In addition, land adjudication committees in most areas were male-dominated. For instance, all adjudication committee members were male. Although all land rights, including under customary law, had to be recorded during adjudication, committees lacked skills and time to do so (Shipton, 1988 as cited in FAO, 2002:15).

In 1932, the Kenya Land Commission was appointed and was charged with the responsibility of giving a sense of security to the African population by settling their claims to land and by assurance of sufficient land for their future needs, and to the European, by defining the area in which he was to enjoy a privileged position (Blundell, 1962:235). This echoes Chancock's (1982 *as cited in* Manji, 1999:449), observation of customary law in the colonial period which he describes as a product of a relationship between male clan elders and the colonial state anxious to prevent social unrest and to reinforce traditional forms of authority over women.

Women's property rights in Kenya have been transformed from the advent of colonialism in Kenya. The colonial Laws which govern women's Right to property still remain long after the British regime ended in 1963. This is mainly because the institutions that govern property rights in Kenya such as marriage, are founded on European concepts. The dilemma that women face is that on one hand, the Institution of marriage is governed by the Married Women's Property Act yet on the other hand, many women are married under customary law. Even for those women who are in marriages that are categorized under Civil or Statutory law, they still have to subscribe to customary law. This is because before a civil marriage is conducted in Kenya the traditional or customary marriage ceremony takes place in form of bride price or dowry payment. Therefore customary law plays a big role during the bride price negotiations ceremony.

The European colonial institution shaped the agrarian economy and the rural society when Kenya submitted to colonial rule. The colonial policy of individualization transformed land from a shared form of property to individual ownership through registration. Land was registered in the man's name. RJM Swynnerton, the then commissioner of Agriculture in Kenya introduced a plan that was to encourage the formation of a new crop of 'Progressive African farmers'. The 1954 Swynnerton Plan aimed to create individual freehold rights as an inducement to produce successful black commercial farming. This comprehensive five-year plan to intensify the development of African agriculture in Kenya. Its main aims were to multiply by ten times the average cash income of as many as possible of the 600,000 African families in the lands of high rainfall and to increase greatly the value of annual exportable surplus cattle from African lands (Blundell, 1962:13).

Most notably for this paper is the fact that according to Kariuki (2004:8), the Swynnerton Plan did not give rise to distinctive classes of yeoman farmers and full-time labourers. The plan did not resolve disputes over land, it weakened rights of women to own land and freehold title did not stimulate the growth of a credit market as expected. In addition, the colonialists assumed that marriages are monogamous and imposed the Married Women's Property Act of 1882 onto Kenyan courts as the only avenue for married women to negotiate matrimonial property. Majority of rural marriages are polygamous and the Act hinders many women from accessing and owning matrimonial property.

In the 1980s, the post colonial government attempted to address the inequality in land rights by passing the Law of Succession Act² (LSA) in parliament. This gesture was perceived as a solution to the inequality of land rights which was believed to stem from the inability of daughters to inherit land from their natal homes in the past. Prior to the law being passed, it had been assumed that among most communities in Kenya, daughters would naturally get married and that at their matrimonial homes they would enjoy user rights on their husband's property. This Law of Succession Act however did not address the land rights for "other categories of women" such as married women or divorced women. Neither did the Act offer heavy penalties for brothers who would oppose their sisters from inheriting land from their natal homes.

Conclusion

Majority of women residing in rural areas in Kenya are in marriages by cohabitation as well as polygamous marriages. These women in these types of marriages are not considered eligible to access matrimonial property. The ones who are married under state law have user rights to matrimonial property such as land but have no ownership rights. This is because the 1881 Married Womens Property Act an archaic law is still applied in the Kenyan court especially in the event of divorce.

² Technically, under Kenya's Law of Succession of 1981, a surviving spouse is entitled to inherit household and personal goods of the deceased, and can use land, houses, and other property. If the surviving spouse is a woman, she can use the property until she remarries. If there is one surviving spouse and a child or children, the surviving spouse is entitled to (i) an absolute interest in the deceased's personal and household effects and (ii) a life interest in the rest of the estate. This means the surviving spouse becomes the absolute owner of personal and household items and can use other property (such as land and houses) during the spouse's lifetime. The spouse cannot dispose of the second category of property without court permission. If the surviving spouse is a woman, her interest in the property terminates if she remarries. A surviving husband's interest does not terminate upon remarriage. When the surviving spouse dies (or, in a woman's case, remarries), the estate goes to the children. The intestate succession rules also provide that if one dies without a spouse or children, the estate goes first to the father, and if the father is dead, to the mother

The land reform process in Kenya, with regards to women's land rights, has operated at a relatively high level of generality through gender activists rather than at a low level of addressing community-specific land rights for women. In rural areas in Kenya such as Rift Valley, there are no rural women movements which have been established by the rural women themselves.

The viability of a Gendered Land reform process was revisited through the establishment of a National Land Policy (NLP) in 2009. The process begun in earnest in 2005 and was done in parallel with formulation process of a new Constitution for Kenya which was realized in August 2010. The 2009 National Land Policy acknowledges that customs and practices discriminate against women it. One of the main objectives of this policy is to promote women's legal ownership and inheritance right to land however the policy creates a paradox for because it equally acknowledges that ethnic customs should be respected. Gender activists and land reform experts have therefore called for the passing of a Matrimonial Property bill 2012 to secure women's property during and after marriage. The Matrimonial Property bill has been lobbied by the Kenya Land Alliance NGO for most of 2012. It was tabled severally in Kenyan parliament but rejected due to the strong male representation in parliament.

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