

# **WOMEN'S LAND AND PROPERTY RIGHTS IN THREE EASTERN AFRICA COUNTRIES**

**by**  
**MAKUMI MWAGIRU**  
**Centre for Conflict Research**  
**University of Nairobi**  
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## **Introduction**

Eastern Africa is a region that has known many conflicts. Some of them started as internal conflicts but later spread over national boundaries. The causes of these conflicts range from the struggle for self-determination and for the right to practise one's own religion in Sudan<sup>1</sup> to a rebellion against bad governance in Uganda, to less well-defined causes in Kenya.

Those conflicts are all protracted: they have now lasted sixteen years in Sudan, a dozen in Uganda, and about seven in Kenya. And even where they have abated, as for a time in Ethiopia and Eritrea, they have caused much destruction, thus creating the need for reconstruction. In Kenya, the conflicts of 1991-1993 at one moment appeared to have been settled, but they erupted again following the general elections of 1997. As a consequence, the reconstruction process that was under way has been disrupted.

Not only have all those conflicts caused deaths and other forms of destruction among the affected populations, but they have also adversely affected social patterns, among them access to land and property rights - which are precarious even in times of peace. It is in this context that land and property rights have been severely reduced. Conflicts can only make such a bad situation even worse. Unfortunately, even the reconstruction period does not necessarily come with effective measures to redress the situation.

This paper reviews the reality of women's land and property rights in three Eastern Africa countries: Kenya, Sudan and Ethiopia. It considers legal and other impediments hindering these rights in situations of conflict and reconstruction. It also outlines the practical problems faced by women in connection with the legal and traditional structures regarding land and property rights, and makes some suggestions about how the situation can be rectified.

## **In Kenya**

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<sup>1</sup> For a poignant analysis of this conflict, see Peter Nyot Kok, 'The Ties that Will Not Bind: Conflict and Racial Cleavage in the Sudan' in P. Anyang' Nyong'o (ed.), *Arms and Daggers in the Heart of Africa: Studies in Internal Conflicts*, Academy Science Publishers, Nairobi, 1993.

In the customary laws of the ethnic communities of Kenya, women are granted access to land either through marriage or through inheritance. These customary rights to land do not necessarily entail rights to property. In any case, both types of rights have often been annihilated by conflicts. Thus, many women have, during reconstruction periods following conflicts, found themselves no longer with the land rights they used to enjoy. This loss of access to land has greatly reduced the possibilities of women whose economic activities are land-based, and who, therefore, find themselves legally and economically disempowered.

The position in statutory law is not much better. In Kenya, property rights of women are governed by the Married Women's Property Act<sup>2</sup>, which is a statute of general application in Kenya. Although it tries to enshrine the principle of equality in property matters, this statute has not been effective in Kenya, where women weigh little with regard to decision-making and social status. In addition, the statute is not useful in conflict situations because it does not provide for cases where the property to which women used to have access has been appropriated by somebody else. Other statutes like the Judicature Act<sup>3</sup> and the Magistrates Courts Act<sup>4</sup> are hardly better: they require that matters of personal law, including property rights, be governed by customary law. But this law already discriminates against women. The Constitution of Kenya is also disadvantageous to women with respect to property matters.

The major conflict-caused obstacles and threats to women's land and property rights in Kenya can be summarized as follows:

- When conflicts occur, many women who own land jointly with their husbands lose any proof of joint ownership. So, in the post-conflict period, they will have lost the land access and user rights they previously had.
- Much of the land that was held by women before conflicts gets 'annexed' by other owners, thus dispossessing women who have lost the evidence of title to their land. And, unfortunately, the law seems unable to correct such a situation, either because a specific, ad hoc law does not exist, or because realistic conflict- management mechanisms are not applied by the authorities and the people concerned.
- For many women, previous access to land was through marriage. So, in cases where their husbands themselves had inherited this land as ancestral land, their widows are left in a precarious position when the husbands die. In many instances the husbands' relatives lay claim to the land, thus exposing the women to the likelihood of losing land access and user rights.

### **In the Sudan**

The issue of women's land rights in the Sudan is complex. Before the conflict began, these rights were regulated by customary law. In the Dinka, Nuer and Shilluk communities, customary law ensured women's access to land and property by virtue of marriage. Otherwise,

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<sup>2</sup> Enacted in the United Kingdom in 1882, still a Statute of General Application in Kenya.

<sup>3</sup> See *Laws of Kenya*, chapter 8.

<sup>4</sup> See *Laws of Kenya*, chapter 10.

women could own land only in cases of direct inheritance from their parents or kin. However, because of the conflict, much of the land has never been subdivided, which has reduced the possibility of individual ownership by women.

What renders the situation even more precarious for women is that their powerlessness with regard to land and property rights is reinforced by the Constitution of Sudan, which imposes Islamic tenets. These are overwhelmingly biased against women in matters of land property rights<sup>5</sup>. Hence, as Carla Tangun, Chair of the Sudanese Women's Association in Nairobi, remarks,

land in most southern Sudan is owned traditionally by the community living there, because it has never been subdivided since colonial times. But customarily real ownership belongs to the male, and this dilemma is complicated by the Sudanese Constitution which is Islamic and tends therefore to disregard any ownership of land and property by women.<sup>6</sup>

After the original conflict in the Sudan was settled by the Addis Ababa Agreement of 1972, many women, still relying only on the precarious access to land stipulated by customary law, were able to acquire property and even conduct business. But once the current conflict began in 1983, much of that property was destroyed, as were their businesses.

One interesting development in Sudan is that, in areas of the country controlled by the Sudan People's Liberation Army (SPLA), some reconstruction has begun, especially in conducting business and farming. This has been possible because the SPLA has utilized traditional chiefs to ensure that returnees reclaim both their land and property taken away during the conflict. Reconstruction has been aided by organizations such as Oxfam and the Sudanese Council of Churches (SCC), which have provided the returnees with building materials, farming inputs, and so on.

For those women who have left Sudan as refugees, the position with respect to land and property rights is doubly detrimental: they have already lost access to their previous land, and they are not likely to inherit any from their parents while they are still abroad living as refugees:

I cannot participate in any level of decision-making ... I am affected because I have been separated from my people, parents and relatives ... My father owned large plantations of coffee crops and livestock, and even if [I was not married] I would have at least inherited something from him ....<sup>7</sup>

But the biggest sticking point in this respect is Sudan's Constitution, which, as already noted, legally discriminates against women. Indeed the question of the Constitution is one of the issues that are at the centre of the current conflict in Sudan.

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<sup>5</sup> This is contested by Moslems. Some argue that in cases of succession under Islamic law, for example, the woman is not obliged to share her property. On this basis they argue that Islamic law does not discriminate against women. One Moslem woman makes such a comment in Kibwana (ed.), *Women and Autonomy in Kenya: Policy and Legal Framework*, 2<sup>nd</sup> edition, Claripress, Nairobi, 1997.

<sup>6</sup> Carla Tangun, interviewed on 10 February, 1998.

<sup>7</sup> Anastasia Akujo, a Sudanese refugee in Nairobi, in an interview on 10 February, 1998.

## **In Ethiopia**

Here the situation is rather different, as the end of the conflict in 1991 seems to have given much hope to women with respect to their land and property rights. During the socialist regime of Mengistu Haile Mariam (1975 - 91), these were virtually non-existent. Ethiopia's then socialist Constitution emphasized the role of men as the guardians of the means of production, basically land. No place or role was practically left for women, which could only adversely affect their land and property rights. The current Ethiopian Constitution addresses this problem:

Any Ethiopian who wants to earn a living by farming has a right, which shall not be alienated, to obtain, without payment, the use of land.

Ethiopian pastoralists have a right to free land for grazing and cultivation as well as a right not to be displaced from their own lands.

Every Ethiopian shall have the full right to immovable property he builds on the land and to the improvements he brings about on the land by his labour or capital. This right shall include the right to alienate, to bequeath, and where right of use expires, to remove his property, transfer his title, or claim compensation for it ....<sup>8</sup>

The Constitutional recognition of the right of women in Ethiopia to own land on the same basis as men has encouraged a lot of the women who were refugees in Kenya to go back and engage in the process of reconstruction. The general spirit appears now to be one of optimism:

I have heard from people [gone back] that now we can have back [much] of the land and maybe property confiscated from our parents and relatives by the Mengistu regime. Since we now have a new Constitution in Ethiopia which advocates for the right of women to own land and property ... I see the new Ethiopian Constitution giving us women more hope in life than before.<sup>9</sup>

This spirit of optimism in the ability of the new Constitution to redress the situation is based on observations made on the ground:

The current Constitution of Ethiopia enhances the chances of women being more secure and [having] a major say in matters regarding property and land. This means that even if they inherit or acquire land and property through sale, their rights will be assured ... I have been to Ethiopia several times, and ... for those people who have settled back in their former land, the government is assisting them [in their reclaiming of the land] confiscated by [the Mengistu] government. In certain circumstances, state land formerly acquired from the people in cities like Addis Ababa and Dire Dawa [was given back to them, and] most people have succeeded in reclaiming land and property lost during the Marxist rule.<sup>10</sup>

However, the spirit of the new Ethiopian Constitution with respect to women's land and property rights is less clear than the letter of the law: if the process of helping women to reclaim their land and property rights is not done expeditiously, this may well help to defeat the intentions of the Constitution. Women should be given priority in land and property matters, since they have

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<sup>8</sup> Article 40, *Constitution of the Federal Democratic Republic of Ethiopia*, 8 December, 1994.

<sup>9</sup> Tsale Shimeles, in an interview on 11 February, 1998.

<sup>10</sup> Abba Bekur, Chief Priest, Ethiopia Orthodox Church, Nairobi, interviewed on 11 February, 1998.

been hardest hit by the conflict that led to their loss of property rights in the first place:

The current Constitution should [put in practice] ... what it advocates [...] on matters regarding women's land and property. By granting women land and property which is rightfully theirs, women will be able to develop that land. Secondly, the process of [reclaiming the] land and property formerly owned or inherited by the displaced [people] should be carried out without any delay to ensure that women are given priority since they were the ones [most] adversely affected by the conflict.

### **Conclusion and Some Proposals for Reform**

The customary laws of ethnic groups in the three countries covered in this paper do not allow women to enjoy their land and property. Although a woman has access to land once she is married, she is likely to lose it if a conflict erupts, especially if the husband dies during the conflict. Moreover, women who have been displaced from their land by conflicts are generally not able to reclaim that property during the ensuing period of reconstruction. In many countries, the written law has hardly alleviated the problem: their statute laws uphold customary law as a valid law for regulating the personal rights of women - including property and succession rights. The Constitutions of these countries, which should, as the supreme laws of the lands, regulate more directly the matter of women's land and property rights, do not do so. In Sudan, for example, the Constitution is Islamic, which further erodes the land and property rights of women. The new, (1994) Ethiopian Constitution is different in that it protects and promotes these rights. But even it does not legislate specifically for women: it deals with the right of all individuals in general, which might not be sufficient to regulate the peculiar problems that women face in relation to property rights, particularly in the current situation of reconstruction. Still, the fact that it guarantees inalienable access to land for all Ethiopians is a step in the right direction.

Now, since none of the laws or Constitutions in the three countries provide specifically for women's land and property rights in situations of conflict, and in particular for how these rights can be reclaimed during periods of reconstruction, the following proposals are suggested as a way of beginning to address such legal and statutory limitations:

- In the face of customary laws that are extremely biased against women, there is a need for legislation that defends firm and inalienable land and property rights for women. This requires new statutes.
- The Constitutions of the three countries, which are now silent on the issue, should provide specifically for the inalienable land and property rights of women. This would be a move towards affirmative action. In Kenya, for example, where a comprehensive Constitutional review will soon be under way, a strong lobby should be put in place with this aim in mind.
- Since, in the three countries, there are currently no laws dealing with the specific case of conflict situations, there should be some which would provide that an intervening conflict will not extinguish land and property rights of women. In particular, such laws should provide that in cases where the land was 'acquired' during a period of conflict, there should

be a higher burden of proof by the new 'owners' of the legality and propriety of the transaction. Such laws would help the reconstruction process.

- It is clear from the Kenyan example that there are many conflicts about women's land and property rights during periods of reconstruction. And yet there are no mechanisms for managing such conflicts. It is equally true that most women affected have little access to the courts, as many cannot afford them. The law should provide for some alternative methods of resolving these conflicts.