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Customary Law and the Limits of Female Land Tenure Reform in Kenya

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Customary Law and the Limits of Female Land Tenure Reform in Kenya

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Introduction: A Tale of Female Land Tenure in Kenya

Though the issue of female land tenure in Kenya has been around for decades, the tale of female land tenure as it relates to this paper began approximately 14 years ago. In 2000, females “constitute(d) over 70 percent of the productive land based labor force,” yet only 4% of females formally owned land (Nyamu 2000). As a Political Science student interested in how gender inequality is expressed on the political level (and who was also seeking a thesis topic), I was intrigued by this statistic and the inequality that it suggested. I was even more intrigued when I continued to learn that in 2004, the percentage of land in Kenya registered under a female name increased only one percentage point to 5% (Kenya Land Alliance 2004).

How could this be, especially when females in Kenya constitute such a large percentage of the land based labor force? I began to do preliminary research on the issue of female land tenure in Kenya, and was struck by the lack of information and research on the subject. This lack of information was further confounded by the fact that in 2010 the constitution of Kenya was revised to include a section that protects the legal right of women to own land. Under Section 60.1.F of the new Kenyan constitution, gender discrimination “related to land and property in land” is to be eliminated (The Constitution of Kenya 2013). In light of these facts, I couldn’t wrap my head around how female land tenure was currently at 5% — and that was as of the last estimate, which was conducted nearly 10 years ago.

Then I continued reading the revised constitution. And in doing so, I saw Section 60.1.G, which grants local communities the authority to “settle land disputes through recognized local community initiatives (The Constitution of Kenya 2013).” Because of this, while the 2010 constitution protects the right of females to legally own land, its level of implementation is

directly influenced by the level in which local communities enfranchise the law on the local level. Local implementation of female land tenure rights in turn, as suggested above, is then influenced by customary law (and its legacy) in Kenya.

When beginning my research, my original research question was “How is the post-colonial implementation of female land tenure rights in Kenya affected by the historical relationship between British colonialism and customary law in Kenya?” In framing my research question this way, I sought to determine the influence that customary law had on the post-colonial implementation of female land tenure rights in Kenya. When I began my research, I also received a grant that would have enabled me to travel to Kenya to conduct archival research at the Kenya National Archives in Nairobi and original field research. The point of this research would have been to locate and analyze national, regional, or local surveys pertaining to female land tenure in Kenya, and then conduct field research to make my own conclusions regarding the current state of female land tenure. However, extenuating circumstances caused me to cancel my plans. As a result, I enlisted the help of James Maina, a resident of Nairobi who had previously conducted academic research for a mutual friend.

After agreeing to help, I specified that I was interested in him visiting the Kenya National Archives and Non-Governmental Organizations (NGOs) working in Kenya in order to find land surveys, taxation surveys, legal documents, NGO documents, interviews, complaints, reports, and journal articles regarding female land tenure. Interestingly, the Kenyan National Archives located in Nairobi had very little information pertaining to female land tenure, and there were almost no land surveys available at the archive as confirmed by the attendants working at the time. The only survey at the archives that James was able to find in regards to female land tenure was a survey concerning the Joluo of Kenya, which was published in 1977. As a result, I became

interested in the lack of information regarding female land tenure, and how the absence of relevant information can be connected or attributed to customary law, and the limits it places on female land tenure reform.

By the end of the research process, James was able to locate the 1977 survey regarding female land tenure, three documents pertaining to current land tenure legislation (the revised Constitution, Law of Succession Act, and Marriage Bill), and four informational reports issued by NGOs working in Kenya. I supplemented this research with my own secondhand research based on the existing academic literature concerned with female land tenure, but continued to run into the problem of a lack of information concerning female land tenure in Kenya. Indeed, as evidenced by my own research experience, the current lack of literature, research, surveys and reports regarding female land tenure is so prevalent that it means female voices are being systematically silenced through the absence of relevant information.

On that note, it should be acknowledged that the information regarding female land tenure that James provided me with could have been influenced by his sex as a male. I provided James with a detailed list of the information I was seeking at the archives, but there is the possibility that I did not receive all of the information available regarding female land tenure. If this is the case, it could have been done intentionally or inadvertently, but in either case it would have stemmed from his own perceptions of and experiences with female land tenure in Kenya as a Kenyan male. This is important to note because the majority of the information I have concerning female land tenure in the postcolonial period was provided to me through James' research in Kenya, and as such potential selection biases in the data should be acknowledged.

As a result of James' and my experiences attempting to find relevant research concerning female land tenure, I reformulated my research question to account for this lack of information.

My research question thus became “How has customary law historically influenced the implementation of female land tenure, and to what extent does it continue to influence female land tenure and the availability of information regarding female land tenure? Since the biggest hurdle I faced while conducting research was the lack of available information pertaining to female land tenure, the absence of relevant information warrants an explanation in itself that must be explored before female land tenure reform in Kenya can become a reality. Similarly, the prevalence of discussion on customary law’s influence on female land tenure (in the limited literature on the subject that was available) indicates that customary law must be explored in relation to female land tenure and the absence of relevant information concerning it as well.

Beginning in Chapter One, I provide an overview of female land tenure in Kenya and why it is important. I then discuss customary law, and conclude with a brief discussion on the current literature on female land tenure in Kenya. In Chapter Two, I discuss the major land tenure policies and legislation during the precolonial, colonial and postcolonial periods. In Chapter Three, I return to my research question and discuss the case study of the Joluo conducted in 1977 to illustrate how the shift to land privatization in the 1970s continued to impose the patriarchal norms embedded in customary law on female land tenure. In the second section of Chapter Three, I transition to discussion on the current state of female land tenure. Finally, I conclude in Chapter Four with a discussion on NGOs in Kenya, and the problems that must be addressed for the question of female land tenure in Kenya to be successfully answered.

Chapter One

1.1 So What, Who Cares? Why Female Land Tenure Matters

Foremost, it is important to discuss in general the issue of female land tenure in Kenya and why it matters. The second section of this chapter will then define and discuss customary law, and the final section concludes by discussing the current gap in the literature pertaining to female land tenure in Kenya.

Admittedly, the issue of female land tenure in post-colonial Kenya appears at face-value to be a very narrowly tailored problem, and an even more specific research topic. Why should we be concerned with the level in which female land tenure rights are implemented in Kenya, when there are much larger politically motivated gender issues facing the world? And even if we were to concern ourselves with the issue of female land tenure, why include customary law in the mix? Foremost, the issue of female land tenure rights is not exclusive to Kenya, sub-Saharan Africa, or even Africa itself. For example, Dzodzi Tsikata (2011, X) observes that:

Commercialization of land and natural resources is in some cases accompanied by a concentration of land... and women are disproportionately the losers... the promise of changing tenure systems, that they will provide women with opportunities which they have... lacked, is not borne out.

In this regard, the issue of female land tenure is a broad one which applies to all states in which land is commercialized. In terms of the economic implications of female land tenure, Patrick McAuslan notes that “official discussion of gender and land tenure is often disconnected from discussion of broader processes of economics restructuring, for instance... women’s ability to access credit is connected to their ability to demonstrate secure interests in valuable land that they can put up as collateral” (2013, n.p.). Dzodzi Tsikata also argues that the issue of female

land tenure should be situated within “the broader context of capitalist transformations in developing countries” (2011, 8). Hernando de Soto goes so far as to argue that “the lack of formalized property rights... explains the failure of non-Western countries... to develop” (2000, 4). Each of these arguments expresses the importance of land tenure and property rights and raises questions about how lack of formalized rights for females may negatively impact economic development in developing countries.

For example, Katrine Saito argues that “women’s access to agricultural inputs and supports services has not improved commensurate within their role as farmers, resulting in (a) considerable loss (in) output – more than 20 percent according to Kenyan analysis” (1994, vii). Thus as indicated by each of these authors, the level in which any country successfully implements female land tenure rights may influence the country’s economic growth and development. Similarly, access to land also influences how economically independent women can be in a capitalist society. As a result, the issue of female land tenure becomes one concerning the economic development of both females, and the capitalist state itself.

Section 1.2 The Importance of Female Land Tenure in Africa

In regards to why female land tenure in Africa is important, Ambreena Manji discusses how “in many parts of Africa, the last two decades have been characterized by a debates as to the purpose and direction of land reform... in short, this has been the age not just of land reform but of land law reform” (2013, 1). Yet while this may be the age of land law reform, Patrick McAuslan notes that, “a review of nine collections of essays on land issues in Africa published between 1996 to 2011 showed that of 86 essays in these collections, only two essays considered gender issues” as they relate to land tenure for females (2013, n.p.). This point illustrates how

the current literature on female land tenure in Africa is almost nonexistent, and therefore why my research question is important. In light of this, it is important to analyze the ways in which customary law continues to influence not only the development of female land tenure rights, but the very existence of knowledge concerning such rights.

At this point, I have established that female land tenure rights and the effective implementation of female land tenure legislation is a global issue that affects (to varying degrees) economic development in countries, and the economic independence of women (particularly in developing countries). Furthermore, the current shortage of literature and research on the the issue of female land tenure rights in Africa, despite the fact that land reform in Africa has remained a prevalent topic for the last two decades, means the issue is largely unexplored (Manji 2013). Having established why female land tenure rights around the world and in Africa are significant to consider, the question still remains: Why choose to study the implementation of female land tenure rights in Kenya, of all places?

Section 1.3 Why Female Land Tenure in Kenya is Important

My decision to analyze the implementation of female land tenure rights in Kenya is motivated by two main reasons: First, as previously noted, in 2000 (Nyamu 2000) only 4% of land in Kenya was registered under a female name, and that number rose only one percentage point to 5% as of 2004 (Kenya Land Alliance 2004). Secondly, in 2010 Kenya passed a new constitution that legally protects the right of females to own land, but the effectiveness of the law is influenced by the prevalence of customary law, which I define in the paragraph below.

Section 1.4 Customary Law Defined

In discussing customary law, it is important to define what it is. For the purposes of my argument I agree with Dr. Muna Ndulo's definition of customary law (2011, 87), in which she defines customary law as:

Having its sources in the practices and customs of the people. In a typical African country, the great majority of people conduct their personal activities in accordance with and subject to customary law... the use of the term "African customary law" does not indicate that there is a single uniform set of customs prevailing.

Under this definition, customary law is construed as consisting of any set of laws or rules that are derived from traditional practices of various ethnic and social groups, and that are not universal. Furthermore, customary law "tends to see women as adjuncts to the group to which they belong, such as a clan or tribe, rather than equals" (Ndulo 2011, 89). As a result, under customary law women's access to land is primarily dependent on their role in a patriarchal society. For example, prior to colonization, females were generally granted access to land through their relationship with males members of their family, but lacked formal land tenure rights over that land (Ndulo 2011). This form of land tenure is formally known as patrilineal land tenure, and refers to a system of land tenure in which the land is formally controlled by males and access to land is granted to females as a result of their status as wives, daughters, or sisters (Pala 1977, 2).

Under British colonialism, "customary law and its institutions" continued to be recognized, and was even adapted and molded to the interests of the British (Ndulo 2011). This means that customary law continued to govern the lives of Native Kenyans, as will be discussed in Chapter Two. Following decolonization, customary law continued to influence the norms, practices, and legislation concerning land tenure. For example, Dr. Muna Ndulo (2011, 89) argues:

Many (modern) African constitutions contain provisions guaranteeing equality, human dignity, and prohibiting discrimination based on gender. However, the same constitutions recognize the application of customary law and they do this without resolving the conflict between customary law norms and human rights provisions.

In fact, this is seen in the 2010 Kenyan Constitution, and the provisions that protect female land tenure while giving local communities the legal authority to oversee matters pertaining to land tenure. As a result, the right for females to own land is protected while at the same time customary law, which has largely traditionally denied females the right to own land, is given legal recognition and protection. This in turn creates a conflicting set of legal principles in regards to female land tenure. In the next section of this paper, I conclude by discussing the current gap in the literature that I have referenced in the paragraphs above to further illustrate why my research question is important.

Section 1.5 Customary Law & Female Land Tenure: A Review of the Existing Literature

Currently, there is a lack of literature and research that discusses how customary law interacts with the implementation of female land tenure rights. In assuming a gender-focused approach, I am helping to fill the gap in the literature. Furthermore, as Catherine Boone notes “there is often acute disjuncture between formal rules that define institutional structures and functions, and the real politics of how government agencies work (2003, 4).” She elaborates that “broad institution-building mandates are interpreted and implemented in locally specific ways, often with geographically uneven and contradictory effects” (Boone 2003, 4). The implication of this is even if female land tenure rights are legally protected on the national level, the actual

implementation of those rights can be influenced by a disconnect between central policy and local implementation caused by customary law and its legacy of patriarchal norms.

Similarly, Janine Udink argues in “*Law, Governance and Development Research*” that “formalization of land rights has been highly unsuccessful in Kenya” because “the enduring strength of customary tenure and the practice of ensuring claims to land through systems of social, political and kin networks and negotiations have meant that formal records and title play an insignificant role in either access to land or dispute settlement” (2009, 63). However, while both Boone and Udink argue that customary law and local institutions have affected the implementation of land tenure rights in Africa, neither author focuses on the specific effect on female land tenure rights. My research question is therefore important because it seeks to further examine what influence customary law has historically had on female land tenure rights in Kenya, what influence it continues to have, and how it influences the current information available regarding female land tenure.

In this chapter, I discussed female land tenure in Kenya and why it is important. I then defined customary law as it relates to female land tenure, and concluded by discussing the current literature on the issue. In Chapter Two, I transition to a discussion concerning the major precolonial, colonial and postcolonial land tenure legislation to illustrate how the issue of land tenure and female land tenure has historically been influenced in Kenya.

Chapter Two: A Review of Pre-Colonial, Colonial & Post-Colonial Land Tenure in Kenya¹

Section 2.1 Introduction

This chapter traces the historical development of land tenure and female land tenure through the precolonial, colonial and postcolonial period in Kenya. This is accomplished by discussing the major national legislation focusing on land tenure and female land tenure. Furthermore, it is also important to acknowledge that female land tenure is historically not a well-developed concept in Kenya. As such, I have decided to provide a general overview of land tenure in Kenya when information regarding female land tenure is limited or not available. The lack of relevant information regarding female land tenure also extends to the availability of information concerning land tenure in Kenya in general. Consequently, much of my discussion on land tenure during the colonial period is informed by Karuti Kanyinga's book "Redistribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya," which contains an overview of land tenure in Kenya during the colonial period, and "Agricultural Land Redistribution: Toward Greater Consensus" by Hans P. Binswanger-Mkhize, Camille Bourguignon and Rogier van den Brink. I begin this chapter with a discussion on agriculture and governance in Kenya. I then transition to a discussion on precolonial and colonial land tenure practices and legislation, and conclude by reviewing the major legislation concerning land tenure and female tenure in postcolonial Kenya.

Section 2.2 Agriculture & Governance in Kenya

¹ Sections of this chapter previously appeared in a final paper written in December 2013 for Professor Reo Matsuzaki's course "Senior Seminar: State Formation and State Building."

In 2013, Kenya had approximately 274,500 sq. km of agricultural land and the population of Kenya was approximately 44.03 million (The World Factbook, 2014). Agricultural land refers to land that is available and suitable for agricultural purposes, such as growing crops. The amount of agricultural land is important because the agricultural sector accounts for 51% of the Gross Domestic Product (GDP) in Kenya, and the percent of the population that the agricultural sector in Kenya employs is 78% (The World Factbook, 2014).^{2 3} The implication of this is that over three-fourths of the Kenyan population is employed, whether formally or informally, by the agricultural sector. As such, the economic success of many Kenyans is directly influenced by their participation in an agricultural economy, and consequently, their access to land tenure. Furthermore, the staple crop in Kenya is maize, and the main export in Kenya is tea (The World Factbook, 2014).^{4 5} This reinforces the importance of the agricultural sector in the lives of much of the Kenyan population, including women, and also illustrates why access to land and land tenure is important.

In terms of governance and legitimacy, in “Pre-Colonial Institutions, Post-Colonial States, and Economic Development in Tropical Africa,” Pierre Englebert classifies Kenya as being assigned a “5” (on a scale of 2 to 7) in terms of good governance, and around .75% horizontal legitimacy (2000, 22). This is significant because it indicates that the ability to govern and political legitimacy in Kenya is relatively established, so that failure to effectively

² "Africa: Kenya." *The World Factbook: Central Intelligence Agency*. N.p., n.d. Web. 16 Dec. 2013.

³ "Africa: Tanzania." *The World Factbook: Central Intelligence Agency*. N.p., n.d. Web. 15 Dec. 2013.

⁴ "Staple Foods Value Chain Analysis." *US Aid*. United States Agency for International Development, Jan. 2010. Web.

⁵ "Kenya Exports." *Trading Economics*. N.p., n.d. Web. 16 Dec. 2013.

implement female land tenure rights cannot completely be attributed to these two variables (2000, 22).

Furthermore, for the purposes of my argument I refer to Mahmood Mamdani's argument that "the form of the state that emerged through post-independence was not the same in every instance" and that "we can identify two distinct constellations: the conservative and the radical" post-colonial state (1996, 25).⁶ In this case, Kenya is classified as a conservative postcolonial state in which "the hierarchy of the local state apparatus, from chiefs to headmen, continued after independence" (Mamdani 1996, 26).⁷ This is important because it reflects how practices (such as customary law) continued in existence, and were supported by the formal state, following decolonization.

Section 2.3 Pre-Colonial Land Tenure

Prior to colonization, land tenure and female land tenure in Kenya was largely based on the patrilineal land tenure system, which was rooted in and enabled by customary law (Pala 1977, 2). For example, "the... system of land tenure (during the precolonial period)... provided an unmarried woman with usufructuary rights to land vested in her father's patrilineage. When she became a full wife and went to live in with her husband's family... she had usufructuary rights to land belonging to her husband's patrilineage" (Pala 1977, 2). "Usufructuary rights" refers to "the right to use and derive profit from a piece of property belonging to another, provided the property itself remains undiminished and uninjured in any way" (dictionary.reference.com). As such, a women's right to land in precolonial Kenya was

⁶ Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton UP, 1996. Print.

⁷ Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton UP, 1996. Print.

based on access rights (rather than ownership rights), which were granted through the patrilineal land tenure system.

Under this system, “women, as individuals or in groups, did not have the legal right to allocate or dispose of land” (Pala 1977, 2). However, “by virtue of their position as lineage ‘wives’ and ‘daughters’ women were entitled to land for agricultural purposes from which they were expected to feed themselves, their children and spouses” (Pala 1977, 3). The implication of this is that in pre-colonial Kenya, “access to land was based on membership in a land controlling social entity defined by birth, marriage, ritual adoption, or incorporation. Once individuals acquired those rights to land, those rights remained inheritable within a family” (Kanyinga 2000, 158). Simply put, land distribution in pre-colonial Kenya was based on an individual’s membership within a group, which was defined by custom and customary law. Therefore, in pre-colonial Kenya the right to land was directly tied to an individual’s social status in a group, and the amount of rights that were associated with that given social status under customary law.

The implication of this is that the “precolonial... system of land tenure... (had the potential to give) women a great deal of leverage in matters relating to the use of land” (Pala 1977, 4). However, while this system may have granted some women a large level of influence over the manner in which the land was managed and distributed, each women’s level of influence was directly determined by her status as a member of a patriarchal society. Furthermore, regardless of the level of control that women were granted over the land, they still did not own the land themselves — that right was reserved primarily for males.

In 1894, a year before England officially colonized Kenya, the British passed the Indian Land Acquisition Act in Kenya to “expropriate land from Indians and Europeans who had

already acquired land speculatively” (Kanyinga 2000, 36).⁸ The Act was a response to the land speculation that had occurred as a result of a proposed railroad that would link the coast of Kenya with Uganda (Kanyinga 2000, 36). At the time, it was believed that all land located near the railroad tracks would increase in value and as a result “settlement schemes for white farmers were established” (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 36).⁹ These settlement schemes were considered a threat to the British plans for land allocation in Kenya, and as a result the Act was passed (Kanyinga 2000, 36). The passing of this Act was the first legislation enacted by the British in Kenya regarding the allocation of land, and was soon followed by the official colonization of Kenya by the British in 1895 (Kanyinga 2000, 35). The Act is significant because it “set the stage for the imposition of (colonial) laws and institutions” by providing a legal basis upon which to base future land legislation on” (Kanyinga 2000, 35). In other words, the Indian Land Acquisition Act served as the precedent to all proceeding land legislation that was enacted during the colonial period by the British in Kenya.

Section 2.4 Colonial Land Tenure

Following the official colonization of Kenya by the British in 1895, the British passed the Crown Lands Ordinance of 1902 (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 90). The Ordinance “provided for sales of land by the Crown or annual rent... of about 99 years” (Binswanger-Mkhize 2009, 90).⁹ These sales were limited exclusively to British settlers, and differentiated between land for native settlement, and land for European settlement (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 90). As a result, a “dual system of

⁸ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

⁹ Binswanger-Mkhize, Hans P., and Camille Bourguignon. *Agricultural Land Redistribution: Toward Greater Consensus*. Washington, D.C.: World Bank, 2009. Print.

land tenure and administration began” (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 90). Under this new system, “customary tenure governed the natives’ relation to land and was enforced by chiefs, appointed to help in the administration of the natives, and therefore, the consolidation of the colonial state” (Kanyinga 2000, 37). Furthermore, the Ordinance reinforced the role of customary tenure in Native Kenyan’s social practices, but the manner in which it was reinforced was also itself influenced by the colonial state (because the chiefs were working under and for the British) (Mamdani 1996).¹⁰

The Ordinance also established that “all ‘waste and unoccupied’ land in the protectorate to be ‘Crown Land’ and subject to the Governor’s power” ((Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 90). This further illustrates how following colonization, the traditional form of land tenure was challenged. However, the norms embedded in the patrilineal land tenure systems continued to influence the allocation of land, and as a result females were still denied access to land tenure. The only difference was that this time, their Kenyan male counterparts were denied access to land tenure as well.

Catherine Boone notes in “Political Topographies of the African State” that following the Crown Ordinance of 1915, under indirect rule African authorities “would exercise considerable power and autonomy on the local level” (2003, 15). For example, the laws imposed by the British upon the Native Kenyans “ignored both the principles and practice of indigenous land tenure arrangements and native claims and rights to land” (Kanyinga 2000, 38). In this regard, traditional pre-colonial land tenure arrangements in Kenya (such as hereditary claims to land), were largely replaced and ignored. Kanyinga elaborates upon this with his argument that the “establishment of Native Reserves eroded the virtues of customary structure of access to land,

¹⁰ Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton UP, 1996. Print.

for in reserves individual families rather than clan or kinship evolved as an important medium of acquiring land” (2000, 39).¹¹ As a result, one of the largest implications of the Crown Lands Ordinance of 1915 was that by establishing land reserves for the Native Kenyans, it challenged and reformulated the traditional forms of land tenure in pre-colonial Kenya.

The structuring of the reserves also further largely prohibited migration from one reserve to another. This is significant because in pre-colonial Kenya if there was a shortage of land, young men would migrate from one area to another and establish themselves in a place with a surplus of land (Kanyinga 2000, 32).¹² This practice kept areas from becoming too densely populated, and ensured that each farmer had sufficient arable land (Kanyinga 2000, 32).¹³ However, under the native reserve system, there was no way of increasing access to more land (or better quality farmland), and as a result land shortages became very common during the colonial period (Kanyinga 2000, 32). In fact, British settlers were given “3 million hectares,” and “more than a half... was... arable land suitable for cash-crop farming” (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 91). In this regard, the British settlers in Kenya were given access to more arable land than was proportional to their population. This in turn left a limited amount of arable land for the much larger Native Kenyan population. In response to this, I suggest that the inherent shortage of land for male farmers in many areas of colonial Kenya may have inhibited the development of a conception of female land tenure rights during the colonial period. This is because if male farmers could not themselves secure access to arable

¹¹ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

¹² Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

¹³ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

land, why would they conceive of allowing females to also compete for access to land that was already in high demand?

In 1918 the Resident Native Squatters Ordinance was passed (Clayton and Savage 1974, 128). The Ordinance was passed in response to the white settler's need for an "easily available labor" force (Clayton and Savage 1974, 38). The Ordinance defined "the relationship by which (white) farmers... engaged the largest proportion of their laborers, and the relationship by which... immense numbers of Africans first came into close contact with a white man and his farming methods" (Clayton and Savage 1974, 128). In terms of land tenure, the Ordinance "provided for labor contract, supervised by the government, by which a squatter had to work for a number of days each year before the settler could allow the squatter and his family to live on the land and cultivate a plot" (Binswanger-Mkhize 2009, 91).¹⁴ The implication of this is that Native Kenyans had to work for the legal right to cultivate land that they still did not technically own (despite being native to the land). It is also probable that the difficulties Native male Kenyans faced in securing access to land also prohibited the development of a conception of female land tenure rights during the colonial period. Similar to my argument above, if Native male Kenyans had difficulty securing access to land to cultivate (that they still did not legally own even once having secured a right to cultivate it), it seems likely the idea of female land tenure rights would not be considered until Native Kenyan males had full land tenure rights themselves.

The British colonial tradition of indirect rule meant that "the policy of administering land through indigenous authorities... was maintained through much of the period until

¹⁴ Binswanger-Mkhize, Hans P., and Camille Bourguignon. *Agricultural Land Redistribution: Toward Greater Consensus*. Washington, D.C.: World Bank, 2009. Print.

1948” (Kanyinga 2000, 42).¹⁵ However, towards the end of the 1940’s the British government in Kenya “accepted the proposal for the selective registration of (land) titles” for Native Kenyans (Kanyinga 2000, 42).¹⁶ In theory, this meant that Kenyans could now register land titles and be recognized as formally owning a plot of land, as opposed to having the right to cultivate it as under previous colonial legislation. However, the program was never fully implemented and it wasn’t until the introduction of the Swynnerton Plan in 1954 that the government began the process of institutionalizing property rights for Native Kenyans (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 92). The Swynnerton Plan “proposed institutionalizing private property rights by giving individuals control of their individual holdings” (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 92). In this regard, native Kenyans could now register for the right to privately own property that they were not a tenant of. Sam Moyo notes that the Swynnerton Plan “provided agricultural assistance, marketing and inputs, and encourage(d) African cash-cropping” (2013, 237). In other words, it created a capitalist system of private land ownership that restructured the colonial land tenure system from one that did not allow Native Kenyans the right to own private property, to one that allowed certain Kenyans the right to legally own land.

However, the Swynnerton Plan favored the wealthier Kenyans, as “the first programs were meant for the settlement of prosperous Africans... to buffer rural areas and stabilize the... peasantry” (Kanyinga 2000, 46). As a result, while Native Kenyans were technically allowed the right to legally own property, that right was limited to a select group of more affluent Kenyans. Furthermore, in regards to female land tenure, women were not allowed access to land tenure

¹⁵ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

¹⁶ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

under the plan except under under rare circumstances, such as the death of a husband (Onoma 2010).

In response to the racial barriers to land tenure implemented during the earlier colonial period, in 1959 the colonial administration began a new initiative of “removing racial barriers from regulations governing ownership of agricultural land” (Kanyinga 2000, 50). However, similar to the Swynnerton Plan, this initiative also favored wealthier Native Kenyans (Kanyinga 2000, 50). This is significant because while land ownership under colonialism was restricted on the basis of race and ethnicity, once those barriers were removed it still discriminated on the basis of economic status.

Beginning in the 1960’s, efforts to formalize land tenure were also more stressed because Kenya was heading in the direction of independence from Britain (Kanyinga 2000, 62).¹⁷ As Binswanger-Mkhize, Bourguignon, and van den Brink note, “the politics of transition to independence centered on land and, in particular, how Africans would access land and farms owned by white farmers” (2009, 94).¹⁸ As a result, in the early 1960’s “the British government, the International Bank for Reconstruction and Development and the Colonial Development Corporation financed the purchase” of land for approximately “1,800 yeoman... and 6,000 peasants... on 73,000 hectares” (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 96). In 1961 the Kenyan government also formed the Land Development and Settlement Board (LDSB), which was in charge of arranging the resettlement of the Native Kenyans who had been

¹⁷ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

¹⁸ Binswanger-Mkhize, Hans P., and Camille Bourguignon. *Agricultural Land Redistribution: Toward Greater Consensus*. Washington, D.C.: World Bank, 2009. Print.

forced onto reserves under the Crown Lands Ordinance of 1902 and 1915 (Kanyinga 2000, 62).¹⁹ However, while this program was intended to increase land ownership, similar to the earlier programs introduced, it still continued to discriminate on the basis of economic class (Kanyinga 2000, 62). As a result, the amount of land a farmer was allocated in most instances was relative to their amount of wealth, or perceived ability to be successful and accumulate wealth (Kanyinga 2000, 62).

It wasn't until the introduction of The One Million Acre Settlement Scheme in 1962 that the issue of land tenure was considered with lower income Native Kenyans in mind (Binswanger-Mkhize, Bourguignon, and van den Brink, 100). Unlike earlier programs introduced, the Scheme focused on "high density settlement" in which "the colonial administration negotiated terms of the plan to settle 35,000 families of smallholders... on more than 1 million acres of... land" (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 99). The implementation of this plan was overseen by "the provincial administration, which oversaw local government in the Native Reserves throughout the colonial period, (and who) supervised the selection of farmers for high-density schemes" (Binswanger-Mkhize, Bourguignon, and van den Brink 2009, 99). As a result, provincial administrators were given high levels of authority, and therefore had a high level of influence on who was selected to receive what land, and at what amount. Furthermore, because the scheme was introduced a year prior to decolonization, questions regarding land tenure "directly influenced the debate on the constitutional and economic arrangements," and also influenced the (attempted) shift from settlement schemes targeted at higher income Kenyans to lower income Kenyans (Kanyinga

¹⁹ Kanyinga, Karuti. *Re-distribution from Above: The Politics of Land Rights and Squatting in Coastal Kenya*. Uppsala: Nordic Africa Institute (Nordiska Afrikainstitutet), 2000. Print.

2000, 46). In this regard, issues relating to land tenure were also influenced by and inherently tied to the political situation, both nationally and on the local level.

Section 2.5 Post-Colonial Land Tenure

Kenya achieved independence from Britain in 1963. Following decolonization, the post-colonial government in Kenya was decentralized with “7 semi-autonomous” regions with their own regional assembly (although this increased to 47 as of March 2013) (Muriu 2013, 25).

Kenya also pursued liberal economic development policies and land tenure policies with limited involvement of the central government. In general, these decentralized land administration policies continued to favor the wealthy, rather than economically disadvantaged or middle-class Kenyans (Kanyinga 2000, 44). As such, these policies reflect previous colonial policies that focused on land tenure for upper income Kenyans.

In “Kenya: A History Since Independence,” Charles Hornsby suggests that following decolonization, “rulers adopted strategies that differed significantly across sub-regions within a single territory” (Hornsby 2012, 8). He credits this to what he construes as a historical conflict between regional and centralized forms of governance (Hornsby 2012, 8). He notes that this debate was fueled by the “right of ‘willing buyers’ to purchase land in the ‘ancestral lands’ of others” and that while “land was not the only issue at stake... it was certainly the most important” (Hornsby 2013, 8). Indeed, land tenure in the years after decolonization was unregulated and unorganized — and also highly contested — so that as a result, customary law continued to influence land tenure. As such, the inconsistent land tenure policies pursued following decolonization, combined with the continued prevalence of customary law over such

matters, makes studying post-colonial land tenure in Kenya even more challenging, because broad conclusions are difficult to make.

However, Catherine Boone argues that increasingly “in the (late) 1960’s the... politics of the nationalist era gave way to a politics of consolidation, centralization of power, and state building” (Boone 2003, 8). As a result, “colonial institutions linking state and countryside were reformed and rebuilt, and new institutions were created” (Boone 2003, 8). As these new institutions were created and reformulated, customary law continued to influence land tenure and female land tenure, but this time in conjunction with a centralized national policy focused on land privatization and consolidation (Boone 2003, 8). For example, in 1968 the Land (Group Representatives) Act was passed (Hornsby 2013, 196). Under the Act, group ownership of an area of land was legalized, which means that the customary practice of having different ownership rights to the same plot of land was recognized as legitimate (Veit 2011, 2). In legitimizing group ownership of an area of land, the Act further reinforced the influence of customary law on land tenure, and its role in society. The Act also gave certain individuals the right to adjudicate and make decisions regarding land tenure (Veit 2011, 2). However, Robert Kibugi notes that these rights rarely extended to women despite the fact that the Act does “expressly provide for women to serve on the committee or as group representatives” (2011, 324). He attributes this to the conservative and “patriarchal traditions,” and notes that “women, with the exception of widows, are not even registered as members” (Kibugi 2011, 324). This illustrates how customary law, and the patriarchal norms embedded within it, continued to influence female land tenure and even the level in which females had legal authority to challenge these norms. Furthermore, this illustrates how women continued to be defined foremost by their

status in relation to men (for example, only widows are registered as members, presumably because their husbands are deceased and therefore unable to serve on the committee themselves).

In the 1970's, a process of land registration and privatization began, in which group rights "to land based on the lineage" were being replaced with "individual tenure" (Pala 1977, 9). The implication of this is that "individuals (invariably males)... (were) given title to particular plots of land. Such a title... (gave) him a theoretical and in practice legal right to dispose of the land by sale... without... (asking) the elders of the patrilineage, who would originally have the power to veto in matters of alienation of land by individuals" (Pala 1977, 9). At face value, this process represents what appears to be a digression from the predominance of customary law in matters concerning land tenure. However, by limiting the process of privatization almost exclusively to males, it continues the tradition of subordinating female land tenure rights to male land tenure rights. Therefore while land privatization differs in practice from customary land tenure practices at the time, the underlying patriarchal norms that govern it remained the same (see Chapter Three for further discussion on this).

Continuing into the 1990's, land tenure reform remained an interest of the state and "under President Kenyatta" the government "embraced land documentation with laws such as the Land Adjudication Act, the Land Consolidation Act and the Registered Land Act, allowing for the issuance of 3.1 million titles by 1999" (Onoma 2010, 178). Each of these policies supported and further expanded the transition to land privatization in Kenya, but were largely only applicable to males.

In August 2010, "Kenyans voted overwhelmingly in a national referendum to adopt a new constitution" (Kramon and Posner 2011, 89). The constitution itself was the product of over a two year process, instigated by the post-election violence that began in December 2007 and

ended in February 2008 (Kramon and Posner 2011, 90). It was developed and drafted by a variety of political and non-political actors, including the Committee of Experts, comprised of “Kenyan legal scholars” with experience working with legal documents, a Parliamentary Select Committee whose responsibility was to determine solutions to “contentious issues” (including land tenure), prominent members of the Liberal Democratic Party and the Democratic Party, and of course President Mwai Kibaki and Prime Minister Raila Odinga (Kramon and Posner 2011, 92-93).

The constitution reduced the power of the central government, and guaranteed a range “of social and economic rights to women, minorities, and marginalized communities” (Kramon and Posner 2011,). The issues of social and economic rights (especially regarding females and minorities) were addressed because “the issue of socioeconomic inequality” had been one of the factors that influenced and drove the post-election violence that ended with over 1,000 Kenyans dead (Kramon and Posner 2011, 97). Because inequitable land tenure policies were prevalent leading up to the post-election violence, they were considered important enough to address in the new constitution (Kramon and Posner 2011, 89). The new constitution contains a clause that protects the legal right of women to own land. Under Section 60.1.F of the new constitution, gender discrimination “related to land and property in land” is to be eliminated (The Constitution of Kenya 2013).

While the implementation of this law is to be done through a “national land policy developed and reviewed regularly by the national government and through legislation,” the constitution also leaves it up to the local communities and administrative structures to “settle land disputes through recognized local community initiatives” (The Constitution of Kenya 2013). In this regard, while the constitution does legally protect the right of women to own land, the

level in which this right can be implemented is directly dependent on the customary laws and continued prevalence of patrilineal land tenure traditions in a given area. This therefore creates a disconnect between central policy, and the actual ability to effectively implement the policy on the local level.

This chapter discussed the major land tenure policies and legislation that influenced the issue of land tenure and female land tenure in precolonial, colonial and postcolonial Kenya. In Chapter Three, I continue my discussion on female land tenure by discussing a study conducted in 1977 that describes how the shift to land privatization during the 1970s influenced female land tenure. I then transition to discussion on the current state of female land tenure, and the issues surrounding it.

Chapter Three: Post-Colonial Land Tenure

As discussed in Chapter Two, female land tenure during the postcolonial period continued to be influenced by customary law and the patriarchal norms generally embedded within it. These patriarchal norms enabled males to continue to exert a high amount of influence over the level in which females were awarded access to land tenure, despite legislation that protected female land tenure. The transition to land privatization was also influenced by these patriarchal norms, and while the lack of current information regarding female land tenure makes it difficult to make conclusions regarding the overall influence of land privatization on female land tenure, based on the existing data it can be hypothesized that it was not beneficial to female land tenure. To illustrate these themes, the first section of this chapter discusses a case study conducted in 1977 concerning female land tenure in the Julou ethnic group in Kenya. The second section then discusses issues currently surrounding female land tenure.

Section 3.2 Case Study Introduction

In light of the fact that James wasn't able to find much information regarding female land tenure at the Kenyan National Archives, the report "Women's Access to Land and Their Role in Agriculture and Decision-Making on the Farm: Experiences of the Joluo of Kenya" is unique in the very sense that it exists despite the otherwise general absence of information concerning female land tenure. As discussed in the Introduction, I revised my original research question to account for the absence of data regarding female land tenure that I encountered throughout the research and writing process. With this in mind, the publishing date of the report (1977) is

indicative of how the absence of academic literature concerning female land tenure has been an issue for decades, and one that continues to go unaccounted for.

Aside from the fact that it exists despite the current shortage of literature, the report is also significant because in looking at this report, we can make conclusions regarding the state of female land tenure in Kenya in the period after decolonization leading up to 1977. In doing so, the first part of my research question “How has customary law historically influenced the implementation of female land tenure” is further illustrated. More specifically, when compared to the current state of female land tenure, the report illustrates how the shift to land privatization and individualized land tenure may have negatively impacted female land tenure, and the very conception of female land tenure as a viable issue. This is because the process of land privatization, though differing in practice from the patriarchal lineage system of land tenure under customary law, was based on and continued to practice patriarchal norms that made it difficult for females to gain access to land (as illustrated below).

Section 3.2 Case Study of the Joluo of Kenya in 1977

The data comprising the case study was attained from field studies that “covered the period between July 1974 and September 1975” (Pala 1977, 2). The purpose of the field studies and report was to determine how “land reform, which is geared towards an eventual transfer of land rights to individual lineage members — usually male — is affecting women’s relationship to land” (Pala 1977, 5). The study was specifically concerned with the effect on Joluo women, who are part of a broader ethnic group that live in parts of Kenya, Sudan, Uganda and Tanzania. The study was conducted by Achola O. Pala, and was “based upon a larger study on socio-economic change among the Joluo of Kenya, ‘Changes in Economy and Ideology: A Study of

Joluo of Kenya (With Special Reference to Women” as part of her Ph.D. thesis for Harvard University’s Department of Anthropology (Pala 1977, 2).

Although Dr. Pala does not explicitly state what influenced her decision to study the Joluo, there are two hints she provides regarding her motivation: First, the Julou had largely maintained the patrilineal system of land tenure throughout the precolonial, colonial and postcolonial periods (Pala 1977, 5). As a result, land privatization was the first major change to the traditional system of land tenure, and therefore the Joluo present a case-study that illustrates traditional land tenure policies and how land privatization influenced those, and in turn, female land tenure. Second, land “was the basis of rural existence” of the Julou (who were primarily “agriculturalists and pastoralists” during the period the survey was conducted), and as a result policies and issues concerning land tenure and female land tenure would logically impact the Julou at a higher rate than Kenyans living in more populated and industrialized areas (Pala 1977, 2).

While the study does exclusively concern the Julou ethnic group, their status primarily as agriculturalists and pastoralists means that the conclusions from the survey can reasonably be placed on other female Kenyans living in rural areas who are also part of agriculturalist or pastoralist communities. Because female land tenure prior to colonization was based on customary law — and customary law by nature is not absolute, or one universal set of rules — there was not one defined system of precolonial land tenure policies. Consequently, the experiences of the Joluo provide insight into one ethnic group’s application of customary law to issues concerning land tenure and female land tenure. And while the experiences of the Joluo cannot be universally applied to describe all precolonial female land tenure practices in Kenya,

the report regardless provides valuable insight into female land tenure practices during the precolonial period.

Under the system of patrilineal land tenure, unmarried Joluo women were allowed “rights to land vested in her father’s patrilineage. When she became a full wife... she had... rights to land belonging to her husband’s patrilineage” (Pala 1977, 2). This reflects how the customary system of land tenure for Joluo women was based on a patriarchal lineage system. Under this system, females could gain access to land, but were never given ownership rights. However, access to land was not exclusive, and “by personal arrangement... individuals could enter into limited exchanges of garden plots for specific seasons or crops” (Pala 1977, 2). These exchanges were not limited to men and many females exercised their right to secure exchanges of their property without first consulting their husbands (Pala 1977, 2). This reflects how prior to the shift to land privatization through individualized land tenure titles, females were able to access land for agricultural purposes. However, this right was also dependent on their status in relation to a man as either a daughter or wife, and therefore reflects the patriarchal norms that governed issues concerning access to land prior to the shift to land privatization (Pala 1977, 2).

Overall, 135 women were interviewed between July 1974 and September 1975. Of the 135 women who were interviewed, in regards to the “amount of land over which respondents” had “cultivation rights,” 124 (or 91.85%) “of respondents” had access to “land ranging between 3.71 acres to 11.12 acres” (Pala 1977, 6). However, the report further notes that none of these women qualify for “the agricultural loan scheme meant for small farmers,” because none of there “land is consolidated all around the homestead” (Pala 1977, 6). The loan scheme (formally called the “Guaranteed Minimum Returns Loan Scheme”) was extended to “Africans in 1960 when the Kenya Land Ordinance of 1960 abolished all the structural discriminatory regulations affecting

Africans” (Pala 1977, 6). However, the land scheme only applied to wealthier peasants who had access to land holdings above 15 acres (Pala 1977, 6). In the case that a farmer had land holdings between 15 and 20 acres, then they could apply for a loan in which they are guaranteed “the farmer credit equivalent to the resources expended in growing a crop... when the farmer can prove that expenditures exceeded returns” (Pala 1977, 6). This purpose of these loans were to protect farmers against losses from crop failure, and were important in ensuring the economic success of farmers, and the larger Kenyan economy (Pala 1977, 6).

The implication of this in regards to female land tenure is that the traditional system of land tenure, under which women have full rights to exchange plots of land, did not allow them the same rights as men to qualify for agricultural loans (overall) because by nature of the exchange system, their land was scattered. That’s not to say women were completely denied access to loans — the report states that “two respondents” had land “consolidated all around the homestead,” which would have qualified them for loans meant for small farmers (Pala 1977, 6). However, the loan scheme also states that “each applicant must have roof of access to a minimum of 15 acres and a maximum of 20 acres,” which none of the women included in the study had (Pala 1977, 6). As a result, under the traditional system of land tenure females were systematically denied access to agricultural loans because female land access was inherently in opposition with the requirements for qualifying for a loan. This is important to note because it reflects how female land tenure rights were suppressed — and that there were customary law norms existing that disregarded female land tenure — prior to the shift to land privatization and individualized land tenure.

In regards to the source of land access, 130 women, or 96.29%, received access to their land “through a relative by marriage and named husband, husband’s father or husband’s

mother” (Pala 1977, 8). There were 5 women, or 3.70%, whom indicated that “the land they are tilling came partly from a lineage source and part was bought (Pala 1977, 8). This is significant because it illustrates how while most women received access to land through a male relative, a few were able to buy access to land. However, bought access to land was also supplemented by land from a lineage source as well. Furthermore, it is unclear whether or not “bought land” refers to land that is permanently held (through land title) under a woman, or whether it refers to a temporary transfer of land. Regardless, this further illustrates how females access to land under the patrilineal system of land tenure was dependent on their status in relation to males, and indicates how strong these norms regarding land tenure were on the local level.

Of the 135 respondents, the report states that 5 “reported being landless,” despite having “access to land ranging between 1 acre to 2.42 acres” (Pala 1977, 7). However, the report fails to recognize that the women were technically landless because their access to land depended on “access rights” through customary law enabled by males. Furthermore, the land itself is registered “in the name of males,” and women “cannot expand their acreage” under this system (Pala 1977, 7). As such, they are technically landless, even if they have access to land between 1 acre to 2.42 acres. Furthermore, this suggests that the 124 women who reported that they have access to land construe the concept of “access to land” differently than the 5 women who reported being landless, and that they themselves are actually technically landless too (Pala 1977, 7). The report supports this point with their point that “in terms of future options... a woman who has .50 hectares of land at the moment is justified in saying she has no land” (Pala 1977, 7). This also reflects how the language concerning female land tenure has historically not been regulated, and that as a result, the study of female land tenure (and the corresponding academic literature) has been inherently limited in its conception of it as a tangible issue.

In terms of land registration, “only 8 respondents (or 5.93 percent) reported that land is registered in their name alone,” while 125 reported that their land was registered under their husband, son, a combination of both, or jointly “under their name and their son’s name” (Pala 1977, 9). The percentage of females with land registered under their name alone (5.93%) is indicative of the norms against female’s access to land under the traditional patrilineage system of land tenure that were carried over into the new system of land privatization and registration. Interestingly, the 8 respondents who had land registered in their name alone is equal to 5.93% out of the total 135 women, and this number corresponds to the 2004 estimate of the national average of 5% of females who have access to land tenure. Although 5.93% is closer to 6%, the scale of the study was much smaller and the sample was relatively homogenous since it was based on the practices of one specific ethnic group in Kenya. Regardless, this indicates that the number of females with access to land tenure may not have increased (and based off these numbers, could have slightly decreased) since the late 1970’s. Either way, because this comparison is not statistically valid, it is useful only as a means of hypothesizing that land privatization did not result in an increase of female land tenure.

As a result of the above, the 1977 survey illustrates how land privatization was influenced by the patriarchal norms that governed patrilineal land tenure systems, and how overall the system was not beneficial to increasing female land tenure. For example, because “the majority of respondents actually till only lineage land... land registration is likely to be a disadvantage to the lineage group if after registration of plots individual title holders intervene in the customary exchange of short-term land use,” which was traditionally targeted towards and executed by females (Pala 1977, 8). However, under the “individualized tenure system,” there are “no provision(s) concerning how women’s access rights are to be defined,” and as such, women are

systematically denied access to land tenure legally (Pala 1977, 21). While it is arguable that these women, despite now not legally having access to land tenure, would have been able to continue to cultivate the land, “in theory this status has been superseded by the new stipulation which gives individual men the right to alienate land from which their female relatives... expect to draw their livelihood for several years to come (Pala 1977, 10). As such, it is evident that the power awarded to males through customary law over land tenure and female land tenure was inadvertently supported through the shift to individual land titles that began occurring in the 1970’s.

Similarly, as illustrated by this study the limited access that females did have to a form of land tenure through the exchange system was fundamentally weakened by the shift to individual land titling because of the continued norms largely prohibiting female land tenure that were embedded in the customary law that influenced land privatization. As such, due to land privatization through individual titling “men’s allocation rights” were “endowed with a statutory status” that enabled “individual men to alienate land without any legal obligation... to... females of the patrilineage,” and as a result, women received “little or no support” after the shift to land privatization (Pala 1977, 20).

Section 3.3 Female Land Tenure Rights Post-1977

In regards to the 1977 study, there is a -.93% difference between the level of female land tenure in the Joluo in 1977, and the level of female land tenure throughout Kenya in 2004. The current level of female land tenure is unknown (for reasons that will be discussed below), but is currently estimated at around 5%, despite the 2010 Constitution that was amended with provisions that (relatively) protect female land tenure. While a difference of under 1 percentage

point is not large (and acknowledging that this comparison is not statistically valid due to the difference in sample size for each statistic), in light of the lack of up-to-date information concerning the level of female land tenure it does reflect how it can be logically inferred that female land tenure has remained relatively stagnant in terms of the development of its realization from the 1970's up to its current state in 2014. This assumption becomes stronger when applied to females in rural areas where the primary occupation is still in the agricultural and pastoral sectors, as the 1977 study primarily focused on females who were part of communities centered around these economies, and even stronger when applied to Julou women today.

Because the majority of families (notably women and children) living in rural areas are still subject to customary law (whether formally or informally through land privatization policies that systematically favor male land tenure), the right to land tenure protected under national legislation is challenged on the local and regional level (Ndulo 2011, 87). Prior to beginning my research, I suspected that the main hurdle to fully implementing female land tenure in Kenya was the result of the conflict between customary law, or its legacy, and national legislation on the local and regional level. For example, it has been noted that “customary social and political institutions, being rooted in patriarchal social, political and economic relations, are virtually by definition bad for women” (Daley and Englert 2010, 5). My research did indicate that “traditional leaders and governmental authorities” operating under customary law do in fact “often ignore women’s property claims and sometimes make the problems worse,” while “courts overlook and misinterpret family property and succession laws” (traditional leaders (such as elders) and local authorities (such as government-appointed chiefs) are the primary enforcers of customary laws, 4).

However, while this does influence the level in which female land tenure rights are implemented, the micro-politics of customary law as it relates to the power awarded to males over female land tenure also plays a large role. For example, regardless of land privatization, in most rural areas “access to land is determined by customary practices, with land use and the proceeds from land owned by male kin” (ActionAid 2008, 12). This means that customary practices and norms continue to exist in tandem with capitalist practices of private land ownership and individual land titles. Consequently, “women’s relationship with land continues to be through husbands, fathers, brothers or sons” (ActionAid 2008, 12). As a result, the current level in which female land tenure is actually implemented is continues to be influenced by familial relations, as it was prior to and during the shift to land privatization seen in the example of the Joluo in Section 3.2.

Therefore, while “traditional leaders (such as elders) and local authorities (such as government-appointed chiefs) are the primary enforcers of customary laws,” male family members also play a role in influencing female land tenure through the rights awarded to them over females through customary law (Walsh, Jefferson, and Saunders 2003, 37). This argument is supported by the fact that “customary law can also be manipulated at the family level” (Walsh, Jefferson, and Saunders 2003, 42). It is important to note that the dynamics within the family can both positively and negatively influence the levels in which females are awarded land tenure.

For example, “the details of the mechanism of land allocation to sons and to wives is somewhat complex and depends on such issues as the personal relationships between a husband and his wives... (and) whether they had any kinship relations prior to marrying” (Pala 1977, 4). The most significant aspect of this relationship between family and female land tenure therefore is the high level in which the male members of the family can continue to influence the level in

which females are awarded access to land tenure as a result of the continued influence of “patriarchal traditions in which men inherited and largely controlled land and other property” (Pala 1977, 4).

Section 3.4 Marriage in Kenya as it Relates to Female Land Tenure

To understand how females are denied access to land tenure on the basis of the power that customary law awards to their husbands and male family members, the different marriage systems (and the role of customary law in these practices) needs to be discussed. In Kenya, “there are five separate legal systems for marriage” (Walsh, Jefferson, and Saunders 2003, 8). These include: “civil (under the Marriage Act), Christian (under the African Christian Marriage and Divorce Act and the Marriage Act), Islamic (under the Mohammedan Marriage, Divorce and Succession Act), Hindu (under the Hindu Marriage and Divorce Act), and customary (under customary laws)” (Walsh, Jefferson, and Saunders 2003, 10). Apart from customary marriage, all marriages must be registered (Walsh, Jefferson, and Saunders 2003, 10). As a result of not being formally registered, customary marriages are noted as being “difficult to prove” (Walsh, Jefferson, and Saunders 2003, 10). Furthermore, as previously discussed, in customary marriages “when it comes to property ownership, (women) are regarded as neither full members of their natal nor their marital clans” (Walsh, Jefferson, and Saunders 2003, 10). The underlying implication of this is that customary marriages systematically deny females land tenure on the basis of their inferior status in their birth families and the family that they marry into.

Section 3.5 The Law of Succession Act

In the instance that a woman's husband dies, The Law of Succession Act (which was recently revised in 2010) is the governing law that determines how property is to be distributed following the death of the title holder of land and property. The Act states that “the surviving spouse shall be entitled to - (a) the personal and household effects of the deceased absolutely; and (b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person” (The Law of Succession Act 2010, 18). This means that under the Act, widows have full rights to the net estate, but that these rights can be removed following remarriage. Thus while a widow has the rights to the estate if they remain unmarried, their rights are not absolute and are subject to their status in the local community as a widow.

The Act also states that “a surviving spouse shall... have a power of appointment of all or any part of the capital of the net intestate estate... but that power shall not be exercised by will nor in such manner as to take effect at any future date” (The Law of Succession Act 2010, 18). This clause also illustrates how widows have control over the capital of the estate and the estate itself, but that this control is only temporal — upon their death, this control is relinquished to other family members. Thus, they have no legal right to influence the estate or capital in a manner that is not immediate (for example, they cannot invest capital from the estate, or make any changes that would manifest after their death).

Interestingly, another clause also states that “where any child considers that the power of appointment... has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made” (The Law of Succession Act 2010, 19). This is significant for four main reasons: First, in stating that “he or, if a minor, his representative,” the clause is implying

that female children do not have the right to apply to the court under this situation. In this regard, while the clause states “Where any child,” the language “he” and “his representative” indicates that it solely applies to male children. This clause is another example of how patrilineal norms have been institutionalized legally in current land tenure policies. Third, this clause also illustrates how female land tenure through widowhood is not absolute and can be challenged by male members of the household, even if they are still considered minors. Finally, in stating that “the power of appointment under subsection (2) has been unreasonably exercised or withheld,” the implicit assumption is that male children have a higher authority over what it means to be “reasonably exercised” than their mothers, even if minors. Furthermore, “withheld” could be construed as implying that the sons of widows may have a right to property regardless of whether their mother is still alive or not. The Law of Succession Act is therefore representative of how female land tenure, even when inherited through the death of a husband, can be limited or even denied on the basis of the power that customary law awards males — including their young sons.

Section 3.6 Female Land Tenure for Adult Orphans and Divorced/Separated Women

As illustrated above, issues regarding female land tenure are frequently framed and discussed in the context of widows and inheritance rights. In this paragraph and the next, I discuss female land tenure as it relates to women whose parents have died, and divorced or separated women. In the case of women whose parents have died, “statutory law provides that daughters and sons should inherit equally from parents when there is no will, (but) it is uncommon for women in Kenya to inherit property from their parents on an equal basis with brothers” (Walsh, Jefferson and Saunders 2003, 26). This was seen previously in the clause listed above, in which the language of the clause denies daughters of widows the right to petition

for a share of inherited property if they feel the property is not being handled and distributed fairly.

In the event that a woman's husband is deceased, if the woman is denied their inheritance by the family they have married into, then their only hope for access to land and/or property is through their natal family (Walsh, Jefferson and Saunders 2003, 26). However, in many instances, a woman's natal family also denies them access to land tenure (Walsh, Jefferson and Saunders 2003, 26). For example, Emily Owino is a member of the Luo ethnic group whose husband passed away (Walsh, Jefferson and Saunders 2003, 16). After his death, neither her male family members or the local elder chief assisted her with gaining access to the land tenure she was entitled to under the 1981 Law of Succession Act (Walsh, Jefferson and Saunders 2003, 16). Instead, "her in-laws took all her possessions... (and) later took over her farmland. She sought help from the local elder and chief, who did nothing" (Walsh, Jefferson and Saunders 2003, 16). This specific example illustrates how patriarchal norms embedded in patriarchal lineage land tenure systems prior to land privatization continue to influence the level in which females can access land tenure. In this regard, this specific example also depicts how female land tenure is can be blocked not only at the local administrative level, but also through the power granted to male family members over female land tenure under customary law.

In the case of divorced or separated women, many reported to Human Rights Watch in 2003 that they left "their homes with nothing but clothing and never getting a share of the family property" (ActionAid 2008, 27). It's important to note that this occurred "despite case law establishing that women can be awarded half of the family property" in instances of divorce or separation (ActionAid 2008, 27). For example, Tipira Kamuye is a Kenyan woman who is part of the Maasai ethnic group who was married to a man who owned "at least two hundred sheep

and cattle,” but upon fleeing from him and returning her dowry, she received no property or financial assets (Walsh, Jefferson and Saunders 2003, 27). She credits Maasai custom for this: According to her, “women are not supposed to go back for property” (Walsh, Jefferson and Saunders 2003, 27). As a result of this custom, women such as Ms. Kamuye are disempowered through customary law that is enabled by traditions that favor men over women. Furthermore, the example of Ms. Kamuye supports my argument that female land tenure rights are further disenfranchised through the power that customary law awards to males over matters concerning female land tenure, regardless of the formal legal protections that exist.

Section 3.6 The Macro-Level Implications

At this point, I have established that males have a high level of influence over female post-colonial land tenure, and that this influence is the legacy of patriarchal norms embedded in the precolonial and colonial patrilineal land tenure systems. However, this dynamic of female land tenure being influenced by males who are empowered by customary law is also seen on the macro-level of Kenyan society. For example, female land tenure continues to be influenced by the “processes of commoditization,” which refers to the privatization of property and goods, and the transition to a capitalist marketplace and economy (Daley and Englert 2010, 2). While increasing market transactions can help to increase female land tenure (because females can now purchase their own land, rather than rely on inheritance), as illustrated by the example of the Julou “most women’s opportunities to access land through market transactions in Africa are more limited than men’s” and as a result capitalist markets should be seen as “gendered institutions” (Daley and Englert 2010, 2). The term “gendered institutions” implies that despite

being dictated by free market capitalist policies, access to the land market is still controlled and dominated by males (Daley and Englert 2010, 4).

However, this does not mean that females do not have access to the land market; indeed, many women “manage to take advantage of opportunities provided to acquire their own land through purchase” (Daley and Englert 2010, 2). Still, while “the argument for land privatization and titling has (stated that)... secure property rights, and the creation of land markets... will boost economic growth,” regardless “land privatization and markets will not necessarily solve the problem as poor women’s ability to acquire adequate land through the market is often remote” (ActionAid 2008, 15). In this regard, the economic status of a woman also influences the level in which she can actively participate in the market economy for land. For example, “more educated and wealthier women, especially those with monetary income, were more likely to hire legal counsel to assert their rights” (Walsh, Jefferson and Saunders 2003, 8). This means that while females have access to the land market, that access is limited by their gender, and if they happen to be economically disadvantaged, they are limited by their lack of wealth and assets as well when compared to their wealthier female peers.

The first section of this chapter argued, through the analysis of a 1977 female land tenure survey, that land privatization in the early postcolonial period continued to be influenced by the patriarchal norms that governed patrilineal land tenure systems. As a result, overall the system of land privatization was not beneficial — and indeed, may have even been detrimental — in regards to increasing female land tenure. In Chapter Four, I discuss NGOs in Kenya and their relation to the issue of female land tenure. I then conclude by offering a series of suggestions to confront the issue of female land tenure in Kenya.

Chapter Four: The Problem of Data and Where NGO's Fit In

Section 4.1 NGOs in Kenya — An (Almost) First-Hand Experience

While customary law, land privatization and the large power awarded to males over each has limited females access to land tenure, one of the biggest problems facing female land tenure currently is the lack of up-to-date and relevant data, information, and surveys that correspond to the current state of female land tenure. This is especially interesting in light of the NGOs working in Kenya who, at face value, appear to deal with gender issues, land tenure and female land tenure. After enlisting James to help with the research process, I asked him to speak with NGOs in Kenya who deal with these issues in order to get information I could use for this paper. However, overall the NGO's were very unhelpful in attaining information pertaining to female land tenure in Kenya. This reflects how there is a lack of interest regarding female land tenure in Kenya even among those (the NGOs) who theoretically should be major proponents of female land tenure rights.

For example, James reached out to the Kenya Land Alliance, The Greenbelt Movement, and The Resource Conflict Institute (abbreviated "RECONCILE"). The Kenya Land Alliance replied that they had no information pertaining to female land tenure surveys, and seemed generally unwilling to help, despite James visiting twice and meeting with a different person each time. The Greenbelt Movement was more willing to help than the Kenya Land Alliance, and the woman James reached out to made numerous calls to her partners and the Ministry of Land, Housing and Urban Development. However, they did not provide her with any information to convey to James pertaining to land surveys on female land tenure either. Furthermore, one of the contacts she reached out to informed James that they have been

threatened before for trying to do a survey on land ownership. The Resource Conflict Institute (RECONCILE, for short) initially seemed willing to assist, and told James that they would get in touch with their partners and collect all relevant data regarding female land tenure. However, when James followed up they informed him that they were not able to attain any information regarding female land tenure. As a result, similar to the Kenya Land Alliance and The Green Belt Movement, RECONCILE also failed to provide any information on female land tenure in Kenya. Ironically, without relevant data the issue of female land tenure becomes much harder to argue for and implement, so that by blocking surveys on female land ownership, the full realization of female land tenure is itself being blocked. _

Maina's experiences trying to find relevant data regarding female land tenure illustrates how limited the information pertaining to female land tenure currently is. If his findings at the archive are accurate, the last regional survey conducted regarding female land tenure was done in 1977, and was only concerned with one portion of the Kenyan population (the Joluo). Because this survey was conducted while the shift to land privatization through individual land titles was occurring, we can hypothesize that this shift might have resulted in decreased access to land for females. However, further research through the form of field studies, and/or surveys, is needed to definitively address this. While the lack of data makes it difficult to argue whether the shift to individualized land tenure did or did not decrease female land tenure, it is clear that since 1977 reporting mechanisms for female land tenure have all but disappeared. Indeed, the fact that the Greenbelt Movement was threatened in the past while attempting to conduct a survey on land ownership indicates how hostile the environment in Kenya is in general to the issue of female land tenure.

Lastly, the lack of information also indicates how the issue of female land tenure is still considered as inhabiting the informal realm, in which there is little regard for the full implementation of female land tenure rights despite the legal protections formally awarded to them. What I mean by inhabiting the informal realm is that female land tenure rights are still not construed as an issue that the predominant policy makers, including NGOs, should be concerned with. As a result, they are not as fully implemented and regulated as more formal issues in society, such as the issue of land tenure in general.

Section 4.3 NGO's & Female Land Tenure

Of the three NGO's that Maina was able to make contact with, the Kenya Land Alliance is the one most concerned with issues of land and land tenure. The Kenya Land Alliance was formed "in 1999 as a "not-for-profit and non-partisan umbrella network of Civil Society Organizations and Individuals committed to effective advocacy for the reform of policies and laws governing land in Kenya" (Kenya Land Alliance 2014). The organization was not founded to deal exclusively with female land tenure, and in fact the information provided on the Kenya Land Alliance website regarding female land tenure is extremely limited. In terms of document downloads available on their website, there are only two documents ("Women Policy Brief") and ("The Case for Women Land Rights") that deal with female land tenure. Furthermore, both documents were published before the new clauses regarding female land tenure were incorporated into the revised 2010 Constitution.

The lack of information the Kenya Land Alliance provided to Maina and that they provide on their website regarding female land tenure further illustrates how the issue is one that is relatively disregarded in Kenya — even at NGO's founded under the pretense of dealing with

issues of land and land tenure. The report “The Kenya Land Alliance Case Study” argues that the Kenya Land Alliance recognizes how “the (Kenyan) constitution by virtue of its recognition of customary law therefore cripples the property rights of women and female children” (The Kenya Land Alliance Case Study 2010, 6). However, while acknowledging this, the Kenya Land Alliance “acts as a middle level link between policy-makers and marginalized groups namely women” and their involvement is almost exclusively limited to “policy recommendations” (The Kenya Land Alliance Case Study 2010, 6). As a result, despite acknowledging the limitations of legal protections for female land tenure, the Kenya Land Alliance fails to successfully actively engage with solving the issue.

As a political actor The Kenya Land Alliance has “played a major role in mobilizing and facilitating its members and others into an advocacy movement for upholding the land rights of the rural and urban poor” (The Kenya Land Alliance Case Study 2010, 2). Among its political activities, it primarily engages in “lobbying and advocacy for policy and legislative reforms,” and participates “in the national debate on land reform and adoption of constitutional principles on land and property” (The Kenya Land Alliance Case Study 2010, 5). Through its political activism, The Kenya Land Alliance focuses heavily on the unequal distribution of land between the different economic classes of Kenyans, arguing that “statistics reveal a high level of imbalance in land ownership whereby less than 20% own more than 50% of the land in Kenya. About 67%... own about an acre each and the remaining 13% are victims of the historical process of disinheritance and... own no land at all” (The Kenya Land Alliance Case Study 2010, 4). As a result, it is conceivable that the issue of female land tenure is not addressed because of the economic inequalities that still prevail regarding land tenure in general. For example, in Chapter Two I suggested that the tradition of unequal land distribution and discriminatory land

practices may have restricted the development of a conception of female land tenure during the colonial and early post-colonial periods. In regards to the Kenya Land Alliance's focus on unequal land distribution and scarce information on female land tenure, this tradition may continue to limit the expansion of female land tenure, to the point where an organization concerned with land tenure itself (The Kenya Land Alliance) has almost no information regarding female land tenure.

The Green Belt Movement, which is considered “an environmental organization that empowers communities, particularly women, to conserve the environment and improve livelihoods” was founded in 1977 (Green Belt Movement 2014). It was founded “under the auspices of the National Council of Women of Kenya (NCWK) to respond to the needs of rural Kenyan women” (Greenbelt Movement 2014). Thus, while unlike the Kenya Land Alliance the Greenbelt Movement does not deal focus exclusively on land tenure and female land tenure, it was founded with the goal of responding to the needs of women in Kenya. In this regard, since female land tenure is an issue that affects rural Kenyan women, the Greenbelt movement has attempted to conduct regional surveys regarding female land tenure (as discussed above). However, they have been met with resistance and threats, which have prevented any survey from being fully realized. In terms of political activity, the Green Belt Movement is involved in advocacy work aimed at environment protection, community empowerment, and the creation of new community tree nurseries (Green Belt Movement 2014). The Green Belt Movement also periodically releases reports aimed at creating policy change. However, the scope of their political activity seems to be more narrowly tailored than that of the Kenya Land Alliance.

According to their website, RECONCILE “is a non-governmental organization (NGO) established in 1999” that “does policy research and analysis, advocacy, public interest litigation,

policy and environmental education and capacity building of community organizations” (RECONCILE 2014). The vision of RECONCILE is “an equitable and just society where policies and laws guarantee access, control and sustainable management of natural resources” (RECONCILE 2014). As such, the group identifies itself as actively involved in working with communities in order to “secure access” and “user rights... for minorities, vulnerable and marginalized community groups” (RECONCILE 2014). However, while the group identifies itself as representing and aiming to protect these groups, women are not explicitly listed on the website as being a part of these groups. This further illustrates how females and female land tenure rights are excluded through the language used to describe the group’s activities, despite their focus on “vulnerable and marginalized” groups. In the next section, I discuss NGO’s and how they influence the manner in which an issue, such as female land tenure, is framed.

Section 4.4 NGO’s as Political Actors

In the paragraphs above I discussed how the Kenya Land Alliance, Green Belt Movement, and The Resource Conflict Institute are all NGO’s, but what exactly does that mean? Furthermore, what does this mean in the context of their ability to frame and influence policy directed at increasing female land tenure? In Kenya alone, “the number of registered NGOs... grew by 184% between 1978 and 1987” (Clarke 1999, 36). Broadly speaking, “NGOs can be said to stimulate effective local participation and set objectives that contribute to the political empowerment of marginalized groups” (Fisher 1997, 455). However, the level to which this is effectively accomplished is contested, as seen in the case of the three NGOs above.

In terms of political participation, Clarke argues, “NGO action is intrinsically political,” with the goal of “strengthen(ing) civil society” (1999, 41). Part of this goal includes empowering “beneficiary communities” and the building of “institutions that challenge local, religious or commercial elites” (Clarke 1999, 44). Interestingly, while The Kenya Land Alliance, Green Belt Movement and The Resource Conflict Institute all challenge these three types of elites, they fall short of challenging the institutions that allow female land tenure to remain relatively unrealized. This nuance may be explained by Marko Ulvila’s argument in “Development NGOs and Political Participation,” in which he argues that “critics see NGOs as instruments for maintaining elite interest and continued subordination” (2002, 149). Applying this argument to the failure of these three NGOs in Kenya to effectively confront and engage with the issue of female land tenure, I argue that the Kenya Land Alliance, Green Belt Movement and RECONCILE all actually serve to maintain the “continued subordination” of female land tenure rights to land tenure rights in general, which traditionally favor males. This is further representative of how female land tenure rights can be conceived of as inhabiting the informal realm in Kenyan society, in which elite interests continue to subordinate female land tenure to other predominant issues.

This conflict between elite and minority group interests is further supported by the argument that “NGO communities have become important new areas of political contestation” (Clarke 1999, 45). If this is the case, it would explain why the Green Belt Movement failed to effectively challenge the limitations against conducting land surveys regarding female land tenure. Furthermore, in “Human Rights NGOs In East Africa,” Makau Mutua argues that “Kenya has historically pursued repressive policies towards NGOs” (2008, 5). These policies include but are not limited to “closely regulating” the NGOs and aiming to “co-

opt or muzzle them” (Mutua 2008, 5). This legacy could also explain the lack of information provided by the Kenya Land Alliance on their website and their unwillingness to speak with or provide information to James, the hostility experienced by the Green Belt Movement when attempting to gather information concerning female land tenure, and the failure of RECONCILE to gather any information concerning the female land tenure, despite promising to look into it.

Section 4.5 Solving(?) the Issue of Female Land Tenure

As discussed, customary laws “are mostly unwritten and constantly evolving norms that exist in parallel with statutory law but derive legitimacy from tradition and custom (Walsh, Jefferson and Saunders 2003, 11).” In light of this, it is conceivable that customary law could evolve to support female land tenure. For example, the “malleability” regarding the norms that dictate customary law “can have advantages for those trying to effect social change through local norms, but one cannot assume that the local norms support women’s equality” (Walsh, Jefferson and Saunders 2003, 11). However, if the local norms are resistant to female land tenure (which in most instances they are), then the “malleability” of the customary laws is relatively moot in regards to female land tenure, because norms regarding females would still influence how customary law evolves in regards to women.

This leaves a problem: If there currently is a disconnect between centralized policy (the 2010 revised constitution which protects female land tenure) and the level in which female land tenure rights are implemented, and if this disconnect is assumably made possible through the prevalence of customary law, what can be done to address the issue of female land tenure? Furthermore, is it even an issue that warrants being addressed? In the following paragraphs, I

answer these questions and offer suggestions for a future research design that would address the issues raised throughout this paper.

First, the issue of female land tenure must be addressed. The reasons for this range from practical reasons concerning divorced and widowed women who are forced to provide for themselves many times without any access to land tenure, to the economic advantages of increasing female land tenure (see Chapter One), to the political advantages of empowering a large group of the Kenyan population that is currently disenfranchised by the land tenure system. Second, in order to address the issue of female land tenure, attention must be paid to it in the form of academic studies, surveys, and literature. At the present, there is extremely limited information available regarding female land tenure in Kenya that is relevant and up-to-date. As I found during the research process, the last study exclusively regarding female land tenure was conducted in 1977. Since then, new legislation has been enacted, and enacted again, yet the academic literature has not done its part to keep up with the issue. What is especially ironic is the scope of the issue of female land tenure — arguably every Kenyan female is impacted by it in one form or another — compared to the lack of scope of concern regarding the issue, as evident from the lack of information provided by the NGOs, James' experiences at the NGOs, and the lack of literature on the subject. And without relevant information regarding female land tenure in Kenya to base new legislation, programs, or policies on, the issue remains stagnant and in the foreground.

In order to address and bring the issue of female land tenure to the forefront, it is therefore imperative that the issue of a lack of literature and information on the subject be addressed. This means that academic scholars, NGOs, policy makers and others need to be conducting or supporting research regarding female land tenure, so that the information can then

be used to actively address the issue. Furthermore, these groups cannot act independent of one another. For example, politicians need to support female land tenure so that when NGOs, such as the Green Belt Movement, are threatened for trying to conduct surveys on female land tenure, they have the support and backing of the government to continue with their intended survey. Similarly, academic scholars need to be available to analyze what the (hypothetical) data collected means for female land tenure, and its relationship in regards to other issues Kenya is currently facing.

As discussed in Chapter Three, when beginning my research I did so under the assumption that I would have the opportunity to conduct original field research in Kenya. Ironically, the results of my findings reinforce the need for original field research concerning female land tenure. An ideal future research design regarding the issue of female land tenure would be designed with the goal of collecting information on the current level of female land tenure to fill the “information gap” discussed above. For example, similar to the study done in 1977, researchers could select a variety of communities throughout Kenya, either through random sampling or systematically, to survey on issues regarding female land tenure. This option would realistically be feasible, especially if the Kenyan national government supports the project.

Another option would be for the government itself to conduct a land tenure survey, either in person or by having each land owner submit information regarding land holdings and if the land titles are held under by a male, female, or jointly. However, regardless of which option is pursued, it is important that the teams or individuals conducting the research have a gendered perspective, as my experience with James illustrates how an individual’s gender has the power to influence the information that is generated concerning female land tenure.

Returning to the issue of James' gender and the information I asked him to seek out regarding female land tenure, it is impossible to tell how much his gender influenced the information that I received from him. However, it is clear that the patriarchal norms that continue to dictate female land tenure through customary law in Kenya exert a high level of influence over the amount of information available concerning female land tenure. This same influence may have been exerted on James so that his ability to attain information regarding female land tenure, whether inadvertently or not, was influenced. This further reinforces the need for original field research to be conducted, so that the possibility of biased data selection can be reduced.

4.6 Conclusion

Female land tenure rights are important for a number of reasons. These reasons generally include allowing a "greater role in household decision making and resource allocation, saving for the future, giving property to daughters, increasing confidence about their future and their children's future, greater mobility and social support, (and) support from in-laws" (Securing Women's Right to Land and Livelihoods 2008, 17). However, because the majority of families (notably women and children) living in rural areas are still subject to customary law, the right to land tenure protected under national legislation is challenged on the local and regional level (Daley and Englert 2010). Therefore, while "constitutional protections for women's rights and in favor of gender equity... provide a key component in the struggle for women's land rights," thus far these constitutional protections have not been enough to substantially increase female land tenure in Kenya (Daley and Englert 2010, 9). The implication of this failure translates to an extremely low level of female land tenure, that is in turn systematically supported by customary

law and a lack of information concerning the issue that could otherwise be used to aid in increasing female land tenure. As a result, females in Kenya continue to have land tenure rights denied on the basis of customary patrilineal systems of land tenure, or private land ownership influenced by the patriarchal values embedded in traditional patrilineal systems, or even both. In light of this, it is imperative that the issue of female land tenure in Kenya be addressed as a prominent issue in the years to come, and the first step to accomplishing this is engaging with the issue academically, as this paper has attempted to do.

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