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**ISSUES PAPER**

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# **THE NATIONAL LAND POLICY IN KENYA**

## **Critical Gender Issues and Policy Statements**



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## **PREFACE**

The purpose of this Issues Paper is to move the debate and stimulate discussion of issues relevant to women's land rights and social security beyond the unfulfilled demands for gender responsive land policies and land legal framework. It is based on lessons learned from various research findings, Kenya Land Alliance experience and discussions with colleagues with whom we work with in various capacities on land policy and law reforms in Kenya and others parts of Africa.

The paper brings out issues that leave little doubt that the social security of women who account for 70 percent of agricultural labour and 80 percent of food production are not covered under provisions of our Kenyan social security, legal and policy framework. The Issues Paper further shows that women are frequently relegated to the status of second-class citizens in that their rights are dependent on the husbands or other male relatives. Independent women are less likely to have access to productive resources such as land, hired labour or financial services because they are poorer. Thus, given the social insecurity women are faced with two sets of issues that are pertinent regarding women's legal status: one pertains to the state of current legislation and the way it treats women (an issue of lobbying for change on the part of the women and awareness raising on the part of the legislators and other policy makers); the other issue relates to women's awareness of their legal rights and their ability to claim these rights, which is more related to information, legal literacy and legal counselling. This Issues Paper shall address both sets of issues.

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## **RATIONALE FOR CAPTURING GENDER ASPECTS IN A NATIONAL LAND POLICY IN KENYA**

The process of formulating a National Land Policy (NLP) in Kenya is already in progress. The successful completion of the Policy will set in motion a series of actions and activities that will have far reaching implications on land relations and land use in this country. Wide ranging changes in the institutional, normative and policy frameworks of land ownership, use and management will be effected by the Government. The National Land Policy will take on added importance since it is being developed at a time when the country is likely to embrace a new Constitutional and Governance Order with the adoption of a new constitution following completion of the constitutional review process.

Gender relations in Kenya have been characterized by discriminatory and inequitable practices against women. These practices are embodied in the legal system and administrative structures of Government. Discrimination against women is also firmly anchored in the customs, traditions and usages of various ethnic communities in the country. One of the most pronounced aspects of gender imbalance in the country is in the area of resource allocation and management. Despite the fact that women constitute over seventy percent of the productive land based labour force in this country, land relations in particular, are based on laws, customs and practices which marginalize and disempower women in terms of their right and capacity to own, manage and transfer land.

This situation has forced reformists across the board to urge for gender equity mainstreaming in constitutional, legislative, institutional and policy regimes. This trend has dominated the constitutional and legal reform discourse during the last ten years. The Draft Constitution contains bold provisions that outlaw gender based discrimination in all spheres of national life. It follows therefore that any laws or policies which by their very nature promote any sort of discrimination against women must be changed to conform to the constitution. Even where the new constitution may not come into force in the foreseeable future, it is imperative that new laws and policies embrace gender equity principles. This will be in keeping with the democratisation wave that is sweeping across the African continent. A National Land Policy

must therefore embrace gender sensitive principles so that the same can be translated into legal and institutional reform. Such a land policy will not only redress past inequities, but also consolidate the gains already made by women in many spheres of life in recent times.

## **1. Fundamental Principles for the National Land Policy**

### **Issue**

The Draft Constitution prohibits discrimination on the basis of sex. Enshrined in the Constitution is the principle that equality and equity among women and men is a fundamental human right of all citizens. In practice, discrimination of women remains widespread. For instance, women provide the bulk of labour in agriculture and while one quarter of heads of households are women, yet only five percent own land in their own names. Agricultural services and education is still directed to male farmers, and women's paid and unpaid labour remains undervalued and invisible in the Gross Domestic Product (GDP). There are laws that deny women equality with men in their rights to own property, borrow money and enter into contracts. Women's full participation on the basis of equality in all spheres of society, including equal rights, opportunities and access and control of resources are critical to the development of a democratic and just society. Gender equality and equitable distribution of land to all citizens should form the basis of a national land policy and the comprehensive review of existing land laws. This would entail the harmonization of various statutes which regulate similar land matters. It would also call for the repeal of laws and regulations which contradict the basic principles of the National Land Policy, as well as the enactment of new laws which are necessary to enforce aspects of the policy that are not catered for by existing legislation.

### **Policy Statement**

The National Land Policy should state that:

- The rights of women to access, own, control, manage, administer and inherit land constitute an integral part of the Fundamental Principles of the National Land Policy. The principle of *equality of the sexes* will be operative in all matters concerning rights to land.
- All policies, customs, practices, usages, laws, rules and regulations which

discriminate against women or affect their capacity, ability, or opportunity to access, own, control, manage, administer or inherit land shall be outlawed. Appropriate laws shall be enacted to protect women against all forms of discrimination in land matters.

- Affirmative action shall where appropriate, be adopted to redress gender imbalances in land tenure, administration and management.

## 2. Provisions of Land Tenure

### Issue

The present Land Tenure Reform tends to emphasise the **extinction** of all customary land tenure systems, replacing them with individual tenure systems and title deeds. Title deeds are being given in the name of the heads of the families or group representatives who are usually men. The adjudication and registration processes themselves have resulted in converting multiple overlapping rights into exclusive and absolute rights over family or community land. **The positive aspects of the customary norms which ensure women's rights of access to land and enhance security of tenure over family or community land are not recognized by statutory land law.**

### Policy Statement

The National Land Policy should state that:

- Extensive legislative and administrative reforms shall be undertaken and provisions made for women's full and equal access to land including the rights to inheritance and ownership of land regardless of their marital status. **Legal provisions and policies that entrench discrimination against women regarding rights to land shall be repealed and abandoned respectively.**
- Different land tenure systems (customary, statutory, community) shall be recognised as far as they conform to the principle of equality between women and men.
- Legislation shall embody clear provisions that give normative expression to the multiple tenure systems. The principle of **equality of the sexes** shall be an underlying norm in all statutory enactments.

### 3. Provisions of Land Ownership

#### Issue

Despite the fact that women work on land more than any category of people in the society, providing 80% to 90% of labour in subsistence production and over 70% of labour in cash crop production they suffer discrimination in all matters relating to land ownership.

Women's rights to land continue to be determined by their marital status, and by laws of inheritance, succession and divorce.

Despite the fact that Kenya's land laws are largely **gender neutral**, only 5% of women have land registered in their names. The problem is that women have limited economic resources in their hands, and also lack decision making power at the household level to buy land independently of their spouses.

#### Policy Statement

The National Land Policy should state that:

- Family land and matrimonial homes shall be protected by the presumption of co-ownership in favour of both spouses. The same will apply to polygamous unions (that is, each wife shall commonly own with the husband the piece of family land and matrimonial property).
- Appropriate legal measures shall be taken to ensure that men and women are entitled to equal rights in land, before marriage (in cases of inheritance), during marriage and during its dissolution and after the death of a spouse.
- **Affirmative action measures** shall be adopted in land distribution, re-settlement schemes and provision of **credit facilities** to improve women's land ownership and security of tenure.

#### 4. Provisions in Trust Land (Community, Public Lands)

##### Issue

Although the local authorities and county councils under the Trust Land Act hold land in trust for the benefit of the people, the Commissioner of Lands as the direct representative of the President **has on many occasions irregularly allocated Trust land to individuals in total disregard of the interests of the communities to which it belongs.** The Local Authorities/ County Councils charged with the custody of community land under the Act do not always protect community interests. Trends show that the Trust Land, (Community and Public Lands) are increasingly being privatised into individual hands and titles given to individual male owners. This has an adverse effect on the pastoralist communities. In the past, women accessed these lands for food, fodder, firewood, building material, medicine and herbs. Selling Trust Land to individual male owners has not only eroded the women pastoralists' land rights but also their sources of livelihood for themselves and their families.

##### Policy Statement

The National Land Policy should state that:

- The Trust Land Act shall be reviewed, while all public land previously privatised shall immediately revert to **public tenure** particularly if it has adversely affected the pastoralist/nomadic communities and especially women's source of livelihoods and means of survival.
- Community Based Management Boards shall be established with equal representation of women and men to manage community lands.
- All Public Communal Lands shall be used only for public purposes and in the public interest of women and men, through consultation with the community.
- Privatisation of Community Public Land and Natural Resources shall be prohibited, **unless such privatisation promotes the public interest.**

- Provisions shall be made for sensitising and educating the pastoralists and pastoralists/nomadic communities on their land rights.
- The Government shall as determined by Parliament, protect and not privatise lakes, rivers, wetlands, forests, game reserves, national parks, beaches, to ensure equitable access to all Kenya's natural resources and pay due regard to its future ecological, economic, social functions and the needs of women and men.

## 5. Provisions for Inheritance

### Issue

Culture and customs continue to support male inheritance rights to land. Women are regarded as strangers in their natal home and also in their marital clan. Fathers transfer land to sons, wife's inheritance rights to husband's land is not guaranteed, while widows are often dispossessed by their in-laws and rendered homeless. The adjudication and land titling process is being conducted in favour of the already established male inheritance patterns thereby denying women their share in family land.

The Islamic law recognises women's rights of inheritance, although her share is usually smaller than that of a male relative. On marriage to a man in another village, women are often obliged to leave land in the hands of male relatives and may find it difficult to exercise **their** rights over land.

### Policy Statement

The National Land Policy should state that:

- Equal inheritance rights of family land by daughters and women and right to pass it on as inheritance shall be guaranteed. **Parliament shall enact appropriate laws on the basis of which women can seek redress where they are denied rights of inheritance.**

## **6. Provisions for Succession and Matrimonial Property**

### **Issue**

Although the Law of Succession Act provides for wives, and all children, including daughters the right to inherit property and titles, specific socio-cultural factors hinders them from enjoying this right. Often, women have been forced to surrender their titles to male relatives, relinquish their inheritance rights or sell land cheaply as a result of social pressure.

There is no legislation that governs property belonging to a married couple. Most of the time matrimonial property including land is registered in the name of the male spouse. Problems arise upon death, divorce or separation. Sons, rather than widows remain the legal heirs to the matrimonial home and land, thus leaving the widow only with rights of occupancy which are forfeited upon re-marriage. Upon divorce or separation, women are sent away empty handed.

### **Policy Statement**

The National Land Policy should state that:

- Widows/widowers and divorcees shall not automatically lose their rights of whatever nature to land upon the dissolution of a marriage either through divorce or death. The principle of co-ownership shall be applicable at all times. The apportionment of land rights shall be based on this principle.
- Changes shall be made in the order of succession to a man's estate placing (the widow on equal position with, rather than behind his descendants) both men and women as equal subjects with regard to land rights.
- The right of a divorcee to retain equal share of family land and property shall be ensured.
- Succession and Matrimonial Property Laws will be harmonised to conform with the principle of equality between women and men.
- Family Land and Matrilineal Property should be specifically defined.

## **7. The Impact of HIV/AIDS on Women's Land Rights**

### **Issue**

Women and girls (the girl children) are the most affected by the HIV/AIDS scourge. Statistics in Kenya indicate that the impact of HIV/AIDS hits hardest on the poorest and vulnerable sections of society, those least able to cope with the burden of care, the loss of labour and income, and the cost of medicines and funerals. The majority of these are women and girls in rural areas where they depend on land as a source of livelihood. Kenya has a dual legal system that recognise both customary and common law depending on circumstances for instance, when women marry according to customary law they join their husband's clan and property including land devolves along the male line. Women access land through men - fathers, husbands, brothers, sons or male cousins. This is highlighted by the fact that men pay dowry (bride price) upon marriage which strengthens their hold over women and property.

Women and girls face destitution after the death of their husbands, partners or parents, while poverty and economic dependence leave them exposed to increased sexual exploitation and violence. Examples of women dispossessed of land by in-laws upon the death of their husbands are recounted all over the country and its exacerbated by weak enforcement of their rights to own and inherit land especially when the death toll from AIDS is on the increase in both rural and urban areas. Under these circumstances women are left without recourse. Fear of violence, the social stigma of pursuing a claim, and being considered greedy or a traitor to one's culture, serves to keep many women quiet.

For those women who do try to fight back, navigating the complex land law system governing land administration in Kenya requires time, literacy and a large dose of patience, as well as money for accessing justice. Lack of police intervention also makes it difficult for women and girls to prevent land dispossession or have their land reinstated, as does the bias and indifference they face from prosecutors, magistrates, judges and officials who have not received adequate training in the relevant laws or sensitisation to women's rights. This appalling situation is compounded by women and girls' lack of knowledge of their rights or support for pursuing claims of restoration.

In some traditions, inheritance is intertwined with such practices as “widow inheritance” and sexual “cleansing”. Because a woman joins her husband’s clan upon marriage, she may be required to marry one of her husband’s male relatives upon his death to retain this link with the clan and her claim to land. Traditionally this implied a responsibility on the part of the man to ensure well-being of the woman and her children, but it now mainly appears to be a way of gaining possession of the property of the deceased. Given the fact that customary norms and practices and prevailing social attitudes are heavily weighted against women inheritance rights, the women who suffer from AIDS or lose their husbands to AIDS are further marginalized in the inheritance equation.

### **Policy Statement**

The National Land Policy should state that:

- All policies, customs, practices, laws, rules and regulations governing land administration should be revised and strengthened to protect and promote the rights of women and girls in the context of HIV/AIDS.
- Counselling and education on property rights and inheritance rights and succession planning be incorporated into secondary school curricula, marriage preparation and counselling, and /or voluntary testing and counselling programmes. These guidelines should include such issues as inheritance planning, will writing, guardianship of children, and, where feasible, saving money for the future care of their dependants.
- The Ministry of Lands and Housing should put in place mechanisms to facilitate protection against dispossession for women and girls; restoration of taken land, alternative shelter and livelihoods for those who have been dispossessed; and training of paralegals to provide education and assistance.

## 8. Land Distribution and Re-Settlement Schemes

### Issue

Land distribution to the landless and re-settlement schemes are often biased towards male heads of households and invariably the registered leaseholders are men. This leaves women particularly disadvantaged in the event of widowhood, divorce or polygamous unions. Upon divorce, women lose access to re-settlement land, as they are the ones who get evicted and not the man.

### Policy Statement

The National Land Policy should state that:

- The Government should allocate land:
  - To female headed households as a criteria for providing more women with land.
  - Registered in the name of husband and wife.
- Proportionate representation of women and men will be made in all structures dealing with land re-distribution programmes.
- The re-sale of land in settlement schemes shall be prohibited to a minimum period of 30 years.

## 9. Land Markets

### Issue

Presently land reform is based on a liberalised land market, based on the principle of a “willing buyer, willing seller.” Registered land title deeds in the name of a male head of household implies that the man has the legal right to dispose of the land by any other means without recourse to the other members of the family. The majority of poor women suffer when their spouses alienate family land and also they have little say in the way money from the sale is used.

### Policy Statement

The National Land Policy should state that:

- It shall be mandatory that married women give their consent before land is disposed (selling, mortgaging, pledging or leasing) in person rather than in writing, before, Courts, District Land Tribunal, or Divisional Land Control Boards.
- Close consideration will be given to: whether the transaction will render a woman and her children homeless or deprive them of their livelihood; and to the spouse who has acted and will continue to act as the caretaker of the children.
- Restrict commercial transaction affecting matrimonial property and family land, **unless such transaction is in the interest of the family.**

## 10. Institutional Arrangements

### Issue

The existing institutions, be they Commissions, Land Boards or Tribunals are generally dominated by men and women's representation remain limited.

### Policy Statement

The National Land Policy should state that:

- Appointment of members to the Commissions; Land Tribunals; Boards and Committees shall endeavour to ensure equal representation and effective participation of women and men.

## 11. Envisaged Legislative Framework

### Issue

The Draft Constitution proposes that parliament shall within 2 years, enact laws providing for among other things, the **revision, consolidation** and **rationalization** of existing land laws. If the Land Policy incorporates the above identified critical gender issues into the policy statements a significant step will have been made towards more equitable treatment of women in any resultant land laws.

## The Principles

Provisions in the **Land laws** shall include:

- Treating women's land rights as a fundamental human right.
- Providing legal recognition of Customary Land Tenure Systems **to the extent that such laws and practices are not discriminatory against women.**
- Promoting an equitable distribution of access to, ownership, control, administration and management to land by all citizens.
- Ensuring inheritance rights of women and daughters.
- Protecting Family land by the presumption of co-ownership by spouses.
- Setting a proportionate women's representation in Land Commissions, Tribunals, Committees and Boards.
- Improving the existing procedure for spouse consent to **family land** transactions.
- Creating protective measures towards women's occupation and use of land as a shelter and a source of livelihood.
- Making provisions with respect to women's and children's customary ownership and access rights to land, ensuring that they are not infringed.
- Making provision protecting the rights of widows and divorcees to retain a rightful portion of the household estate.
- Adopting Affirmative Action to redress the gender imbalances in land tenure: allocations, administration and management (that is, 40% to go to women).
- Accessing resources and opportunities to benefit both women and men working on land, including a special provision in the national budget to promote women's economic activities especially in the rural areas.
- Increasing support in the provision of information and services for women's use, transfer, administration and control of land.
- Giving clear guidelines for enforcement of the Land Law.

## **CONCLUSION**

Public policy reform in the land sector poses significant challenges for policy makers, if it is to be completed and to consequently have the desired impact or support development goals. Policy makers need to recognise the central role women play in Kenya in economic and social development through their activities and contribution on land and agrarian reform.

Thus, the process of formulating the National Land Policy (NLP) will provide an opportunity for resolving women's land issues that have marginalised them due to stereotypes. Through the National Land Policy, women's land issues will be integrated into mainstream economic planning without prejudices thus improving their overall status with greater involvement in decision-making processes.



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