

# **HOW DO CUSTOMARY PRACTICES ENSHRINED IN STATUTORY LAW UNDERMINE WOMEN'S ACCESS AND RIGHTS TO LAND?**

***A CASE STUDY OF YAW PACHI, SIAYA DISTRICT, KENYA***

JEMAIYO CHABEDA

A research report submitted to the Faculty of Humanities, University of the Witwatersrand, Johannesburg in partial fulfilment of the requirements of the Masters of Arts degree in Development Studies.

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## **Abstract**

The study aimed to investigate the issue of women's access and rights to land in Kenya. The study targeted Yaw Pachi women's group, Siaya district who have experienced several problems of land tenure in terms of access and rights within their community which is Luo by tribe. The factors that influence these women's access to land were also examined. The factors included Luo customary law, Luo customary practices, statutory laws as well as statutory institutions. The study also aimed to analyse the 2006 Draft National Land Policy by looking at what aspects of gender reform had been incorporated into the policy. The study examined the role of the land board as a statutory institution responsible for ensuring women and men have equal access and rights to land.

In order to collect data, this study used qualitative method of social research. The researcher chose a small sample based on the research being conducted using a case study method. The sample was from an area where the phenomena such as customary laws and practices are prevalent. Qualitative research enables the researcher to collect and analyse in-depth information on a smaller group of respondents. Documentary analysis, interview techniques were used to gather data. The study population comprised of seventeen women from Yaw Pachi women's group in Siaya district and twelve key informants.

The key findings of the case study of Yaw Pachi women's group shows that women can gain access to land in Siaya district mainly through marriage and by association with a male relative, who could be the woman's father, father in-law, brother or son. Although the law of succession states that women can inherit land from their fathers, most findings revealed that this does not happen in reality.

The 2006 Draft National Land Policy that intends to solve all the disparities women face when it comes to equity in land resources has been put on hold following an unsuccessful constitutional review in 2005. While the policy acknowledges that there are customs that discriminate against women, it also seeks to promote customary systems of land tenure. The Draft National Land Policy proposes a pluralist approach to land reform.

## **Declaration**

I hereby declare that this is my own unaided work. It is submitted for the degree of Masters of Arts, Development Studies, University of the Witwatersrand in Johannesburg, South Africa. It has not been submitted before for any degree or examination in any other university.

.....  
Jemaiyo Chabeda

.....2008  
Date

## **Dedication**

To my parents for their love, encouragement and support and to those who took part in the study, giving their time and advice and sharing their experiences

Thank you and be blessed.

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This work would not have been possible without the kind advice, direction and supervision, patience, encouragement of my supervisor Dr. Samuel Kariuki.

I am in debt to UNDP Kenya and more so to Ms Elizabeth Lwanga, the UNDP Kenya Resident Representative for the moral and financial support during my studies. I convey a word of appreciation to Dr Akinyi Nzioki, Director, Center for Land Economy and Rights for Women CLEAR, who helped me, understand the scope of the research topic. My gratitude goes to my family who supported me morally during this journey. I would like to thank Ms Theresa Handa for supporting me to translate the field notes from Luo language to English and who tirelessly helped me with interpretations.

Last but not least, I would like to acknowledge the members of the Land Board in Siaya and the members of Yaw Pachi women's group who agreed to meet with me despite the difficult circumstances they face. In particular, I thank Ms Jane Rogo, the secretary for the Yaw Pachi women's group who arranged all the meetings necessary to conduct the material from Yaw Pachi women's group.

## **Table of Contents**

|                       |     |
|-----------------------|-----|
| Abstract.....         | ii  |
| Declaration.....      | iii |
| Dedication.....       | iv  |
| Acknowledgement.....  | v   |
| Table of Content..... | vi  |
| Abbreviations.....    | ix  |
| List of Tables.....   | x   |

## **Chapter One: Introduction**

|                                             |    |
|---------------------------------------------|----|
| 1.0 Background Information.....             | 1  |
| 1.1 Aim and Rationale.....                  | 5  |
| 1.2 Research Questions.....                 | 7  |
| 1.3 Definition of Concepts.....             | 8  |
| 1.4 Relevance and Limitations of Study..... | 11 |
| 1.5 Chapter Outline.....                    | 13 |

## **Chapter Two: Literature Review and Theoretical Framework**

|                                                                                    |    |
|------------------------------------------------------------------------------------|----|
| 2.0 Introduction .....                                                             | 14 |
| 2.1 History of Land Reform in Kenya.....                                           | 15 |
| 2.2 Customs Undermining Women's Access and Rights to Land .....                    | 24 |
| 2.3 Role of Statutory Institutions Women's Access and Rights to Land .....         | 38 |
| 2.4 2006 Draft National Land Policy.....                                           | 41 |
| 2.5 Comparing Aspects of Gender Equitable Land reform in Kenya and South Africa... | 50 |
| 2.6 Theoretical Framework.....                                                     | 58 |

## **Chapter Three: Case Study of Yaw Pachi Women's Group, Siaya District, Kenya and Research Methodology**

|                                      |    |
|--------------------------------------|----|
| 3.0 Introduction .....               | 62 |
| 3.1 Qualitative Research Design..... | 63 |

|                                                              |    |
|--------------------------------------------------------------|----|
| 3.2 Case Study Research.....                                 | 63 |
| 3.3 Sample.....                                              | 64 |
| 3.4 Analysis of Materials gained .....                       | 69 |
| 3.4.1 Data Gathering Techniques.....                         | 69 |
| 3.4.2 Interviews.....                                        | 69 |
| 3.4.3 Questionnaire method with Yaw Pachi Women's group..... | 76 |
| 3.4.4 Documentary Analysis.....                              | 77 |
| 3.5 Access.....                                              | 77 |
| 3.6 Ethics Consideration.....                                | 79 |

## **Chapter Four: Findings and Analysis**

|                                                     |     |
|-----------------------------------------------------|-----|
| 4.0 Introduction.....                               | 81  |
| 4.1 Demographic Features of Respondents.....        | 83  |
| 4.2 Marital Status.....                             | 84  |
| 4.3 Type of Marriage .....                          | 85  |
| 4.4 Level of Education.....                         | 87  |
| 4.5 Sources of Income.....                          | 89  |
| 4.6 Wife Inheritance.....                           | 91  |
| 4.7 Patrilineal Inheritance of Family Land .....    | 94  |
| 4.8 Polygamy.....                                   | 97  |
| 4.9 Property Stripping.....                         | 99  |
| 4.10 Institutional Support - Land Board .....       | 101 |
| 4.11 Institutional Support at Grassroot Level ..... | 106 |
| 4.12 2006 Draft National Land Policy.....           | 107 |

## **Chapter Five: Conclusion and Recommendations**

|                                |     |
|--------------------------------|-----|
| Summary of Lessons learnt..... | 112 |
|--------------------------------|-----|

## **References**

## **Appendix 1: Questionnaire, Appendix 2: Letters of Consent**

## **Abbreviations**

|          |                                                            |
|----------|------------------------------------------------------------|
| CBS      | Central Bureau of Statistics                               |
| CILS     | Commission of Inquiry into Land Systems in Kenya           |
| CICLS    | Commission of Inquiry into Customary Land Systems in Kenya |
| CLEAR    | Centre for Land Economy and Rights for Women               |
| DLA      | Department of Land Affairs                                 |
| DNLP     | Draft National Land Policy                                 |
| EASSI    | Eastern Africa Sub-Regional Support Initiative             |
| FAO      | Food and Agriculture Organization of the United Nations    |
| FIDA     | Federation of Women Lawyers in Kenya                       |
| GAD      | Gender and Development                                     |
| GLTN     | Global Land Tool Network                                   |
| GoK      | Government of Kenya                                        |
| HIV/AIDS | Human Immuno Deficiency virus                              |
| HRW      | Human Rights Watch                                         |
| IFC      | International Finance Corporation                          |



|           |                                              |
|-----------|----------------------------------------------|
| KEMRI     | Kenya Medical Research Institute             |
| KLA       | Kenya Land Alliance                          |
| LSA       | Law of Succession Act                        |
| MDGs      | Millennium Development Goals                 |
| MoCGS     | Ministry of Culture, Gender and Sports       |
| MoE       | Ministry of Education                        |
| MoL       | Ministry of Lands                            |
| NFPLP     | National Formulation Process for Land Policy |
| NGO       | Non-Governmental Organisations               |
| SID       | Society for International Development        |
| SPRR      | Strategic Public Relations and Research      |
| UNDP      | United Nations Development Programme         |
| UNHABITAT | United Nations Agency for Human Settlement   |
| WID       | Women in Development                         |
| WB        | World Bank                                   |

## List of Tables

|           |                                                         |     |
|-----------|---------------------------------------------------------|-----|
| Table 1:  | Age .....                                               | 83  |
| Table 2:  | Marital Status.....                                     | 84  |
| Table 3:  | Type of Marriage.....                                   | 85  |
| Table 4:  | Level of Education.....                                 | 87  |
| Table 5:  | Source of Income.....                                   | 89  |
| Table 6:  | Wife Inheritance.....                                   | 91  |
| Table 7:  | Wife Inheritance in Relation to Property Stripping..... | 92  |
| Table 8:  | Size of Land .....                                      | 95  |
| Table 9:  | Ownership of Land.....                                  | 95  |
| Table 10: | Polygamy.....                                           | 97  |
| Table 11: | Property Stripping .....                                | 99  |
| Table 12: | Institutional Support-Land Board.....                   | 102 |
| Table 13: | Institutional Support – Traditional Authority .....     | 106 |
| Table 14: | 2006 Draft National Land Policy.....                    | 107 |

# CHAPTER ONE

## 1. INTRODUCTION

### 1.0 Background Information

The Republic of Kenya has an area of approximately 582,646 sq. km. comprising of 97.8 percent land and 2.2 percent water surface. Only 20 percent of the land area can be classified as medium to high potential agricultural land and the rest of the land is mainly arid or semi-arid (MoL, DNLP, 2006:5). Kenya is divided into eight provinces one of which is Nyanza province. This research investigates a case study of Yaw Pachi women's group located in Siaya District which is one of the twelve districts that comprise Nyanza Province<sup>1</sup>. Kenya has forty two tribes and members from the Yaw Pachi group is found within the Luo tribe which speaks Luo language.

In most of the countries in the East African region, women's access and rights to land depend on their relationship with the male family members as a wife, daughter, sister or mother except where a matrilineal kinship system is practiced. Women's land and property rights are addressed by some institutional conventions and by new policies and laws enacted during the course of institutional reforms. However, the gap between formal policy and law and actual practice remains large. One of the major challenges to women's land rights in Southern and East Africa has been how to bridge the gap between statutory law and customary law, as the latter dominates in practice (Izumi, 2006:1).

Women who are about 50 percent of the population constitute the category of vulnerable people who suffer marginalisation during the land reform process during and after colonization. In Kenya, women account for just 5 percent of registered land holders nationally and yet, they contribute over 80 percent of the agricultural labour force, 64 percent of subsistence farmers, and produce approximately 60 percent of farm-derived income.

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<sup>1</sup> It is bordered by Busia District to the North, Vihiga and Butere/Mumias Districts to the North-East, Bondo District to the South, and Kisumu District to the South-East.

Society of International Development observes that in Kenya, culture and traditions continue to support male inheritance of family land,<sup>2</sup> while there is lack of review of gender sensitive family laws (SID, 2006:339). Social cultural factors limit women from rights enshrined in the Law of Succession Act (LSA)<sup>3</sup>, while land markets, based on the principle of a 'willing buyer, willing seller' do not favour women who are often vulnerable to poverty and male dominations. Few have land registered in their names and lack of financial resources restricts them from entering the land market.

For rural women living in Siaya<sup>4</sup>, their contribution to the household or to purchasing of the land is mostly unattainable. Ironically, rural women work an average of nearly three hours longer per day than rural men. In addition, there are so many women working in the agricultural sector and so few in formal employment. (Human Rights Watch report, 2003:10).The remuneration in agricultural sector is much lower than for their counterparts in formal employment.

With population pressures, cultural change, agricultural intensification and commercialisation, many customary systems have evolved towards greater individualisation. Family control over land has weakened, and the content of the rights vested in male household heads has broadened, becoming increasingly inheritable and transferable. In this context, women's secondary rights have tended to erode, while the very rationale of women's limited rights (retaining land under family control) has faded.

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<sup>2</sup> Family land is also referred to as Trust land and in terms of the constitution and Trust Land Act, such land must be held for the benefit of the people resident in those territorial units. The legal regime governing tenure relations in all Trust land units is, therefore, customary law. There are instances of violations of the constitutional and statutory provisions relating to the setting apart of trust land. This constitutional contempt of Trust land as evidenced *inter alia* by, by the lack of security for customary land rights particularly those of women and its perception as a transitory domain to be phased out at the earliest opportunity through privatisation of ownership rights, has led to the expropriation of community property in many parts of Kenya (Njonjo Commission Report 2002: 47)

<sup>3</sup> 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.

<sup>4</sup> Projected population in the year 2002 showed 493,326 people in Siaya District, with 226,682 males and 266,644 females (UNDP/Ministry of Culture, Gender and Sports 2006).

This process of tenure individualisation and erosion of women's rights has in some cases been accelerated by land registration and titling programmes (Lastarria-Cornhiel, 1997; Kevane and Gray, 1999b *as cited in* FAO, 2002:14)

Customary laws in Kenya are constantly evolving norms that exist in parallel with statutory law but derive legitimacy from tradition and custom rather than a government Act. The constitution recognizes and acknowledges the existence of customary practices. Luo customary law is well documented. The colonial government officially recognized and endorsed the compilation of a report funded by the former colonial social science research council. Thus, Luo customary law<sup>5</sup> is applied in the rulings in Kenyan courts.

Statutory law in Kenya seems to be lagging behind in the national agenda of achieving the millennium development goal<sup>6</sup> number three which aims at promoting gender equality and empowering women. As of 2008, archaic legislature such as the 1882 Married Women's Property Act is still applied in the Kenya law courts. It provides for the equal division of property between spouses upon divorce. However, a landmark case<sup>7</sup> established that women are entitled to half of the family property in cases of death or divorce, but only if they can prove that they contributed to the household.

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. For women residing in rural areas such as Siaya, this is an uphill task especially for those married under the customary marriages or marriage by cohabitation, which majority of rural Kenyans' marriages fall under<sup>8</sup>.

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<sup>5</sup> This report was written by Gordon Wilson and is called 'Luo customary law and marriage laws customs'. The report is readily available at the government printer in Nairobi.

<sup>6</sup> Millennium Development Goals are eight objectives agreed upon by the member countries of the United Nations on September 2000. The MDG's include poverty eradication, universal primary education, gender equality, maternal health care, reducing infant mortality, environmental sustainability, combating HIV/AIDS and building global partnerships.

<sup>7</sup> Josephine Wairimu vs. J.K Kibogy-In this case, the petitioner claimed that she was married to the respondent under Kikuyu customary law and that they had lived as husband and wife at different places over a period of 12 years. Six children were born to the couple. However, the court found no evidence of a customary marriage since the father did not receive any dowry from the respondent. In view of this, the court ruled that the respondent had no duty to maintain the petitioner, yet the respondent had large farms in Uasin Gishu whilst the petitioner was a poor woman with no source of income (Mute and Kibwana, 2000:130).

<sup>8</sup> This is a view by Kivutha Kibwana, former Minister for Lands, gathered at *Fanikisha* conference attended by the researcher on 25-26 July 2007 in Nairobi. The *Fanikisha* conference, whose aim is to empower women in business, was attended by over 3000 women who participated in the session on the 2006 draft land policy and women's This 'women and land' session was officiated by the Honourable Minister for Environment and Lands rights.

The government of Kenya embarked on a new land reform process in 2000 by commissioning an inquiry to the land systems in Kenya (CILS). The commission was chaired by Charles Njonjo, a former attorney-general of Kenya. Several recommendations from the report submitted by this commission in 2002 aimed at addressing the problem of gender inequity in the land reform since the country's independence in 1963. To complement the work of the Njonjo Commission, a sub-commission: Inquiry into Customary Land Tenure Systems (CICLS) for the Agikuyu, Luhya, Gusii and Luo Community, was formed. This report underscored the need for recognizing that cultural practices in some communities had undermined women access to land as well as denied them their right to land.

The formulation of a land policy begun in earnest in 2005 and was done in parallel with formulation process of a new constitution for Kenya. The implementation of the 2006 draft national land policy into law was pegged on the review of the constitution in 2005. The new constitution bill, which was presented on 23 August 2005, allowed women to own land and property and widows to inherit land from their husbands despite the absence of a will. The bill says 'A surviving spouse shall not be deprived of a reasonable provision out of the estate of a deceased spouse whether or not the spouse died having made a will' (Ik Dahl *et al* 2005 as cited in Izumi, 2006:17).

The 2006 draft national land policy has not been passed into law owing to the fact that the proposed constitution was rejected by Kenyan citizens. However, the *Daily Nation* newspaper of 19 April 2007 published the 2006 draft national land policy, thus indicating that it is still a matter of interest to Kenyans. Due to its relevance to the research, aspects of the draft land policy will be reviewed in this study.

Conclusion of the study is that, it is essential for policymakers to understand community specific needs regarding women's access and rights to land. These needs should form a basis for passing legislature that would protect women's rights in relation to land tenure in Kenya. Gender equitable land reform at all levels of administration, has to ensure that the voices of rural women are heard.

## **1.1 Aims and Rationale**

The core aim of this study is to investigate the impact of customary law and practice on women's access and rights to land. The study will also investigate whether statutory law and institutions such as the land board protect women's access and rights to land. Under customary law, the study focuses on the cultural practices such as wife inheritance, patrilineal inheritance of land, polygamy and property stripping.

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. In the course of her life, a woman's guardians would include her father, husband, brother-in-law, or other male relatives if her husband dies and ultimately her son, once he married (Kanogo 2005:43).

The adjudication, consolidation and land titling process are being conducted in favour of the already established male inheritance patterns thereby denying women their share in family land. The study looks at how at a national level, in terms of policy pronouncements, the Law of Succession Act and the constitution promote gender equity. At the grass-root level, succession and land disputes are governed by customary rules, and enforced by those who traditionally are seen as leaders e.g. the chief in Siaya District.

A motivation to carry out the study is that, at the core of the paradox of the land reform process in Kenya since independence, is the belief of policymakers that women derive more access and right to land through freehold tenure than through customary tenure. The study seeks to establish whether formalisation of property rights through titling necessarily promotes and increases tenure security for women or whether it results in uncertainty for women. This motivation is based on the fact that, gender activists lobbying for equitable land reform are now advocating for it.

Macharia, (1995:19) states that land laws in Kenya, while not discriminatory on their face, have exacerbated women's inequality by recognizing men's traditional allocation rights as worthy of registration while ignoring women's user rights to clan land. Although a non-binding administrative decree instructs land control boards<sup>9</sup> with authority to approve certain land transactions-to take families' interests into account; this guideline is not always effective.

Further, Kibwana (1996:157) acknowledges that women's access to land under customary laws were not reflected in the register for land titles even as overriding interests. Moreover, the husbands or the male relatives, whose names appear on the title deed, are not treated as trustees by the law but as the individual owners of the land. Although women may continue to enjoy access rights to titled land registered in the names of their spouses, the spouses' titles are easily transferable and hence, the male spouse can sell the land, thereby extinguishing the access rights of the wife /wives.

Lastly, the 2006 Draft National Land Policy holds the key to addressing some of the land tenure issues faced by women in rural communities in Kenya. The passing of the policy into law is however pegged on the constitutional review of the country. Nevertheless, the analysis of this draft policy is an instrumental part of the research study. There has not been an in-depth analysis of the 2006 Draft National Land Policy, with the focus on the cultural practices and customary law that women in rural communities in Siaya face.

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<sup>9</sup> The Land Control Act provides that any sale, transfer, partition, lease, division of or other dealing in agricultural land will be null and void unless the parties to the transaction have obtained consent from the land control board. The members of the land board are appointed by government ministry in charge of land but also include representatives from the area such as the local elders (Wanjala, 1997:13).The boards are available at district level and there is a central land board in Nairobi. Once a land board receives an application to undertake either land transfer or sale, the chairperson scrutinizes the application then makes a 'ruling'. This decision is very powerful because this ruling cannot be easily challenged in a court of law (Wanjala, *et al.* 1990: 48).



## 1.2 Research Questions

The cardinal question to be answered through this research is: *How does customary law enshrined in statutory law undermine women's access and right to land, specifically members of Yaw Pachi women's group in Siaya?*

To answer the cardinal question, a series of secondary questions are asked:

1. Are widows more likely to face wife inheritance?
2. Does the cultural practice of patrilineal inheritance of land exist in the community land ownership and impact on land ownership?
3. Does property stripping of land in particular exist and is it related to wife inheritance?
4. What laws have been put in place in Kenya to protect women in Yaw Pachi, Siaya?
5. Is the statutory law independent of the customary laws?
6. What role do land boards play in protecting women's access and right to land?
7. Is the 2006 Draft National Land Policy a successful intervention to protect women's access and right to land?

### **1.3 Definition of Concepts**

#### **1.3.0 The Concept of Customary Land**

The term customary land differs all over the African continent as each country has its own definition, in Kenya; the officially recognized wording for it is Trust Land. The most common form of tenure in Africa is what is termed as communal tenure, whereby land belonged to no one individual in particular but to the community (clan, ethnic group) as a whole. In this study, the term communal/trust land tenure will be used when referring to customary land tenure. In accordance to 2006 Draft National Land Policy, community land refers to land lawfully held, managed, and used by a specific community. Families and individuals within the community are allocated land and are allocated rights to use the land in perpetuity, subject to effective utilization. The ultimate ownership vests in the community (MoL, DNLP, 2006: Chapter 3, No 62).

At a women's conference-*Fanikisha*- held in Nairobi on 25 June 2007, the then Minister for Lands in Kenya, Kivutha Kibwana stated that: "land ownership in Kenya is still largely controlled by a customary system that ensures access to land is determined by men yet the irony behind all this is that the women who shoulder the burden in harnessing land for food are the ones most deprived of this vital resource" (Kibwana, 2007).

#### **1.3.1 Rights to Land**

The research study seeks to establish how customs and statutory law have undermined women's access and rights to land in Siaya district. Rights to land are diverse and, in practice, multiple rights to an object can be held by several persons or groups. The rights include; (a) Use rights: the right to use the land for grazing, growing subsistence crops, gathering minor forestry products, (b) Control rights: the right to make decisions on how the land should be used and to benefit financially from it and (c) Transfer rights: the right to sell or mortgage the land, to convey the land to others through intra-community reallocations or to heirs, and to reallocate use and control rights (FAO, 2002:5).

### 1.3.2 Customary Law

In Africa, the term 'customary land law' has been used to describe the land tenure system practiced by indigenous peoples, which is distinguished from the western land law. A common feature of the customary land tenure in Africa is its customary origin and its generally unwritten form (Mitsud, 1967). It is now fairly well documented that what is applied in many African countries as customary law is in Martin's Chancock's popular phrase is 'neither customary nor law',<sup>10</sup>.

However, in this research study, a view of customary law which is influenced by accounts of the interaction between African custom and colonial rule in Kenya is adopted. These accounts describe the shift from custom to customary law which took place most prominently in the sphere of the family during the colonial period. In Kenya, as is in most of Africa, the process consistently involved an alliance between the colonial administration and African male leaders. The latter, as the traditional holders of power over strategic resources namely land, cattle, women and children'- saw this power dwindling and sought to regain it by manipulating the local government institutions such as the chiefs and village elders (Chancock, 1987).

Kenya is not the only country that exemplifies how customary law undermines women's land rights. A look at the land reform process in South Africa shows that under customary law and under apartheid law, women' rights to land were derivative and temporary as well. Hassim (2006:204-205) states that women could not own land or occupy property in their own right, but were dependent on male spouses or customary partners. They lost these rights upon the death of a spouse, in part also as a result of the principle of male primogeniture, which required that property be passed to the nearest male relative.

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<sup>10</sup> Martin's Chancock's "neither customary nor Law" : A case of mistaken identity unpublished paper was delivered at the Regional conference on social change and legal reform in East, Central and Southern Africa, Harare 13-16 January 1987. Chancock's analysis sought to establish whether African customary laws and traditions are really inimical to women and children's Rights.

### **1.3.3 Freehold Land Tenure**

The term individualized/freehold land tenure will be used intermittently when referring to private land tenure. Freehold property can be termed as the formalisation of property rights through titling. Private land refers to land lawfully held, managed and used by an individual or other entity under statutory tenure. Private land is derived from the Government Land Act, Land Tittles Act, Registered Land Act and the Indian Transfer of Property Act also referred to as Matrimonial Act (MoL, DNLP 2006). The Commission of Inquiry into Land Systems in Kenya (2000) states that the concept of ownership arose when the Registered Land Act of 1963 was introduced in Kenya. This act gives an individual the right to hold title deeds. Once land is surveyed and certified, the owner is given a title deed.

### **1.3.4 Gendered Land Reform**

The research study dwells on land tenure as a right for women. The Draft National Policy 2006, states that ‘ Land tenure refers to the terms and conditions under which land rights to land and land-based resources are acquired, retained, used, disposed of, or transmitted. In the study, the term gendered land tenure will be used to mean an examination of aspects of equality and equity in the land tenure reform process with regards to women. This will, therefore, include customary and statutory factors influencing women’s access and right to land in Kenya.

In accordance to Wanyeki (2003:85), there is no blueprint for gender equitable land reform, as land reform can legitimately take a variety of forms. The important principle is to grant women effective rights, not just in law, but also in practice. Independent rights to land provide women with access to economic and social resources needed for basic survival and with fallback positions in cases of domestic violence or marital breakdown. Gender equitable land reform requires the establishment of structures of governance and local institutions that promote women’s active participation in decision-making and structures of management that challenge long standing institutional power relations.

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

The sample size used, which totaled to twelve key informants and seventeen women from Yaw Pachi women's group was too small to be representative of the research topic. The alternative to this would be to interview a larger number of people but such an option would have been more time consuming for the researcher. Also interviewing a large number of people would be relevant for a quantitative type research. However, the research study is qualitative in nature, and then there would be no use for survey method. Accessing the group was an uphill task because of difficulty in getting the women to keep appointments. It was impossible to list all the women and then randomly select from a list, so instead, the researcher used subjective information.

The members Yaw Pachi women's group consists of rural women in a community located in a remote village in Siaya district and where cultural practices such as wife inheritance, patrilineal inheritance of land, polygamy and property stripping exist. The researcher had to request Ms Agnetta Onyango, the former project manager UNDP/Plan project in Siaya, to approach the Yaw Pachi women's group so that the research study could be conducted. According to the 2006 joint report on 'Facing the Challenge: HIV/AIDS Initiatives in Kenya' published by UNDP Kenya and Plan-International, some customary practices are indirectly linked to the spread of HIV/AIDS in the community. Therefore, for this reason, the researcher assured the respondents from Yaw Pachi women's group that no issue about HIV/AIDS would be brought up.

To build the trust of the women's group, the researcher had to identify a translator who had the following characteristics; a woman who is not from the community but who comes from a community that shares the same cultural experiences as the Yaw Pachi women's group, an elderly Luo woman of at least forty five years and above age who is widowed and therefore can relate to the same issues as the women. The researcher is not Luo by tribe; she therefore hired a translator for the exercise, Theresa Handa, who effectively handled the task as she is a retired English teacher and is fluent in Luo language.

Ms Teresa Handa was effective in doing the task as she is a retired English teacher and is fluent in Luo language. However, translation was time consuming and valuable idioms and expressions were sometimes lost in translation. For example, one of the respondents, an elderly widow from Yaw Pachi women's group wrote in her questionnaire in response to the following; when asked what land issues widow's face in the community; the respondent answered '*Buok Kuom Yuoro*'. This idiom means that a widow may be under temporary reprieve before she is officially inherited. This respondent would have said more but opted for a three word phrase that could have been worth one page of information. Such case of information 'loss' through translation was a great challenge to the researcher.

In addition, because the researcher is not a Luo meant that she could not transcribe the interviews. This language barrier was not cost effective because the researcher had to pay for the interviews to be transcribed in Luo. Even though every effort was made to guarantee confidentiality, the women seemed uncomfortable to write what they felt of the questionnaire and so the researcher had to rely on the interviewer /translator Ms Handa to quickly translate what the women had said. The researcher would then note this down. This meant that more time than was necessary was spent on these interviews.

## **1.5 Chapter Outline**

Chapter One: This chapter gives a short background to the study and discusses the aims and rationale of this study, the problem statement and on basis of this, articulates primary and secondary questions framing the study.

Chapter Two: This chapter clarifies some concepts and terms that are used in the research study. The terms include; customary land, freehold land and gendered land reform. Chapter two also presents the literature review and the theoretical framework. The literature on the land reform process in Kenya, customs hindering women's access and right to land, statutory law discriminating women and thus hindering their access and right to land before, during and after colonization are presented. The literature review also links the land reform process to Kenya using the 2006 Draft National Land Policy. Theoretical considerations that frame this work are; women and law theory and legal centralism and pluralism theory.

Chapter Three: This chapter presents the methodology used which is a qualitative research strategy. The case study of Yaw Pachi women's group involves a contextual perspective on the issues of customary law and practices, which are not commonplace in other communities. The study involves interviews with a group of seventeen female respondents. Use of twelve key informant interviews and questionnaires is adopted for the study.

Chapter Four: This chapter presents and discusses the data gathered from the field.

Chapter Five: The chapter presents the conclusion which is made up of a summary of findings and provides recommendations related to the land tenure issue confronting Yaw Pachi women group situated in a rural area of Siaya district in Kenya, and the land reform process, to the policy makers and to the lobbyists/gender activists.

## **CHAPTER TWO:**

## **LITERATURE REVIEW AND THEORETICAL FRAMEWORK**

### **2.0 Introduction**

The main purpose of this literature review is to examine the treatment accorded to customary land rights in Kenya, from the colonial period to the present day; establish whether customary tenure has been applied alongside statutory tenure in terms of land ownership; ascertain whether, and the extent to which, the customary laws of the Luo community in Kenya recognise and protect women's rights to land. This literature review will address specific laws, practices, customs, and policies that constrain women's rights to land. Also, the role played by existing institutions such as land boards in gender equitable land reform will be highlighted.

The research study will undertake a comparative study between customary practices of Luo community and various statutory laws. Further, the study will identify and analyse how legal pluralism has been incorporated into the existing legislation of the land reform process in Kenya. This literature review will attempt to explain how land reform processes have evolved over the years. The reform process will reflect how women's land rights have been affected by different legislature as well as cultural practices. Notably the review will borrow a conceptual framework by Cheryl Walker, a gender expert on the land reform process of South Africa, to analyse some aspects of the 2006 Draft National Land Policy. Walker (2003), states that there is a disjuncture between what is said in formal policy documents about promoting gender equity in and through land reform and what happens to gender policy 'on the ground'. Also, the gendered land reform process has been addressed at national level and not implemented at grass root level. The theory of women and law will provide an insight into the disjuncture between policy makers who as decision makers figuratively constitute the 'top' section of the land reform hierarchal process and the rural women who, as beneficiaries are at the grass root level hence constitute the 'bottom' part of the land reform hierarchal process.



## **2.1 History of Land Reform in Kenya**

This section of the research study is three-tiered and mainly focuses on the Luo community in Nyanza province to whom the Yaw Pachi women's group belongs. The key tensions around women's access and right to land in Kenya relates to various political periods in the history of Kenya. The tensions relate to how, on the one hand, governance of land at the time and on the other hand, the situation of women's access and right to land. These tensions date back to pre-colonial period of land tenure under customary law, to colonisation period where adjudication, consolidation and registration of land took place and much later to a period when Kenya became an independent state and land tenure is governed through customary and statutory law.

### **2.1.1 Pre-colonisation Land Systems among Luo**

The period before Kenya became a Crown Colony, dated before 1920, is adopted for this research study as pre-colonisation. At that time, in accordance with Shipton (1989:19), Luo political organization tied directly into relations of kinship, gender, and age. This means that kin groups, based on real or putative descent through one sex, in this case male, divide and subdivide like branches of a tree. Patronymic in naming, virilocal in post marital residence and in a third of family homesteads, polygynous, the Luo gave a high public profile to their males.

Shipton (1989:30) further states that though women did not normally inherit land when married, they held well recognised rights in the lands of their conjugal families, holding these in trust for their own unmarried sons. The impact of this customary law is that women held land rights that were conferred over a lifetime. Pala explains that among the Luo, the traditional system provided a woman with 'usufruct' rights of land belonging to her husband's patrilineage. Her role in agriculture and food production was recognised by customary rights of access to land and support from the family labour. Such rights to land conferred to wives lasted for a lifetime. Women as individuals or groups did not have the legal rights to allocate or dispose of land but neither did the individual men (Pala, 1983:70 as cited in CICLS, 2000).

During pre-colonisation period, Luos 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 men and therefore, it was patrilineal succession. Although indigenous property laws excluded women from owning or inheriting. However, this cannot be a 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, and although women were 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 (Okoth-Ogendo, 1982a:24 as cited in CICLS, 2000).

In Luo culture, it is very important to bear male children because they are viewed as the security to the clan. Firstly, because a son would be able to offer security of tenure to his mother in the case of his father's death and secondly, because wives and widows were, considered as custodians of the land for their sons with no inheritance rights to it; where a widow had no sons, under traditional system, she stood to lose the land to brothers or other male relatives of the dead husband (CICLS, 2000).

However, women had virtual control and monopoly of crop production which led them to having rights to land they controlled for the maintenance of their households. Although men were considered heads of their families, when they died, the property remained intact for family use (Gutto, 1976). In pre-colonial era, there were some laws regulating land boundaries in Luo land. If for example two people who had a common land boundary, in the course of time destroyed the boundary which the elders had marked, the case would be brought before the council of elders, but they (the elders) would throw it away. Furthermore, in some areas, consolidation of fragmented landholdings under the land tenure reform curtailed the relatively independent managerial control that women exercised over the dispersed family plots they cultivated (Fleuret, 1988 as cited in FAO, 2002:16).

The leviratic unions helped the widowed women to maintain their husbands' property as property right was contingent on residence and status. Furthermore, the rules that governed land, its acquisition, tenure, use, disposal and control of produce, gave women an enviable authority. By virtue of their status, women had stronger voices in terms of land rights and obligations which operated to hold the kinship group together (Gutto, 1976). In this system, wives had rights to prevent husbands from giving out family land to another person. If the husband was dead, dumb, impaired or very old, a woman could sue for trespass, eviction, settle boundary disputes of her husband's land and retain all rights to the land until the sons got married (Nangendo, 1994:107).

Under customary practices, decisions on land were usually taken by chiefs or elders on behalf of, and in trust for, the clan or family. Authority was generally ascribed to the patriarchal lineage, and most major decisions were taken by men. While women could bring their views to the attention of such authorities, they never participated in decision-making. Thus, in setting up committees to advise and arbitrate on land, custom was invoked to exclude women from decision-making (men and not women decide land disputes) and acquiring ownership interests (Martin and Hashi, 1992:35). In such a scenario, women's claims to land within customary systems could only be obtained through their husbands or male kinsfolk and therefore considered secondary rights. Such rights, for example, could be subject to change and could also be subject to good relations between the parties involved.

The pre-colonial tenure system benefited women whose role in agriculture and food production was recognised 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 alive 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).

### 2.1.2 Pre and Post Independence: Swynnerton Plan and Million Acre Scheme

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. A major land tenure reform issue in Kenya and the rest of Sub Saharan Africa has been the relative merit of indigenous customary tenure systems and those based on western concepts involving the registration of individual ownership.

The neo-liberal argument is that communal tenure constrains effective management of common property resources which are key to rural livelihood. This is in tandem with the tragedy of the commons<sup>11</sup>. When land reforms were first introduced in Luo land, fear was high that such reforms would create land-less people with a few individuals holding land rights to large acres of land (Wilson, 1968:23).

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.

This comprehensive five year plan to intensify the development of African agriculture in Kenya was compiled by RJM Swynnerton. 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

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<sup>11</sup> The tragedy of the commons is a type of social trap that involves a conflict over resources between individual interests and the common good. It was popularized and extended by Garrett Hardin in his 1968 *Science* essay "The Tragedy of the Commons". The parable demonstrates how free access and unrestricted demand for a finite resource ultimately dooms the resource through over-exploitation. This occurs because the benefits of exploitation accrue to individuals, each of which is motivated to maximize his or her use of the resource, while the costs of exploitation are distributed between all those to whom the resource is available (which may be a wider class of individuals than those who are exploiting it).

lands of high rainfall and to increase greatly the value of annual exportable surplus cattle from African lands (Blundell, 1962:13).

The 1954 Swynnerton Plan aimed to create individual freehold rights as an inducement to produce successful black commercial farming. Though the Swynnerton Plan was initiated to counter the rural insurgency - *Mau Mau*- the logic behind these schemes exemplifies a long-held tradition in studies of rural development where a “safe and sound” investment is regarded as that which concentrates on building a class of “progressive farmers” to the exclusion of the “poor and less able” farmers (Kariuki, 2004:8).

Most notably for the research area 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. Although such colonial land policies had an equally detrimental effect on both sexes, the Swynnerton Plan, in particular, undermined women’s relative economic stability in rural areas for the main reasons that, it gave precedence to individual ownership invested in male heads of households and in turn, marginalised the usufruct rights of women formally guaranteed under the lineage tenure (Kibwana, 1996:150). It eroded many rights that women enjoyed in their traditional settings, leaving them with unsupported and unrecognised bulk of agricultural work in the rural areas.

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 Luoland 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).

The policy of individualisation through the process of land rights and the subsequent registration of absolute titles were pursued vigorously. The Registered Land Act (GOK, 1962) further enhanced the individualisation of tenure among the indigenous communities. These changes dramatically transformed the gender relations to land. The solutions imposed by the colonial system aimed at intensifying agriculture and introducing cash crop, with emphasis upon male controlled agriculture was a primary determinant of women's loss of status and power in agriculture. In essence, the men rather than women benefited from reforms and re-structuring of customary practices of land tenure (EASSI, 2002:40).

The colonial administrators felt that to make the Kenya colony more productive it was necessary to introduce private property rights. The lack of individualized property rights among Africans led the colonial administrators to assume that the land was openly accessible to anyone who cultivated it. They did not concede to the rights that these communities had over land. This assumption of Africans; wasteful use of land served as the vehicle for the transmission of the communities' property to the individuals and to the state. Africans continued to look upon registered land as family land and perceived that the person whose name was use in the registration, as a trustee for the member of the family. In the process, women's access to land became tenuous since it would have to depend on the goodwill of the male members of their families (Mbote, 2001:7).

Individualization and registration of titles has threatened the security of tenure of women and children and the security of economic opportunities of entire families through rights of disposal conferred on the male head of the household (Green, 1987:1). In addition, Wilson (1968:23) states that the land registration as an individual's property seems to have reduced the rights of women in land. Husbands who in most cases are the title-holders under the new system are freer than before to pledge or dispose of the land without seeking the advice of their wives first.

In Sub-Saharan Africa, most land reform programmes have been limited to titling, registration of land and settlement schemes. In the recent past, in the context of liberalisation programmes, observers have noted the rapid development of land markets in a large number of sub-Saharan countries. Most of these programmes allocate land titles to male heads of households. Most customary tenure systems gave women access to land not in their own right, but as their husbands' wives or in the case of divorce or widowhood, as daughters or sisters of male within their own families. While they may have a right to land through their husbands and other male relatives, they have no right to a particular piece of land and may be forced to move from field to field (Bruce 1993:46 as cited in Wanyeki 2003:77).

In Kenya, the process of registering land is manual and not computerized. The registries such as the Siaya registry have a paper filing system. This consequently creates room for manipulation and corruption. In Bondo District<sup>12</sup> 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 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 whose case study is Yaw Pachi, Siaya district in Nyanza province (Okoth-Ogendo as cited in Aliber *et al.* 2004:15).

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 – not that it introduced the bias in favour of men's, 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" (1988:119 as cited in Aliber *et al.* 2004:15)

In accordance to EASSI (2001), because the name of the title owner in most cases is a male figure; husband, father or son, in the community, this accelerated the

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<sup>12</sup> Bondo district is adjacent to Siaya district. Both districts are in Nyanza province and share characteristics such as Luo language, Luo customs.

individualisation process and further curtailed women's land rights because the implementation of the land registration programme was carried out in a period in which gender was not in the development agenda.

Land tenure reform in the 1960s has affected women's land rights. The reform intervened in a context where customary law was evolving towards increasing individualisation; with an erosion of women's customary land right. According to Nzioki (1996:56), these reforms have in effect resulted in some outright abuses when ancestral land is sold at will by the person whose name appears in the registrar's file. In this context, the individualization process has been accelerated and further curtailed women's land rights. In Luoland such as Siaya district, registration was usually made to male household heads, thereby undermining women's unregistered secondary rights. In accordance to Shipton (1988 as cited in FAO, 2002:16), in Kanyamkago, for instance, only 7 percent of the plots were registered to women as joint or exclusive right-holders, and 4 percent to women as exclusive owners.

At the time of independence, there were three substantive regimes in property law governing land of various tenures, five registration systems and an elaborate structure of administrative agencies dealing with land and related issues. The purpose of that infrastructure was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of Africans. These systems of land tenure were based, in the one case, on principles of English property law and in another, on a largely neglected regime of customary law (MoL, CILS, 2002: 30).

Apart from the official joint Government and World Bank Plan known as the million acre scheme of 1962, which by 1971 had settled 35,000 families in 470,000 hectares of land, the process of facilitating greater and broader access to land by the dispossessed has never been a central operationalised policy of the government (Gutto, 1995:37).



In Kenya, massive inequality stems from deliberate government policies that can be traced to the colonial days. Kenya missed the mark as soon as the first government decided to inherit the structure of governance that was established by the colonialists (SID, 2006:342). The attainment of independence in 1963 saw accelerated efforts by the Kenya Government to resettle the 'landless' on former 'scheduled' areas which were European-farmed. The majority of the holdings were still supporting large families and, in practice, women continued to cultivate their separate gardens instead of using the consolidated registered land as one economic unit. Consolidation also created a landless class and failed to pave way for improving the majority except a small minority of a landless class (Said, 1985).

Women's access to land through freehold property was difficult, stemming from the fact that farms were often massively overvalued, securing excellent prices for the departing farmers. Costs were high, amounting to more than £25m, of which the British government paid 67 percent (Kenya Land Alliance, 1990:23). Although property had been transferred to Africans in the million-acre scheme, the reality was that the poor and landless (majority whom are women) seldom gained access to the farms. The vast majority of land under the million-acre scheme was taken up by wealthier farmers who could afford the purchase costs.

In the 1980s, the policy debate on the individualization of tenure focused on economic development. In the 1990s, the focus has turned to the sustainable use of land resources. Both of these arguments tend to underestimate the importance of customary land tenure systems, which are an integral part of the social, political and economic framework. Above all, they overlook the unintended effects of undermining land tenure systems, which protect poor and vulnerable members. They also tend to disregard the empirical evidence that traditional tenure systems can be flexible and responsive to changing economic circumstances. With population pressure and commercialisation, individualisation has occurred autonomously (Migot-Adholla *et al.*, 1994).

The privatization of land has reduced the authority that clans have over individual land holdings. Clans through their elders retained the right to resolve land disputes and to enforce the will of the deceased through distributing the land belonging to the deceased. Now, with competing needs amongst land scarcity and education, attitudes are changing to accommodate the commercialisation of agriculture. Individuals exert more control and influence over the land that they own (Wanyeki, 2003:267).

## **2.2 Customs Undermining Women's Access and Rights to Land**

### **2.2.1 Overview**

Kenya's current constitution outlaws discrimination on the basis of sex, however, some laws undermine the constitution by permitting discrimination in personal and customary laws. Customary laws tend to neglect women's rights and give men authority over women. Patriarchal and cultural biases enshrined in the Kenyan constitution deny women equal rights and opportunities at the same level with men. This draws on debates about the state to argue that; women who use a liberal rights framework to press claims are seen as colluding with external forces and as such, betraying the cultural values of their own society. This suggests an important link between the legitimacy accorded to women's claims and the legitimacy of the state for which it has, in post-independence period, relied on appeals to custom and tradition (Stewart 1996 as cited in Manji, 1999: 449).

The Kenyan constitution exempts certain laws from the discrimination prohibition. It permits discrimination "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law and with respect to the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons" (Karuru *et al.*, 2001: 25). There are as many customary laws as there are tribal communities, and each has its own nuances. Kenya's legal system formally recognises customary laws despite the fact that no act of parliament has been passed to reinforce the existence of these laws. Cultural practices and stereotypes that hinder the realization of women's rights are stronger in the rural areas. It is in the rural

areas where practices such as wife inheritance, polygamy, and early marriages that hinder education of girl child are normal practices. Cultural stereotypes also hinder women in the rural areas from participating in decision-making at the local level. With all these disadvantages, it is not surprising that ignorance on women's rights is high in the rural areas (FIDA<sup>13</sup>, 2006).

Customary laws, to this day, have a profound impact on women's property rights and it is important to understand their nature, their place in Kenya's legal system, and basic principles. For example, a Central Bureau of Statistics report (2005: 42) states that, further complicating the gender analysis in Kenya is cultural diversity within the country such as communities with a tradition of polygamy and in which wives in polygamous households have separate residences. In addition, statistics from a joint report by Ministry of Culture, Gender and Social Services and UNDP, show that men own 95 percent of all landholdings in Kenya while women own just five percent. This partly results from application of traditional practices and male attitudes and laws discriminate against women and dispossess them of their property, while burial rites demean women. (UNDP/MoGSC, 2006:9).

Apart from hindering women's access to land, the customary practices are sometimes accompanied by physical abuse and harm to the women who resist these practices. FIDA reports that denial of access to and/or use of land or property comprised 6.3 percent of all violations, whereas 4.1 percent was in regard to property, mainly denial of inheritance rights, perpetrated by husbands. These violations occurred frequently to women who were separated, widowed or simply could not agree with their husbands. Numerous women reported being denied the right to inherit property by their in-laws, upon their husband's death. There is no provision in the law to criminalize domestic violence. Consequently, women must rely on customary law, which gives husbands the right to

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<sup>13</sup> The Federation of Women Lawyers Kenya (FIDA Kenya) is a non-profit, non-partisan and non-governmental membership organization, committed to the creation of a society that is free of all forms of discrimination against women through provision of legal aid, women's rights monitoring, advocacy, education and referral. Its main objective is to enhance access to justice by needy women in Kenya in targeted areas, to improve the legal status of women in Kenya and to enhance public awareness on women's rights issues

"chastise" or "correct" their wives with physical punishment whenever necessary (FIDA, 2006:32).

### **2.2.2 Introduction**

The primary aim of this research is to conduct an assessment of women's land rights within the context of inheritance and land ownership based on a case study of Yaw Pachi women's group, Siaya. This assessment seeks to ascertain the extent to which customs faced by women have undermined their access to land.

These customs include:

- (a) Wife/widow Inheritance
- (b) Patrilineal inheritance of family property such as land
- (c) Polygamy
- (d) Property Stripping

Customary law often poses a problem and hinders the enforcement of laws that positively considers women's rights in land. Economic restructuring and land distribution policies have often excluded women because bureaucrats are almost always gender insensitive. The land market remains inaccessible to women for lack of financial resources (EASSI, 2001:3).

### **2.2.3 Wife Inheritance**

One of the most contested aspects of women's lives during colonial period related to the guardianship of widows, their children and the property of their deceased husband. Different ethnic groups invested diverse male relations of the deceased with varying responsibilities for these. Chief among them was a leviratic marriage commonly referred to as wife inheritance, in which a brother or other member of the family became the widow's new husband (Kanogo, 2005:65).

In a number of Kenyan communities, initiation of a new sexual relationship with a male partner, known as widow inheritance, is an acceptable and sometimes obligatory practice. Most of the times, these widows are forced into these rituals to enable them stay in their matrimonial homes and to maintain life interest in their husbands' property (FIDA, 2006:32). Generally, Luo tradition dictates that a woman should be protected and respected. In the past, a widow was inherited along with the property and was cared for by whoever inherited the property.

In Siaya, wife inheritance is a cultural practice that may take a number of different forms depending on the clan. First, there is non-sexual wife inheritance, whereby the coat of an inheritor is placed in a widow's house overnight to symbolically cleanse her. This generally applies to widows beyond childbearing age. Second, there is inheritance involving long-term sexual relations, typically with a brother of the deceased, in what amounts to a marriage. Third, there is a combination of cleansing and inheritance, whereby a widow first, has sex with a social outcast (known as a *jater* in Luo language) who is paid to have sex with her to cleanse her of her dead husband's spirits, and is then inherited by a male relative of the dead husband. Fourth, there is cleansing alone, where a widow has sex with a *jater* to cleanse her but is not inherited permanently (HRW, 2003:12)

Wife inheritance as a guarantee on a widow's security might have been a good reason some years back for many communities in Africa. In accordance to Wanyeki (2003:158), the community in Maguzawa area in Nigeria, widows, upon the death of their husbands, they are some times allowed to continue using land allocated to them by their deceased husbands, on the condition that they remarry a member of the family or stay as part of the family. However, today it rather means a choice between two unpleasant options for the widow, the first choice, to agree to be inherited, accompanies widows often with a low status within their new family. Secondly, if a widow opts out, she loses her right and access to matrimonial land.

In Zambia, when a seventy year old widow (Theresa Chilala) refused to be inherited by her brother in-law, he turned her homestead into a graveyard to 'teach' her a lesson. After her husband's funeral in 1990, one of her brothers-in-law stripped her of her property that included her house, the oxen, ploughs, household goods, thirty cows and iron-roofing sheets. Furthering her plight, wife inheritance was imposed on the widow when another brother-in-law then wanted her to marry him (Izumi, 2006:93-94).

When a widow objects to wife inheritance, the consequence can be property stripping. The relatives of her deceased husband treat her as an outsider and enforce it by taking everything that their deceased brother owned away from the widow. In Zambia, when Theresa Chilala objected to wife inheritance, her brother in-law began to bury dead relatives in front of her house, to try and evict her from her land. Theresa took the case to the land tribunal, but lost, and was ordered to pay fifty million Kwacha (equivalent to \$12,000 at the time of the interview in 2005) to the brother-in-law. However, he continued to bury dead relatives on the land. In total, seventeen graves had been dug by the time the last burial was made on 6 June 2005 (Izumi, 2006:93-94).

The fear of witchcraft otherwise called *Chira* is prevalent in Luo culture and serves as a control mechanism on women's actions. Aliber *et al.* (2004:128) state that *Chira* is the illness that afflicts a person for 'going against tradition'. Specific to inheritance, widows feel that if they question the actions of their deceased husband's family, they will be cursed by witchcraft. Further, a widow may fear that the family of her deceased husband can curse her, so that she may fall ill, her children may fall ill or she will die or her children will die. This fear strongly deters many women from taking action against the relatives (MS Kenya, 2007)

However, due to the advent of Christianity, widows from Luo community, more so in urban areas, are increasingly refusing to be inherited, while at the same time men do not want to inherit the wife of their deceased relative. However, this transition is yet to be embraced by rural communities such as the one in which the Yaw Pachi women's group live in. The situation is different in Nigeria; even though Christian marriages in southern

Kaduna are recognized under the marriages and matrimonial clauses act, the inheritance rights of widows and daughters are still governed by customs. As a result, the liberating effect that Christian marriages would have on women's inheritance is not felt. Also, women would rather be in a polygamous/traditional marriage because unlike the Christian marriages, traditional marriages allows for divorce (Wanyeki, 2003:172)

In Kenya, households headed by women are sometimes the result of divorce, separation, or widowhood all of which are generally thought to contribute to lower levels of economic well-being. The HIV/AIDS pandemic has caused an increase in female headed households, especially in areas where the disease is prevalent. In Kenya, Nyanza province has the highest incidences of HIV/AIDS related deaths. The 1999 population and housing census indicated that in Nyanza province; almost fifty percent of households are headed by women (Central Bureau of Statistics, 2005:53).

#### **2.2.4 Patrilineal Inheritance of Family Property such as Land**

Mbote (2001:3) states that succession among many African communities denotes the passage, not only of the property of the deceased, but also the obligations to which he was subject and the status that he held in society. The successor is invariably the eldest son of the deceased or the brother or widow depending on the community. Among the Luo, it is the eldest son or brother, among the Kikuyu, it is the wife. This practice is prevalent among the Luo community. Whisson (1964:86) adds that the most important means of acquiring land is through inheritance, from one's father, or a member of the agnatic lineage to who one is the legitimate successor. The land is divided between sons according to their mothers and between the sons of the women into equal parts under the direction of the eldest son, assisted and advised by senior men in the lineage (*kakwaro*) in case of dispute.

Under African customary law, daughters generally do not have inheritance rights to family land. Many families in Africa hope that their daughters will marry and so use the land belonging to the family of their husbands. It is assumed that women always get

married, and that their husbands always give them land when they need it. An unmarried woman only has limited user rights in the family where she was born. The likelihood of daughters inheriting land is only where families have no sons (Nzioki, 2006).

Theoretically, it is assumed that tenure reform in Kenya gives equal chances to both women and men to inherit land. The Law of Succession Act (LSA) of 1981 abolished the discrimination of sons and daughters when it comes to the issue of inheritance of family property such as land. This further attempted to bring some uniformity to succession in Kenya, by allowing women to inherit land. If one's spouse dies, 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. However, if the surviving spouse is a woman, her interest in the property terminates if she remarries. FIDA (2006:17) reiterates that the LSA, which governs matters of inheritance, has ensured that woman's property rights are upheld. However, ignorance of law among rural women is a deterrent and many have been disinherited due to ignorance and lack of access to legal services.

The issue of gender inequality in matters of land ownership has been addressed in some ways by the Law of Succession Act. Some women have gained from registration. For instance, widows sometimes registered land in their name, instead of returning it to the dead husband's family under customary law (Shipton, 1988).

In principle, women are not denied property rights in Kenya. Married women are granted property rights through formal statute law, and the 1882 Married Women's Property Act. But a different picture emerges in practice. In accordance to Kanogo (2005:153) at times, in-laws appropriate all manner of assets from the widows' household. Despite such incursions of the property of the widow, a dead man's brother could not inherit the property of the dead man if the latter had left male children behind. The widow would act as custodian until the male children were old enough to inherit the property. While the children were young and the property was in the widow's hands, the in-laws kept a watchful eye over as to how she utilized it.



On the other hand widows who are eligible to inherit the deceased husband's land may not always do so, and those who inherit do so in severely restricted terms. MS Kenya (2007) explains that the nature of rights that a widow enjoys in her husband's land are, in practice, contingent on a variety of factors, such as whether or not she is inherited by the relatives of the deceased husband, remains single and chaste, whether she has minor sons and whether the deceased husband had been allocated a separate land from the joint family land before his death. A widow usually loses her rights if she re-marries, leaves her husband's village on his death, if she only has a daughter or is childless. A woman with minor sons is allowed to use the husband's land as a trustee on behalf of her sons till they grow to adulthood, after which she is expected to live with one of them but has no independent use to the land.

Boserup (1970:58-59) warned as early as 1970, that the scarcity of land may result in the loss women's right to land. In many tribal regions, land tenure seems to be at an immediate stage between tribal right to clear plots and the full private ownership of land. When the sales of land increase, women are at a disadvantage because they usually cultivate subsistence crops for the family, while men cultivate cash crops of work for a wage. Therefore, it is the men who have money and can purchase land. Thus, the possession of land is likely to gradually from women to men, even in tribes where women have the right to inherit land.

Overall, the Kenyan government has not made women's property rights a priority. According to officials in ministries and other government departments who could play a role in preventing or redressing property rights violations, or at least in alleviating the hardships victims endure could not identify any program aimed specifically at alleviating women's property rights violations. The government conducts no civic education on women's property rights and does not fund NGOs that do.

There is no government legal aid system (other than for murder and treason cases) and no women's shelters funded or operated by the government. Also, Human Rights Watch (2003) insists that government offices that perform human rights education do not focus

on women's property rights. The Women's Bureau conducts 'gender sensitization' trainings for government officials but does not offer civic education on women's property rights. The Standing Committee on Human Rights has a human rights education program but does not specifically address women's property rights.

### **2.2.5 Polygamy**

Polygamy is the matrimonial union whereby a man has more than one wife. In some cases, the number of wives is regulated by religion. In most of Africa, however, the number of wives is infinite<sup>14</sup>. Polygamy in sub-Saharan Africa is not only a type of marriage but also a value system. Its prevalence as a type of marriage has declined substantially in the southern part of the region where the adoptions of plow cultivation and commercial livestock raising, as the basic economic activity, have reduced the importance of the participation of female labourers and hence have reduced the incentive to have multiple wives (Boserup 1970; Kuper 1985; Timaeus and Graham 1989). As a value system, it has been highly resistant to the competition of the imported ideology of monogamy and to the impacts of various structural changes such as the transition from subsistence to a money economy and urbanization.

The main features of polygamy in most cultures including the Luo culture are: women's very early age at first marriage, which ensures their early exposure to pregnancy; men's very late age at first marriage, which is determined by their family's ability to pay for the marriage and to support a household; and the quick remarriage of separated, divorced, or widowed women, which helps extend their reproductive duration.

The payments of the bride-price by the groom's family to the bride's family can be a substantial amount and may be stretched through a long period until or even beyond the birth of the first child (Ueda, 1992 as cited in Hayase *et al* 1997). The bride-price originally took the form of tangible goods like livestock but has never included land. However, it has increasingly been replaced by cash. The remarriage of a widow is usually

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<sup>14</sup> According to a BBC report in 2005, a Luo man called Akuku has more than 50 wives and has a whole neighborhood as his family. People have nicknamed him Akuku danger because he is 'dangerous' with women.

of the nature of levirate (i.e., to another male of the deceased husband's family, usually one of his younger brothers).

In Luo culture, men have a duty to marry and provide a plot of land to their wives for their use, but since there has been recent land pressure, there are reports of husbands not allocating land to their wives. The culture of polygamy helps maintain a very high fertility level. It has, thus, contributed to the explosive population growth in sub-Saharan African countries since the 1950s when the transplantation of relatively cheap and effective health and sanitary technologies from developed countries began to substantially reduce the extremely high mortality level. By exposing nearly all women to early and prolonged risks of pregnancy, the polygamy system has helped maintain very high total fertility rates, which in turn offer supplies of labour on land (Hayase *et al.*, 1997: 295).

Polygamy, in a large part of sub-Saharan Africa, has long co-existed with a primitive system of agriculture in which women do most of the farm work (Boserup, 1970:38). Typically, when a man gets a new wife, he clears a field for her, and later her children, to cultivate. Men are motivated to have two or more wives and many children, because their wives and children serve as a form of cheap labour and as a means to expand their ownership of farmland cleared from communally owned land. Since, in addition to farming, there are many domestic chores to do (e.g., fetching water and firewood, cleaning, cooking, and nursing), a woman may even encourage her husband to take in a co-wife to share her heavy workload. Boserup (1970:43) explains that, since, the first wife is usually vested with the authority to assign and distribute domestic chores to her co-wives; the existence of co-wives also helps enhance her status. In addition, women view marriage as an important rite of passage that has to be undertaken.

Polygamy affects a variety of land issues, including division of property, management of property, and joint ownership. In countries where polygamy is illegal but widely practiced, the effect on land rights is ignored. However, a country such as Burkina Faso has incorporated polygamy in the legislation on marriage, family, inheritance and land. In

Burkina Faso, under the 1990 Family Code, if a couple is monogamous, their property is community property. But, if there is more than one wife, all property is separate property (UN HABITAT, 2005:42).

Polygamy is not necessarily imposed on women. Due to high level of poverty in areas such as Siaya, it is more prestigious to be a second or third wife of a wealthy man than a pauper's first wife. This prestige is not only felt by the women entering this polygamous union but also by her relatives who are suddenly put in a privileged status in society. Also the woman has guarantee that her children will have a chance at a better life with this wealthy man. Kanogo (2005:106) says that some girls opt for marriage into polygamous situations if the homesteads were wealthy.

However, polygamy is also exercised among poor men. Their reasons have mostly to do with the gains that accompany offering the services of a *jater* (man who inherit widows). The Luo traditions are such that, a woman cannot carry out duties on her gardens without the 'blessings' from a man in his capacity as a husband. These duties include planting and harvesting. Also, her granaries have to be built and repaired by this same man. Widows find themselves in an awkward position of not being able to reap from the land left to them by their deceased husband if they have not found someone to succeed him in the homestead. A *jater* comes in handy. The *jater* also gains by being able to access the property left by the widows' deceased husband.

Having little property rights and being treated essentially as a form of property to be exchanged for material goods between families, women in the polygamy system of sub-Saharan countries have much lower status than men and are especially vulnerable when they become spouseless or childless (Boserup, 1970). Without the right to inherit the property of her husband, a wife in this system is motivated to maintain high fertility, hoping that at least one of the surviving children is a son on whose inherited field she can continue farming after her husband's death. Her greatest fear is the inability to bear children, more so male children, which is not only a valid reason for her husband to divorce her, but also a cause for her community to make her an outcast.

### 2.2.6 Property Stripping

Women in Southern and East Africa have never enjoyed the same statutory rights to property as men, but under customary laws and practices they have had limited rights to use and benefit from property belonging to their male family members. The upsurge of HIV/AIDS in Kenya, particularly among illiterate, semi-illiterate and poor women, has further complicated the existing insecurity surrounding women's land and property rights in Kenya. There are many widows who have lost their matrimonial property rights after their spouses passed away. The worst aggressors are their in-laws, particularly their husbands' brothers. Instead of helping their sister in-law, many of them grab their property (Izumi, 2006:19).

Increasing numbers of widows are facing evictions and property grabbing after their husbands die. The problem is significantly affecting young widows who do not have children, and who are likely to form new relationships with other men when their husbands die. These young widows are often forced to return to their natal homes. Older widows are in a stronger position to stay in the marital home because of their well established social networks and relations (Aliber *et al.*, 2004). Widows without sons also tend to be more vulnerable to eviction and dispossession, compared with those who have male children.

With the prevalence of HIV/AIDS in Siaya district, the practice of stripping a widow of her matrimonial land occurs. This is because the community believes that a surviving widow living with HIV/AIDS is the one who was infected her spouse and thus causing his death. This rationale by the community members validates the reason for relatives of the deceased to forcefully take matrimonial land from a widow. This is similar for widows in Mozambique, conflicts related to family matters such as polygamous marriages, contested divorces, access to family belongings and land upon divorce and widowhood were often not taken to official justice institutions. They were instead arbitrated by family or clan. In areas such as Anchillo and Corane in Mozambique, women insisting on their rights within families were frequently accused of adultery and witchcraft and suffered from social stigmatization. Widows contending for their rights

were often accused of murdering their husbands for the purposes of obtaining family belongings (Wanyeki, 2003:122).

In Luoland, the occurrence of property stripping is further exacerbated by the fact that majority of the Luo people find it taboo to write a will. Most Kenyans residing in rural areas have very little knowledge of the laws concerning wills and inheritance and are not making wills due to fear and social stigma. For example, even the most educated Luos do not have wills. They say that if they make a will, the person who stands to benefit will kill them. Another belief is that they will be bewitched through *Chira* and die if they make a will. FIDA (2006:60) states that, it is also a fact that most Kenyans die without having written a will. This, in many cases, causes conflict among the real beneficiaries and those who perceive themselves as beneficiaries, although they may not be under the law.

Women in Kenya are caught up in battles with the family of their deceased husbands as they claim the rights to most of the property and goods the deceased had shared and acquired with his wife. Criminal lawyer Sam Meleo (SM) Otieno was born a Luo, in Nyamila village Nyalgunga, Alego in Siaya district (Cohen and Odhiambo (1992:2). A prominent lawyer such as SM Otieno did not, the records shows, inscribe as will, testament, letter, or contract any indication of a wish as to how and where his burial would be performed. That SM failed to convey any uniform burial instruction opened up an important and continuing national debate concerning the relative legal standing of the three juridical codes in use in Kenya: existing Kenyan law statutes, principles of common law carried into Kenyan practice from an English legal tradition and concepts recognized as customary law. This in many cases causes conflict among the real beneficiaries and those who perceive themselves as beneficiaries although they may not be under the law. (Cohen and Odhiambo, 1992:13)

Although the *Economist-Namibia* reports that, Namibia does have laws protecting inheritance rights in civil marriages Namibia's Married Persons Equality Act of 1996 and the Communal Land Reform Act of 2002, in a largely rural country, most marriages are

customary law unions - which means they fall under tribal conventions. In reality, village chiefs and customary or tribal laws determine all things in rural life, including the most contentious issue of all; the seizure of property from newly-widowed women, leaving them homeless and destitute. When a dead man has a will, Namibian law allows it to be enforced by a court. But even then, women face strong resistance from traditional leaders (Mukumbira: 2006).

Discrimination in inheritance practices is not limited to Kenya only. In Rwanda, Wanyeki (2003:201) states that women in informal marriages, especially those in polygamous marriages and widows are among the women most vulnerable to losing their access to land. In many instances, widows find their land rights challenged by their brother in-laws who want to live in the house or exploit their fields. Widows, who have children following the death of their husbands, are particularly vulnerable to losing these battles. Women in polygamous marriages face similar problems on the death of their husbands, although their challenger is often a legally recognized co-wife. Further (Wanyeki 2003: 201) states that, women in informal or polygamous marriages are often chased off their husband's land when a dispute arises with their husband or if the husband dies.

In Malawi, widows face the same predicament, whether rich and educated or poor, rural and uneducated women. Tujilane Chizulmira, Attorney at Law and widow of a former Minister of Justice, was left with virtually nothing after the death of her husband, found herself with no avenues for recourse. Even knowledge and familiarity of the legal system could not help her because in Malawi, property grabbing is not an offense in the cultural scheme of things (Papadopoulos, 2000: 8).

Since many women in Kenya never make it to court to claim property, they often turn to local authorities, both governmental and traditional, to resolve disputes. Although informal dispute resolution can help limit the financial and social costs of claiming property rights, local officials are more apt to apply customary law than statutory law, which can disadvantage women. Despite the presence of the Law of Succession Act,

1981 which allows for widows to inherit the land of their deceased husband, few women are aware of legal procedures with regard to land

Eastern Africa Sub-Regional Support Initiative (2001) states that, unfortunately, widows do not fare any better under traditional authorities. Traditional authorities hold a great deal of power and respect in rural areas. Traditional authorities value the man's family more than the widow's welfare and most admit uncertainty as to how to distribute property when called upon by a family in dispute. They still believe that the widow will eventually remarry and thus, be taken care of by another man.

Tradition alone is not the culprit: current laws fail to protect women. Kenya's pluralistic legal system is complex and confusing even for those with high levels of education and access to information. For women not in that privileged position, it is unusual for them to know their legal rights. Women are not educated enough to know their rights. Property grabbing should be criminalised with enforceable punishments, and this should be accompanied by large-scale public campaigns to raise awareness of the issue, and to inform people that it is an illegal act. The judiciary and police need to be trained on international standards, conventions on women's rights, and the third Millennium Development Goal, which promotes gender equality and the empowerment of women. More financial resources and technical expertise should be directed to the judiciary and police, to allow them to intervene more effectively in cases of property grabbing. Information about inheritance and property rights should be included in the school curriculum so that children are educated on these rights at a younger age (Izumi, 2006d).

### **2.3 Role of Statutory Institutions in Women's Access and Rights to Land**

The research study will assess the role played by institutions that are recognised by statutory law on the issue of women's rights and access to land. Specifically, the research study will look at the role played by the Land Board in Siaya town, which serves the communities in Siaya district of whom the Yaw Pachi women's group belong to. The land boards have played an important role in the issue of land adjudication since the



period of colonization up to date. Their significance arose out of the evolution of land tenure systems from customary land tenure to registered land tenure.

In Luoland, during and after, colonization traditional land tenure systems began evolving into individualized tenure arrangements with private transfers being made exclusively by and to male household heads. Whisson (1964:233) states that as each area was mapped, disputes would arise and these could be settled by a special sub-locational court of elders (who are at present, the most respected arbiters in land disputes). Once the title to the land was established, the owner would be given the right to sell that piece. Once the land was registered in this way, it could be bought and sold through the land office. Men who wished to obtain more land would be able to do so by purchase, and thus establish an inalienable right to the plot.

### **2.3.1 Land Boards**

Adjudication is the confirming of existing rights in land while registration is the final step where the parcels of land already adjudicated are entered into a register and land certificate is issued in the name which appears in the register. It must be mentioned here that the whole process from adjudication, to registration has generally been implemented by men. That is, adjudicators and land committee and board members are often men. The women's participation in this process has been almost non-existent. It has been argued that by custom women did not take part in land disputes and therefore it was reasonable that they do not take part now (Pala, 1980:39).

The Land Control Act of 1967 establishes areas where Land Control Boards control transactions in agricultural land. The goal of this Act was to prevent fragmentation of agricultural land; the owner of agricultural land has to obtain consent from a Land Control Board before any transfer of such land can take place. In principle, the Land office in Siaya and more so, the Land Control Board, must preside over all land matters, be it land market transactions or boundary disputes before they can proceed to the family court of the tribunal (Benschop, 2002:602).

Land transactions require the approval of the competent Land Control Board, which decides on the basis of economic and social criteria (e.g. prevention of uneconomic subdivision and of landlessness, respectively). However, the constitution disadvantages women by vesting more adjudication powers in the land board by exempting the operations of the board from the discrimination clause. The post-independence constitution provides that ‘all Kenyans are entitled to fundamental rights and freedoms, whatever their sex’<sup>15</sup>. However, section 82(6, b), of the Constitution states that the principle of non-discrimination by public authorities does not apply to the activity of Land Control Boards (FAO, 2002:16).

Findings by Human Rights Watch Report (2003: 22) show that, if a land control board permits a man to sell family agricultural land, a woman cannot challenge that decision as discriminatory. Eastern Africa Sub-Regional Support Initiative (2000:43) states that cases handled by the Land Control Board are reported by women, whose husbands use the family’s title deed without consulting the wife to secure loans which most of the time did not benefit the family.

As for the composition of the boards, no women representation is specifically required, and more than one-half of the board members must be “owners or occupiers of agricultural land within the province” (Land Control Act, Schedule, art. 1); given the little share of land owned or occupied by women, this provision may constitute indirect discrimination.

EASSI (2000:42) states that neither women as wives or daughters get involved in the process of land adjudication and registration. Indeed, very few women owned land in their own names. Problems arise after the registration process, especially when a husband decides to sell land, or to use the title to the land as security to acquire loan without consulting the wife. Such conflicts are at first solved by clan elders and chiefs and women are rarely made clan elders or chiefs which means that women are not represented

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<sup>15</sup> (Article 70), any law that is “discriminatory either of itself or in its effect” is prohibited (Article 82, 1) and defines discrimination to include discrimination on the basis of sex (Article 82, 3).

in the structures solving conflicts over land. Since women are generally not consulted nor involved during land adjudication and registration, their interests and concerns as members of the family are not addressed in the process. Few women address family conflicts over land through the Land Control Boards or Court. On the other hand, findings from FAO (2002:16) show that Land Control Boards have in many cases protected women's land rights, e.g. by hearing the views of the spouse before approving land transactions and by refusing approval for transactions that ignored unregistered land interests.

## **2.4 2006 Draft National Land Policy and Women's Land rights**

### **2.4.1 Overview**

There are some government initiatives which attempt to address gender matters in Kenya; national formulation process on the land policy and the Njonjo commission. The primary contributor to policy framework that addresses women's access and right to land is the Report by the Commission of Inquiry into the Land Law Systems of Kenya (CILS), also known as the Njonjo Commission report after its chairman, Charles Njonjo. Recommendations by the *Njonjo* commission were used to formulate the 2006 Draft National Land Policy.

Njonjo report recommends that women's right to land should become part of the fundamental principles of the national land policy. It also states that legislation should be enacted, which assures gender equity with respect to access and control of land. To ensure there is gender equity, the report states that a proportionate and equal number of women representations should be constituted in all the land bodies at all levels. In addition, the report observes that custom that has been observed over a long period of time and is of general application should be recognized by statute and taken judicial notice of except that customs relating to inheritance which discriminate against women should not be recognized (MoL, CILS, 2002: 81).

The formulation process for the Draft National Land Policy in Kenya is itself a milestone in the area of gendered land reform. The overall objective of the draft national land policy of 2006 is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with government's overall development objectives. The vision of the 2006 DNLP is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity (MoL, DNLP, 2006).

The constitution is significant in steering the land rights for women in Kenya and other African countries as well. There is a disjuncture between the commitment by government to pursue a gender equitable land reform in Kenya and the actual implementation of this commitment. The government has failed to pass the 2006 draft land policy into law because the objectives of the policy are pegged on enacting a new constitution for Kenya. This gap in policy and actual implementation is captured by Walker (2003:114) who states that the disjuncture between high-level commitments to gender equity and practice in South Africa's land reform programme hinders women's access and right to land in South Africa.

The South African government's commitment to gender equity has been honored more in the breach than in the execution, and has remained at the level of lofty, high-level principles (Walker, 2003:114). This echoes the observation by Kariuki (2004:58) that the right to equality and protection from discrimination on the basis of gender as enshrined in Section Nine of South Africa's constitution will be a distant chimera to many rural women who aspired to full statutory recognition under formal land management systems. On the one hand the democratic bill of rights attempts to uphold civic and political liberties while on the other hand, a wide range of political and social imperatives have compelled the government to accord constitutional credence to tribal authorities who are anti-modern and unable to uphold the virtues of a modern liberal democratic model.

The need for land reforms in Kenya largely arises due to the ineffectiveness of the current constitution in establishing an efficient, accountable and equitable institutional framework for the land ownership, administration and management. The deficiencies

have resulted in inequitable distribution of land in Kenya. In particular to women, children and minority groups, and persons with disabilities have been denied their land rights. (MoL, DNLP, 2006)

In order to minimize the fall-off between policy objectives and policy impacts, Hall (1998: 460) states that, a land reform policy committed to gender equity should:

- (a) provide a rationale for why gender equity is necessary for the success of land reform;
- (b) Integrate the commitment to gender equity into the policy instruments and implementation methods;
- (c) Anticipate and account for the potential impact of the all aspects of the policy on gender relations; and
- (d) Anticipate potential blockages in implementation and set up mechanisms to deal with these.

In Kenya, gender inequality in land tenure is being advocated through the proposed 2006 Draft National Land Policy (DNLP), a policy document driven by the National Land Policy Formulation Process NLPFP in Ministry of Lands. The DNLP was drafted against the backdrop of the 2005 constitutional review process. The proposed constitution of 2005<sup>16</sup> aimed at strengthening women's land rights in Kenya. This proposed constitution was however rejected by the citizens of Kenya.

Kibwana (2007) states that the DNLP underscores the need for a constitution with broad principles on land and thus, the proposals under the policy may not be realized without a new constitutional order. For this reason, the land policy principles must be entrenched in the new constitution in the immediate, whether Kenya undertakes maximum or minimum review on the constitution.

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<sup>16</sup> Chapter 3, Section 13. (1) The national values, principles and goals include: recognition of the diversity of the people and promotion and protection of their cultures; ensuring full participation of women, persons with disabilities, and all other citizens in the political, social and economic life of the nation; implementation of the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender ;recognition of the special responsibilities that the State, society and parents owe to children, and upholding the family and the institution of marriage;

Since the beginning of the millennium, there is a growing realisation that the right for women to access land in Kenya has come of age. Kenya Land Alliance organised a conference to debate the feasibility of the DNLP. A response from a delegate at that conference published by the *Daily Nation*, states:

“Mr. Simon Cheruyiot from Rift Valley said the draft [land policy] should address historical imbalances and allow married women to access title deeds, which were a preserve for men. Mr. Cheruyiot further added that when a woman is married either in church, or Attorney General’s Chambers, she should be entitled to inherit land. Family land, he says, belongs to the family not an individual. In the event that a man decides to sell the family land, it is the women and children who are the losers” (Muriuki, 2006).

#### **2.4.2 Introduction of Draft National Land Policy**

Several developments in the country have brought the question of gendered land reform into sharp focus in the mid 2000s. These are; gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in the land decision making process are among a few (MoL, DNLP, 2006).

The DNLP observes that, it was expected that the transfer of power from colonial authorities to the indigenous elites would lead to fundamental restructuring legacy on land. This did not materialize and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. Property rights protection was deemed imperative for the conclusion talks held in Lancaster house from 1960-1962. Having worked out an acceptable bargain, the new rulers set about consolidating their power in the new state (MoL, DNLP, 2006).

Women’s access and right to land is hindered through contradictions between existing statutory law and customary law. The DNLP acknowledges that land is critical to the economic, social and cultural development of Kenya. Land was a key reason for the

struggle for independence. Since independence, Kenya has had two land tenure systems, namely customary and statutory land tenure systems. The duality is manifest in systems of land tenure based on principles of English property law on one hand and a largely neglected regime of customary property law on the other hand (MoL, DNLP, 2006:Chapter 2, No.23).

Customary law does not operate on the principle of gender equality and offers few formal means through which women's independent needs or claims on land can be addressed. As observed by Rangan and Gilmartin (2002), the constitution in South Africa accords equal rights to women and men; it simultaneously endorses the exercise of traditional customary law in former Bantustan areas. Manji (1999:443) perceives that the rights approach adopted in constitutional cases is met with considerable opposition in the face of other legitimacy such as custom and tradition.

A guiding philosophy of the draft national land policy is that existing policies and laws on land in Kenya pursue economic productivity at the expense of other equally important values. These policies and values assume that only individual tenure can ensure economic productivity. Accordingly, the thrust of previous laws and policies has been to individualize all modes of tenure, especially customary tenure. As a result, customary tenure has been neglected and treated as an inferior tenure system (MoL, DNLP: Chapter 3 and No. 29). The policy states that: "The Land Policy recognizes the value of economic productivity, equity, environmental sustainability and the conservation of culture, and seeks to facilitate their protection" (MoL, DNLP 2006: Chapter 3, No. 31).

The impacts of these developments have had many and ultimately led to low productivity and poverty, severe tenure insecurity due to overlapping rights, disinheritance of women and vulnerable members of society and biased decisions by district tribunals, committees and boards and landlessness and squatter phenomenon. (MoL, DNLP, 2006)

The policy does not offer a solution to the reasons that have lead to poverty and low productivity from land use. For example, the DNLP does not indicate whether it will

adopt affirmative action in the case of formation of the composition of district tribunals and committees. In addition, the issue of disinheritance is mentioned but not addressed.

In rural areas, customary and traditional communities are indifferent to the existing statutory law. It is not clear then, how the government will reinforce the notion of plural approach. The DNLP states: “It adopts a plural approach; in which individual land tenure and customary tenure co-exist as equal partners. The rationale for this plural approach is that equal recognition and protection on individual and customary tenure will facilitate the reconciliation and realization of the critical values which land represents” (MoL, DNLP, 2006: Chapter 3, No. 32).

Historically, the processes and procedures of land adjudication and consolidation were intended to extinguish customary tenure and replace it with statutory tenure. The implementation of the process of adjudication has been slow due to legislative and institutional constraints. The government shall ensure the process of adjudication and consolidations are speedy, efficient, transparent and accountable (MoL, DNLP, 2006: Chapter 3, No. 83-84).

#### **2.4.3 2006 Draft National Land Policy and Customary Land Tenure**

The countries of Eastern Africa such as Kenya, have been undertaking land reforms involving varying degrees of policy changes, including redistribution of public or private land, consolidation of holdings, re-settlement schemes, changes in land ownership, tenurial rights and changes in conditions of tenure such as the conversion from customary to Western legal rights statutes. In these processes, several problems arise towards women's access to and ownership of land. The land reforms do not necessarily promote women's legal ownership and inheritance rights. Instead some of these reforms have undermined women's traditional use right under customary land tenure by registering family land in the name of the husband or son (EASSI, 2002:3).



The DNLP acknowledges that customs and practices discriminate against women. This policy is silent about the sort of customs actually discriminate against women. The government does not provide a mechanism of how it will actually protect the human rights for women. Instead, the policy indicates that the government will be incorporating customary mechanisms for land management and dispute resolution as well as invest in capacity building for communal land governance institutions and facilitate their operations.

Upholding custom and tradition are compelling arguments for a society that has been subjected to colonial dominance and imperial interests for over a century. Whilst appeasing the international community with a façade of democracy, however the government appeals to its citizenry with promises to maintain customary practices and halt further deterioration of the traditional order; all to the detriment of women's advancement (Stewart 1996 *as cited in* Manji, 1999:449).

In Kenya, the DNLP supports women land rights by stating that culture and traditions continue to support male inheritance of family land while there is lack of review formulation gender sensitive laws (MoL, DNLP, 2006: No.100). On the other hand, the DNLP appeals to Kenyan citizens by supporting customary law and practices that govern land, stating that existing policies and laws on land have protected private land rights especially under the Registered Land Act at the expense of indigenous or communal land rights. In addition the policy states that “the individualization of land rights has undermined indigenous culture and conservation systems and colonial systems as well as post colonial systems land administration have destroyed traditional resource management institutions, thereby creating uncertainty in access exploitation and control of land and land based resources” (MoL, DNLP, 2006: Chapter 3, No 55-53).

In showing commitment to promoting equitable rights, the DNLP states that “in order to have a firm foundation, for the land policy reform, the constitution should respect the principle of protection of Human Rights for all. In particular it should allow protection against laws, customs and practices that discriminate against women, minorities, children

and persons with disabilities with respect to access and to ownership of land rights” (MoL, DNLP 2006).

Struggles over land manifest the problems inherent in Kenya’s dualistic legal system. The DNLP attempts to solve the problem by proposing the adoption of legal pluralism. On the one hand, to increase productivity, private land rights will be safeguarded. Land markets deal with the transfer, lease and mortgages of interests in land. Land markets in rural areas are hindered by policies and laws that emphasising individualization of tenure, which make communal land tenure arrangements unattractive for commercial investments. The government shall facilitate the commercialization of land rights subject to principles of equity and sustainability (MoL, DNLP, 2006: Chapter 3, No. 85-86).

The government seeks to protect community interests based on customary law and practice. The result is that there will be a failure to abolish patriarchal systems of land governance which discriminates against women. The DNLP states that the process of individualization of tenure, that is land adjudication and or consolidation, the eventual registration of interests in land and declaration of whole districts in the pre-independence period as government land has affected customary law by ignoring customary land rights deemed to amount to ownership such as family interests in land, the rights of strangers, for example *jodak* among Luo (MoL, DNLP, 2006: Chapter 3, No 63).

To secure community land, the government shall define in the Land Act, the term community and vest ultimate ownership of community land in the community. The policy will lay out in the Land Act, a clear framework and procedures for; the recognition, protection and registration of community rights to land and land-based resources taking into account multiple interests of all land users, including women. It will also incorporate customary mechanisms for land management and dispute resolution by investing in capacity building for communal land governance institutions and facilitating their operations (MoL, DNLP, 2006:Chapter 3, and No 65).

#### **2.4.4 2006 Draft National Land Policy and Individual/Freehold Land Tenure**

The proposition by government to introduce the idea of shared proprietorship is based on the premise that both women and men have similar purchasing power and as such, will both benefit from this type of land ownership. The DNLP supports the existence of private land ownership systems and proposes to ensure the alienation of private rights to land takes into account all other legitimate rights held or claimed by other persons over the affected land, such as the rights of spouses. It proposes to facilitate the acquisition of rights of access to land through mechanisms such as leasehold. (MoL, DNLP, 2006: Chapter 3, No 66-70). The draft national land policy proposes to increase land productivity targets by reviewing and providing for laws that encourage shared proprietorship, time sharing of and property as opposed to individual ownership (MoL, DNLP, 2006:Chapter 3, No. 117).

The level of illiteracy is higher among the rural women than their male counterparts. Since statutory law is written in English, it is complicated and hard to follow. As a result, the rural women still lose and consequently resort to approaching the customary law. In accordance to the DNLP, freehold connotes the largest quantity of land rights which the state can grant to an individual. While it confers unlimited rights of use, abuse and disposition, it is subject to regulatory powers of the state.

On the issue of married women's right to marital property such as land, The DNLP aims to impose an obligation on the primary rights holder to obtain the written and informed consent of all secondary rights holders before disposing of the land (MoL, DNLP, 2006 Chapter 3, No. 76). This written and informed consent is based on the assumption that all parties have equal power relations in a marriage, which is not the case, especially for rural women. In addition, withholding consent puts women at the risk of being abused or abandoned.

Land rights can be acquired through inheritance, which entails the transmission of land rights from one living person to another or through testate or intestate succession. The

Law of Succession Act was supposed to harmonize inheritance laws but in practice, the transmission of land rights is largely done within customary law, which discriminates against women and children. The policy proposes to sensitize and educate Kenyans on the provisions of the Law of Succession Act as well as to expedite the application of the Law of Succession Act (MoL, DNLP, 2006).

The policy does not indicate how this sensitization exercise will occur and what it aims to achieve. In addition, these women earn lower incomes than the men, so even if a woman knows that she is entitled to land, the prohibitive cost of justice may discourage her from approaching the institutions for help. In addition, the sensitization programmes from the Ministry of Health have failed in the past because they do not have a buy-in from the men. For example, the campaign by the ministry of health that couples should use condoms has been largely unsuccessful because of the lack of a buy-in from the men and this may explain the high prevalence of HIV/AIDS in areas such as Nyanza. The sensitization exercise has to have a buy-in from the men. It would be a challenge to get a buy-in from men who are enjoying the beneficiaries of a patriarchal system that protects their right to land.

## **2.5 Comparing Aspects of Gender Equitable Land Reform in Kenya to South Africa**

From a comparative point of view, between Kenya and South Africa, the government may express a strong formal commitment to gender equity in high level documents but not necessarily follow up. In South Africa, Walker (2003: 124) states that since 1994, the Department of Land Affairs DLA, has expressed a strong formal and public commitment to gender equity as a major policy objective at the level of principle. Further, these broad commitments were developed into high-level policy documents, including the White Paper, which may be termed as first tier documents. Formal documents or rather the first tier documents that are pivotal to the land reform process of gender equitable land reform in Kenya include: the Report from the Commission of Inquiry into the Land Law Systems of Kenya (Njonjo report) and the 2006 Draft National Policy on Land.

There are several similarities between the gender equitable land reform process in Kenya and South Africa. Firstly the disjuncture between what is said in formal policy documents about promoting gender equity in and through land reform and what happens to gender policy 'on the ground' lies at the heart of the women's land rights problem in Kenya. The 2006 Draft National Land Policy for Kenya mentions that customary practice discriminates against women in relation to land ownership and inheritance; it does not, however, offer a solution to counteract these customs. Similarly, in South Africa, the white paper – a land policy - states that “discriminatory customary and social practices are largely responsible for gender inequities” (DLA as cited in Hall, 1998:454). However, Hall (1998) argues that the same document does not follow this observation through into a discussion of how the policy will address this.

In as much as the 2002 Njonjo report affirmed that indeed cultural practices are a hindrance to women's access to land, no bill has been passed in parliament to date (2008) to address this issue. Also, the promise by the draft national land policy to enact a land act has yet to be implemented. The proposed 'Land Act' will govern all categories of land, to counter the widespread abuse of trust in the context of both the Trust Land Act and the Land Group Representatives Act.

The disjuncture in gendered land reform arises because the government may not follow through the first tier documents with second tier. Walker (2003: 124) explains that the measure of the seriousness of such commitment is their treatment in 'second-tier' or middle-level policy documents, such as guidelines for project approval and generic consultants' briefs and training materials for staff. Here, the treatment of the principle of 'gender equity' is erratic and the commitment to women as a major target of land reform is not consistently visible. At this level, the commitment to gender equity is much less forthcoming. In Kenya, the second tier documents may include the documents for constituency development fund CDF<sup>17</sup> projects that are a mandatory requirement for all members of parliament to execute in their constituencies since 2002.

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<sup>17</sup> A report by Central Bureau of Statistics (2005:39) states that the constituency Development Fund Act, 2003, and the subsequent establishment of the fund by legislation in January 2004 ensures that a specific portion of the national annual budget is devoted to constituencies for purposes of development. Specifically, an amount of money equal to not less than 2.5% of all government ordinary

Theoretically, in Kenya, this second tier documents for the economic development are honouring the commitment to gender equity. In accordance to FIDA (2006:47), the Acts creating decentralized funds such as CDF, HIV/AIDS district strategic plans and Education Bursary Funds have explicit provisions for at least a third representation of women in decision-making structures. However, women are still marginalized in these local governance structures and their participation therefore poor. However, at the provincial administration level there have been appointments of more women chiefs and assistant chiefs. The efforts have, however, not been sufficient as the numbers are still low due to patriarchal attitudes at the lower level and lack of a gender sensitive policy of appointment.

In accordance with Walker (2003:128), the conceptual tools that have informed the development of gender policies such as the department of land affairs gender policy and guided its implementation are inadequate. There is a heavy reliance on externally derived orthodoxies and formulae, operating at a relatively high level of generality, which do not offer sufficient support to management or field staff in the operationalisation of policy.

An example of how expert advice on gender equitable land reform has operated at a relatively high level of generality, in the case of South Africa is that the source of authority for drafting the gender policy for the gender unit is a feminist – Bina Agarwal – whose four-fold case for women’s rights in land – welfare, equity, equality and empowerment (Agarwal, 1994 as cited in Walker, 2003). Agarwal draws her experiences from South Asia. Certainly, Agarwal comes out strongly in favour of rights that are independent of male ownership and control. Her point of departure, however, is the position of women in South Asia, where tenure relationships are very different from those in South Africa with 86 percent of the land in private ownership in small family farms (Agarwal, 2001:19 as cited in Walker, 2003:128).

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revenue collected in very financial year is targeted and set aside for the CDF strategy in the fight against poverty at the constituency level.

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 Siaya, there are no rural women movements have been established by the rural women themselves. On the contrary, non-governmental organizations such as Federation of Women lawyers FIDA is working with Kenya land alliance to argue that customary law in the present day context has been used to selectively preserve practices that subordinate women. For example, a workshop on women's right to land, organized by FIDA, was held on 19 January 2007 in Nairobi and was largely attended by the urban women.

This echoes the observation by Freeman (1993 *as cited in* Manji, 1999: 440) that in the Third World, the work of many feminists groups has focused on state and the achievement of reform. Their conviction that state institutions can bring about an improvement in women's position is illustrated by their reliance on the provisions of the Convention for the Elimination of All Forms of Discrimination against Women CEDAW, 1979.

Two reasons may be advanced to explain the attachment to constitutional adjudication by 'gender progressive groups' in the Third World (Agarwal, 1994: 2 *as cited in* Manji, 1999: 440). First, in response to the promulgation of international instruments relating to gender, there have been a number of expansions in the gender related non-governmental organisations. The NGOs perform the function of foreign-funded watch dogs on behalf of the international community. The achievement of law reform is taken to signal progress, a fact which explains the focus of many gender progressive groups in the developing world on the state and state law. Second, in the Third World, lawyers and others working on women's issues may be characterised as members of the post-colonial bourgeoisie, constituting what Shivji (1993 *as cited in* Manji, 1999:440) terms as state bureaucratic elite.

In South Africa, there has been a heavy reliance on externally derived orthodoxies and formulae, which do not offer sufficient support to management or field staff in the

operationalisation of policy (Walker, 2003:128). In both Kenya and South Africa, the Land reform process was heavily guided by World Bank experts. Williams (1996:141) states that in the 1970s, the World Bank massively increased its lending for agriculture and rural development projects in Africa. African farmers needed to be modernized and monetized. World Bank advisor put Kenya forward as a positive model for South African land reform. During President Jomo Kenyatta's 15-year tenure in State House, there was an elaborate scheme funded by the World Bank and the British Government, the Settlement Transfer Fund Scheme. This proposed scheme operated at a relatively high level of generality and did not offer sufficient support to management or field staff in the operationalisation of policy.

Williams (1996:143) further adds that, the Tomlinson Commission proposed to grant freehold title in South African reserves to a class of fulltime farmers. On the other hand, in Kenya, the Swynnerton Report (1954) sought to create a class of accumulating yeomen farmers established on economic farm units. It was only possible to implement land consolidation by recognising the right to land of all male land owners, large and small. The statutory registration of title weakened the rights of access to land of women and of tenants. The DNLP states that women are not sufficiently represented in institutions that deal with land. Their rights under communal ownership are also not defined and this allows men to dispose of family land without consulting women. (MoL, DNLP, 2006: Chapter 3, No 101).

The DNLP on land in Kenya proposes to resolve this by increasing the representation of women on the land boards. It is not clear whether the institutions mentioned in the policy include land boards or provincial administration institutions such as councillor positions. Also, the policy does not offer a structure of how this objective will be followed thorough. The DNLP, however, suggests that reducing the power vested in county councils, which are the trustees of Trust Land may resolve the issue of illegal sale of communal land because many, have disposed of trust land irregularly and illegally.



Another similarity between the gender equitable land reform process in Kenya and South Africa's is the discord between government's commitments to the land reform processes at international *vis-a-vis* at national level. At international level, Kenya has ratified several human rights charters<sup>18</sup> but its constitution still recognizes customary practices that undermine women's right in general and their access to land. International conventions on Women's Human Rights relevant to women's property rights ratified by Kenya Government have not been translated into policies or laws'. Article 14 of the CEDAW Convention<sup>19</sup> recognizes the vulnerable position of the rural woman and urges governments to implement measures to uplift her socio- economic and legal status.

The Kenyan government finds it more important to report on commitments to gender equity in specialist, international fora than to constituents at home. For example, at the international level, Kenya has ratified several international human rights conventions such as ICESCR<sup>20</sup> which is the International Covenant on Economic Social and Cultural Rights (FIDA, 2006:33). Also, the DNLP proposes that the government shall adhere to principles of non-discrimination, by repealing existing laws and outlaw regulations, customs and practices constituting discrimination against women in relation to land. In addition, the DNLP proposes to put in place appropriate legislation to ensure effective protection of women's rights to land and related resources (MoL, DNLP, 2006).

In the case of Kenya, the DNLP aims to secure gender equity principle. It is mentioned in the policy that many customary systems are inequitable as regards social status, age, gender and other aspects. The gender and equity principles of the DNLP states that there is conflict between constitutional and international provisions on gender equality *Vis-a-vis* customary practice that discriminate against women in relation to land ownership and inheritance, however it lacks to provide a solution of how to address this imbalance. The

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<sup>18</sup> At the regional level Kenya has ratified the African Charter on Human and People's Rights, the African Charter on the Rights and Welfare on the Child, the Protocol to the African Charter on the establishment of an African Court on Human Rights, the African Union Convention Governing Specific Aspects of Refugee Problems in Africa, the Treaty establishing the African Economic Community, and the Cultural Charter for Africa.

<sup>19</sup> The Convention on Elimination of all Forms of Discrimination against Women, CEDAW, was adopted in 1979 against a backdrop of accentuated gender inequalities around the world. The Convention seeks to enhance social, economic and civil rights of women among them the right to work, education, health, equality before the law and the right to participate in decision- making. This Convention recognizes culture as a major hindrance in the realization of women's rights and prescribes abolition of such cultures.

<sup>20</sup> the International Covenant on Economic Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), and the Optional Protocol to the Convention on the Rights of the Child (CRCOPACF, the Convention against Torture(CAT),

DNLP, like in the case of South Africa white paper, fails to give an elaborate plan of how this discrimination will be addressed. Similarly, in the constitution of Kenya, section 82(4) expressly allows for discrimination with respect to issues of adoption, marriage, divorce, and burial, devolution of property on death and other matters of personal law.

Finally, Walker (2003:129) states that without institutional support for implementation, then the overall goals of land reform with respect to gender, is hard to achieve. Also, without political accountability then realisation of women's land rights is hindered. In South Africa, the DLA's senior management has treated the goal of gender equity essentially as an undertaking for formal, symbolic occasions, when the broader transformatory goals of liberation are explicitly remembered. DLA's annual reports to government do not report on gender targets and few questions get asked to the minister about performance in this regard. There is no serious political accountability by the minister and senior management around the gender policy goals of the Department, either to Parliament or to the public at large, nor have there been serious political demands made on them in this regard.

In Kenya, the budget has not been adjusted to pursue the objectives outlined in the 2006 Draft National Land Policy. The objectives to ensure women's land rights are exercised include; recognising gender equity, HIV/AIDS and poverty as cross-cutting issues in land tenure. Also recognizing the diverse roles that women play in dry areas and the special problems that lack of rights places in their way of performing these rights. There is an implementation gap existing between two leading government departments responsible for the achieving the objectives of issues highlighted in the DNLP. The National Formulation Process for Land Policy NFPLP is the secretariat that has been steering the land reform in the Ministry of Lands. This secretariat has very few staff and therefore cannot be able to carry out the other duties such as advocacy of the land policy to Kenyans as a whole, more so, raising awareness among the women on their right to land. Also, the Ministry of Lands does not carry out a joint gender equitable land reform programme with the Ministry of Culture, Gender and Sports.

The institutional mechanisms for enhancing the rights of women have been put in place through the creation of the Ministry of Culture, Gender, and Sports. There is also a National Commission on Gender Development. However the allocation of resources to both the Gender Department at the Ministry and the Gender Commission is poor, meaning that these institutions cannot achieve desired objectives. Lack of technical capacity in the Gender Commission also renders it impossible to carry out its mandate. The department of gender is for example crowded out by other departments such as the sports and culture and social services in the same ministry. The sports department is given priority because of Kenya's famed long-distance runners who are a source of revenue as well as marketing gimmick for the tourism industry (FIDA, 2006:47).

The DNLP does not state whether women in rural areas such as the members of Yaw Pachi women group, were consulted before the consolidation of the document. For this reason, the study seeks to investigate whether Yaw Pachi women's group are aware of a draft national land policy. The research also seeks to investigate to what extent the draft land policy has addressed customary practices that hinder women's access and right to land.

Making women aware of new land laws and policies and reforming customary laws that discriminate against women is another essential component of ensuring women's land rights (Sunde, 1997 as cited in Wanyeki, 2003:85). Such laws are key to creating the social legitimacy of women's claims to land rights. However, they have to be accompanied by context-specific measures that are likely to foster changes in deeply entrenched social attitudes. To be effective, gender equitable land reform also necessitates the adoption of special measures to advance the interests of rural women.

## **2.6 Theoretical Framework**

Two theoretical frameworks are used namely the Women and Law theory and the Legal Centralism and Pluralism theory. The Women and Law theory is used to understand the power dynamics in the field of gender equitable land reform process. The research study seeks to establish whether the gendered land reform captures the opinions by rural women and then incorporates these with recommendations by the gender activists. To do this, the theory uses the perspectives from below, opinions by women at grass root level as well as perspectives from above, opinions from women at the policy making level. The research study adopts the use of the legal centralism and pluralism theory to understand what statutory laws operate to protect women's right to land. The theory is used to establish how these statutory laws operate parallel to customary law and in effect. This theory also explains the extent to which the existing legal dualism has affected women right and access to land.

### **2.6.1 Women and Law**

The women's law approach, developed in Scandinavia, is associated with grassroots-oriented research methodology, which aims at exploring and examining the position of women in society. It aims at describing, understanding, and improving the position of women in law and society. It uses perspectives from 'below' and 'above'. Perspectives from above seek to analyse statutory laws so as to determine whether they are gender neutral, discriminatory or gender specific. The perspectives from below use women's experiences as a starting point in analyzing the interplay between the law and the realities of women's lives. The two perspectives, thus, permit a more complete critic of the law (Mbote, 2001:5).

This approach assumes that there are problems beyond law reform which need to be addressed, and that this can only be done by carrying out field research using women as the starting point. In order to grasp the relationship between law and practice, Scandinavian and African researchers have found it fruitful to collect empirical data

about the experiences of women in their interaction with the law; statutory and customary, and other dispute management practices. In order to accomplish this, legal methods have been supplemented with methods from the other social sciences and in particular feminist research methodologies (Mbote, 2001:5).

### **2.7.2 Legal Centralism and Pluralism**

Kenya today has a two-sided legal system. On the one hand, there is the traditional, community-based system, and on the other, the official constitutional-based legal system. Legal centralism and pluralism are analytical frameworks, which provide different understandings of the law. Legal centralism describes “a unified system of rules which are enforced through state machinery”. It assumes that the state-legal system is the only applicable regulatory mechanism (Aubert, 1989: 37-47 as cited in Karuru, 2001).

One of the key developers of the theory, Jack Griffiths, defines a situation of legal pluralism as “one in which law and legal institutions are not all subsumable within one ‘system’ but have their sources in the self regulatory activities which may support, complement, ignore or frustrate one another so that the law which is actually effective on the ‘ground floor’ of society is the result of enormously complex and usually in practice, unpredictable patterns of competition, interaction, negotiation, isolation and the like” (Forsyth, 2007:1). Endeavours to ameliorate the position of women remain within the magnetic field of state law and within the dominant paradigm of legal centralism (Manji 1998 as cited in Manji 1999: 440). However, legal pluralism can operate within a framework either, inside or outside the formal state legal system (Griffiths, 1986 as cited in Karuru *et al*, 2001).

In accordance with Forsyth (2007:4), the theory of legal pluralism permits one to move from focusing all enquiries on the state system, to exploring other legal orders that exist in a given jurisdiction. For example, the case study of Yaw Pachi women in Siaya, where two systems of land governance abide side by side. There is statutory law-introduced during the time of colonisation and the customary law system that is administered today

by chiefs on the issue of adjudication and solving of boundary disputes. This research study will use this theoretical approach to investigate the role played by customary land law system in regards to women's access and right to land and whether it is preferred due to accessibility, familiarity efficiency and cultural attunement.

Forsyth (2007:4) states that legal pluralism also provides valuable insights into the inter-relationships between various systems. It may reveal that legal orders in a society operate semi-autonomously and consequently that changes to one through conscious reforms or societal change will have significant consequences for the other. In Kenya, the constitution allows for the existence and operation of a multiplicity of laws, which include statutory laws and African customary law (Karuru *et al.*, 2001)

Armstrong and Stewart, (1990:169) observe that in Zimbabwe, the legal dualism of English law and customary law was formally abolished after independence by the Customary Law and Primary courts Act of 1981. This Customary Law and Primary Courts Act introduced socially based choice of law criteria which was intended to give flexibility in the choice of applicable system of law. However, one of the consequences of the automatic application of customary law was that women were disadvantaged by a system of law that was inherently discriminatory. This echoes Wanyeki's (2003:240) observation that legal dualism makes it possible for a patriarchal society to resist claims for women's rights by vacillating between the two legal systems, successfully neutralising any reforms that might have been instituted.

Manji (1999:439) states that there has been little feminist theory which has deliberated on enduring structures of power embedded in other normative orders such as the lineage, the clan, or groups. In consequence, other sources which; generate law, the ways in which they secure compliance and their effects have been neglected. In the rural economy, in which land is the most valuable productive resource, the lineage and clan have struggled to retain the autonomy of their control over land *vis-à-vis* the state. As a consequence, state activity in land matters is more often limited than is allowed for, so that it is doubtful whether the state is in fact 'the fundamental unit of political organisation'

(Griffiths, 1986 as cited in Manji , 1999: 441). The theory on legal pluralism is a useful in understanding how customary practices such as wife inheritance, patrilineal land inheritance, polygamy and property stripping affect women's access to land.

Legal pluralism may be divided into juristic and diffuse legal pluralism. Juristic legal pluralism arises where the official legal system recognises several other legal orders and sets out which of their norms will apply in a given situation. Thus, the official legal system provides an operating environment for plural legal orders. For example, the constitution may provide for the operation of certain religious or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which was common in colonial and post-colonial Africa, state law was the ultimate authority and dominated other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour, but whose operation is neither sanctioned by, nor emanates from state law (Mbote, 2005:4).

The limitation of legal pluralism to date has been that, after helping to create a picture of various systems-that are presently run in the society –and in so doing –identifies the problematic areas in relationships between legal systems, it is unable to take us further. In other words, it has not provided a normative path for reforming the various systems to allow them to work together. On the other hand, “legal centralism has been criticised on three main bases: the concept of law as universal across time and space, its monopolistic claim to state power over recognition, legitimacy and validity of law; and the states claims to integrity, coherence and uniformity” (Griffiths, 2004:8 as cited in Forsyth, 2007).

## **CHAPTER THREE: A CASE STUDY OF YAW PACHI WOMEN'S GROUP IN SIAYA DISTRICT, KENYA AND ANALYSIS OF WOMEN'S RIGHTS**

### **3.0 Introduction**

The primary aim of this research is to conduct a critical assessment of women's land rights within the context of inheritance and land ownership based on a case study of Yaw Pachi women's group, Siaya district. This assessment will ascertain the extent to which problems faced by women have undermined their access to land. The research study will also analyse the significance of the 2006 Draft National Land Policy to women's access to land; more so, if the land policy will improve the position of women in law and society, once it is passed into law. The case study however, is not a generalization of rural women's rights with regards to access and right to land in Kenya.

The methodology that the researcher adopted is particularly helpful in bringing attention to understanding the relationship between land tenure and women's rights, as they are reflected in the social interaction with the women from Yaw Pachi group. A critical point raised by Emerson *et al* (1995) relates to the need for the researcher to continuously be cognizant of and maintain his/her objectivity. A researcher's perceptions, theories and values have a significant impact on informing and limiting various aspects of the research, and it is vital that the researcher recognise and reflect on these throughout the research.

Emerson *et al* (1995:65-66) succinctly illustrate this in referring to writing as a "construction" and a "filter, rather than a mirror of reality". It is thus vital that the researcher engages in what Adler & Adler (2003:44-45) call "methodological reflections" to assist in identifying when and to what extent research processes are shaped by the researchers own orientation. For this research study, a methodology that can acquire openness and in-depth knowledge of the issue was adopted.

These issues were fundamental to understanding the research topic thus examined.



### **3.1 Qualitative Research Design**

The research study is conducted using a qualitative method which is one of the two major approaches to research methodology in social sciences. Qualitative research involves an in-depth understanding of human behaviour and the reasons that govern human behaviour. Unlike quantitative research, qualitative research relies on reasons behind various aspects of behaviour. Simply put, it investigates the why and how of decision-making, as compared to what, where, and when of quantitative research. Hence, the need is for smaller but focused samples rather than large random samples, which qualitative research categorises data into patterns as the primary basis for organising and reporting results.

### **3.2 Case Study Research**

#### **3.2.1 Definition**

The term "case study" has multiple meanings. It can be used to describe a unit of analysis (e.g. a case study of a particular village) or to describe a research method. Yin, (2002) defines the scope of a case study as follows: A case study is an empirical inquiry that: investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.

#### **3.2.2 Profile of Yaw Pachi Women's Group, Siaya District, Kenya**

The focus of this study is Yaw Pachi women's group in Siaya, Kenya. This population study is made up of seventeen women. The projected population in the year 2002 showed 493,326 people in Siaya District, with 226,682 males and 266,644 females (UNDP/Ministry of Culture, Gender and Sports 2006). The phenomenon here is the existence of wife inheritance as a cultural tradition that impacts on Women's access to land. This women's group is situated four kilometres from Siaya town and is just opposite Sagam Mixed Secondary School. The women's group started in 1993 as a support group for widows, who at the time were facing a lot of societal stigma due to HIV/AIDS prevalence in the area. It has since evolved to have a membership of over 20 women, who even support orphans and vulnerable children in the community.

In Yaw Pachi village of Siaya district, the cultural systems of action include; wife inheritance, and communal land tenure systems otherwise referred to as 'block' by the women following the interviews sessions. Case studies are multi-perspective analyses. This means that the researcher considered not just the voice and perspective of the actors, but also of the relevant groups of actors and the interaction between them. This one aspect is a salient point in the characteristic that case studies possess. They give a voice to the powerless and voiceless.

The researcher's target was to interview 20 women but a total of 17 women were interviewed. Their ages varied from 35 years to above 55 years of age. The unit of analysis is a critical factor in the case study. In the research study, the unit of analysis was Yaw Pachi women's group in Siaya, which has experienced the cultural phenomena of wife inheritance. The widows informed the researcher about the various customary practices in the area and how some of these practices are hindering their access to land. The case study of Yaw Pachi selectively focused on the issue of land rights in the context of wife inheritance, polygamy, property stripping and patrilineal inheritance of land.

### **3.3 Sample**

#### **Sampling of Yaw Pachi Women's Group**

Purposive sampling method was adopted for this study. The primary goal for using the sampling method is to get a representative sample or a small collection of units or cases for a much larger collection or population, such that the researcher can study the smaller group and produce accurate generalisations about the larger group (Neuman, 2000:195). The researcher used purposive sampling to select women from a difficult-to reach and specialized population.

Purposive sampling was appropriate for collecting data from the case study of Yaw Pachi women's group for the following reasons; first, researcher needs to identify particular types of cases for in-depth investigation. The purpose was less to generalise to a larger population than it was to gain a deeper understanding of types. The results therefore do not reflect the general plight of rural women, but just a small population who are from the

Siaya District. For example, intensively interviewing women from Yaw Pachi women's group in Siaya district who have undergone cultural practices such as wife inheritance was not enough, the researcher purposefully interviewed those women who have been victimised by the cultural practices. Cases of victimisation included being kicked-off the land by in-laws, forcefully inherited and forcefully 'cleansed' once they had been widowed.

The researcher used the experts from Plan International and UNDP with whom the women associate, to identify a 'sample' of women for inclusion in the research. The purpose of the research study is to get an in-depth understanding on how customary law and practices amongst the community in Siaya have hindered women's access and right to land. The researcher, therefore, selected Yaw Pachi women's group because these women have experiences of insecurity of land tenure. The women have in one-way or another, experienced customary practices such as wife inheritance, polygamy, patrilineal inheritance of land and property stripping. In this case, of Yaw Pachi, it was a location where these women are highly concentrated.

The sample that was obtained included women in Siaya between the ages of 35 to above 55 years of age. These women were either married, young widows, old widows, divorced but another category emerged during the research. This category was - women who had been twice widowed. The married women were in polygamous marriage and some had been inherited, so they were second or third wives in a second marriage.

### **Sampling of Key Informants**

Another reason why the researcher used purposive sampling is to select unique individuals who possess special expertise on the relevant information for the study. The researcher purposefully selected key informants, totaling twelve, from the following organizations:

- Evelyn Opondo, Officer at Federation of Women Lawyers in Kenya FIDA

- Dr Akinyi Nzioki, Director for the Centre for Land Economy and Rights for Women CLEAR
- Reuben Murugu, Coordinator, National Formulation Process for Land Policy, Ministry of Lands
- Mercy Njamwea, Rapportuer for the task force on customary practices and women's land rights, National Formulation Process for Land Policy, Ministry of Lands.
- Prof. Kivutha Kibwana, Minister for Lands as of 2007, Government of Kenya.
- Peter Nyanja, Member of Land Board in Siaya
- Mary Asiko, Member of Land Board in Siaya and member of Yaw Pachi women's group
- John Ogunga, Jater, a man who has inherited two widows
- Erika Lind, Officer at the Global Land Tool Network-UN HABITAT
- Caesar Handa, Chief Executive officer of Strategic Public Relations and Research, (SPRR).
- Odenda Lumumba, Coordinator Kenya Land Alliance
- Agnetta Onyango, Project Manager, for a project a joint NGO by UNDP/Plan International<sup>21</sup> in Siaya.

Key informants were selected based on the standard protocols for a qualitative research setting, for example local experts on women's rights and land reform in Kenya, were identified. Key informants should occupy roles that make them knowledgeable about the issues being researched and be able and willing to communicate with the researcher (George and Reve, 1982:519).

The key informants were chosen based on their experience in the field of land reform. The Minister of Lands in 2007, Professor Kivutha Kibwana has a wealth of experience on matters regarding land reform in Kenya. The minister was informally interviewed by the researcher shortly after his presentation at a women's conference dubbed *-Fanikisha*. This was on June 2007 at the Kenyatta International Conference Centre. At that forum,

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<sup>21</sup> Plan international is in 49 developing countries, and raise over US\$501 million a year to plan and implement our program work on health, education, livelihood, housing, water and sanitation projects, and cross-cultural learning. Plan has worked in Siaya, Kenya on the heifer project for HIV positive widows- and published a book in 2006 together with UNDP-Kenya called *Facing the Challenge*.

the minister had presented a paper in the form of a speech, on women's land rights in Kenya. The interview was invaluable to this research and has been quoted severally in the literature review.

The Ministry of Lands is responsible for land reform in Kenya; some officials were selected as key informants for the research study. These include, Mary Asiko and Peter Nyanja who are members of Land Board in Siaya. These informants from the land board were sufficiently informed about land tenure issues at grass root level because they interact with communities and thus witness the problems and challenges of the land reform process in Kenya. At national level, the research study selected Reuben Murugu and Mercy Njamwea, from the National Formulation Process for Land Policy situated in Ardhi House, Nairobi. The informants from the NFPLP secretariat on the other hand provided valuable information about the land reform process with regards to 2006 Draft National Land Policy.

In Kenya, the NGOs work closely with community members and over time, the community members easily confide about their situation to them. Because most NGOs receive funding from donor countries – which in most cases are the developed countries- these NGOs have funds that enable them easy accessibility to remote communities in Kenya. Further, the NGOs are more likely to efficiently carry out their work amongst their communities because unlike government ministries, the NGOs are less bureaucratic in their disbursement of funds and secondly, unlike government ministries which are centralized, the NGOs are widespread in the regions of specialization.

The three key informants from NGO sectors; Federation of Women Lawyers in Kenya FIDA, Kenya Land Alliance KLA and Centre for Land Economy and Rights for Women CLEAR and UN HABITAT were selected because as compared to their counterparts in government ministries, they are prone to give a critical objective situational analysis of grass root level. FIDA is part of an organization, committed to the creation of a society that is free of all forms of discrimination against women through provision of legal aid, women's rights monitoring, advocacy, education and referral. The key informant from

this organization provided the researcher with information about what is needed to enhance access to justice to needy women in Kenya more so rural areas so as, to improve the legal status of women in Kenya and to enhance public awareness on women's land rights issues.

Kenya Land Alliance (KLA) has been in the forefront in championing the cause of women with regards to their property rights especially land. The NGO has been worked closely with the Ministry of Land in preparing the draft national land policy as well as publishing a book: *A Case for Women in the Proposed Constitution*. The key informant was chosen from CLEAR because as an organisation, this NGO specialises on research, policy analysis and advocacy with regard to women's land/property rights. CLEAR has been advocating for women in Kenya to have equal rights of access, control and ownership to land, property, natural resources and their benefits. The key informant from UN HABITAT was selected because she has had the added advantage of knowing about the issues of land tenure and women's land rights from a global perspective.

Agnetta Onyango and Dr Bernard Olayo former project coordinators for a joint NGO project – UNDP Kenya/Plan International in Siaya, were approached for expert advice and to gain access to the women because they have worked with the Yaw Pachi women's group in the area. Furthermore, Dr Bernard Olayo is a Luo by tribe and Ms Agnetta Onyango is married to a Luo and thus, her interaction with the community members is less restrictive than for someone without that kind of leverage.

According to George and Reve (1982), informants need not be representative in a statistical sense of the population from which they are drawn; rather, they are selected based on the insights they are capable of providing as a foundation for future research. Therefore, the researcher selected some informants were members of the Luo tribe because they come from the same geographic area as some respondents. In Kenya, there are a number of highly qualified experts in the area of land tenure and women's rights. However, the researcher purposefully selected some key informants from the Luo tribe who had the added advantage of understanding the customary practices and customary

law in relation to their line of work. The researcher thus used the issue of tribe to an advantage. The key informants who are Luo include; Dr Akinyi Nzioki ,CLEAR, Evelyn Opondo, FIDA, Caesar Handa, SPRR, John Ogunga a wife inheritor-*jater* (has inherited two wives), Mary Asiko and Peter Nyanja both from the land board. Their views illuminated the researcher's understanding of the root of land reform and customary law amongst the Luo people of Siaya.

### **3.4 Analysis of Material Gained**

#### **3.4.1 Data Gathering Techniques**

A data gathering technique is a method in social science that was used to collect information concerning the research topic. Three important issues are crucial when selecting a data gathering technique. Firstly, the researcher must establish the use of a technique that will observe trust and yet have the ability to gain deeper insight into phenomena. In this case, study, the research deals with customary practices such as wife inheritance, property stripping, polygamy and patrilineal inheritance of land. The technique that the researcher adopts will emphasize the need to constantly reflect on the need for privacy so as to engage the respondents in the sample.

Secondly, the technique that a researcher selects will have to address group dynamics and how these dynamics may filter the type of information a researcher gains access to or how certain members may act as gatekeepers of information. Finally, Emerson *et al.* (1995) emphasize limiting analysis to what is directly observed and heard. Whilst the researcher may record the events in context, this may not necessarily adequately answer the historical and underlying sociological processes that shape the way people ultimately behave.

#### **3.4.2 Interviews**

Interviewing could be particularly relevant in trying to understand dynamics

- (a) that are not always easily discussed;
- (b) that are not necessarily apparent;
- (c) that facilitate exploitative conditions;

- (d) that shape complex socialization processes;
- (e) that influence activities that society frowns upon and
- (f) that reflect the lives of those society overlooks i.e. the poor, disadvantaged and marginalized.

Interviews are useful for getting in-depth and comprehensive information. Typically, the interviewer asked questions from a written questionnaire and recorded the answers verbatim on tape but only when permitted to do so by a respondent. The Minister of Lands refused to be recorded verbatim because he was being cautious about the implications of disseminating information before the national general elections in December 2007.

The researcher contracted Ms Theresa Handa a 65 year old widow, who is also a retired English teacher for the past 12 years, to conduct the unstructured interviews. The main reason for hiring Ms Handa's services was that she is fluent in both English and Luo. In addition, the researcher realized that the women would feel more comfortable to confide in someone that they could relate to both circumstantially. In addition, Ms Handa is their neighbor because she lives in Bondo, a district that shares the same demographic characteristics as Siaya. The respondents further respected the interviewer because of her age.

### **Key Informant Interviews**

The study used in-depth interviews with key informants to suggest the nature and structure of theory underlying the security of land tenure for women either through customary or statutory law (freehold land tenure). As a form of naturalistic inquiry, the key informant methodology provides an approach for gathering data when the underlying theoretical framework is not well understood. In this data gathering technique, the interviewer allows respondents to speak more broadly about the topic being discussed.

In such situations, the interviewer has a plan of inquiry, but not "a specific set of questions that must be asked in particular words and in a particular order". Instead, questions posed to key informants are loosely structured. For the purposes of the study



discussed here, the interviewer used an outline of areas to be covered, but they were afforded considerable latitude in terms of the scope and direction of individual interviews. This research methodology is appropriate for this study due to the requirement for extensive, detailed probing of attitudes, behaviours, motivations, and needs required for understanding a case study type of research.

The purpose of using key informant interviews in this research was to collect information from a wide range of people including government officials, professionals, or residents who have first hand knowledge about the community. These government officials close to the community such as the Land Board Members, with their particular knowledge and understanding, provided insight on the nature of problems and gave recommendations for solutions.

The researcher allocated different dates for interviewing the key informants. All of the key informants are situated in Kenya. The interviews carried out in April 2007 were on phone because the researcher was still in Johannesburg. Persons interviewed include Evelyn Opondo of FIDA and Ms. Mercy Njamwea from the secretariat of National Formulation Process of Land Policy, Ministry of Lands. These telephone interviews lasted 30-45 minutes and were, therefore, quite an expensive endeavour for the researcher. On the other hand, this time period of 30-45 minutes was too short to get detailed information. Similarly, the researcher was not able to get all information from the key informants on phone because their demeanour was too formal and curt.

In June 2007, The University of Witwatersrand sponsored the researcher to attend a women's conference '*Fanikisha*' that was scheduled 24-26 June 2007 in Nairobi and during the conference, the researcher was able to informally interview Kivutha Kibwana the then Minister for Lands for 30 minutes. In the months that followed, between July and October 2007, the remaining key informants were interviewed. The duration of interviews with key informants lasted on average between 30-50 minutes this is accordance with Collin (2002:273) who suggests that concerning interview duration any time under half an hour is unlikely to be valuable, and that any thing going beyond an

hour may be making unreasonable demands on busy interviewee and could have the effect of reducing the number of persons willing to participate.

Key informant interviews were carried out in a different manner for each individual being interviewed. For example, the government officials being at a national level were asked questions that had leaned towards land policy and its intended impact on women's access to land. The members of land board, being at grass root level, were asked questions that leaned towards establishing whether the rural women that they serve perceive the statutory law as a means to access land, or whether customary law still prevails.

Key informant interviews were conducted so as to achieve the following:

First, the researcher was able to obtain information about the pressing issue of women's land rights within the context of cultural practices in the community from Agnetta Onyango UNDP/Plan project manager as well as Evelyn Opondo, FIDA who are well connected and informed community experts.

Secondly, after conducting interviews with Mr. Peter Nyanja and Ms. Mary Asiko both of the Land Board in Siaya, the researcher was able to understand the challenges posed by traditional authorities e.g. chiefs in land adjudication that is mandated for the land board. In addition, the researcher was able to see how the manual registries that are still in use today slow down the process of addressing women's land tenure issues in Siaya. Dr. Nzioki, who has worked extensively on the area of women's land rights in Kenya, was able to provide valuable input to the research work.

Third, the key informant interview with Mr. Handa of Strategic Public Relations and Research, which is a media monitoring firm, provided a very different view because his diverse background and his opinions about why wife inheritance should still be practiced was able to give the research more variety.

The advantage with such interviews is that the researcher is able to obtain professional advice from a limited number of sources on the topic without having to randomly draw a sample from the population. Furthermore, the method of using key informants was effective in both time and accuracy of information because the key informants are experts in their field of work, the interviews are precise and the information quite reliable.

In conclusion, no difficulty was encountered when interviewing most of the key informants because English is the language that was used. However, one key informant Mr. John Ogunga, a wife inheritor could only communicate in Luo, so the researcher used translation services.

### **Focus Group Interviews with Yaw Pachi Women's Group**

The researcher was motivated to use the focus group interviews as a research tool after reading the 'Impact of HIV/AIDS on Women's Land Rights in Kenya' report that also adopted this tool. There are two main rationales for conducting interviews First, interviews can help to point to weaknesses in using a questionnaire and secondly, they can be a potent source of information on their own right, especially in so far as they provide an opportunity to engage community members in their own analysis of the situation or the problem at hand and to generate debate and discussion among them. (Aliber *et al.* 2004:21)

The researcher carried out a situational analysis before approaching the Yaw Pachi women's group to participate in the interviews. The customs such as wife inheritance, patrilineal inheritance of land, polygamy as well as property stripping practiced by the community in Siaya to which Yaw Pachi women's group belong are controversial and often judged in different perspectives. Through an interview with the respondents from Yaw Pachi, communicating about these issues was made easier and opinions were out in the open.

In case of very sensitive topics, such as taboo topics on culture and customs, interviews may also have their limitations, as group members may hesitate to air their feelings and experiences freely (IDRC, 2003). The researcher employed the services of a facilitator

who was quite comfortable with the respondents and whose past experiences were similar to the experiences that the women are going through.

Another way to ensure confidentiality with the Yaw Pachi Women's group is that the researcher and facilitator gave participants an option to introduce themselves under any name they would like to use. Further, before the discussion, it was stressed that it is not necessary to bring painful personal experiences in the open. The women, however, were quite at ease with the facilitator and each other saying that the community is very small, so everyone knows everyone's business, and there was nothing to hide from each other.

Communities are seldom or never homogeneous (IDRC, 2003). There are always differences between community members, for example in education, level of income levels, gender, economic status and marital status. These differences will be reflected in their perceptions of the problems they suffer from and possible solutions. The researcher was aware of these differences. The researcher approached Ms Agnetta Onyango-former project manager, UNDP/Plan project in Siaya as an entry point to the Yaw Pachi women's group because Ms. Onyango knows the criteria for the selection of participants in the interviews. Another task for the researcher was to interview with some key informants about the situation in Siaya so as to add credibility to the topic being studied.

The participants in the focus group interviews were of varying age, level of education and from different socio-economic group. They however have a similar background in relation to the issue under investigation. The secretary of Yaw Pachi women group identified 20 women. Once identified, the participants were invited at least a day or two in advance, and the general purpose and procedures of the interview was explained, in order to obtain their consent to join. On the actual day of the interviews, 7 October 2007, only 17 women showed up and this was the total sample population used for the exercise.

The participants were briefed before beginning the interview. Chairs were placed in a circle. The venue was at the orphan feeding centre – right opposite Sagam mixed Secondary School and here, there were no disturbances, and there was sufficient quietness. In addition, at the venue, a woman from the community was hired to prepare a

lunchtime meal so that participants would have no excuse for leaving the venue suddenly. The researcher selected the venue because it is in a neutral setting as compared to a venue at a member's home. This idea encouraged participants to freely express their views.

The researcher employed the services of Ms. Teresa Handa to act as 'facilitator' or 'moderator' for the briefing before the interviews and this briefing was conducted in Luo language. The researcher is not a Luo so; she occupied that time to serve as 'recorder'. The facilitator shares the same characteristics with the participants in terms of; same sex, roughly same age and widowed. The same list of questions in the questionnaire that had been administered earlier on to the respondent was used.

The facilitator did not act as an expert on the topic. Her role was to stimulate and support discussion. Ms Teresa Handa introduced herself as facilitator and introduced the researcher. The participants, led by the secretary of the group, introduced themselves with whatever names they wished to use. The facilitator put participants at ease and explains the purpose of the interviews, the kind of information needed, and how the information will be used (for the purposes of women's rights in a land policy). The researcher asked permission to use a tape-recorder; the secretary of the women's group offered soft drinks and allowed some informal discussion before the actual session starts.

The facilitator was very enthusiastic, lively, and humorous and showed genuine interest in the groups' ideas. The questions asked encouraged participants as much as possible to express their views. The researcher and facilitator avoided being placed in the role of expert. They both tried not to comment on everything that was being said. In the interest of time, the facilitator controlled the rhythm of the meeting, but in an unobtrusive way. Ms Handa, being a retired primary school teacher, also listened carefully, and moved the discussion from topic to topic. Subtly controlling the time allocated to various topics so as to maintain interest. Finally, the facilitator listened for additional comments and spontaneous discussions, which occur after the meeting has been closed.

The researcher used a tape-recorder and carried a set of spare batteries in case the machine malfunctions. The researcher captured the whole discussion and later, had it

translated into English. The focus group interviews for Yaw Pachi women's group was captured in one session because the researcher did not envision a need for several and lasted between fifteen and thirty minutes.

### **3.4.3 Questionnaire Method with Yaw Pachi Women's Group**

The instrument of analysis for conducting the interviews with Yaw Pachi women's group was an interview schedule. The language spoken in Siaya is Luo and Swahili. Ms Theresa Handa did translation of some questions into Luo language. The researcher established that cultural practices hinder women's land rights using a questionnaire<sup>22</sup> that consisted of two sections. The first section of the questionnaire related to information such as age, gender and marital status. The second section included questions that establish customary practices hinder the women's right to access land.

The questionnaire did not require a name, so that all responses remain anonymous. However, because of the issue of translation of some information from Luo to English, the researcher indicated the name of each interviewee on the questionnaire so that all the information that had been noted down by the researcher during the interview could be later on matched with the relevant respondent. If you recall, this research was using translation services from Ms Handa. Immediately after transcribing, the researcher deleted the names from the questionnaire.

All of the questionnaires were strictly confidential. The only two people that have access to them are the supervisor and the researcher. Participation in this study was voluntary; three expected participants from Yaw Pachi withdrew. The women, who chose to participate in this study, were entitled to leave out questions that they felt uncomfortable answering in the questionnaire.

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<sup>22</sup> Appendix 1

#### **3.4.4 Documentary Analysis**

A documentary analysis is a technique where by a researcher reviews documents such as books, journals, newspaper or online documentation via the Internet, to obtain information on the research topic. Most of this review is then put in the literature review section of the research study. The documentary analysis is very important because it will also help the researcher to correlate findings with established written facts that s/he has already found (Neuman, 2001).

Extensive archival newspaper analysis helped the researcher to build a picture of the past, as well as subsequent developments. Using documentation from previously done research around the topic of women's land rights, the researcher was able to comprehensively reference material that facilitated interpretation of findings from the case study. Documents may illuminate some of the 'aspirations and intentions' of people during 'the periods to which they refer and describe places and social relationships at a time when we may not have been born, or were simply not present. Bloyce, (2004:17) states that newspaper articles in this sense are particularly useful, not only as a source of descriptive information, but also for the researcher to gain knowledge of the 'position' of the press, so to speak, in relation to journalists' impressions. It is argued that, 'to ignore documents is to cut off sociology from the whole process of social change, which is one of the fundamental concepts of the discipline itself' (Bloyce, 2004:17).

#### **3.5 Access**

The term access was used to indicate various ways in which a researcher achieves some kind of understanding of a social research. Access at other times means the practical sense of negotiating permission with organizational gatekeepers to collect data in a particular site or provide the financial backing to run a project (Payne, 1982:203). For the researcher, to get permission to come into contact with the respondents of the sample size earlier alluded to; she had to officially seek mutual agreement from the women's group in Siaya. In addition, the researcher approached the Kenya Medical Research Institute

KEMRI, and a non-governmental organization that has worked with the women through a joint project by Plan International and UNDP Kenya.

Primarily, the government of Kenya has to give permission to any researcher to carry out work. The researcher applied to the ethics committee and more specifically, met with Ms Christine Wasuna and Carol Kithinji, at Kenya Medical Research Institute (KEMRI) to follow through with proceedings. The requirements from KEMRI were; four copies of research supervisor contact, letter for admission from university, curriculum vitae of researcher and copy of Masters Proposal.

Secondly, Plan International and UNDP Kenya (who provided the contact for Yaw Pachi women group from which the samples were obtained) were sent a letter<sup>23</sup> requesting permission to conduct a research project on the women they work with. UNDP Kenya agreed to participate. The next step was to send the women that are suitable for study, a letter<sup>24</sup> stating the purpose and requirements of the research. The researcher called the treasurer of the group Ms Jane Rogo (who is the only one with a mobile phone) and she in turn mobilized the women who wished to participate. The women were able to return a consent form signed by them. The informed consent form was in Dholuo language.

The questionnaires were administered on 6 October 2007. The researcher negotiated with the chairperson of the women group- Regina Nyakalo, and with an official from UNDP Kenya for the meeting point for the Yaw Pachi women's group. The meeting took place at the convenience of Yaw Pachi women's group just where the group has an informal structure for feeding the orphaned and vulnerable children. The administration of the questionnaires began with a briefing by the researcher, in which the ethical considerations of confidentiality and the rights to withdraw from the study or abstain from answering any questions were emphasized.

A box was left in the feeding room, in which questionnaires were placed on completion. This procedure was explained at the start of the session. The researcher then left the

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<sup>23</sup> Appendix 2

<sup>24</sup> Appendix 3



room. On completion of questionnaires, the UNDP Kenya official debriefed the women in the form of a discussion on women's rights and access to Land. The researcher collected the box of questionnaires from the UNDP Kenya official after the session.

### **3.6 Ethics Considerations**

Ethics define what is, or what is not legitimate to do, or what moral research procedure involves. Many ethical issues involve a balance between two values: the pursuit of scientific knowledge and the rights of those being studied or of others in the society (Neuman, 2000:428). For the ethical purposes of this research, a letter was sent to UNDP Kenya based on the fact that UNDP and Plan International managed a joint project in Siaya, requesting permission to conduct a project research on the women group(s) that they work with. This letter stated the nature and purpose of the study as well as important ethical considerations. In this letter, it was emphasized that the NGO is under no obligation to participate in the study, and are entitled to withdraw at any time. It also highlighted that the confidentiality of the NGO and the Women's Group was to be held with the highest regard.

The Yaw Pachi women's group members were provided with an information sheet. This information sheet provides the potential participant with an introduction to the researcher as well as the nature and the purpose of the research. It also stated what was required of the participants and how long it would take to fulfil these requirements. The information sheet also informed the potential participant that participation in this research project was voluntary, and that their affiliation to UNDP Kenya would in no way be affected by their participation in the study. There was also an emphasis on the confidentiality and anonymity of each participant. Attached to the information sheet was a letter of consent that anyone wishing to participate in the study signed and dated it.

Women who participated in the study received a briefing, 10.00 am of 6 October 2007, in order to clarify the ethical considerations and answer any questions that any of the participants may have had relating to the study. This time was arranged in accordance with the convenience as perceived by Yaw Pachi women's' group and UNDP, Kenya; It

emerged during the study that some women are members of *Sabato Church* and therefore, it was convenient that the session start slightly later than 9.30am.

During this time, participants were also informed of the arranged method for returning their questionnaires. The confidentiality of the participants was ensured by insisting that no names are written on the questionnaire, as well as by putting procedures in place that provide for anonymous return of questionnaires. In addition, the participants were provided with a sheet of information pertaining to various support structures, such as centers that provide psychological counseling, should participation in this research project arouse any feelings relating to past trauma that may have been experienced by any of the participants.

## **CHAPTER FOUR**

### **FINDINGS AND ANALYSIS**

#### **4.0 Introduction**

This chapter presents results obtained from data analysis. There are many customary impediments to the implementation of women's right to land. The aim of this research is to conduct an assessment of women's land rights within the context of women's access and right to land based on a case study in Yaw Pachi, Siaya. The information in the tables is retrieved from the questionnaires filled out by the Yaw Pachi women's group in Siaya. This assessment focuses on the extent to which customs faced by women have undermined their access to land.

These customs include:

- (a) Wife Inheritance
- (b) Patrilineal inheritance of family property such as land
- (c) Polygamy
- (d) Property Stripping

The study also investigates statutory institutions; in particular the role of the land board in ensuring women's right and access to land is protected. The study also investigates statutory policies such as the 2006 Draft National Land Policy. In order to achieve this aim, an empirical research was conducted in Siaya District and specifically on a case study of Yaw Pachi women's group.

All the key informants were familiar with the Draft National Land Policy and the issues associated with land reform in Kenya. In particular, some of the key informants are from the Luo tribe who members of their families have experienced some of the customs that undermine women's access to land. All the respondents were quite familiar with women's rights issues with regard to access of land. Some such as Yaw Pachi women's group have experienced these issues whilst others such as officials from National Formulation Process for Land Policy, Ministry of Lands, are involved in finding solutions to land related issues facing the women in Kenya. The women who speak Luo language

were asked to fill in a questionnaire. The researcher also interviewed them to get a clarification on issues.

This chapter discusses the results from the field and all the findings are presented according to the themes. The themes are divided into three sections; customary practices, institutional support; land board and traditional and Draft National Land Policy. Each section presents the research results and the analysis.

The first section presents and discusses the demographic profile of respondents. The respondents are women from Yaw Pachi women's group aged between 34 to above 55 years whose access and right to land has been undermined by the existing discord between customary law and statutory law. The analyses revolve around socio-demographic information such as age and marital status, type of marriage, the family land size, the education level, major source of income, major provider of the family and the percentage of income that is derived from farming.

The second section presents the research results on land tenure problems faced by women when they need to access land. This section presents the results on the views from women about government institutional support available for them to access when confronted by issues surrounding insecurity of land tenure. These institutions include the Land Board, and traditional authority such as chiefs and village elders. Some of characteristics of the issues are; seeking permission to access land, in whose name is the land registered under, the size of the land available for access and disputes that the women have encountered in accessing land.

The third section presents the research findings on the DNLP, specifically on how the national land policy intends to deal with the women's land tenure problems and the recommendations outlined to increase women's security of land tenure. The researcher also obtained views from key informants about the national land policy and its role in the legal pluralism of customary law versus statutory law.

## 4.1 Demographic Features of Respondents

### 4.1.1 Age

**Table 1 – Age**

| Age group               | Frequency | Percentage |
|-------------------------|-----------|------------|
| 18 – 24                 | 0         | 0          |
| 25 – 29                 | 0         | 0          |
| 30-34                   | 2         | 12         |
| 35-39                   | 2         | 12         |
| 40-44                   | 2         | 12         |
| 45-49                   | 2         | 12         |
| 50-54                   | 5         | 29         |
| 55 and above            | 4         | 24         |
| Total women interviewed | 17        | 100        |

Source: Field work 6 October 2007

Age is a very important factor in the research study because, by observing the age groups of members on Yaw Pachi women's group, the study will answer some of the research questions. The table shows that the age group with the highest frequency (29 percent) of the women respondents is aged between 50 -54 years and above. About nine women are aged 50 years and above while eight women (48 percent ) are aged 49 years and below, which shows that majority of the women that join socio-economic groups such as the members of Yaw Pachi group, tend to be much older women.

Findings from this study echo the observation by Aliber *et al.* (2004), on impact of HIV/AIDS to land rights in Kenya and more so in Bondo district. The study suggests that older widows are more established in the home and therefore face lesser problems of security of tenure. The younger widows have to remarry to regain access to land. However, another interpretation attributed to the recorded higher numbers of older women than younger women in this study is that on the one hand, younger women may be afraid of the 'perceived repercussions' of exposing information about cultural

practices within the community while on the other hand, the older women of the group being more confident of their position in society are more courageous.

The women's group has thirteen of its members above the age of 40 years. At this age , most women in the rural areas have children who are grown up and the women may have 'more' time on their hands and so in this case, they may have channelled it into taking care of the orphans in the village.

The Yaw Pachi women's group started in 1993 as women's support group but has evolved to include a feeding programme for orphans who have HIV/AIDS. Also, older women in society are more assertive about their place in society and therefore, even offer support to other marginalised groups as a means of conveying that message. This could be in accordance to Aliber et al (2004) that older widows are in a stronger position to stay in the marital home because of their well established social networks and relations.

#### **4.2 Marital Status**

**Table 2 - Marital Status**

|                                  | Frequency | Percentage |
|----------------------------------|-----------|------------|
| Married                          | 7         | 41         |
| Divorced                         | 0         | 0          |
| Widowed                          | 9         | 53         |
| Husband died and woman remarried | 1         | 6          |
| Total women interviewed          | 17        | 100        |

Source: Field work 6 October 2007

From table 2, nine respondents are widowed (53 percent) and only one respondent's husband had died and she remarried. This special case was for a respondent who is between 35-39 years. This could mean that she was probably widowed much younger than the other women.

The findings show that there was no respondent who is divorced. In rural areas such as Siaya, women's right to land is determined by their marital status. The findings may suggest that the respondents from Yaw Pachi women's group stay married so as to access land. A woman in a situation of divorce or separation can be extremely vulnerable. Since community properties belong to men, and divorced rural women are easily being left with little or no economic support. In such context, inheritance of land as a daughter would make a critical difference to her ability to sustain herself and her children.

A study conducted by Catherine Dolan, lecturer at the University of East Anglia, that looks at the situation in some parts of Kenya like Meru, shows that opposition to male authority can engender social exclusion, landlessness, and destitution, and women's long-term well-being depends on the stability of the household. In addition, the findings show that women have become more dependent on their husbands, and are working even harder than before. A bill to improve women's rights to own land may change all that. Under the traditional system of land rights in Kenya, women have the right to cultivate usufruct land, but not own it, and access is usually given through a male relative (Ayieko, 2001).

### 4.3 Type of Marriage

**Table 3: Type of Marriage**

| <b>Marital Status</b>                                                      | <b>Frequency</b> | <b>Percentage</b> |
|----------------------------------------------------------------------------|------------------|-------------------|
| Traditional Customary Marriage-polygamy                                    | 14               | 82                |
| Married at Attorney General's Chambers (one wife)                          | 2                | 12                |
| Legally married at Attorney General's Chambers (but there are other wives) | 0                | 0                 |
| Married in church (one wife)                                               | 1                | 6                 |
| Married in church (but there are other wives)                              | 0                | 0                 |
| Total women interviewed                                                    | 17               | 100               |

Source: Field work 6 October 2007

Findings from table 3, show that fourteen respondents from Yaw Pachi women's group (82 percent) are in a polygamous marriage that was conducted through customary law, be they widowed or married. One respondent whose husband died was remarried and her new marriage is recognised through customary law. There are two respondents whose marriages were carried out at the Attorney General's Chambers and only one respondent is married through the church, in total only three respondents (18 percent) are in formally recognized marriages.

The fact that majority of the women are within marriages that are mandated by customary law, could be a factor that influences their decision-making and further obligates them to subscribe to culture and customs of Luo tradition in terms of access and right to land. This may explain why such women may perceive that they are not entitled to land because culturally it is the men who are perceived to be the rightful owners of the land. Also, the fact that majority of women were married under customary law, may exacerbate the issue of women abiding and succumbing to other cultural practices that hinder their access and right to land. Such practices include wife inheritance and accompanying rituals such as wife cleansing as well as being the temporary custodians of the land for their sons.

The findings from this study show that women in formal marriages such as church or attorney general's chambers face the same problems as their counterparts in traditional marriages. There is a case of a widow whose marriage is formally recognised i.e. Attorney General's chambers, yet she now faces the problem of land disputes with her in-laws and it seems difficult for her to pursue her right and access to the land using the statutory institutions like the land boards, courts or councilors.

Kanogo (2005:112-113) states that women married under the East Africa Marriage Ordinance could seek divorce if their husbands reverted to 'paganism' and married another wife or wives while the first marriage was still subsisting. In the Catholic Church, such a syncretic practice resulted in expulsion from the church. Polygamy and Christianity were strange bedfellows.



In Kenya, the registration of pagan marriages ordinance defined and codified marriage in a language and within parameters provided by the colonial state to facilitate official surveillance and control of the institution. The measure included the imposition of monogamy and measure designed to allow for the consent of a woman to a marriage. Efforts would also be made to deal with the conflicts over the legal status of widows, including curbing leviratic marriages and the imposition of legislature regarding the inheritance of property and resolving the question of child custody (Kanogo, 2005:130)

#### 4.4 Level of Education

**Table 4: Level of Education**

|                                         | <b>Frequency</b> | <b>Percentage</b> |
|-----------------------------------------|------------------|-------------------|
| No formal education                     | 3                | 17                |
| Primary School Education                | 8                | 47                |
| Secondary School education              | 4                | 24                |
| Tertiary education including university | 2                | 12                |
| Total women interviewed                 | 17               | 100               |

Source: Field work 6 October 2007

The table above shows that eight of the respondents (47 percent) have a primary school education. This could be explained by the introduction of free primary education in Kenya. The research did not reveal whether these respondents completed the primary school. Respondents were classified into different categories of educational level. Categories included those with a tertiary education that includes college or university, a high school education, a primary school education and those that have no formal education. In Kenya, free primary education was introduced for all regardless of age immediately after the 2002 general elections. This has led to an increase in primary school enrollment rate. A census on the literacy level of Kenyans was last conducted in 1988 and the Ministry of Education embarked on a new study in 2006, however the statistics from this are not yet available to the public. The 1999 population census

estimated that illiterate adults at 4.2 million. Illiteracy manifests itself among the poor, particularly women who constitute 61 percent of the total illiteracy population (sourced from Ministry of Education website).

The low level of formal education indicated by the findings from the study could be the reason why the respondents may have difficulties in accessing information about women's rights and access to land. The information could be in the form of payments for pursuing justice for their right and access to land; the cost of hiring a lawyer as well as the cost of a surveyor. During the interviews, one respondent said that she was conned off her money because she unknowingly hired a 'quack' surveyor to sort out boundary dispute issue with her.

Efforts to devise simpler, more appropriate and less costly forms of land administration that cater to the needs of the urban poor should also factor in the particular needs of women. The issue of literacy levels and level of education is crucial if awareness on land issues is to be effectively communicated to Yaw Pachi women's group of whom majority have been educated only at primary school level. There are only two respondents (12 percent) who have pursued tertiary secondary education including university. The same respondents are within marriages that are registered at the attorney general's chambers.

The findings from the study on the low level of education among Yaw Pachi women's group could be influenced by the fact that most girls in the rural areas drop out of school when they reach puberty, mostly at secondary school level either due to early marriages or teenage pregnancy. Also according to the education policy for Kenya in the past, when a girl became pregnant in primary or secondary school she was completely banned from returning to school after the birth of the baby. However since the year 2000, more schools re-enroll girls who dropped out of school due to, pregnancy. This is in accordance to the joint report by Ministry of Culture, Gender and Sports and UNDP, 2006).

#### 4.5 Sources of Income

**Table 5: Sources of Income**

|                                                       | <b>Frequency</b> | <b>Percentage</b> |
|-------------------------------------------------------|------------------|-------------------|
| Farming as main source of income                      | 15               | 88                |
| Fifty percent of family income generated from farming | 15               | 88                |
| Dress making                                          | 1                | 6                 |
| Woman as main income provider                         | 11               | 65                |
| Husband as main income provider                       | 6                | 35                |
| Children as main income provider                      | 0                | 0                 |
| Revolving fund as other source of income              | 12               | 71                |
| Total                                                 | 17               | 100               |

Source: Field work 6 October 2007

Table 5, shows that fifteen of the respondents (88 percent) view farming as their main source of income. Also, fifteen respondents (88 percent) reported that farming constitutes fifty percent and above of the total income generated by the family. Eleven respondents (65 percent) stated that women are the main income providers while six respondents (35 percent) state that men are the main income providers.

The findings from the study coincide with findings from an interview with a key informant who stated that, “because of the proximity to Lake Victoria, in Luo, Nyanza most families derive an income from fishing industry but if you live in a place like Siaya one has to rely entirely on the land” (Source field work September 2007, In-depth interview Dr Akinyi Nzioki, CLEAR office, Nairobi).

Nzioki (2000:3), states that in Kenya, as in many other regions of the developing world, women play crucial roles in agriculture as producers and providers of food. Women are culturally obligated to provide food for the family and to earn income to meet the needs of daily family welfare. Traditionally, they have been provided access to productive resources, including land, to enable them to fulfill their obligations. The pre-colonial

system of land holding created stable security of tenure which acted as incentive to full and committed participation by women in the economy. Today, their obligation to provide food to the family remains but their access to productive resources and ability to control the product of their economic activities is less secure or has actually declined.

The respondents also have another major source of income which is the revolving fund otherwise called 'merry-go-round'. The term merry-go-round was coined because this figure is circulated among all members of the group. Twelve respondents (71 percent) derived alternative income from this activity. A revolving fund is a socio-economic group that may be started by a group of women with the single aim of raising money within a particular period and allocating the money raised per person depending on whose turn it is. The group of women has to trust each other because most revolving funds are informal and there is no legal work involved.

These findings are in accordance with literature that shows rural poor have alternative sources of income. Cousins *et al.* (2005:4) states that the urban and rural poor already have some access to credit, through informal mechanism such as loans from family member or *stokvels* (revolving fund in South Africa). They try to avoid long-term debt burden and are averse to forms of borrowing that might lead to loss of important assets. In Yaw Pachi women's group for example, the women agree on a sum of money e.g. Contributing 100 Kenya shillings (1.5 US Dollars) per month.

The Yaw Pachi women's group is located in a rural area in Kenya where the community engages in farming, either crops or animal husbandry e.g. dairy animals. Income is the means of livelihood that sustains a household. The theory of gender and development stresses that women need to be strategically placed in order to make a difference in society. The difference can be in the form of being in a position of decision-making. Income is a source of empowerment to a woman because it enables her to purchase property such as land. Land security is, therefore, of utmost importance to the women and men of the community because it is the main livelihood as well as the main source of security.

## 4.6 Wife Inheritance

**Table 6: Wife Inheritance**

|                                                         | Frequency | Percentage |
|---------------------------------------------------------|-----------|------------|
| 1. (a)Wife inheritance common feature in community      | 17        | 100        |
| (b)Wife inheritance uncommon feature in community       | 0         | 0          |
| 2. (a)Wife inheritance –better access to land for widow | 2         | 12         |
| (b)Wife inheritance –worsens access to land for widow   | 15        | 88         |
| 3. (a)Women who have faced wife inheritance             | 8         | 47         |
| (b)Women who have not faced wife inheritance            | 9         | 53         |
| Total women interviewed                                 | 17        | 100        |

Source: Field work 6 October 2007

One of the aims of the study was to investigate how cultural practices such as that of wife inheritance undermine women's access and right land. The study seeks to establish if for example, a young widow, refuses to be inherited, she would risk losing her *de facto* rights over land use, whilst if she accepts the practice, if land will go to the male relative who inherits her. Findings in Table 6 show that the practice of wife inheritance is still common in Siaya. All the seventeen respondents (100 percent) agreed that this feature is still existent.

The act of inheriting a widow is called *tero* in Luo language. Widows often call their inheritors or *jater* "terrorists" because they make their life more dreadful. Salmon (2001), states that in Luo culture, a woman who is not inherited is cursed. For women who live upcountry (in the rural areas), they are under a lot of pressure to agree. One of the consequences for not agreeing to be inherited includes property stripping. The study further investigates how refusing to be inherited results in case of property stripping. This is a sub-theme for wife inheritance but the research study explores the theme of property stripping on its own.

**Table 7: Wife Inheritance Impact on Property Stripping**

|                                                                           | Frequency | Percentage |
|---------------------------------------------------------------------------|-----------|------------|
| 1. Agree that refusal to be inherited leads to land grabbing from in laws | 12        | 71         |
| Refusal to be inherited doesn't lead to land grabbing                     | 5         | 29         |
| Total women interviewed                                                   | 17        | 100        |
| 2. Women inherited but land is in her name                                | 0         | 0          |
| Women inherited but land not in her name                                  | 4         | 24         |
| Women not inherited and land not in her name                              | 13        | 77         |
| Total women interviewed                                                   | 17        | 100        |
| 3. Women who have faced wife inheritance                                  | 8         | 47         |
| Women who have not faced wife inheritance                                 | 9         | 53         |
| Total women interviewed                                                   | 17        | 100        |
| 4. Refusal to be inherited; property grabbing from in laws                | 12        | 71         |
| Refusal to be inherited; no property grabbing from in laws                | 5         | 29         |
| Total women interviewed                                                   | 17        | 100        |

Source: Field Work 6 October 2007

Table 7 shows that twelve respondents (71 percent) perceive that when their refusal to be inherited can lead to the land been grabbed from them by the in-laws. The customs in the community are still very much prevalent .The *jater* - man who inherits the widow-becomes the custodian of the woman especially if the widow is quite young, but not her land. Sons and father-in-laws have a huge role to play in how land is appropriated. This finding from Yaw Pachi women's group corresponds to the views by Gutto (1976:22) that widows on the other hand, held property as trustees for their sons, while the leviratic unions helped the widowed women to maintain their husbands' property as property right was contingent on residence and status.

Field work interviews show that the practice of wife inheritance does translate to better access to land for the widow. The respondents state that for those who have husbands, however poor, people still regard you with respect and no one would come and deprive

you of your property. In cases of widows, when you lose your husband, you get an inheritor who takes you away from your home to his home. This makes you leave your land, which is, in the meantime, being tilled by one of your relations. It reaches a time when you want to use your land and here a case always arises.

According to Shipton (1989:21), since the turn of the 20<sup>th</sup> century, British, American and other Catholic and protestant missions have competed for converts in the Luo country, the strongest churches carving up the region sharply into hegemonic territories smaller than districts. Moreover, Buttermann (1979:127 as cited in Shipton 1989) states that the gospel according to St Mathews was translated into Luo by 1913. The fieldwork interviews with the women revealed that a number of them consider themselves to be Christians because they believe that Jesus Christ died to save them from sins, what is commonly referred to as being 'saved'. Others attend the *Sabato* church whose members congregate in church on Saturdays.

There could be two reasons for these findings; first, as explained by Shipton (1989:22), married women sometimes rely on church ties to help compensate for lack of full membership in their husbands' patrilineages. Secondly, the women may be Christians to gain institutional protection from the church because the Christian doctrine does not accommodate cultural practices such as wife inheritance. However, by virtue of following Christian teachings and hence not adherent to cultural traditions like wife inheritance subjects the women to societal pressure such as property stripping and encroachment of land.

While a number of customary norms are patriarchal in nature, wholesale dismissal of custom cannot only be alienating, but also misses a wide range of practices which do have positive implications for women's living conditions. Moreover, the mere substitution of statutory rules for customary land rights has failed to improve women's security of tenure, since custom still provides legitimacy and influences general opinion and decision-makers. Findings from a key informant, point to the diversity of cultural

practices and challenge the stereotyping of custom as necessarily static, unchanging or incapable of gender responsiveness.

“Coming from Luo Nyanza and specifically Bondo, which neighbours Siaya, the situation on ground is the same. Wife Inheritance is a practice that should be maintained by the Luo community. Wife inheritance in fact helps to curb spread of HIV/AIDS. I presented a paper at a conference in the United States of America on why some cultural practices need to be preserved and I feel that if a women’s husband dies and she becomes lonely then she will start sleeping around carelessly. But if she is inherited, then she will remain in the family and the disease will be ‘contained’” (Source Field work 2 October 2007, In-depth interview with Caesar Handa, Executive Director, Strategic Public Relations & Research Limited).

Mr. Handa further added that wife inheritance is a means through which a woman can still have access to cultivate land. His rationale is the choice between poverty or wife inheritance. Also, the informant believes that if boys and girls are given equal opportunities to inherit land, then that means that boys are being short-changed, the girls will still have land from their natal homes and also land from their matrimonial home. Therefore, men as breadwinners of the household should be the ones with property so as to be recognised as heads of homes.

Similarly, the wife inheritor may favour his ‘old family’ over the new family; widow and her children. This places her in an inferior position in her 'new' family as a second or third wife. During the research study in Yaw Pachi Siaya, widows expressed clearly that their 'new' husbands would only care marginally about their children as they already had a family of their own. Also competition with the first wife is prevalent.

#### **4.7 Patrilineal Inheritance of Land and Ownership**

Historically, land has always been regarded as a form of security. In Kenya, women are likely to be severely disadvantaged since the dominant judicial interpretation of the law



recognising registration often extinguishes all non-registered rights. A respondent from Yaw Pachi further states that women's right to access land can be achieved through purchase land because patrilineal inheritance is perceived to be a land right for the males of the society.

**Table 8: Size of Land**

|                                    | <b>Frequency</b> | <b>Percentage</b> |
|------------------------------------|------------------|-------------------|
| Family land is between 1 – 2 acres | 8                | 47                |
| Family land is strictly 1 acre     | 8                | 47                |
| Family Land is larger than 2 acres | 1                | 6                 |
| Total women interviewed            | 17               | 100               |

Source: Fieldwork 6 October 2007

Findings on the size of land as shown in table 8 reveal that, nine respondents (53 percent), access family land that is more than one acre in size. Out of these nine respondents, eight access land that is between 1-2 acres in size while one respondent has access to 7 acres of land. Another eight respondents (47 percent) access land that is less than 1 acre in size. Overall, findings in table 8 show that all land is registered.

**Table 9: Ownership of land**

|                                               | <b>Frequency</b> | <b>Percentage</b> |
|-----------------------------------------------|------------------|-------------------|
| 1. (a) Land that is registered                | 17               | 100               |
| (b) Land not registered(communal)             | 0                | 0                 |
| 2. (a)Land registered-husband's name          | 8                | 47                |
| (b) Land registered-woman's name              | 1                | 6                 |
| (c) Land registered-father in law             | 8                | 47                |
| 3. (a)Women with unlimited access to the land | 2                | 12                |
| (b)Seek permission to access                  | 15               | 88                |
| Total of women interviewed                    | 17               | 100               |

Source: Field work 6 October 2007

Table 9, shows that according to eight respondents (47 percent) of the respondents, land is registered in the name of their husband while another eight respondents (47 percent) reported that land is registered in the name of their father in-law. Fifteen respondents (88 percent), seek permission to access land. This shows the extent of women's vulnerability to the patriarchal system of land governance that is still existent in the community. The father in laws and husbands wield power over the women's rights to land. Also, women are regarded as rebellious within the male dominated society if they challenge common customs and jeopardize the status quo. If they try to inherit their land and property, which they have cultivated for many years, the in-law family will in many cases try to grab their land by force (MS Kenya, 2007).

The only respondent with land registered in her name, owns 7 acres of land and she bought it when she migrated from Nairobi, capital city to settle in Siaya when her husband died. In sharp contrast to the other women in the group, this respondent also supports the fact that girls/women should be allowed to inherit the land.

In Table 9, customary tenure system also referred to as communal ownership of the land, is non-existent. Instead, registered land act has been largely applied to the land ownership pattern as attested by the respondents of Yaw Pachi, Siaya. This breakdown of traditional land use systems to modern systems of freehold land tenure could explain the high level insecurity of tenure among the Yaw Pachi women's group in Siaya.

Okoth-Ogendo (1982a:24) states, "land was transmitted through the permanent members of the family - who were men and therefore it was patrilineal succession. He stresses that, although indigenous property laws excluded women from 'owning' or 'inheriting', "this cannot be a symbol of an inferior status or in any way a form of chauvinism developed by one sex for the suppression of the other". This is because rights over immovable property were trans-generational, and although women were 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.

In addition, a report Policy Makers Guide to Women's Land, Property and Housing Rights Across the World', states that "in general, land registration systems throughout the world are seen to be incapable of facilitating access to land or guarantee security of tenure for the majority, particularly women. Most of the systems are based on colonial laws relating to inheritance, forms of proof, and methods of demarcation that are not suitable for present-day local conditions. As these systems, often under resourced and over-centralised systems are not set up to collect, process or register transactions effected in the informal land market and (frequently) customary lands, they contribute to problems rather than solutions" (Augustinus, 2007:10).

#### 4.8 Polygamy

**Table 10: Polygamy and Land Ownership**

|                                                           | <b>Frequency</b> | <b>Percentage</b> |
|-----------------------------------------------------------|------------------|-------------------|
| Traditional Customary Marriage-polygamy                   | 14               | 82                |
| Married at Attorney General's Chambers; one wife          | 2                | 12                |
| Married in Church and in monogamous marriage              | 1                | 6                 |
| Polygamous marriage and each wife has separate land title | 0                | 0                 |
| Title deed to land is in husband's name                   | 17               | 100               |
| If man dies, land distributed equally to widows           | 0                | 0                 |
| If man dies, land distributed to sons                     | 17               | 100               |

Source: Field work 6 October 2007

Table 10, shows that seventeen respondents agree totally (100 percent) that in polygamous marriage, the women do not have separate title deeds to land but actually the land is registered under the husband's name. In table 3, fourteen respondents (82 percent) from Yaw Pachi women's group are married under customary law and are in polygamous marriages.

In Kenya, 16 percent of married women live in polygamous unions compared to 1.3 percent of boys, 20 percent of girls between 15 and 19 years are or have been married.

Often, these girls are married to older men, leaving them vulnerable to unequal power dynamics and their husband's sexual history (FIDA 2006: 23). Some tribes such as the Luo practice polygamy at a larger scale than other tribes.

Kanogo (2005:147), states that in a polygamous home the young bride initially lived with her the eldest wife, referring to her as mother .While under her wings, the older woman would teach the bride the basics of becoming a wife. Further, Kanogo (2005:151) observes that widows in a polygamous situation, the women's lives were bound to an intricate set of social conventions that would make daily life difficult if broken.

Another challenge that faces women in polygamous marriage is jealousy between co-wives is likely to be a problem that threatens the harmony in a polygamous family. It is reduced by such means as; the establishment of a separate hut for each wife and her children as well as the choice of a co-wife who is a sister of the existing wife. The women here do not have access to land because the husband is the one whose name appears in land registry, at the land office as the rightful owner of the land (Wilson 1962).

Hayase (1997: 299) states that for the women in the East African country of Kenya, their husbands' education shows a significant monotonic negative effect on their choice for polygamous marriage: 38 percent for no education, 23 percent for primary education, 15 percent for secondary education, and 11 percent for those who have had higher education. In short, the study found that an increase in education up to secondary level for either females or males, tended to reduce the females' propensities of being in polygamous unions. Except for Kenya, the effects of a further increase in education diverged so that, an increase for females continued to show a strong negative effect, whereas an increase for males had no practical effect (Senegal and Ghana) or even a positive effect (Zimbabwe) on their polygamous tendencies.

Feminist organization such as FIDA, advocate for individual title to land to women in polygamous marriages from dispossession.

‘In most marriages, it’s the man’s name that appears in the title deed. Since customary marriages allow for polygamy, women find themselves vulnerable to dispossession as they may be constrained from taking full control of the land and the initiating of long-term projects. Moreover since women’s interests are largely not recorded on title deeds, the land on which they have customary user rights and on which they may depend on for livelihoods can be disposed off without their knowledge’ (Source field work April 2007, In-depth telephonic interview Evelyn Opondo, FIDA-Kenya).

#### 4.9 Property Stripping

**Table 11: Property Stripping**

|                                                        | Frequency | Percentage |
|--------------------------------------------------------|-----------|------------|
| 1. Women involved in land dispute at time of research  | 11        | 65         |
| Women not involved in land dispute at time of research | 6         | 35         |
| 2. Widows faced land grabbing from father in-law)      | 9         | 53         |
| Widows face land grabbing from step sons               | 6         | 35         |
| Widows have not faced grabbing from relatives          | 2         | 12         |
| 3. Woman pursuing property stripping matter in court   | 4         | 24         |
| Woman not pursuing property stripping matter in court  | 13        | 77         |
| Total women interviewed                                | 17        | 100        |

Source: Field work 6 October 2007

One of the research questions for this study was to investigate how the cultural practice of property stripping is hindering women’s access to land. The findings are categorised as; land grabbing experiences that the women have faced from their in-laws, step sons, as well as whether any of the respondents have a case of land grabbing pending in court. Table 11 shows that eleven respondents (65 percent) from Yaw Pachi women’s group are involved in a dispute over land. Nine respondents (53 percent) reported that they have faced land-grabbing from in-laws.

The same persistence of in-laws grabbing land left to the widows has been explored by studies conducted by Izumi (2006), organisations such as Food and Agricultural Organization (FAO 2002) and Human Rights Watch (2003). For example, the gendered division of labour combines with patriarchal social and family structures, lack of access to credit or to legal advice as well as a range of other factors to deny most women ownership of property. Women's savings through labour are often appropriated by males, and their land purchases are often made in the husband's name (if married), or, by male members of their natal families, if unmarried (Izumi, 2006)

Nearly all land in this research study is registered in individual male names either the father in law or the husband. EASSI (2002:44), points out that, once the man dies, the wife's continued access to land is often threatened by the male relatives of the husband. Widows are generally powerless in protecting their usufruct rights in the face of adult male husbands' relatives, who may want to take the land. Frequently, they find that the land they had access to while their husbands were still alive is suddenly taken from them when the husband dies.

The findings show that six respondents (35 percent) face hostility from step sons when accessing land. This could be as a result of wife inheritance, a woman who has been inherited by her late husband's brother for example, will move into a homestead where she would now share it with the already existing wife of this new man. Her new husband could already be having sons with his wife and these step sons may begin to feel threatened by the presence of a new wife and possibility of her bearing new children. These step sons are therefore eager to hinder land accessibility for the women because they do not want to share the land with the children that she has brought into the home nor with children that she may bear with their father.

In accordance to Cousins *et al.* (2005:4), formalisation of property rights through titling does not necessarily promote increased tenure security or certainty and in many cases, does the opposite. This is echoed in a report by UN HABITAT (2007:11), which observes that in a country such as Laos, women have a difficult time proving ownership of property because many families, particularly in rural areas, do not have ownership

documentation regarding their land rights. If documentation is required for taxation, for example, the male head of household traditionally deals with these formal and written procedures, and his name appears on these types of documents.

Also, Cousins *et al* (2005:4) state that formalisation through registered title deeds creates unaffordable costs for many poor people. Registered property becomes subject to building regulations, boundaries must be surveyed and services must be paid for. The result is the exclusion of a significant part of the population from tenure security. During the field study, this issue was shown to occur:

“there were title deeds but when the children grew up, they argued that the man who had purchased their land had bewitched their late father to do his bidding and therefore they felt they have a right to be given a piece where they can build. There is another case where I witnessed a dispute between two co-wives- the younger one does not have a child but the older one has children. The young wife has the ear of the man and they connive to dispose of the land so that the children of the elder wife” (Field Work 6 October 2007, interview with Yaw Pachi women’s group Sagam, Siaya).

Daughters, wives or widows, women virtually never inherit family land. It is important to note that widespread disinheritance of women as daughters is a critical gender disadvantage which cannot be made up even if women's rights as widows are fully recognised. Once disinherited as daughters, most rural women for the major part of their lives would have no land of their own. This places women in significant weaker bargaining position *Vis-a -vis* men, both within and outside the family (Agarwal, 1994:16)

#### **4.10 Institutional Support in Addressing Land Issues- Land Boards**

Findings from a study done by UN HABITAT shows that in the early 1980s, a government policy guideline was issued, instructing the Boards to take into account the

families of the persons wanting to transfer agricultural land, as families should not be left destitute as a result of the transfer. In practice, however, this policy guideline is not always adhered to (Benschop 2002:603). The research study seeks to establish the role played by statutory institutions such as the land board in the protecting women right and access to land.

**Table 12: Institutional Support – Land boards**

|                                                                                          | <b>Frequency</b> | <b>Percentage</b> |
|------------------------------------------------------------------------------------------|------------------|-------------------|
| 1. Perceives support from government as–village elders, chief, land registrar            | <b>17</b>        | <b>100</b>        |
| Perceives NO support from government                                                     | <b>0</b>         | <b>0</b>          |
| 2. Agrees that Land Board are addressing women’s access and right to land                | <b>17</b>        | <b>100</b>        |
| Does not agree that Land Board are addressing women’s access and right to land           | <b>0</b>         | <b>0</b>          |
| 3. Agrees that Land Board are fair (with example of woman on land board)                 | <b>17</b>        | <b>100</b>        |
| 4. Agrees that Land Board are fair (with no example)                                     | <b>0</b>         | <b>0</b>          |
| Does not agree that Land Board are fair                                                  | <b>0</b>         | <b>0</b>          |
| 5. If decision is unsatisfactory after the village elder , women approach the land board | <b>1</b>         | <b>6</b>          |
| Total women interviewed                                                                  | <b>17</b>        | <b>100</b>        |

Source: Field work 6 October 2007

The table above shows that seventeen respondents (100 percent) say that when it comes to the issue of land rights, the government is offering institutional support. An interview with Mr. Peter Nyanja of the land board that serves both Siaya and Bondo Districts - which convenes in Siaya town, revealed that the land office does not tolerate chiefs or village elders carrying out the duties mandated to Land Board such as land sales and transfer of ownership..



This echoes similar observations made by Aliber *et al.* (2004) that in fact people engage in consultation with the chiefs and village elders for land matters, not so much to bypass the Land Control Board but because they pay little heed generally to the formal tenure system. The level of education among the members of this women's group may be what hinders their understanding of statutory documents such as land maps.

A respondent admits her inability to interpret the land maps that are provided by the land office in Siaya.

“There's a piece of land I bought in the past but there's someone who came and purchased it from me. But he has erected a fence that is encroaching on my land but when I went and brought officials from Siaya, they said I was the one on the wrong. But the map shows it clearly, though he said that the map wasn't the one being administered” (Field Work 6 October 2007, interview with Yaw Pachi women's group Sagam, Siaya).

Table 12 also shows that from the questionnaires, all respondents agreed 100 percent that the land board put in place by government has been addressing women's right to land. The women's perception was as such because of the presence of a woman as a member on the Land Board i.e. Ms Mary Asiko, who also coincidentally happens to belong to this Yaw Pachi women's group, then this is evidence enough of the government having addressed women's access and right to land.

The same respondents allude to the issue of prohibitive cost of justice in accessing land:

“The only way you can take it back is when you have cash. And they have seen that there is nowhere I can get cash from” (Field Work 6 October 2007, interview with Yaw Pachi women's group Sagam, Siaya).

Table 12 also shows that all of the respondents (100 percent) agreed that the land board is quite fair. This may be due to the fact that the land board applies statutory law when

addressing land disputes cases. In an interview with Mr. Peter Nyanja-Land Officer-Siaya, it was acknowledged that it is difficult to change the culture. However Mr Njanja says that these days they (male land owners) don't exclude the land board.

“When a husband decides to sell a piece of land he must come with the wife, you cannot go through these days, he has to bring the wife, if she is not there, either the son or daughter but without that we cannot allow him. He cannot go through the land control board” (Field Work 5 October 2007, in-depth interview with Peter Nyanja, Land Office Siaya Town, Siaya).

These findings are in accordance with the objective of the Law of Succession Act of 1981 which abolished the discrimination of sons and daughters when it comes to the issue of inheritance of family property such as land. This law has brought some uniformity to succession in Kenya, by allowing women to inherit land.

During the field work, some information was provided by Land Officer Mr. Nyanja that states that sensitisation of women's right to land had been carried out. Mr Njanyia says that the venue is normally the chief's *barazas* whereby communities are educated on matters of land inheritance. The land board member, however, pointed out challenges that his office faces, mainly that of transportation to the venues. The land office has a new vehicle but it has no tyres so one cannot go to the field. The Ministry of Lands has not issued this office with money to buy tyres. The researcher also asked the women if there had been any chief's *barazas*. One of the respondents from Yaw Pachi women's group said:

“A chief's baraza has not been held since the death of Chief Aguku which was more than 7 months ago” (Source: Field Work 6 October 2007, Interview Yaw Pachi women's group, Sagam, Siaya).

Mary Asiko who is member of the land board that serves both Siaya and Bondo Districts - which convenes in Siaya town as well as a member of the Yaw Pachi women's group, said that.

“The issue that is very prevalent here is that the widows who take the matter to court have to get their own lawyer and this means that they have to pay the lawyers some money to represent them in court. Most of the time cases are dropped because of lack of money by the widows. Also some women in the villages do not know that by law they are entitled to inherit their husband's property such as land” (Source: Field Work 7 October 2007, In-depth Interview at her shop in Luanda Market, Maseno).

An interview with Mr. Peter Nyanja of the land board revealed that the land office does not tolerate chiefs or village elders carrying out their mandated work. However the same officer confessed that the office does not have adequate machinery to raise awareness amongst the women in the village about their statutory right to land

Feminists such as FIDA have other ideas on how to strengthen rights and access to land. Evelyn Opondo says that FIDA is targeting gender equitable land reform with respect to customary law. Here, FIDA is lobbying that in promoting the concept of co-ownership in matrimonial property, all customary marriages should be registered to ascertain who is entitled to a particular matrimonial property at time of divorce or at time of death of Husband. The feminist organisation also launched a book called *A Case for Women's Land Rights in the Proposed Constitution...*

#### 4.11 Institutional Support: Traditional Authority versus Councillor

**Table 13: Institutional Support – Traditional Authority versus Councillor**

|                                                           | Frequency | Percentage |
|-----------------------------------------------------------|-----------|------------|
| First authority to resolve land dispute is village elder  | 17        | 100        |
| First authority to resolve land dispute is land board     | 0         | 0          |
| Women approach the chief after the village elder,         | 16        | 94         |
| Women approach the area councilor after the village elder | 0         | 0          |
| Total women interviewed                                   | 17        | 100        |

Source: Field work 6 October 2007

The table above shows that seventeen respondents (100 percent) agreed that their first authority to resolve a land dispute is the village elder. Sixteen respondents (94 percent) admitted that the second option, after the village elder, is chief and only one respondent admitted that she would seek redress through the land board. Findings during the field work revealed that a member of the women's group was a councillor in the year 2004 and another is currently serving on the land board. Despite this occurrence of female representation in statutory institutions, findings from the study reveal that no respondents would seek redress through an area councillor. The research study established that the village elder is called Mr. Sinaga and the chief is called Mr. Omondi. During the interviews, the respondents said that in case of land matters regarding adjudication, they will approach the chief or village elder but not the councilor. This may be explained by the fact that the women are used to a male figure (chief/village elder) as a problem solver within this society rather than a female figure who in some cases is a councillor.

Table 4 on level of education, shows that only two respondents from Yaw Pachi women's group have tertiary education, hence the inability of these women to decipher statutes such as the Registered Land Act. The women may not be able to understand the formal law which in Kenya, is written in English language. The women therefore could be opting to use a law that they easily understand; customary law which is passed on from

one generation to the next. The lower the education level, the more a woman is inclined to approach traditional authority.

Also from the interviews with respondents of Yaw Pachi women's group, majority said that it is more expensive to seek help from the Land Board in Siaya because of the added expense of *matatu* (public transport minibus) fare whereas; the village elder or chief is a walking distance away. In echoing an observation from Aliber *et al.* (2004) about land sales in Bondo, it could not be established whether informal sales of land do take place, or whether perhaps they involve an exchange of money for a registration number, that is, a transfer of the symbol of formal ownership without the benefit of going through the formal procedure.

#### 4.12 The Draft National Land Policy 2006

**Table 14: Draft National Land Policy**

|                                                      | Frequency | Percentage |
|------------------------------------------------------|-----------|------------|
| 1. Aware of draft land policy 2006 by government     | 1         | 6          |
| Unaware of draft land policy 2006 by government      | 16        | 94         |
| 2. Land policy should include women's right to land  | 17        | 100        |
| Land policy should not include women's right to land | . 0       | 0          |
| Total women interviewed                              | 17        | 100        |

Source: Fieldwork 6 October 2007

Table 14 shows that, one respondent (6 percent) is aware of the 2006 draft national land policy. This respondent could be the member of the land board. Despite the fact that the draft national land policy was published in full in the '*Daily Nation Thursday April 19, 2007*'. Sixteen respondents (94 percent) have no knowledge of the existence of a draft policy. The women in rural areas rarely buy newspapers because of the high price attached to it which is 35-40 Kenya shillings (0.5 US dollars).

The respondents from Yaw Pachi women's group revealed that they do not support a law to be passed that provides women equal right to inherit land. When the interviewer asked if women be allowed to inherit land, the respondents say that it should be single ownership of land (Source: Yaw Pachi women's group 7 October 2007).

A respondent from Yaw Pachi attested to the fact that her pastor's take on the land rights has influenced her stand on the issue of women's right to inherit land law:

“When there was a funeral at my home, the pastor said that in the draft constitution (it was rejected), there was only one good part, that ladies were allowed to own land. Because as much as they are married off, much of the cultivation is back home. Even myself when I get back home, I can still get a portion of land to till even if it's not officially mine. So he said that was the only thing about the rejected constitution. But when he thought again of how his sisters would still come back and disturb him because of the land issues, he dismissed it. So in such cases we should have a law to cover the girls, so when she comes back home, she can be allocated at least some small part to manage but those who are already married should not be included” (Source: Yaw Pachi women's group 7 October 2007).

The researcher noted the following from an informal interview with the former Minister for Lands, Kivutha Kibwana.

“I must say, there is some form of agreement and political goodwill across the political divide on the need to address the gender disparities as regards access and utilization of land. Both the Bomas Draft Constitution and Wako Draft Constitution addressed issues of equality and equity in matters relating to land. These two drafts provide for women's equal treatment stating that "women and men have equal right to inherit, to have access to and manage property, and that any law, culture, custom or tradition that undermine the dignity, welfare and

interests or status of women is prohibited” (Source field work 25 June 2007, Informal interview Prof Kivutha Kibwana, Fanikisha conference, Nairobi).

In 2005, Dr Akinyi Nzioki was the lead consultant in the drafting of a *‘Women’s Policy Brief: Critique on the 2006 Land Policy’* for FIDA and Kenya Land Alliance. Her opinions gathered from an interview with the researcher share the same perceptions that she wrote for the two non-governmental organizations. Firstly, Dr Nzioki insists that family land and matrimonial homes should be protected by the presumption of co-ownership in favour of both spouses. The same should apply to polygamous unions (i.e. each wife shall commonly own with the husband the piece of family land and matrimonial property). The idea of shared tenure in polygamy has been adopted by countries such as Ethiopia. This echoes the observation by UN HABITAT (2005:45), that in Ethiopia, during distribution of land rights, a man with two wives must choose one with which he will jointly own land, and the other wife will receive an independent right to a separate plot of land

Dr Nzioki says that 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. She suggests that appropriate legal measures should 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 spouse. Positive discrimination should be adopted in land distribution, resettlement schemes, awarding women grants/loans to improve women’s land ownership and security of tenure. In addition, changes should 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.

Another key informant, Evelyn Opondo from FIDA-Kenya also contributed to the Women’s Policy Brief. Opondo notes that existing institutions, be they commissions,

land boards or tribunals are generally dominated by men and women's representation remain limited. She suggests that the women policy brief include the appointment of members to the Commissions; Land Tribunals Boards and Committees should endeavour to ensure equal representation and effective participation of women and men. It should be mandatory that married women give their consent before land is disposed (selling, mortgaging, pledging or leasing) in person rather than in writing. I.e. Court or District Land Tribunal. This she believes will restrict commercial transaction affecting matrimonial property and family land.

During the field work for the research study, it was noted that some expert informants are quite pessimistic about the eventual passing of the draft law into an act of parliament. In particular, experts such as Odenda Lumumba of Kenya Land Alliance KLA and Dr Akinyi Nzioki of Center for Land and Economy Rights for women CLEAR.

Dr. Nzioki says she was among key land experts who were at the forefront in consultations with Professor Kivutha Kibwana, Minister for Lands, to endorse the National Land Policy to become an Act of parliament. Primarily, the process of passing the draft land policy into an Act of parliament stalled because the constitution of 2005 was rejected. Dr Nzioki is warned that with the 2007 general elections on the top of the agenda in Kenya, the country policymakers were preoccupied by election campaigns and consequently, no politician was willing to engage in something controversial, such as the draft national land policy. Since the minister was vying for a seat as a member of parliament, his first and foremost priority was how to win the seat (Source: field work September 2007, In-depth interview Dr Akinyi Nzioki, CLEAR office, Nairobi).

In the event that the Draft Land Policy is not passed into law, Kenya Land Alliance is proposing and seeking alternative means of ensuring women's rights to land become a reality. The Land Alliance has published a land charter that was circulated in the daily newspapers, *Nation* and *East African Standard*, so that Kenyans can hold any ambitious politician accountable to them on delivering land rights to Kenyans.



“As you may have read we now have unleashed a new land charter. We are demanding on behalf of Kenyans that the political parties in 2007 elections commit to equitable land rights. When I say it you like so, this phrase may sound vague but we have specified in the charter to cover issues of women’s access to land. Point number three of the charter clearly states that, the parties should agree ‘In particular our party shall ensure law; policy and practice secure the rights of women, who are the main users of land in most parts for the country’”

(Source field work November 2007, In-depth interview Odenda Lumumba at a conference held at Methodist Guest House, Nairobi).

One of the aims of this research study was to analyse the significance of the 2006 Draft Policy on Land to women’s access to land more so, if the land policy will improve the position of women in law and society once it is passed into law. It has been noted that in South Africa, the weaknesses in implementing a gender equitable land reform, stems largely from limitations within the broader programme, compounded by the inadequate conceptualization and management of the task and an absence of political accountability around women's land rights by the Department and Ministry. In Kenya, the National Formulation Process for Land Policy secretariat in the Ministry of Lands is responsible for equitable land tenure. However, although a commission was set up to carry out an assessment of the impact of customary land tenure on women’s land right in 2005, the government has not allocated adequate funds to this department to enable the staff to raise awareness about initiatives on women land rights in Kenya.

## CHAPTER FIVE: CONCLUSION

### Summary of Lessons Learnt

The aim of this study was to investigate how customary laws enshrined in statutory law has undermined women's access and right to land. The case study was Yaw Pachi women's group in Siaya district. The study was conducted among seventeen women who have experienced cultural practices such as wife inheritance, patrilineal inheritance of land, polygamy and property stripping. The study also looked at the role of statutory institutions such as the land board and how women's access and rights to land seeks to be resolved through the 2006 Draft National Land Policy for Kenya.

For purposes of this research, it was noteworthy to recognise that vulnerability of women in situations of divorce, separation or singlehood remains in an extremely vulnerable position with regard to land. Since, the major community resource is being registered under individual's male names; women under such conditions mentioned above are easily being left with little or no economic support. In such context, inheritance of land as a daughter would make a critical difference to her ability to sustain her life and that of her children. The findings from interviews with the respondents from Yaw Pachi women's group are echoed by EASSI (2002:34) which observes that widows were sometimes found to be disinherited of the land they use by the deceased husband's male relatives.

On the other hand, the registration of land in the name of a widow seems to strengthen the rights and protection of the widows to land against their male relatives of their husbands even in cases where they do not have sons. However, in Yaw Pachi it was only one lady who enjoys such *de jure* rights to land, the rest are all subject to *de facto* right to land through their sons or father-in-law.

During the field work, the women filled out questionnaires spelling out the nature of their problem of access to land. In order to analyse data, the study used the interview method. The use of this method was motivated by its quality of providing data on issues that one may not get from simply using a questionnaire. The interviews with key informants enabled the researcher to collect and in-depth information on a smaller group of

respondents, to observe and understand values of the Luo in Siaya whilst carrying out the assignment. Documentary analysis was an equally important data gathering technique.

The study population was made up of seventeen women from the ages of 39 to 60, who have experienced land related problems. There was an additional 12 key informants. In order to identify them the study used purposive sampling. Interviews were conducted with all the twelve key informants however some were formal whilst others such as the interview with Minister for Lands, was informal.

Yaw Pachi women's group in Siaya was chosen due to its specific characteristics in terms of the interplay between customs and statutory law in the daily lives of the community members. The problems which are largely caused by customary practices were identified by Agnetta Onyango, UNDP/Plan project manager (Luo by tribe) to be specific to this community. The choice of the women group from this community is further supported by 'Facing the Challenge' a report released by UNDP/Plan joint project.

The women constitute more than 50 percent of the population yet account for just 5 percent of registered land holders nationally and yet, they contribute over 80 percent of the agricultural labour force. The choice of these women was motivated by the fact they have experienced discrimination in matters regarding their ownership and access to Land and some have suffered violations from in-laws when they tried to resist the cultural practices. Also as rural women, they have been excluded from the land reform process in Kenya. The choice of the key informants was motivated by the fact that regarding their expertise in the field of Land reform in Kenya and women's rights, they would be able to provide the research study with an accurate account.

The women and law theory and the legal centralism and legal pluralism theory framed this work. Similarities were drawn between the gender equitable land reform in South Africa and Kenya in the sense that the commitment by government to gender equity has been honoured more in the breach than in the execution – and has remained at the level of lofty, high-level principles. The process of land reform should be one that is participatory and where all stakeholders whether 'below' e.g. the rural women or 'above'

e.g. the women lawyers, activists and bureaucrats at government ministries take into account all the needs and views of both sides in order to achieve effective land reform process that addresses the realities faced by women.

The study established that a gap exists between the government effort to address the issue of women's rights and access to land in Kenya. There is a discord between the secretariat of National Land Policy Formulation Process NLPFP, Ministry of Lands and the Gender Department, Ministry of Culture, Gender and Sports. These two government departments that should be leading the gender equitable land reform process. Secondly, these departments do not receive the adequate funds from the treasury that would efficiently resolve the land issue as well as the skewed distribution of land resource between men and women. This issue is manifested by the existence of manual registries run by poorly paid land officers who are gullible to bribes.

To overcome these challenges of collaboration between government ministries, there is need to build capacity of government officials in Ministry of Land and Ministry of Gender, Sports and Culture so as to strengthen cohesion of both department and in turn effectively address the gap that exists. Women's representation, more so, rural women voice should be audible, in matters of land reform in Kenya. Some of the policies that were put in place such as registration of land were assumed in the past to increase security of tenure for women because of the introduction of title deeds to land. This, however, increased the inequity of land distribution because the men further marginalised the women by registering themselves as the sole owners of the once communal land.

The research study also showed that the colonial administration saw individual land tenure as a more progressive mode of African agriculture than the customary/communal tenure, yet, the perceptions by Yaw Pachi women respondents is that communal land tenure offers more security than the individual tenure. In other words, policymakers such as Ministry of lands and policy lobbyists such as gender activists and federation of women lawyers should seek views from the women and especially the rural women, and then meet their needs through passing of a Land Act to address the women's needs.

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## APPENDIX 1: Questionnaire

**Perceptions on how customary law enshrined in statutory laws undermine women's land rights.**

**A case study of 'Yaw Pachi Women's group in Siaya, Kenya.**

|                                                                                                                                                                                                                                                                                                                                                                 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 1: Respondent's Characteristics</b>                                                                                                                                                                                                                                                                                                                  |
| 1. In which of the following age groups do you belong? Would you say you are between:<br>18 – 24                      25 – 29                      30 – 34                      35 – 39<br>40 – 44                      45 – 49                      50 – 54                      55 and above                                                                  |
| 2. Are you<br>a) Married<br>b) Divorced<br>c) Widowed<br>d) Husband died and remarried                                                                                                                                                                                                                                                                          |
| 3. If married or have been married before, how was the marriage conducted<br>a) Traditional customary marriage/polygamy<br>b) Legally married at Attorney General's Chambers (one wife)<br>c) Legally married at Attorney General's Chambers (but there are other wives)<br>d) Married in church (one wife)<br>e) Married in church (but there are other wives) |
| 4. What is your level of education<br>a) No formal education<br>b) Primary school education<br>c) Secondary school education<br>d) Post secondary education including university                                                                                                                                                                                |
| <b>Section 2: Family resources</b>                                                                                                                                                                                                                                                                                                                              |
| 5. What is the main source of income for the family                                                                                                                                                                                                                                                                                                             |
| 6. What are the other sources of income for the family (probe for sources and regularity)                                                                                                                                                                                                                                                                       |
| 7. Who is the main income provider for the family                                                                                                                                                                                                                                                                                                               |
| 8. Do you contribute any form of income to the family (Probe for types of income and regularity)                                                                                                                                                                                                                                                                |
| 9. What percentage of the family's income is from farming                                                                                                                                                                                                                                                                                                       |

|                                                                                                                                                                                             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 3: Access to land</b>                                                                                                                                                            |
| 10. About how many acres of land do you own as a family                                                                                                                                     |
| 11. Is the land registered                                                                                                                                                                  |
| 12. In whose name is the land registered (probe for joint ownership)                                                                                                                        |
| 13. Do you have unlimited access to all the family land or you have to seek permission to use it.                                                                                           |
| 14. If you have to seek permission to use it, from whom do you seek such permission                                                                                                         |
| 15. Have you ever been involved in disputes over ownership or use of family land by other family members? What was the nature of the dispute                                                |
| 16. Looking at the community are you aware of other women who have been involved in disputes with other family members over use or ownership of land. What was the nature of such disputes? |
| 17. Would you tell me what land issues face widows in the community                                                                                                                         |
| 18. Have you faced disputes as described above? (Probe for details)                                                                                                                         |
| 19. (If widowed) Did you face disputes over land ownership/use when your husband died. What was the nature of the dispute                                                                   |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 20. In Luo traditions, it is required that women who lose their husbands are inherited. Is that a common feature in your community?                                                                                                                                                                                                                                                                                                                |
| 21. Does widow inheritance help women access land better or not                                                                                                                                                                                                                                                                                                                                                                                    |
| 22. (If widowed) What was your experience (probe for if she was inherited and how that affected her ownership and use of family land)                                                                                                                                                                                                                                                                                                              |
| 23. (if was inherited) was the registration of land changed to the name of the man. (Probe for inheritor's role in land ownership and authority over use)                                                                                                                                                                                                                                                                                          |
| 24. What is the situation of land ownership in a polygamous family? Does each wife have separate titles to the family land                                                                                                                                                                                                                                                                                                                         |
| 25. In a scenario where a man dies and leaves several widows, please comment on what happens in the following regard: <ul style="list-style-type: none"> <li>a) How is the land distributed among the different widows</li> <li>b) Who is responsible for such distribution</li> <li>c) in case of a dispute, who is the first authority in resolving such dispute</li> <li>d) Who would one appeal to if they do not like the decision</li> </ul> |

|                                                                                                                                                                                    |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Section 4: Government support</b>                                                                                                                                               |
| 26. As a woman, what form of support do you receive from the government with respect to protecting your rights to land                                                             |
| 27. Are there land boards put in place by the government to help women in addressing their rights to land? If so, how have the boards handles issues of land with respect to women |
| 28. How fair are such land boards with respect to land ownership by women. (probe for examples)                                                                                    |
| 29. Are you aware of family court (probe for description)                                                                                                                          |
| 30. Are you aware of any case that has been handled by the family court (probe for details)                                                                                        |
| 31. What is your opinion of family courts (probe for fairness in handling cases involving women)                                                                                   |
| 32. What suggestions would you propose to be included in the new land policy (probe for inheritance of land by girls etc)                                                          |
| <b>THANK YOU.</b>                                                                                                                                                                  |

## **APPENDIX 2: Letters of Consent**

### **Appendix 3.1: Letter to UNDP/ Plan International, Project Siaya**

Dear (Manager UNDP/Plan International)

My Name is Jemaiyo Chabeda and I am a student at the University of Witwatersrand, I am currently completing my Masters degree in Development Studies. To complete this degree I must submit a research report. The primary aim of this research is to conduct a critical assessment of women's land rights within the context of inheritance and land ownership based on a case study in Yaw Pachi, Siaya. This assessment will ascertain the extent to which customs faced by women have undermined their access to land. I will specifically be focusing on Women who have been subjected to traditions such as wife inheritance and also women who may have lost land as a result of this customs. I will be establishing that these practices consequently hinder the women's right to access land using a questionnaire that consists of two sections. The first section of this questionnaire relates to information such as age, gender and marital status. The second section includes questions that establish customary practices hinder the women's right to access land.

You are under no obligation to participate in this study. However, should you allow the research to be carried out on the Women's Group that is affiliated with UNDP/Plan International, the anonymity and the confidentiality of your organization as well as the volunteering women's group will be maintained. The Women who choose to participate in this study will be asked to fill in a questionnaire. The questionnaire consists of two sections. The first section of this questionnaire relates to information such as age and gender. The second section includes questions that establish customary practices hinder the women's right to access land.

If you have any questions regarding this research study, you can contact

Jemaiyo + 277764543154

Or My Supervisor Dr Samuel Kariuki

Thank You!

Yours Sincerely,

Jemaiyo Chabeda

### **Appendix 3.2: Informed Consent in Dholuo**

Idhi nade Ms.....(Yaw Pachi women's group)

Nyinga Jemaiyo Chabeda, to achiengni tieko somo Masters Degree e university mar Witwatersrand South Africa (piny mar Nelson Mandela).

Andiko report mondo ayud degree na.

Mondo andik report ni, an gi penj ma matin daher mondi ikonya go ka lwore gi wach mar.

1. Ter
2. Lowo
3. Jater
4. Kony moa e ruoth gi serikal e wach mar pogo lowo.

Penj moko luore gi higni ma ingo gi ka okendi (ka okendi Siaya e kanisa koso gi ehenro mar dala/mier)

Duoko gi okabing'iso ngato. Duoko gin kinda kodi

Okochuno ni iduoka, to mak mana daher ni ikonya.

Ka diher konya, ket lwedo e barua ni.

Ka ingi penj moko, namba na mar simu en 0723727779

Ago ni erokamano maduong'



### **APPENDIX 3.3: Informed Consent in English**

Dear Woman (from UNDP Kenya/PLAN International affiliated Women Group)

My Name is Jemaiyo Chabeda and I am a student at the University of Witwatersrand, I am currently completing my Masters degree in Development Studies. To complete this degree I must submit a research report. This research report will take the form of a study in which I demonstrate my research skills. The primary aim of this research is to conduct a critical assessment of women's land rights within the context of inheritance and land ownership based on a case study in Yaw Pachi, Siaya. This assessment will ascertain the extent to which customs faced by women have undermined their access to land. I will specifically be focusing on Women who have been subjected to traditions such as wife inheritance and also women who may have their rightful ownership of land as a result of this customs. I will be establishing that these practices consequently hinder the women's right to access land using a questionnaire that consists of two sections. The first section of this questionnaire relates to information such as age, gender and marital status. The second section includes questions that establish customary practices hinder the women's right to access land.

The questionnaire will not require a name, so that all responses remain anonymous. All of the questionnaires are going to be strictly confidential. The only two people that will have access to them are my supervisor and I. Your participation in this study is voluntary, and you may withdraw at any time. If you do choose to participate in this study, you are entitled to leave out questions that you do not feel comfortable answering in the questionnaire. There will be no negative consequences if you decide not to participate in this study. If you would like to participate please could you fill in, and return the reply slip.

If you have any questions regarding this research study, you can contact me by phone:

Jemaiyo + 277764543154

Or My Supervisor Dr Samuel Kariuki

Thank You!

Yours Sincerely,  
Jemaiyo Chabeda