

WOMEN, LAND, AND RESOURCE CONFLICTS

Policy Implications and Interventions in Kenya

Elvin Nyukuri
Research Fellow
African Centre for Technology Studies

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CHAPTER ONE

1.1 BACKGROUND TO THE RESEARCH PROJECT

1.1.1 Introduction

The Beijing Platform for action calls for bringing a gender perspective to all structures, institutions, policies and programs. Its paragraph on gender mainstreaming specifically states that “governments and other actors should promote an active and visible policy of mainstreaming a gender perspective in all policies and programs so that, before decisions are taken, an analysis is made of the effects on women and men, respectively.”¹ This is consistent with the approach of the United Nations Commission on Human Security which quite successfully integrates gender concerns throughout their report. The report concentrates on distinct but interrelated issues concerning conflict and poverty. These include protecting people in conflict and post conflict situations, shielding people forced to move, overcoming economic Insecurities, guaranteeing essential health care and ensuring universal education. The commission discusses for example the differential impact of poverty on women as well as man and specific problems that women face as immigrants or refugees. The report also recognizes the important role women play in peace process including conflict resolution.²

Inequitable access and control over resources including credit, land, water, and time is near universal between women and men. Women play a critical role in managing natural resources and have extensive knowledge and experience of the water, land and energy supplies that sustain households and communities. Yet their lack of land tenure or inheritance rights and current trends such as water privatization, undermine their ability to own, manage, use, and conserve these resources and to provide for themselves and their families. Women’s limited title to land property and inheritance often means less access to agricultural extension services and credit and translates into reduced access to water and food. Women are still concentrated in the informal sector, where there are no job or safety protections and those entering the formal wage economy tend to be employed in the lowest paying jobs with the greatest environmental and safety hazards. Women still earn less than men for the same work, outnumber men among those who are illiterate. Women’s responsibility for domestic chores tends to mean that time is an extremely limited resource for women-time to participate in community organizations, time to study and time to earn an income. Thus women’s ability to protect their own security and ensure the security of family members differs enormously.

Gender relations in Kenya have been characterized by discriminatory and inequitable practices against women. These practices are embodied in the legal system and administrative structures of Government. Discrimination against women is also firmly anchored in the customs, traditions and usages of various ethnic communities in the country. One of the most pronounced aspects of gender imbalance in the country is in the area of resource allocation and management.³ Despite the fact that women constitute over seventy percent of the productive land based labour force in this country, land relations in particular are based on laws, customs and practices which marginalize and disempower women in terms of their right and capacity to own, manage and transfer land. The likelihood of conflict increases substantially when such gross inequities characterize land holding patterns particularly when a large landless or land

– poor population has limited livelihood opportunities.⁴ Some degree of conflict typically characterizes a situation involving competing claims to the ownership or use of the same piece of land. Whether claims are grounded in formally recognized rights or in customary use, circumstances involving a group of people, rather than individuals significantly intensify the risk of a larger scale conflict.⁵ The social injustice and inequities that characterize land holding and usage among the genders can lead to a conflict when mobilized by leaders who are ideologically inspired to address poverty and political injustices.

1.1.2 Research problem

Environment and conflict research and policy interventions have focused primarily on the linkage between natural resources and acute violence but have paid less attention the gender dimension of this correlation. Paradoxically women are more active in environmental and resource conservation activities especially land, which are widely documented.⁶ They play significant roles in interventions against the chronic food insecurity which has a significant link to the conditions such as destitution associated with marginalization exclusion and voicelenss. Environment and conflict researchers have neglected the opportunities to explore the gender, land and conflict linkage as a pathway to cooperation, confidence building and peace. It is imperative therefore to consider gender in land conflicts research and policy to help identify the specific pathways involved and hence the entry points for intervention.

1.1.3 Research questions

The study seeks to answer the following questions;

- How has gender aspects been manifested in land conflicts?
- How can the participation of women in decision making and peace building in land based conflicts be promoted /enhanced?
- What roles can women play to prevent land conflict?

1.1.4 Theoretical framework

A brief overview of the most important modern theories of conflict, prevention and resolution shows that they tend to neglect the gender specific relationship with and responses to different conflict factors. The behaviourists or micro theories of conflict for example claim that the root causes are in human nature. Individuals react to an external stimulus, translating individual frustration into a group reaction. Although there are different schools within this theory, they all take a starting point the frustration-stimulus response hypothesis and use this as a paradigm for the analysis of the individual within the wider social environment.

Classical or macro conflict theories tend to focus their analysis of the roots of conflict on the competition between groups for the pursuit of power and resources. They assume that human are rational actors that can rationalize decisions, including ones related to engagement of human conflict. Both micro and macro lack gender sensitivity in their analysis. They do not consider that human beings apart from their ethnic, class, religion identities that determine the stakes in particular conflict are also bound by their gender identity. That is to say that an entire dimension analysis has been neglected by not recognizing the gender difference argument.

It is on this line of thinking that this study takes off. The study uses the feminist theory known as the “Ecofeminism”⁷ theory that rests on the basic principal that patriarchal philosophies are

harmful to women, children, and other living things to elaborate more on the interrelations between gender and land conflicts. Ecofeminism is a sub type of Feminism theory which seeks to answer such questions as what makes the environment a feminist issue. What are some of the alleged connections between the domination of women and domination of nature? How and why is recognition of these connections important to feminism, environmentalism and environmental policy? A feminist analysis of the environment starts with the understanding that environmental problems derive from the actions of large scale institutions and cultural arrangements that create ecological distress.

This study shall also borrow ideas from the structural conflict theorists who try to answer questions such as whom or what is responsible for the generation of conflict? Who identifies the conflict, and hence who will take action to remove the conflict. The gender, land, conflict nexus is embedded in the structure of relationships and hence the actors might not immediately recognize it. Men and women have different socially –structured relationships to the environment. Quite clearly if there were no relationships in the society, then there would ever be structural violence or conflict, because the basis for it would not exist. In other words there would exist no structures to generate conflict.⁸

1.1.5 Conceptual framework

The construction of a conceptual framework for sustainable integration of gender and land conflict issues must begin with the exploration and definition of salient terms and concepts. Gender just like ethnicity, race, class or religion is an important determinant of individual or group identities. If conflict is about different needs, interests and perceptions as we are told by conflict scholars, then gender identity becomes an important determinant in creating, maintaining and ending violent conflicts and wars. But before analyzing further, gender as an analytical tool in conflict must be defined.

Gender is a concept that refers to a system of roles and relationships between men and women which are determined not by biology but by the social, political and economic context. *Gender analysis* refers to a multitude of methods and approaches that look into the roles and relationships between women and men, and their access to and control over resources. It is not only a cognitive tool for structuring and framing the interactions and relations between sexes, but also a practical tool that cuts across needs assessment, activities and responsibilities, resources, access and control, benefits and institutional constraints and opportunities. In gender analysis access to and control over resources is “one of the principal factors determining the economic and social well being of women especially in situations of conflict and reconstruction, when their rights are violated on a mass scale”⁹ This is especially true in countries with protracted history of war, famine, environmental degradation, resource scarcity and highly conservative and male dominated societies like Kenya.

An environmental conflict in this context is a conflict caused by the social injustice and inequity in the distribution of resources. The inequity of land can lead to overuse of a renewable resource. This overuse can also reach the stage of a destruction of the space of living.¹⁰ A case in point is that of Zimbabwe where an unequal distribution and concentration of black small holders on communal lands has contributed to resource degradation and added urgency to land reform. Conflict as used in this study therefore is very fluid; referring to debate, contest disagreement, argument, dispute or quarrel, a struggle battle or confrontation, a state of unrest turmoil over land. Conflict is viewed as a process evolving over time and responding to and altering different underlying factors.

Land which is the preferred environmental resource of study is considered to be the most fundamental resource to both men and women’s living conditions, economic empowerment,

to some extent their struggle for equity and equality. Over the years land has become a limited resource due to “rapid population growth leading to competition over land use and environmental, soil and land degradation, low prices for agricultural produce, lack of access to productive resources amounting to production pressure on a constrained resource”, in the words of Olson.¹¹ When there is a limited resource, then this leads to conflict, prejudice and discrimination between groups who seek that common resource. Once the hostility has been aroused, it is very difficult to return to normal relations and an ongoing feud can arise.¹² The major issue is the growing differentiation in Land control and questions of access and equity. A combination of state policies and agrarian change has created various forms of differentiation which have an impact on land relations.¹³

Land tenure is, in brief, the social relations established around and that determine who can use what land and how. A land tenure system and its set of tenure relations are interwoven and related to other societal structures and institutions, including family structures and its marriage and inheritance systems. All these structures tend to reinforce each other within a society: if there is a change in one of them, the others often modify and adjust to that change. In other words, a person, household, or group of persons does not possess, use, and transfer land independent of and isolated from other persons and institutions.

There is mounting concern over the extent to which *environmental stress* is threatening livelihoods, health and the fulfillment of basic needs, and harming the sustainability and resilience of fragile ecosystems. Land degradation is intensifying conflict and competition over natural resources, aggravating social tensions, and in certain volatile situations, provoking or escalating violence and conflict.¹⁴

As stated earlier, the majority of the rural poor population is the women who depend on Agricultural produce for living. When they face such constraints such as lack of access to land for agricultural production, the issue of food insecurity comes in. Food insecurity contributes to grievance and suffering of people and may eventually lead to conditions where violence may be inevitable. Even though the link between hunger and conflict is disputed and far from clear, poverty is perceived as the seedbed for developing unrest and violence: “hunger anywhere threatens peace everywhere”¹⁵

1.1.6 Literature review

There is a very large body of literature on land tenure, and land reform. There is also a vast amount of published material in the area of conflict management and resolution. The same applies to the literature on gender. The challenge at hand is to bring these three together, and enrich the smaller body of literature that intersects these three fields. Land and conflict factors are being linked in different ways than in the past, with substantial implications for the direction of policy, and for the effective management of conflicts. This literature review takes a preliminary look at the existing body of research related to land gender and conflict linkages in the Kenyan context. Although a rather new area of research to Kenya, as it is elsewhere, it is important to policy making for conflict management given that conflict continues in many regions of the country, and because land is a prominent topic of debate in relation to the country’s equitable development.

Resource based conflicts, especially over rights of access to land, are increasing in frequency and intensity. Whether caused by greed or grievances, land conflicts cause serious social dislocations suspend or destroy income opportunities, create food insecurity, damage the environment and frequently result in the loss of life. Poor households bear the heaviest burdens of land-related conflicts for the simple reason that their daily needs and future livelihoods are directly tied to their property rights. Their land dependency ratio is high. Poor

households face a high risk of becoming victims of conflict if their fragile access to land is threatened further.

It is easier to define the boundaries of land as a resource unit.¹⁶ The World Bank summarizes the broader importance of owning land –access and control over land shapes equity because land is still one of the major assets held by households; influences efficiency because land is one of the economy’s main productive assets; underlies sustainability of resource use, for its important for agricultural production and affects governance because there is a strong link between land tenure and the prevention of conflict.¹⁷ In the context of land conflict, the sources of grievances among people and groups that underlie disputes tend to result from achieving or retaining control over a scarce resource.¹⁸ A distinction is often made between resource abundance and resource scarcity as stimuli to conflict but the two do overlap and the dichotomy may be false one since both scarce and surplus may impact a given area.¹⁹ In isolated rural areas, shortages of level land, good quality soil may undermine productivity and threaten livelihoods. In densely populated areas, land itself can be a scarce commodity. Two large scale studies undertaken in the 1990’s led by Gunther Baechler and Homer Dixon attempted to establish an empirical evidence for the relationship between resource scarcity and violence.²⁰ The Baechler project concludes that there is a relationship between environmental threats of which it singles out Land degradation and conflict but that the social and political context is critical in determining whether scarcities will actually lead to violence.²¹ The Homer-Dixon study puts even more emphasis on population growth leading to degradation.

According to the Baechler studies, conflict is most likely to erupt in areas, remote, mountainous or dry land locations, where environmental stress coincides with competition for political power. With population growth and commercialization of agriculture, more people are pushed into these marginal areas that are not only rugged or arid, but also very prone to erosion and other forms of degradation.²² Resource scarcity can be a factor contributing to conflict but resource abundance appears to be even more closely associated with the potential for violence.²³ There is no motivation to diversify the economy when resources are readily available and countries in such a position are likely to be sustained by the direct sale of these resources. When the state has access to resource wealth, it can create a rentier economy and either buy off enough interest groups to ensure compliance or invest in the means of repressing the population. The more lootable the resource, the more likely that there would be an economic base for extending any conflict into a lengthy confrontation.

Many conflicts have their origins in rural agricultural areas, which can no longer provide sufficient food, other basic goods and services and employment opportunities for their resident populations. Such areas provide many people with low opportunity cost who might be willing to choose violence as a means of income earning. Rural communities suffer in conflicts when pushed off their land by investors so as to eliminate any interference while the invaders prospect for mineral wealth. Given this reality, it is understandable that villagers impacted by conflict will relocate to camps on the outskirts of large towns that are managed by government agencies while others would gain access to vacant land which has not been developed.

Rights to use and control land are central to the lives of both genders in countries where the main sources of income and livelihood are derived from natural resource. The lack of land rights by women for example indicates that they are victims of discrimination since land is considered the most fundamental resource to women’s living conditions, economic empowerment and to some extent, their struggle for equity and equality within a patriarchal society. Weak legal, institutional and traditional/customary protections feed heavily into the gender dimension of the land and conflict picture. Conflict over land, particularly involving land access and rights, disproportionately and negatively impacts women. In conflict and post

conflict situations many men have either been killed or gone missing, causing a sharp rise in the number of women headed households. Women who do not have formal rights to land and property are left without the means to create stable and sustainable livelihoods. This situation contributes to poverty and perpetuates a cycle of social and political inequality that provides fodder for future conflict.

People with insecure tenure rights are often indiscriminately or forcibly removed from their land. In Kenya, the statutory law is non-discriminatory, but in practice women are bound by traditional customary laws which do not recognize women's capacity to own or inherit land or property in their own names, except via a system of vicarious ownership through their husbands or fathers. Bina Agarwal argues for women's independent rights as follows: 'in making the case for women having rights in land I mean effective and independent rights, and by independent rights I mean rights independent of male ownership and control. In other words, I am not talking about joint titles, which have several disadvantages for women'.²⁴ Where communal rights to land often conflict with statutory laws which require title deeds to establish rights over land, women's rights to land and or property become even more uncertain after conflict. Displaced populations who have no traditional rights to settle on the land and have no title deeds for the land thus find themselves rendered homeless.

If the situation of women regarding land and property rights whether under customary or statutory law is precarious in times of peace, it is even more so in situations of conflict, says Makumi Mwangi²⁵ of the Institute of Diplomacy and International studies.

The likelihood of a conflict increases substantially when gross inequities characterize land-holding patterns particularly when a large landless or land poor population has limited livelihood opportunities. Grievances over unequal distribution of resources that are deeply rooted in a strong sense of injustice also increase the probability of violence. Violence in this scenario is considered as a just seeking means for the breadwinner of the household. A positive relationship between poverty and environmental degradation has been identified, lending support to the hypothesis that poor producers will systematically degrade the resources on which they depend if they have no alternatives. Conditions threatening the livelihood of the poor could lead to violence and in many cases rural community and agricultural issues are at the heart of the problem. For example, the so-called "sons of the soil" conflicts are mainly centered on agricultural land taken by immigrants.²⁶ The other angle of this argument

The output from this study shall inform policy makers on the relevance of the gender component in land conflict and the inclusion of the gender aspects in the forthcoming land policy in Kenya.

1.1.8 Study objectives

The *overall objective* of this study is to identify and assess the extent to which gender aspects can be of help in identifying the specific pathways involved and hence the entry points for intervention in resolving land and conflicts research and policy.

Specific objectives include;

- Identify the conceptual and empirical gaps in understanding the inter-linkages between conflict, gender relations and land.

- Contribute to the further development of conceptual tools for researching land and conflict linkages.
- Identify gender issues that contribute to and/ or impact on land conflict.
- Suggest policy interventions critical in integrating gender in the Land reform process in Kenya.

1.1.9 Study hypotheses

- Acute land degradation and resource scarcity also contribute to the increase in the value and control over land as a resource.
- Women and men have different relationships to these institutions.
- Land conflict is gendered.

1.1.10 Research methodology

Data collection

Primary and secondary sources of data will be employed. Interviews and structured questionnaires will be distributed to women and regional and key government representatives in relevant ministries (Agriculture, Lands and Gender) Literature on Kenya land policy, land laws, Land and conflict from books, journals, official documents, internet documents will be collected synthesized and used as secondary data.

Emphasis will be put on getting qualitative data. In- depth views of respondents will be sought on Gender land and conflict linkage. It is hoped that key data including such important issues as data availability, misconception and miscommunication of gender-land and conflict linkages of its broader policy implications, interdisciplinary research in Kenya will also be revealed through Literature review, interviews and questionnaires.

Data Analysis

With the aid of a computer, quantitative data received from the interviews will be analyzed to assist presentation and collation of research findings-(Excel). As far as appropriate and practicable, tables and figures will be used to capture the required information. Throughout the research, effort will be made to provide answers to the questions raised in the research problem. Analysis of the research findings will be based on the conceptual framework of the study.

Qualitative data derived from field notes and reading will be evaluated and analyzed to determine the adequacy of the information and the credibility, usefulness, consistency and validation of the hypotheses.

CHAPTER TWO

2.1 GRIEVANCES AND TENSIONS OVER LAND IN KENYA

2.1.1 Introduction

This chapter looks at the combination of sources of grievances, tensions that have escalated into conflicts over land in Kenya since colonial period. Emphasis is placed on genesis of Land tenure failures and insecurity; competing land claims and uses; land holding inequities; endogenous population increase; an increase in commercial agriculture and extensive land use over limited land resources; Exogenous populations immigrating into lands and communities with established tenure regimes; Confusion among the three sources of rules; Customary rules, official law and land markets; and disagreement over arbitration procedures and the legitimacy of the mediating organizations.

2.1.2 Land tenure failures and insecurity

People have fought over land since the beginning of recorded history. Population growth and environmental stresses have exacerbated the perception of land as a dwindling resource, tightening the connection between land and conflict. Land is often a significant factor in widespread violence and is also a critical element in peace-building and economic reconstruction in post conflict situations.

In the context of land conflict, the sources of grievances among people and groups that underlie disputes tend to result from achieving or retaining control over a scarce resource. In this case the resource will be one or a combination of land, water, trade routes, renewable and non-renewable resources on/under the land, infrastructure etc. Some scholars such as Fisher²⁹ have argued that many of the sources of grievances though common to many societies do not necessarily shift into a conflictive situation or into hostilities. In fact, most land tenure systems tend to be resilient to change and can absorb turbulence, but only to a limited extent. Beyond certain thresholds, they can begin to break down. “Serious land conflicts tend to be generated by an accumulation of different sources of tension which result in the erosion or abandonment of previously accepted and socially recognized rules of access to and use of land and other natural resources.”³⁰

Mathieu³¹ shares the same views as Fisher when he brings out the case of Kivu, in which tens of thousands of people lost their lives and many more were made homeless. In this case, the deep causes of conflict were intermingled massive in migration by different ethnic groups seeking land, the dispossession of increasing number of small farmers as a result of land sales by chiefs, uncertainty and confusion over whether migrants were citizens of Democratic Republic of Congo and political manipulation by rival parties and personalities. In other words, competition over scarce land, together with lack of off farm opportunities, frustration, and lack of hope for the youth... may create a context of instability where other trigger factors like political or ethnic manipulation may lead to violent conflict.

Exogenous populations immigrating into lands and communities with established tenure regimes, the increase in populations and diverse cultural backgrounds are a source of grievance, especially when the immigrant’s access to land has no specific time limit, nor does it

conform to customary rules.³²In Kenya, for example land conflicts are as a result of the above mentioned tensions and many more as shall be highlighted later in this chapter. These tensions began at the time when the British colonialists evicted indigenous nomadic pastoralists that is the Kalenjins, Maasai, Samburu and Turkana from the most fertile land in the rift valley in the west and recruited non-indigenous agricultural labourers from the neighbouring provinces to work on their farms, particularly Kikuyu community from the central province. During the 1960's with the departure of the colonialists, from the white "farmlands", the non-indigenous agricultural labourers on the European farms took advantage of the land buying schemes offered by the president Jomo Kenyatta and bought the land they hard worked on for the white colonialists.³³The nomadic pastoralists who had been evicted by the colonialists were there by denied access to land they believed to be rightfully theirs.

This situation was largely maintained throughout the KANU period until 1992-1993 when the non-indigenous agriculturalists were ordered by the government to leave the rift valley and return to their homeland in the central province. This order and the consequent violent displacements coincided almost exactly with the amendment of the Kenya constitution to permit multi-party politics in September 1991³⁴. Soon afterwards, parties were formed along tribal lines, with KANU officials paying landless youth to harass and force mainly Kikuyu people out of their homes and constituencies. The major periods of violence and displacement centered around the 1992 and 1997 elections and the main perpetrators of the violence in both these elections were predominantly dispossessed Kalenjin and Maasai supporters of the KANU government against members of opposition groups.

Endogenous population increase leading to intensification in resource exploitation and degradation led to tensions in the affected community. Exploitation and oppression against the colonized communities who were hoarded in reserves to create room for intensification of agriculture by settlers using forced native labour led to massive landlessness mostly in the parts of the settler agriculture and vibrant economic activities in Kenya. This led to poverty, discontent and hopelessness. It also led to land pressure, overstocking and soil degradation.

After independence Kenyans wanted the land that they had fought for but the government was faced with the need to sustain the settler economy in order to sustain the economic development. The situation became more complicated when the government retained policies and laws inherited from the colonial regime with regard to land ownership and use. Most of the communities did not get back their land. The British government made sure that the rights of those who opted to settle in Kenya were safeguarded. Such changes

Within the endogenous population arising from shifts in social consensus, be they caused by internal issues like increased pressure on resources from endogenous growth or from external sources- new markets driving demand for sources previously untapped are a bed rock for tensions.

The land that was availed for redistribution to the landless Kenyans was on the basis of the willing buyer willing seller. This further increased the tensions because most communities that had lost their land witnessed their land being individualized to those who could afford it at the market place.

2.1.3 Competing land claims and uses

Government land appropriation and resettlement schemes are notorious for causing conflict and tension related to competition for land uses and claims.³⁵ In the 1970's the Kenyan government reverted to a system of settlement fund trustees. Corruption and mismanagement

of these scheme resulted into settling only those that were politically correct leaving out the squatters conflicting over the very lands that was meant for their settlement. It was realized that the settlement schemes were not sufficiently addressing the problem of the land less and so the government encouraged the purchase of land through companies and farming cooperatives by the land less pooling resources together. The cooperatives were abused by the politicians as a means of swindling land hungry peasants.³⁶

Kenya has on several occasions witnessed violence erupting in the Rift valley as a result of Pastoralists and farmers competing over the same land use or for vastly different uses. The warring clans of pastoralists facing resource scarcity kill each other during cattle raids as they search for productive grazing land and reliable water sources. Although the Kenyan Constitution ensures access to the rangeland for traditional users, privatization has still taken place on some of the better grazing land where the government has encouraged Western-style ranching. On higher ground, wet season grazing has been replaced by maize and vegetable growing. Creating National Parks has further reduced access to traditional grazing areas, increasing competition amongst pastoralist groups.³⁷ Whether claims are grounded in formally recognized rights or in customary use, circumstances involving groups of people rather than individuals significantly intensify the risk of larger- scale violent conflict.

The increased competition for land is also linked to the desire of private investors, whether national or International, to gain access to land for a variety of purposes, ranging from commercial production to speculation to mining. In Kenya the local inhabitants of the Kilifi district where Tiomin was discovered were forcibly moved by the government to other areas. There were issues raised over proper compensation for their lands, their resettlement, and a posting of security bond by the mining company so that their land will be restored to its original form once mining is over. The villagers disputed the amount offered by Tiomin. Tiomin is offering approximately \$110 per acre as a one time fee and \$30 per acre as the annual leasing rate. This amount cannot secure the villagers a similar plot in similar conditions anywhere else in Kenya they complained.

There were allusions of use of violence of halting the mining project. The south coast council of imams and preachers while advocating for the right of the villager to be allocated their plots and be compensated, stated that “Not an inch of that land is going to be mined before allocation is done unless the government wants to see chaos and bloodshed.”³⁸ They also twin the compensation claim with environmental hazards and contended that “coastal people would rather die from police bullets than from a radioactivity emitted from the titanium project.”

Over the past one year, over 2000 families have been evicted from Samburu forest in the Rift valley, slum families in the Balozi estate in Nairobi and the Timau evictions. The heavily armed security personnel descended in Karuri (Nyayo) settlement scheme a village in Timau central, Meru district and proceeded to systematically destroy houses, schools, granaries and livestock. Television footages showed a number of elderly people, women with babies strapped on their back, the sick and children stranded in the forest.³⁹

The Ogiek community who live in the Mau forest claim that the settlement scheme totally interfered with their customary land tenure that allowed communal sharing of land and resources besides a peaceful co-existence of both human needs and the environment

protection. There has been much mistrust, suspicion, conflict, competition and even rivalry between Kenyan communities and ethnic groups competing for power and control over natural resources leading to the current invasion trend of the Ogiek ancestral land under the guise of settlement and conservational purposes. The Colonialist protected their interests through buffer zones, which ended up being forests, as informed by the forest legislation Cap 385, while the KANU regime used Human shields against persons it did not trust.⁴⁰

One interesting case was that of the Maasai wanting their land which they reiterate that they had signed an agreement with the British Government. In the month of August 2004, the Maasai Dressed in traditional regalia handed a petition to the Kenyan lands and justice ministries and demanded compensation from the United Kingdom. The one million hectare area is now subdivided among some white farmers, who own ranches, and black Kenyans, who practice small-scale farming. The Maasai wanted the white farmers to be evicted and compensation from the British for the land occupied by the black farmers. But the Lands and housing minister Hon. A. Kimunya had this to say to them. “There is a difference between a treaty signed between the Maasai and the British and between them and the Kenyan government. This government has no treaty with that community,” he explained.

2.1.4 Sources of rules

Confusion among the three sources of rules; customary rules, official law and land markets expressed in different interpretations (of legal designations, zoning, common property, private, open access, boundaries) and their administration (voice and representation, perception of fairness of procedure, transaction costs) are issues that cause the accumulation of tension. Land tenure rules constitute a web of interests, forms of holdings, and rights.

Box: 1

Intersecting INTERESTS

Overriding interests: When a nation or community has the powers to allocate or reallocate land e.g through expropriation.

Overlapping interests: When several parties are allocated different (partial) rights to the same parcel of land for example one party may have lease rights another may have right of access.

Complementary interests: When different parties share the same interest in the same parcel of land for example shared rights to grazing land

Competing interests: When different parties contest the same interests in the same parcel

Disagreement over arbitration procedures and the legitimacy of the mediating organization

Box 2

Forms of HOLDINGS

Open access: tenure where there is no control on access to resources: specific rights are not assigned to anyone and nobody can be excluded. This may include rangelands, forests, etc, where there may be free access to the resources for all.

Communal: a right of commons exists within a community where each member may have a right to use independently the holdings of the community. For example, members of a community may have the right to graze cattle on a common pasture. This differs from an open access system in that non-members of the community are excluded from using the common areas.

Private: the assignment of rights to a private party who may be one person or a group of people, or a corporate body such as a commercial entity or non-profit organization. For example, individual families may have exclusive rights to residential plots, agricultural plots and certain trees. Other members of the community can be excluded from using these resources without the consent of those who hold the rights.

State: property rights are assigned to some authority in the public sector. For example, in some countries, forest lands may fall under the mandate of the state, whether at a central or decentralised level of government.

(Adapted from FAO, 2001: 6)

Box 3: Examples of RIGHTS

A right to use the property; claim that others should not interfere without permission.

A right to control how to use the property; the "control right". It includes the right to exclude access to unauthorized people.

A right to derive income from the property; the "cash-flow right".

A right from illegal expropriation of the property.

A right to transmit the rights to the property to one's successors; the right of inheritance.

A right to transfer the entire property or portion of it, or to partially transfer rights (e.g through a lease).

A residuary right to the property; when partially alienated rights lapse (e.g., after a lease expires), those rights revert to the holder who alienated them.

A right to enjoy the rights to the property for an indeterminate length of time; rights do not terminate at a specific date but can last in perpetuity.

A duty not to use the property in a way that is harmful to other members of society; the right is held by those who do not hold the right to use the property.

A duty to surrender the rights to the property when the interests are taken away to satisfy a lawful action e.g in a case of insolvency where the right is held by the creditors. (Adapted from FAO, 2001: 7)

Box 4:

Formalisation of RIGHTS

Formal property rights may be regarded as those that are explicitly acknowledged by the state and which may be protected using legal means.

Informal property rights are those that lack official recognition and protection, but recognized by customary or local laws and/or authorities. In some cases, informal property rights are illegal, i.e., held in direct violation of the law. An extreme case is when squatters occupy a site in contravention of an eviction notice

Extra legal rights: informal property may be “extra-legal”, i.e., not against the law, but not recognized by the law. In some countries, “customary” property held by rural indigenous communities falls into this category.

Illegal property holdings may arise because of inappropriate laws; e.g., the minimum size of a farm may be defined by law whereas in practice farms may be much smaller as a result of informal subdivisions among heirs. They may also be illegal because of their use, e.g., the illegal conversion of agricultural land for urban purposes.

The combination of the different interests, power relations, and forms of holdings, types of rights and grouping of rights constitute a compounded set of sources of tension. It becomes more complex when uncertainties regarding the rights of different groups are aggravated by the plurality of laws and systems of regulation for control over land.⁴¹

2.1.5 Land holding inequities

The Land-holding inequities in Kenya is believed to have resulted into the uprising of the MAU MAU movement. It is worth noting that the likelihood of violent conflict increases substantially when gross inequities characterize land holding patterns, particularly when a large landless or land-poor population, the displaced native Kenyans for this case, has limited livelihood opportunities. The stakes are even higher when a marginalized population literally depends on a small piece of land for subsistence and survival. The natives felt that there was too much injustice from the white settlers which increased the probability of violence.

The government programme to transform nomadic pastoral areas into settled agricultural regions has been marked by conflicts over the subdivision of group ranches. At Ndoto group ranch adjacent to the Ndoto hills in Samburu district in northern Kenya, an interesting scenario has unfolded. On September 2, 1981 nine prominent individuals in the district presented themselves to the then land adjudication committee and sought to be allocated plots of varying sizes within the 54,000 acres adjudications area. At the end of the meeting a total area of 14,350 acres had been given to the nine so that they could initiate development in the area. Inhabitants of the area had no idea what went on until late 1993 when they sat as a group to deliberate on whether to sub-divide the area or not to. The people for whom land was to be sub-divided numbered about 14,000. The total acreage left for them was 39,650 acres, about 2.83 acres of arid land with no economic viable use. It was then that the land adjudication which had remained unchanged since the allocations of 1981 realized the absurdity of their unanimous decision then to “initiate development”. They resolved to reduce the acreages of the nine individuals from an excess of 1,000 acres to 20 acres each. The matter remains unresolved today.⁴²

2.1.6 Displacement and return of populations

Resettlement schemes and /or violent conflicts can displace people from their homes and lands. Tension and violence often accompany the initial displacement and can also be part of the dynamic when displaced people return to their place of origin, especially when others have since taken up occupancy. (see Annex I) The table shows the location and number of IDPs in Kenya.

2.1.7 Arbitration procedures

In Kenya the courts are clogged by land conflict related cases. The so called land tribunals are also clogged up with land related cases which are awaiting arbitration. Cases involving land are fatal and can lead to death. Family members fight over land but the problem is that we have no mechanism of solving. We either say we want to go to Elders others say it is the Chief others say it is the lawyer others say it is surveyor. Each case depends on itself but then we need a general policy on that and then the speedy expedition of these cases.⁴³

The report of the commission of inquiry into the illegal/irregular allocation of public land popularly known as the Ndungu report⁴⁴ has created more confusion. At a function organized by the Law society of Kenya immediately after the release of the report, it came out clearly that the document could even be inaccurate and therefore fails the test of authenticity. Kenyan authorities hardly keep proper records on any dealings and land transactions. Most local authorities have poor record keeping while others have no idea of the amount of public land under their jurisdictions. The district land registries are not any better. Thus the Ndungu report could not in many cases access accurate information.

Matters are complicated by the fact that section 75 of the constitution was designed to protect private property especially land acquired during the colonial period. Any attempt to dispossess alleged defrauders is likely to founder on this provision because it could easily be declared unconstitutional. The existing legal framework is therefore ill prepared to solve the land question.⁴⁵

2.1.8 Increase in commercial agriculture and extensive land use over limited land resources

Government interventions and establishment of agricultural projects and commercial farm enterprises add further elements of instability to land relations. In 1977, Sakwa location in Kisumu district, there were people who were displaced by the South Nyanza Sugar Company limited to set up its nuclears sugar plantation, known better as Sony Sugar company limited .Many bought land and settled in the peripheries of Sakwa North. These people have lived in their newfound land as squatters because they are constantly harassed by those who sold them parcels of land and the provincial administration at the local level. The matter is complicated because the transactions were on a gentleman's agreement, or were signed on papers not provided by the lands Registry. The very people have turned against them 27 years after willingly selling them land. The chiefs and village elders have ganged up to invade the people's homes, causing wanton damage to their property.⁴⁶

The injustices over land are being felt by the international community too. At the moment Denmark's aid to Kenya worth euro 20 million is being withheld as the Kenya

government is accusing a Danish organization of undermining its land policy and fuelling violence. In Denmark, the press and organizations focus on Kenya's ruling elite and their large properties as the relations between Copenhagen and Nairobi are getting sour. Three employees of MS-Kenya, including country director Lotte Grauballe, have been told their working permits will not be renewed due to their engagement in Kenyan land policies. According to the Nairobi government, MS-Kenya has actively contributed to land conflicts in the country by promoting calls for land to be redistributed to the poor. In Denmark, meanwhile, the press and local organizations are continuing to use strong rhetoric against the Kenyan government. A row of articles in the Danish press focus on the injustice in Kenyan land policies and the wealth of Kenya's ruling elite. The articles are often accompanied with photos from Kenya's slums.⁴⁷

When several sources of grievances are present at the same time, a situation may become compounded and 'flip' from a balanced dispute to a conflict and hostilities. This flip may be precipitated when one social group seeks to force its agenda on others for political purposes or exploitative aims. A dispute situation that may have been held in balance for years may be catalyzed into a conflict as a result of external interventions, changes in weather, challenges to leadership structures, weak administrative systems, or changes in rules and laws.

CHAPTER THREE

3.1 GENDER, LAND AND CONFLICTS

In gender analysis access to and control over resources is “one of the principal factors determining the economic and social well being of women, especially in situations of conflict and reconstruction, when their rights are violated on a mass scale.”⁴⁸

3.1.1 Introduction

This chapter builds on the previous chapter by integrating the gender dimensions into the land conflicts in Kenya. The first part of this chapter focuses on the findings drawn from the field and the views of respondents on men’s and women’s access to and control over land in Kenya in general. The second part looks at the relevant international/National laws that govern access and control of natural resources particularly land. The final part in this chapter analyses the inter-relationship between issues of insecure access to land, gender and conflict.

3.1.2 Access to and control over land

The Men and Women relationship to land outside the context of conflict directly informs their relationship to land during conflict. It is therefore essential to understand the former before the latter.

To begin with, Men and Women have different gender based roles and responsibilities in their own lives, families, households and communities. They have different knowledge of access to, and control over land and different opportunities to participate in decisions regarding land use. This section gives a summary of the outcome of a study undertaken on men and women’s access to and control over land in different parts of the country. The study evolved out of a need for increased insight into gender differences in access to and control over land and the implications of insecure access to land for households in times of conflict.

The objective of the study was to identify and assess the extent to which gender aspects can be of help in identifying the specific pathways involved and hence the entry points for intervention in resolving land conflicts. It was anticipated that such information could contribute to: (i) an enhanced decision making power of women in their efforts to obtain more secure access to land within the framework of existing legal, customary rights, regulations and practices, (ii) inclusion of gender aspects in the forthcoming land policy in Kenya (iii) improved agricultural productivity, of especially women farmers, and improved food security at the household level due to an increased security of land tenure.

3.1.3 Key findings

The key findings were based on the outcomes of 150 questionnaires administered in three districts located where conflicts occurred in the early 1990’s in the Rift Valley Province (Mt Elgon, Uasin Gishu and Laikipia) and focus group discussions held with traditional rulers, opinion leaders, teachers and community members.

Importance of the farm sector

The study confirmed that farming activities were the main source of income in the province, a region that is well known for both its food and cash crop production. Most of the crops grown were partially sold and partially consumed by the household. Many households, however, were experiencing problems in accommodating the nutritional needs of the household due to an increased competition for farm land, an increased migration of young farm labourers to urban areas, a change of farming systems, an increased cultivation of less nutritional crops, a decrease in productivity due to a lack of credit among farmers and increased laziness among men.

Sources of credit used for farming activities

Farming activities were mainly financed by the farmers themselves, followed by monies received from spouses, moneylenders, relatives and friends. Women often financed their farming activities with funds obtained through trading activities and contributions from women groups (chama). Remarkably few farmers used formal financial institutions, local saving groups and/or Community Based Organizations to finance their farming activities. Incomes derived through farming activities were mainly spent on the education of children, the purchase of food and clothing, an expansion of farming activities and health care.

Gender division of labour

A clear division of labour existed with regard to farming activities performed by men, women and children. Men were actively involved in land clearing, land preparation and planting cash crops, whereas women were more involved in activities such as planting food crops, watering the crops, storage and food processing. Children were responsible for chasing away birds and rodents, whereas all parties were engaged in activities such as weeding and harvesting.

Men generally allocated more hours to farming activities than women did. Women, however, were responsible for a larger number of reproductive activities performed in and around the house, in addition to their productive and community management activities. As a result, women performed more tasks, had greater responsibilities and worked longer hours than men.

The intercropping of cash and food crops by women on their husbands' farm plot(s) was a common practice observed in the province. Men generally controlled the incomes derived from this activity. In addition, they often assisted their husbands in farming activities on his farm plot(s). This obligation had shifted from being a legal obligation that is according to traditional law to more of a moral or economic obligation. Most women were compensated for their assistance either in cash or in kind, but few were of the opinion that they were sufficiently compensated for their hard work, as they were seldom given fixed assets. Men, on the other hand, seldom assisted their wives on her farm plot(s).

A small number of men and women worked as farm labourers on the fields of others. Although male and female farm labourers were said to receive equal pay for a day's work, the study showed that male labourers received higher daily wages as compared to female labourers. The difference was ascribed to the tougher tasks performed by men and their longer working hours.

Changing roles and responsibilities of women in the farm sector

The study revealed that women's roles and responsibilities had increased in the farm sector since independence. This was ascribed to changes in the gender division of labour, an increased involvement of male household members in non-farm activities, increased financial and nutritional needs of the household, and the desire of women to become economically independent. Women had become increasingly involved in both cash and food crop production, and farm related trading activities. Their greater involvement in cash crop production was remarkable because this activity was traditionally only open to men as it could increase one's ownership rights to the land. It was feared that if women were to obtain such rights, land could be lost to another clan or lineage in case of marriage. The increased need for labour paved the way for an increased involvement of women in cash crop farming, thus making their involvement socially acceptable. Their greater involvement in food crop production was ascribed to an increased need of households to become self-supporting, an increased demand for their labour to meet the financial and nutritional demands of the household, the unsuitability of the land for cash crop production and the shorter production cycles of food crops.

Access to land

The median size of farmlands cultivated by households in the study area was three acres. The largest median sizes were observed in the Uasin Gishu district, the smallest in the Mt. Elgon and Laikipia districts. These differences were related to variances in population densities in the districts and the availability of land suitable for farming activities.

Most respondents were of the opinion that men and women had equal access to land in their communities, as the land use rights of lineage and clan lands were open to both sexes. Further questioning, however, revealed that women's access rights were less equal than initially assumed, as their rights were generally secondary rights. Those who indicated that men had greater access to land explained that men were traditionally considered to be the custodians of family property and the patrilineal inheritance system, the dominant inheritance system applied in the three districts, favoured men over women in terms of land acquisition.

Access rights of different categories of women to land

Differences in access rights to land were observed, not only between women and men, but also between women. The study revealed that the access rights of widows with children and biological daughters were slightly more secure than those of step or adopted daughters, widows without children, women with physical disabilities and women involved in a consensual relationship. Access rights of all categories, however, strongly depended on the presence of a father or husband and/or their relationships with his relatives. Many women feared that they would be among the first to lose their access rights to land if the demand for land continued to increase, making them not only vulnerable in terms of opportunities to generate an income but also in terms of food security. A comparison of the perceptions of men and women with regard to women's access rights to land revealed that men generally had a more positive view of their rights.

Impact of marriage on access to land

The study showed that marriage had a strong impact on especially women's access rights to land among the patrilineal societies studied. Women generally gained secondary access rights to their husbands' land through marriage, but lost primary access rights to their own lineage land at the same time. Women's inability to retain control over their own lineage land after marriage were persistently seen as a source of insecurity to women. It was therefore recommended that women had to try to maintain access to their lineage land, for example, by renting the land out or by planting cash crops. By doing so, women would not have to "re-apply" for land upon return to their own lineage in the case of widowhood or divorce.

Common means of acquiring land

Most households acquired land through male household members, mostly through inheritance from a father. In cases where female household members had acquired land it was usually through inheritance from a mother or through the allocation of land by a spouse. Most of the households who had obtained land through inheritance from a mother were located in the Uasin Gishu and Laikipia districts. This could be related to the presence of the Kikuyu communities who believe that children belong to their mothers. Very few households had obtained land through purchase, although this was also mentioned as a common means for acquiring land in the communities studied.

Most of the respondents claimed that men and women had equal opportunities to buy land, as it mainly depended on the financial standings of the individuals. Those who indicated that it was easier for men to buy land ascribed this to the fact that traditionally men had the right to own land, also men were richer than women and women were more interested in acquiring personal effects rather than land. A few respondents indicated that it was easier for women to buy land with funds obtained through their trading activities. Men generally had a more positive view of women's abilities to purchase land compared to women.

Control over land

While most men and women had access to land, few actually had control over the land they cultivated, as this was strongly linked to land ownership. Land ownership was largely vested in lineages, clans and family units. Differences, however, could be observed between the sub-regions, districts and communities due to variations in social, economic, cultural, ethnic, historic, demographic and political developments. Family units owned most of the land in the studied districts.

Control over land was largely ascribed to men by lineage, due to the higher status allocated to them by society, the advantages accorded to men through the patrilineal descent system, the leadership roles executed by men at the household and community level, and their relatively better financial positions. Furthermore, men had greater means of acquiring land through inheritance because the patrilineal inheritance system favoured men over women.

Traditional barriers to women's acquisition of land were beginning to break down in the Region. An increase was observed in land ownership among women within the communities studied due to an increased purchase of land by women and an increased receipt of land by women as gifts from parents, grandparents and/or spouses. Land ownership among women, however, was still an exception rather than the rule.

Decision-making and leadership

Men strongly dominated decision-making processes and leadership in the studied districts. They were seen as natural leaders, whereas women were considered to be too weak and vulnerable to be good leaders or major decision-makers. These perceptions down played the important roles played by women in the regions studied, often on the background, in decision-making and their capabilities of becoming successful leaders and major decision-makers. An appeal was made to give women a chance to demonstrate their capabilities rather than suppress them based on unproven assumptions. Furthermore, women were encouraged to organize themselves in their fight for a greater recognition of their capacities as leaders and for a greater involvement in decision-making processes at all levels.

Very few changes had been observed among the communities studied in terms of leadership and decision-making. It appeared that male dominance in leadership and decision-making is considered to be a fundamental principle of daily life either because change was not considered necessary or because it was considered to be too difficult to change existing traditions.

Decisions concerning communal land were generally taken by men at lineage and clan meetings where women seldom participated, and if at all, only as listeners or resource persons. Decisions on what crops to grow were generally made by both men and women. Whether these decisions were pursued strongly depended on their access to resources, such as credit, labour and land.

Changes in access to and control over land

Colonial rule introduced land policies based on land demarcations, compulsory acquisition, and cash crop production. As a result land ownership shifted from communal to individual land ownership, thus breaking down traditional systems that provided security to vulnerable groups in society, such as women and the poor. This development continued after independence due to population increases and an increased commercialization and intensification of the farming sector.

Most respondents indicated that there had been no specific changes in women's access to and control over land since independence. A few- mainly men respondents noted an increase in their access and control as women had obtained increased opportunities to buy land, their involvement in agricultural activities had increased, women had become more empowered and communities had become more gender sensitive. Other respondents noted a decrease in women's access to and control over land due to a decreased availability of land. This was ascribed to increasing population pressures, the fact that the patrilineal inheritance system favoured men over women, and the increased competition between men and women to obtain access to and control over land.

Security of land tenure and agricultural productivity

Most respondents indicated that if women were to obtain greater access to and control over land, it would have a positive impact on the (i) household food supply, (ii) household income and (iii) family welfare, due to their increased agricultural productivity. In addition, more secure land rights would give the users of the land greater control over their labour, a rationale to invest short and long term investments in the land and crops, access to extension services,

access to credit and inputs, bargaining power, and a higher status within the community. It was noted, however, that if women were to effectively and substantially increase their productivity, they also required greater access to and control over other resources, such as agricultural inputs, credit, knowledge, information and labour.

Customary inheritance practices

Access to and control over land was strongly determined in the province by customary inheritance practices, which were largely defined by tradition, family heads, and lineage/clan leaders. The patrilineal inheritance system was the dominant inheritance system applied by all the communities studied, even amongst migrants from matrilineal societies.

In theory men and women could equally benefit from land inheritance under customary law. However, in practice men were favoured over women. This bias was related to the fact that land, being a priceless commodity, was vested in men as they were considered to be responsible for the welfare of the household and community, as well as the continuity of the descent group. The main reason for restricting women's land rights was to avoid losing land to another clan or lineage through marriage. In addition, lineage and clan heads preferred to give land to people generally men who had assisted in land clearing activities or who were willing to grow cash crops. In addition, it was said that women had fewer opportunities to develop their farms due to time and financial constraints.

Perceptions of the customary inheritance system

Men have historically determined traditions related to property distribution in the study districts and remain the dominant force in maintaining these traditions through their decision-making powers. They were generally of the opinion that the customary inheritance system was good as it ensured equal access rights to family property for everyone. A large number of female respondents, however, indicated that the system could be/needed to be improved, as it favoured men over women and children.

Few respondents, especially men, indicated that women had obtained greater inheritance rights because opportunities had increased for them to inherit property under their names, women had become more aware of their rights due to the formulation of the new constitution and there was an increased awareness among communities for gender equality. Others, especially women, indicated that women's inheritance rights had worsened as the discrimination against women had increased.

Knowledge of relevant legislations affecting land in Kenya

The study registered low levels of knowledge, among both men and women, of relevant laws affecting land in Kenya. This applied to all the sub regions and all the laws discussed. Male respondents generally had more knowledge of the laws compared to female respondents. In addition, educated respondents who had completed secondary school were more aware of the contents of the laws, probably due to their greater access to and understanding of written documentation on the laws discussed. The law of the succession act and Constitution of Kenya were the best-known laws among both male and female respondents.

The laws seemed to exist mainly in name and on paper as they were seldom applied in the communities studied. A positive relationship was observed between the application of the

laws and knowledge of the laws, as laws were better known in areas where they had been applied. A low application of existing land legislations in the districts however was related to a lack of awareness and knowledge, a lack of enforcement and the fact that statutory laws were seldom perceived as usable alternatives to customary laws.

Sources for obtaining information on legislation affecting land

Information on land legislation was mainly obtained through verbal means of information transmission such as electronic mass media especially the radio, interactions with friends, relatives and key persons, and discussions on the streets. Little information was obtained through written documents.

Men acquired most of their information through electronic mass media, whereas women obtained most of their information through interactions with relatives/friends and respected persons. This difference could be related to men's greater access to and control over electronic equipment such as radios and televisions and their greater amount of leisure time. Specific programmes mainly mentioned by women, were Women on the move, Good morning Kenya, Agenda Kenya, Association of Media Women in Kenya, (AMWIK) programmes which discuss issues on gender and violence. The women and men in the communities have received counseling and legal advice from the Coalition on violence Against Women (COVAW), The Federation of Women Lawyers (FIDA) and Men for Gender Equality. Few men and women had obtained knowledge of land related legislation through court cases.

A large number of women had obtained information on land legislation through their husbands, yet none of the male respondents had obtained information through their wives. Thus, any programme trying to address women's legal rights needs to also focus on increasing men's awareness of women's legal rights. Chiefs, Old ladies and Village Elders can play an important role in the process as information disseminators and agents of change.

Land disputes

Land disputes were common among all the communities studied and were said to have a negative impact on agricultural production in the districts. The dependence of women with access to land on men led to series of conflicts between land owners and labourers. In the three areas of study, women reported that they had an average of four incidences of conflicts with men laborers who worked on their farm. Late start by male labourers constituted the highest incidence of conflicts followed by breach of agreements. Boundary disputes were the most common form of land disputes observed, followed by ownership disputes and access disputes. Boundary and ownership disputes dominated in all the districts. These land disputes were solved through customary methods of conflict resolution.

Land registration

Land registration was an uncommon practice despite the large number of land disputes observed. Main reasons for not registering land were: (i) a lack of knowledge on how to register land, (ii) no need to do so because it hadn't been done in the past, and (iii) the inability to register the land as the land did not belong to the person using it. Respondents were generally of the opinion that the existing system of property distribution and property demarcation provided

sufficient security against interference and feared that registration processes could result in a re-demarcation of land and therefore an uprooting of traditional landmarks.

Many believed that family land only needed to be registered if it was to be used for building purposes and that family heads would not sign land registration documents because it could challenge their traditional authority. Respondents who had completed secondary school generally had greater awareness of the possibility of registering land and reasons for doing so than respondents with a lower education level, even though they were also unaware of the land registration procedures.

It is remarkable that despite the large number of land disputes observed in the Region only a few community members had registered their land. It is expected that the number of land disputes will increase in the future if the population continues to grow, as predicted, and land registration remains an uncommon practice.

Use of the State court system

Although State courts were accessible to all communities studied, most disputes were solved through customary methods of conflict resolution rather than through the State court system. The State court system was considered to be too slow and only necessary if disputes could not be solved locally. The main reasons for going to court were to settle land disputes, to address theft issues, to address marriage matters, and to solve quarrels/fights. The courts were mainly used by men, as women were not supposed to challenge their husbands or other male relatives in court. Furthermore, women were reluctant to go to court because of the time it takes to solve disputes through the State court system.

Although the distance to a court was seldom mentioned as a reason for not using the court system, the study did reveal a greater use of courts by communities where courts were located within three kilometers vicinity as compared to those located beyond three kilometers. The lowest percentage of court use was observed in the most remote district included in the study, namely the Mount Elgon District.

Strategies adopted to increase awareness of women's rights

Various radio, television and legal awareness programmes have been implemented in the country to increase men and women's awareness of women's legal and human rights. These programmes and other activities undertaken by locally respected persons, civil organizations, NGOs and the Government have contributed to an increased awareness among men and women in the districts of women's rights and an increased assertiveness among women.

If statutory laws, which support equal rights for men and women, are to further strengthen women's rights in Kenya, then an increased awareness of the laws is required among men and women as well as an increased application of the laws. Legal services need to be offered at a low cost to women, if this restricts them from using these services. State courts need to become more accessible to women so they can enforce rights stated in the Constitution and legislation. Existing laws need to be reviewed from a gender perspective to determine whether they address the needs of both men and women. Finally, opportunities need to be developed for women to become more involved in decision-making processes at all levels.

3.1.4 International legal frameworks

To protect women's rights, the international community has created specific standards set in different legal foundations. The provisions concerning women's rights to natural resources are embodied in human rights law, in international environmental law and in soft law instruments

Under International human rights law, women have a right to own and administer property without discrimination⁴⁹. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) brings together all conventions and treaties that protected and promoted the rights of women in particularly vulnerable areas into a single instrument.⁵⁰ The CEDAW lays the basic principles on how women's land rights should be treated in a rights-based approach. Specifically article 14 of the CEDAW obliges state parties to ensure equal treatment between men and women in land and agrarian reform. In order to achieve real equality, the CEDAW requires that marriage and inheritance laws with regard to land rights should be based on equality. Article 16 of the CEDAW also implies that land tenure reform must ensure women's property rights during marriage, at divorce and in the event of death of the husband. Kenya has ratified the CEDAW. The question is; is Kenya doing what it agreed to do? By signing the CEDAW, Kenya agreed to incorporate the principles of equality of men and women in their legal systems, to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women.

However, by simply signing a policy statement containing a general principle of gender equity does not guarantee women's equal access to and control over land in practice. In Kenya the National land policy document mentions gender equity in land as a critical area but never materializes at the end of the day.

Soft-law instruments have been adopted by the human rights bodies of the United Nations. For instance, Resolution 15 (1998) of the Sub-Commission on the Promotion and Protection of Human Rights entitled "Women and the Right to Land, Property and Adequate Housing" stated that discrimination against women with respect to acquiring and securing land constitutes a violation of human rights law, and urged governments to amend and/or repeal discriminatory laws and policies and to encourage the transformation of discriminatory customs and traditions (paras. 1 and 3).

As for international environmental law, the preamble of the Convention on Biological Diversity (CBD)⁵¹ recognizes women's "vital role" in the conservation and sustainable use of biodiversity, and affirms the "need" for their participation in policies concerning these issues (Para. 13). Gender-specific provisions are also embodied in the 1994 Convention to Combat Desertification,⁵² which provides for the facilitation of women's participation in efforts to combat desertification at all levels, and specifically for their effective participation in national action programmes and as an instrument for capacity building (arts. 5, 10 and 19). Women's participation in national action programmes is also required by article 8 of the Regional Implementation Annex for Africa. The annexes for Asia, Latin America and the Northern Mediterranean do not specifically mention women, although articles 4 and 5 respectively refer to article 10 of the Convention which envisages women's participation in national action programmes.

Among Rio soft-law instruments, principle 20 of the Rio Declaration⁵³ states that "women have a vital role in environmental management and development" and that "their

full participation is therefore essential to achieve sustainable development⁷. The Non-Legally Binding Authoritative Statement of Principles on Forests calls for women's participation in the planning, development and implementation of national forest policies and in the management, conservation and sustainable development of forests (principles 2(d) and 5(b)). Moreover, Chapter 24 of Agenda 21⁵⁴ is specifically devoted to gender.

Women's rights to natural resources have also been addressed in soft-law documents adopted by other international conferences. The Beijing Platform for Action envisages legislative and administrative reforms to ensure gender equality in access to natural resources, including inheritance and ownership rights (para. 61(b)). Similarly, the World Food Summit Plan of Action affirms the objective of ensuring gender equality and women empowerment (objective 1.3) and envisages measures to enhance women's access to natural resources (para. 16(b)). The Durban world summit on sustainable development, Johannesburg, 2002, confirmed the strong link between the gendered nature of violations of human rights and advancement of women's rights.

3.1.5 National laws

Kenyan property law does not discriminate on the basis of sex/gender. Moreover, under the Contract Act, women have contractual capacity to acquire and administer property. Family law varies according to religious belonging (Marriage Act; Mohammedan Marriage, Divorce and Succession Act; Hindu Marriage and Divorce Act; African Christian Marriage and Divorce Act; customary marriages are recognized under section 37 of the Marriage Act⁵⁵ However, the property provisions are contained in the Married Women's Property Acts of 1870-1884, which are English statutes now having general application. Under these Acts, a married woman has the right to own property, and can sue her husband to protect her rights.

Under the Law of Succession Act of 1972⁵⁶, female and male children have the same succession rights, and widows have a life interest in the intestate estate which they lose with remarriage. However, inheritance of agricultural lands, crops and livestock continues to be governed by customary law (sec. 33), according to which wives and daughters usually do not inherit family property.⁵⁷ In rural areas, it is widespread practice for fathers to leave land to their sons, in the expectation that daughters would be cared for by their husbands⁵⁸. Land tenure in Kenya encompasses individual private property, group private property, state property, and land held in trust by the state. As for private property, land ownership by women is rare. Earlier studies done in Kajiado, Kisumu, Mombasa, and Muranga found that the majority of women do not own any land.⁵⁹

A considerable amount of legislation governs trust land, which accounts for some 90 percent of the total land. In these areas, land titles are vested with county councils, which are to give effect to land rights existing under customary law although they can also allocate land to non-residents and persons without customary title.⁶⁰ Moreover, a land tenure reform to convert customary rights into freehold was adopted by the colonial authority and continued by the post-independence government.⁶¹ Under these norms, land has been registered systematically - not upon application by landholders) in three phases: adjudication, i.e. ascertainment of existing customary land rights; consolidation, that is aggregation of fragmented holdings - with landholders exchanging dispersed for contiguous plots; registration, that is recording of titles over consolidated plots and their conversion into freehold. As for grazing land, the Land

Act of 1968 allows the registration of collective property ranging from families to “tribes” through the creation of “group ranches”; however, many group ranches have subsequently been divided. Implementation of the Swynnerton Plan is still underway.

These norms do not formally discriminate against women. For instance, the Registered Land Act does not exclude women from possible titleholders, and uses gender neutral words like “proprietor”. However, the land tenure reform has affected women’s land rights. The reform intervened in a context where customary law was evolving towards increasing individualization, with an erosion of women’s customary land rights.⁶² In this context, the implementation of the land registration programme, carried out in a period in which gender was not in the development agenda, accelerated the individualization process and further curtailed women’s land rights.

First, land adjudication committees were male-dominated; in Luoland, for instance, all adjudication committee members were male.⁶³ Moreover, although all land rights, including under customary law, had to be recorded during adjudication committees lacked skills and time to do so. Registration was usually made to male household heads, thereby undermining women’s unregistered secondary rights. In Kanyamkago, for instance, only 7 percent of the plots were registered to women as joint or exclusive right-holders, and 4 percent to women as exclusive owners.⁶⁴ widespread non-registration of women’s rights is also documented for the Kikuyu and the Maasai.

On the other hand, some women gained from registration. For instance, widows sometimes registered land in their name, instead of returning it to the dead husband’s family under customary law.⁶⁵ Moreover, there is evidence that women’s customary secondary rights for example access to men’s fields to harvest trees and graze livestock are still de facto recognized. In addition, the establishment of a gender neutral land market enabled women to purchase land on a formally equal position to men, abolishing customary limits to women’s land rights. Indeed, there are reports of women who have purchased land, both as individuals and in groups, and registered it in their name. However, women’s constrained access to capital credit, employment in the formal sector, etc. has limited their ability to gain access to land through purchases

The operation of Land Control Boards is also relevant for women’s land rights. Under the Land Control Act of 1967, land transactions require the approval of the competent Land Control Board, which decides on the basis of economic and social criteria. On the one hand, the Constitution states that the principle of non-discrimination by public authorities does not apply to the activity of Land Control Boards⁶⁶. As for the composition of the Boards, no women representation is specifically required, and more than one-half of the board members must be “owners or occupiers of agricultural land within the province”⁶⁷ given the little share of land owned or occupied by women, this provision may constitute indirect discrimination.

According to a key informant, Land Control Boards have in many cases protected women’s land rights, e.g. by hearing the views of the spouse before approving land transactions and by refusing approval for transactions that ignored unregistered land interests. This mechanism reduced the negative effects of the immunity to challenge for mistake or fraud enjoyed by first registrations under section 143(1) of the Registered Land Act. However, many transactions are in practice carried out even when Land Control Boards refuse approval.

Overall, women's land rights in Kenya are limited. The extent of these rights is determined by the interplay of customary and statutory law. Customary rules are invoked by women to challenge registration benefiting exclusively men, and by men to limit the rights acquired by women under statutory succession law.

3.1.6 Interrelationship of land conflicts and gender

The argument put forward by the eco-feminists that patriarchal philosophies are harmful to women children and other living things is true. There is typically a close link between conflict and Land tenure issues which cannot be isolated from gender. The genders relations of access to and control over land in contemporary Kenya can be viewed as a relationship where by the parties are in situations of conflict but do not realize it. The victims in this case do not realize that the structure of their relationship is itself generating conflict. In Kenya, women play crucial roles in agriculture as producers and providers of food. More than 80 % of the women in Kenya live in rural areas, playing multifaceted roles in the rural sector as smallholder farmers, income earners and family caretakers.⁶⁸ Women contribute most of the labour required for cultivation of food crops on family holdings and have increasingly also contributed much of the labour in the small and medium size holdings in the production of cash crops. It is estimated that 27% of the small holdings in Kenya are solely managed by women while another 47% of the holdings are managed by women in the absence of their husbands.⁶⁹ The woman is more of a "happy slave"

The study findings indicate that women have access to land, but their security of tenure is often precarious. Under customary law, men and women usually have clearly defined rights to land, trees and water as well as usufruct rights, bestowed on them by the community elders. Women thus retain control over the land they use and its products. In the past we have witnessed traditional communal rights being replaced by land tenure systems based on exclusive use, ownership and titling which tend to erode the rights of vulnerable groups, including women and minority, ethnic or nomadic groups. Women's inequality of access to land is thus as a result of the increase in purchase of legal titles, in line with the British legal tradition, that linked the use of the land with individual property. It also stemmed from the fact that land settlement schemes granted resources mainly to male heads of household, who were perceived to be the ones responsible for the sustenance of their family. This ignored the fact that in many parts of the world it is in fact the women farmers who are largely responsible for food production and security.

Just as Makumi Mwangi ponders over it, '*if the situation of women regarding land and property rights, whether under customary or statutory law is precarious in times of peace, it is even more so in situations of conflict,*'⁷⁰ In situations of conflict, all the traditional and cultural support systems existing before the conflict break down. Moreover, because most of these women have no access to a title deed — which could protect them — they are unable to assert any rights over the land or property.

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 as mentioned earlier are governed by the Married Women's Property Act⁷¹, 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 Act⁷² and the Magistrates Courts Act⁷³ 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.

Worse still, although many statutory provisions guarantee women equal rights with regard to land, women frequently cannot enforce their modern rights as they are caught in personal situations which do not allow them to go against the customary law, even if that is in contradiction to statutory law. Often women are not represented in decision making bodies, because their social security network depends on peace and harmony within the family and village. In some cases such inability to evoke modern statutory law effectively means that women may even lose the land they obtained in land reform to men again.

Another legal impediment to the realization of women's rights to land is the legal pluralism. Legal pluralism refers to a legal system where two systems of law such as the statutory law and customary law co exist. There exists a conflict when the two are used at the same time. For example the pluralism of authority over law can allow people to choose the legal framework that provides them with the best claim to property, a process known as 'forum shopping'. As much as it can be beneficial when it comes to allowing people to adapt to social, political and environmental changes, and by allowing the existence of diverse systems of land tenure that have evolved to meet local conditions, there are those who will take advantage over the widows who cannot defend themselves and deny them the land that their dead spouses owned.⁷⁴ It becomes more complicated when the very learned friends still from their clients—the widowed women their land just because they cannot read and have to depend on them wholly for legal advice.

Even in those instances where law appears to protect women's right to land regardless of marital status, obstacles still appear because law is open to judicial interpretation. For example the statutory law pertaining to land ownership appears gender neutral. It does not explicitly refer to women and/or refer to all persons or every individual or some other generic grouping. The absence of women in the legislation can leave their rights to land open to the discretion of a judge. Needless to say, gender neutral laws applied by male judges who are the predominant in our courts, applied in a social and cultural context where women are relegated to the private realm accorded second class status in this society and regarded as minors often results in legal decisions which do not benefit women.⁷⁵

Beyond legislation, the legal system and process itself pose formidable barriers to women's rights to land. In Kenya, the proposed new constitution and the statutory law provide protection

of women's rights to land but these same women have to overcome two serious obstacles before they can even make a legal claim. One, is that they must be apprised of their rights and secondly, they must believe in their own entitlement to these rights. Overcoming these obstacles simply leads to more court process which are usually complicated, expensive, time consuming and presume literacy and legal knowledge which few women possess. Moreover, courts are often geographically inaccessible.

In post conflict situations, impartial procedures for resolving disputes are often not available. The court systems may not exist, or they may be so overburdened or ineffective that they do not provide a remedy. Corruption may be widespread. Alternative dispute resolution mechanisms may not exist. The rules of making judgments may not be clear.

Competition over the same piece of land for use to some degree causes tension among the users. For instance with the advent of commercialization of agriculture and the subsequent demand for land has eroded women's traditional land rights. Before the introduction of cash crops, women, who usually produce the bulk of food crops, were traditionally entitled to land. Once cash crops were introduced, however, the same right to land with high potential was claimed by the men who grow them. As cash crops are perceived to be more profitable than food crops, competition for land use rights results between men and women which can lead to a progressive marginalization of women farmers' formerly cultivating fertile land. Pheko asserts that "The Marketization of Land is the most destructive force that women are experiencing and will experience in even more profound ways in future"⁷⁶

Women have been known to dominate nature. Their lack of access to and control over productive resources such as land is directly related to women's poverty worldwide.⁷⁷ Simply put, for women land serves as security against poverty, a means to basic needs.⁷⁸ The study findings show for example that households with only marginal plots of land are likely to have significant lower risk of absolute poverty than landless households. Right over access to and control over land

have a direct and indirect bearing on poverty. The direct link to poverty stems from production possibilities and the indirect include facilitating access to credit from institutional and private sources and serving as assets that can be sold. The ownership of land can increase women's status within her community and increase her bargaining power within her household.

Without rights over access to and control over land, with labour which is difficult to obtain and low pay, women do not have the means to meet subsistence needs for themselves and their families. In turn women have to rely on the goodwill of their spouses or male relatives to share their earnings and household resources. This does not work for the women. When male earners are present in the household they do not necessarily share their income with the women in the household. The men instead choose to retain much of their earnings for their own enjoyment creating a poverty trap.

In those situations where women are largely entitled to own land, financial constraints make purchasing land impossible. As it stands local financial institutions and lending agents do little to assist women with purchasing land. Their economic and financial policies, priorities and procedures commonly employed for loans and other forms of credit have put women at a significant disadvantage in acquiring credit for land. The constraints on women are both societal and operational and arise from a mix of both social practices and institutional

practices. For example, the process of applying for a loan, like the judicial process assumes literacy levels that few women possess.

Even if women could apply, other barriers emerge. Loans taken to finance dwelling units are often large⁷⁹ entail long-term repayment, often require legal-tenure documentation, and cover only a percentage of the price. On the basis of having to safeguard their capital, conventional lending institutions require proof of an adequate and dependable income as well as ownership of the property. In those countries where women are classified as minors and/or cannot engage in contractual agreements, they cannot acquire credit or can only do so on a husband's or male relative's guarantee. While there are exceptions to these lending practices, on the whole, credit and lending agencies provide no solution to women's lack of rights in, access to and control over land.

Women's lack of rights in, access to and control over land can also contribute to women's experiences of violence. Without security of tenure it is difficult for women to leave abusive and violent households. At the same time, a lack of security of tenure means that women can be forcibly evicted from their homes and lands on the whim of an angry spouse or male relative⁸⁰ upon marriage breakdown which leads women to homelessness, landlessness and destitution exposing them further to violence.

Women's lack of access to land or property in the reconstruction period after a conflict not only means that they are further impoverished but also that the conditions which led to the conflict in the first place are perpetuated and further entrenched. As the UN High Commissioner for Refugees, Mrs. Sadako Ogata,⁸¹ stated in her opening address at the Kigali consultation, societies not only have a "moral obligation" to respect the right of women to inheritance and ownership of land and property, but they also have a concrete interest in upholding such a right. "Disregarding (women's) ownership rights marginalizes them, thus depriving a large part of the community of its means of livelihood. This creates poverty, which causes — in turn — new tensions and conflicts," explained Mrs. Ogata.

Resettlement schemes or conflicts can displace people from their homes and Lands. Tension and violence often accompany the initial displacement. According to UNCHS - Habitat, even though the immediate reason for displacement of populations is often civil war, overpopulation linked to land degradation and scarcity of arable land is often a prime reason for sustained unrest. In many countries affected by civil strife, the whole system of land tenure breaks down. This can trigger new conflicts and dissuade farmers from resuming production and prevent displaced populations from returning home.

Men react to displacement differently from Women. The loss of property and lack of alternative employment reduces men's capacity to provide for the family. They become demoralized, breakdown, less likely to seek counseling and some end up taking drugs. Some men abandon their wives as experienced in the land clashes in Mt Elgon region. A woman respondent said that her husband who had worked so hard on their farm, built a home for them, and used the proceeds from the sale of the Irish potatoes and Onions to educate their children could not come to terms with effects of the land clashes. The man moved to a slum in Eldoret where he re-married a younger wife to start all over again.

Displaced women have few or no opportunities to continue their livelihoods and often have no access to remunerative work. They are pushed into menial and marginalized labour as maids and servants, construction labourers and prostitutes, all highly unorganized and socially

humiliating roles. They are forced to walk miles from villages leaving behind their children to collect produce or find wage labour and are often forced to sell all their livestock. In many cases there is seasonal migration leading to work insecurity and break up of family relations and exposing women to additional social hazards.

Daily survival in refugee camps and those established for the internally displaced is not easy. As the UN Special Representative on Internally Displaced Persons states: *Internally displaced women are particularly vulnerable to gender-specific violence as the protection afforded to them by their homes and communities disappears and the stress of displacement becomes manifest in the family unit ...* Gender based discrimination and unequal treatment in allowing access to food, water, clothing, housing, adequate medical care and sanitation often undermines the satisfaction of these subsistence needs. This is particularly serious in camp situations where these needs are acute.⁸²

During conflict women fleeing violence face the danger of physical and sexual violence including torture, humiliating interrogation procedures, rape and trauma of watching their loved ones being killed or raped and their property looted or destroyed. Overtime the cumulative effects of personal loss may result in depression and physical deterioration. Those who have been displaced for more than a few months suffer from post traumatic stress. Women are the first to be affected by infrastructure breakdown and carry the ever increasing burden of caring and providing for their families, the injured and the wounded. In conflicts throughout the world, violence against women has been used as a weapon of war⁸³, not just to violate the women but to humiliate the men of the other side and to erode the social and moral fabric of entire communities across generations.

Accessing food and generating an income can be particularly difficult in the face of food blockades and the destruction or looting of seed stocks, foodstuffs, crops, livestock, and drinking water installations. Women also find it difficult to run family farms without men's labour and if transportation systems have been destroyed. In turn, although the armed conflict provides women with an opportunity to make decisions regarding the running of the household and the cultivating of lands, the conflict situation makes it nearly impossible for women to survive economically and emotionally under incredibly harsh conditions.

The land conflict affects the young men as well. They do not regularly seek immediate rewards in illegal activities and looting, as long as the society they live in can provide for their livelihood which is based on land related activities. This is a social position which they have been culturally taught to expect as men in the society. Due to lack of opportunities to gain assets, cattle and cash necessary to enter married life, many young men are prevented from starting their families and getting recognition in the society. Moreover they are not able to behave according to the norms of masculinity. Their inability often means disempowerment in the public sphere to which some retaliate by exercising power in the domestic sphere over their children and wives.

Kenya's land reform policy is aimed at changing customary land tenure into individual ownership. The land tenure reform legislation provides for registration of land titles in the name of the head of the men who in this case are usually men. The legal rights of a woman are not specified in this individual tenure system. In an agrarian economy such as Kenya land is the most valuable form of property for its economic as well as its political and symbolic importance. It is a productive, wealth creating and livelihood sustaining asset. Many people

value land because it provides identity and roots within the village and in people's minds land has a durability and permanence which no other asset possesses.

Women may in fact be worse off under the legal land tenure system because not only is it nearly impossible for women to buy land, but also, without ownership rights, they are prohibited from using land rights which they have under customary law.⁸⁴ Individualized and private ownership transfers the few rights, such as cultivation rights, that women had to land under customary law to a few men who are able to claim all rights to land when they possess land titles.

Insecure land tenure is linked to poor land use which in turn leads to environmental degradation. Lack of clear rights can reduce the incentive to implement long term resource measures. In the case of privately held land for example, tenant farmers, with short term leases may not undertake soil protection measures, plant trees and improve pasture if they do not hold the land long enough to receive the benefits of their investments. Women, the poor and other marginalized groups are less likely to invest time and resources or adopt environmentally sustainable farming practices on land they do not own. This factor affects both the men and women equally.

Without secure access to and control over natural resources such as land, water, livestock, and trees, women are less likely to be able to cope with permanent climatic change or willing to make investments in disaster mitigation measures. Deforestation due to inappropriate agricultural practices or weak tenure rights degrades the land. Women are usually more vulnerable to poverty than men and therefore have gender specific needs in climate change driven scenarios.

Water rights are linked to land tenure. Under section 27(a) of the Registered Land Act, registration vests in the titleholder not only "absolute ownership of the land", but also "rights appurtenant thereto", including water rights. Under the Water Act, water ownership is vested in the state, and individuals can only have usufruct rights obtainable through a permit issued by the competent ministry. However, it is usually landowners that apply for permits for irrigation purposes, and some domestic uses by riparian landowners do not require a permit. Therefore, the gender-biased land distribution entails unequal water rights⁸⁵

Under customary law, although women usually cannot plant trees for example among the Luo, they have other well-established tree rights for example the right to harvest fuel wood and fruit from communal and men-owned land. These rights are highly differentiated on the basis of age with older women usually having stronger tree rights and, in polygamous households, of marriage order. For instance, among the Luo of Siaya District, while citrus trees are owned by men, the fruits belong to the first wife. However, women's customary rights of access and collection in common property lands are being eroded by agricultural commercialization processes, involving privatization of the commons usually to benefit male household heads.⁸⁶

These restrictions on women's land rights hinder their ability to access other resources and information. Unable to use land as collateral to obtain loans, women have difficulty in adopting new technology and hiring labor when needed. In addition, women may not be able to access other supportive services, such as extension programs and training on innovative land management approaches. Studies from many countries show that agricultural extension agents have traditionally focused on male farmers, even where men are working off the farm and women are the primary cultivators.

Liberalization has brought changes in the agricultural sector. The liberalized market only aims at producing agricultural commodities for exports to regions with high purchasing power. This in itself has an impact on the women farmers. These agricultural commodities are produced for the world market where production costs are lowest and labour is cheap. In Kenya export crops like Flowers, exotic fruits and vegetables take high preference resulting in the displacement of local small farmers and small scale food producers many of whom are women. Women labour continue to be exploited as workers for these exports while the bulk of that money goes to men. Borrowing from the arguments of Burton,⁸⁷ a founder and champion of World society school of International relations, who reasons out that the imperative to war does not come from the nature of the state or its external relations, but from the way in which the environment acts on individual. These very women who spend more of their time in tending the crop are denied the fruits of their labour. Women have certain needs they try to fulfill, and that it is the frustration of these needs whether individually or collectively that leads to violent conflict within the system.

The lack of land rights by women and girls indicates that they are victims of discrimination since land is considered the most fundamental resource to women's living conditions economic empowerment and to some extent their struggle to equity and equality within a patriarchal society. Without rights to land, women's economic and physical security is compromised. They are deprived with a reliable resource of food and further curtailed access to other inputs, especially credit, necessary for carrying out productive activities.

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.

Land, and property rights are recognized as women's human rights both directly and indirectly at the international level, but despite the legal provisions in the CEDAW and the general recommendations expounding on these provisions, the international community has predominantly focused on women's right to be free from discrimination with respect to inheritance practices, as opposed to articulating women's rights to land, and property as rights unto themselves.

But an argument has been advanced by some feminists that situations of conflict create spaces for women to go out, earn a living, become more independent, make decisions and act more freely. Also as a result of conflict, there has been an emergence of women's organizations that are focused on women's livelihood issues including women's rights to land. These organizations have been instrumental in promoting women's interests so that they appear on the political agenda and are important to women's overall empowerment.

Daniel Buckles, a senior program specialist at IDRC and editor of *Cultivating Peace*⁸⁸ sees conflict as a catalyst for positive social change. In nonviolent settings, conflict can be

a visible demonstration of a society adapting to a new political, economic, and physical environment. For marginalized groups seeking to redress injustices or inequities in resource distribution, conflict is an inherent feature of their struggle for change and can provide the leverage needed to assert their claims. In the Copán Valley of Honduras, for example, conflict provided the nudge needed to start negotiations between the Chorti, the government, and large landowners. Likewise, in the Galapagos Islands, threats by island fishers to kidnap foreign tourists made international headlines and forced the Ecuadorian government to recognize local groups and grant them power to set their own goals for sustainable resource use in the national park area.

Although confrontation can lead to violence, avoiding and shunning away can be equally dangerous because unresolved problems may flare up again, often with renewed vigour. The key is not necessarily to resolve conflict, since that may not be possible, but to manage the land conflict so that it achieves change instead of leading to violence. The management of the land conflict may, in fact, offer a better chance at achieving a more lasting and meaningful peace.

CHAPTER FOUR

4.1 PEACE AND POLICY INTERVENTIONS

4.1.1 Peace interventions

The United Nations Security Council resolution 1325 on women, peace and security which is a landmark resolution that was adopted in 2000 demands the world action to redress the severe inequities, injustices, and violations encountered by women and girls in conflict affected areas. It also emphasizes the important role of women in every stage of peace processes, in peace making, peace building and peace keeping. It also urges the inclusion of gender perspectives in all post-conflict legal, judicial and constitutional process.

The causes of land conflicts are numerous but their nature is largely systematic. It is clear from the Kenyan example that there are many conflicts about women's land 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. Women have not been adequately involved in conflict management yet they have the potential to contribute to land conflicts management institutions. They have a good understanding of the issues at stake and may help solve land disputes.

To arrive at a peace agreement, peace committees should come up with strategies which are locally owned and culturally appropriate and not imposed from outside. Such strategies could include the use of mixed and single sex groups; prepare women before they present and discuss proposals with men. This is because most women are not used to speaking in public or in front of men. The use of local or external facilitator is also essential in supporting the whole process. The role of the external facilitator is to encourage discussions about local traditions and culture. Since he is a cultural outsider he/she can probe into the justification underpinning certain beliefs and attitudes more easily than a local facilitator. The natives would expect the local facilitator to know the local culture and not to question accepted practices.

Providing legal assistance or training para-legals so that land poor households have access to legal assistance to claim and defend their rights should be considered for peaceful co-existence. There is need to enforce to rule of law where the poor households are confident that the state will protect their legal entitlements to land, and that whenever agrarian reforms occur, they be given title deeds.

The law should provide for some alternative methods of resolving these conflicts since there are no laws dealing with specific cases of conflict situations. There should be one that would provide that an intervening conflict will not extinguish land rights of women. Such laws should provide a higher proof by the new owners of the legality of the transaction.

Despite an end to official fighting, conflict and tensions remain and continue to affect both men and women. The root causes to these land conflicts are multidimensional, involving economy, social and political forces. They must therefore not only be addressed within the

agendas of peace, and legal reforms but within a holistic framework that integrates human security, development and human rights.

The society should be answerable to women and men for crimes committed against them, by punishing those responsible and ensuring redress for victims.

It is crucial that women's voices are heard and their work on the ground valued, recognized and supported. After all it is they who bear the brunt of conflicts and decisions should be made with them and not for them. However, peace, if it is to be sustainable, must be developed at a more grassroots level and, at this level, the participation of women must be significant.

The relationship between access to land and the livelihood strategies of people should be analyzed. The analysis of the need for land by returning refugees and IDP'S should consider seasonal access to land. The availability of food, and the need for it will vary from one season to another. Issues such as restitution, compensation, eviction, and resettlement must be considered. The analysis should address operational issues including; land administration agencies and their mandates; staffing levels of agencies; availability and condition of land records.

Need to establish sound land management systems in urban as well as rural areas for successful repatriation programmes and for maintaining peace and stability.

Need to establish either a dual system of private and customary land tenure or simply a modification to customary tenure schemes. Formal land tenure systems may co-exist with customary tenure systems. In such cases, customary tenure in rural areas and especially in more remote locations. Customary institutions may survive the conflict, possibly in altered forms.

Women's organizations and others must monitor government compliance with international legal obligations. Women's organizations and others must initiate campaigns to pressure governments into ratifying all international and regional human rights conventions. They should also venture to exploit a human rights framework in their work. Governments as well as NGOs must ensure that women and women's organizations are included in the negotiation of peace agreements and in the reconstruction process from the outset and not as an afterthought.

National and local organizations must document the impact of the privatization of land tenure systems on women. National organizations must also conduct further research on other types of land tenure systems, with a view to determining which are the most viable for women's livelihood.

Many conflicts have shown in recent years that long-lasting peace is difficult to achieve and is unlikely to be sustained if the underlying causes of the conflict are not addressed. Feminist theory and gender analysis has also questioned how relevant notions of peace and security are if women remain socially, economically and politically marginalized in times of peace and still vulnerable to violence. Whilst it is not within the mandate of development agencies to become arbiters of the distribution of political power and economic resources, there should be an awareness of the winners and losers in conflict situations and an attempt to redress some of these inequalities. This is vital if future conflict is to be averted.

Post conflict interventions in most cases have always dealt with practical problems of the return of refugees and the rebuilding of infrastructure and reestablishment of services

and restoring productive capacities. The underlying factors which led to the conflict and to establish trust in the society and means of communication and negotiation which do not revolve around violence need to be addressed too.

All sectors of society must receive human rights education with a focus on women's rights and on economic, social and cultural rights including women's rights to land. Where appropriate, human rights education should also focus on local, national, regional and international legal and other mechanisms to enforce these rights.

Male-defined custom and tradition must be transformed. To achieve this, national organizations must explore strategies for effecting cultural change. This research could then be used to develop a socio-legal framework which accommodates legal pluralism but which does not violate women's human rights to land. To stop all forms of violence against women, all available media should be mobilized to cultivate a social attitude and climate against such totally unacceptable human behaviour.

At the international level, women's rights to land must be more firmly established as human rights. To this end, human rights lawyers and activists should work together to delineate and develop a more holistic legal framework to support the claim that women's rights to land, are human rights. Women's organizations must document violations of women's rights to land.

United Nations agencies and governmental and non-governmental aid agencies must re-examine their programmes through a gender lens and then coordinate and restructure efforts to ensure that women's interests and entitlements with respect to land, play a defining role in their work plans and activities. Relevant UN agencies and international human rights organizations and legal experts must contribute to research on the impact of privatization of land on women.

The Women for Peace Network is a vital international initiative which requires ongoing support both in terms of financial and moral support. To enhance its effectiveness, this Network should forge alliances with other international networks focused on women and conflict.

The international community should not only listen to national stakeholders, but respect and support national ownership of implementation strategies in order to provide the most effective assistance and support to communities emerging in conflict.

In post conflict transition phases, women must be strongly encouraged to participate and provided the resources to do so, in the development of legal, judicial and constitutional structures to promote gender equality and justice.

4.1.2 Policy interventions

To create coherent systems of policies, law and institutions which ensure a nationally appropriate gender balance in land tenure is not easy. For a land policy to bear truly gender balanced results, its entire content matter as well as the laws and institutions to support it have to be designed in such a way that both women and men benefit equally or at least have the same benefit. The development and implementation of these policies should be a political, social, cultural and economic priority. The land tenure should be dealt with in a broad policy framework as distinct from a series of separate issues. This section highlights the policies that could be formulated in order to mainstream gender issues in land tenure.

It is worth the effort for the mandate of the government to allow it to undertake quick and decisive actions where land issues are concerned. To begin with, a comparison is made between the Current constitution and the proposed constitution on how both of them address the genders issues over land in Kenya.

The current constitution in Kenya

The current constitution provides that all Kenyans are entitled to fundamental rights and freedoms, whatever their sex, and prohibits laws that discriminate on the basis of sex. However, article 82(4) exempts certain laws from the prohibition against discrimination. It permits discrimination “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” and with respect to “the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.” Thus, in areas vital to women’s property rights, such as marriage, inheritance, and the application of customary law, discrimination is condoned. In addition, article 82(6) provides that if an official body controlling transactions in agricultural land (such as a land control board) gives or withholds consent to a transaction, this decision may not be deemed discriminatory. In other words, if a land control board issues a decision permitting a man to sell family agricultural land, his wife cannot challenge that decision as discriminatory.

The proposed new constitution of Kenya

The proposed new constitution addresses many of the current constitution’s shortcomings. If enacted and implemented, it would constitute a profound step forward for Kenyan women and their families and communities.

The draft constitution prohibits discrimination on the basis of sex and marital status in article 37(1), which provides:

Article 37 (Freedom from Discrimination)

(1) The state shall not discriminate directly or indirectly against any person on any grounds, including race, sex, pregnancy, marital status, health status ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The proposed new constitution provides for equal rights relating to marriage and its dissolution. Article 42(4) provides:

Article 42 (The Family)

(4) Parties to a marriage are entitled to equal rights in relation to the marriage at the time of the marriage, during the marriage, and at the dissolution of their marriage.

The proposed new constitution guarantees women’s right to equal treatment with men, including equal rights to inherit, have access to, and control property and prohibits any law, culture, custom, or tradition that undermines women’s dignity, welfare, interest, or status. Article 38 provides:

Article 38 (Gender)

(1) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social activities.

- (2) Women and men have an equal right to inherit, have access to and manage property.
- (3) Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.
- (4) Despite clause (1) The state shall -
 - (a) protect women and their rights, taking into account their unique status and natural maternal role in society; and
 - (b) provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realize their full potential and advancement.

The proposed new constitution guarantees every person the right to acquire and own property in article 78(1), which provides:

Article 78 (Land and Property)

- (1) Land is Kenya's primary resource and the basis of livelihood for the people and shall be held, used and managed in a manner which is equitable, efficient, productive and sustainable.
- (2) The state shall define and keep under review a national land policy ensuring
 - a. Equitable access to land and associated resources
 - b. Security of land rights for all land holders users and occupiers in good faith
 - c. Sustainable and productive management of land resources
 - d. Transparent and cost effective administration of land
 - e. Sound conservation and protection of ecological sensitive areas
 - f. Elimination of gender discrimination in laws, regulations, customs and practices related to land and property in land and
 - g. Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this constitution.

The proposed new constitution requires that parliament enact laws to regulate the recognition and protection of matrimonial property and in particular, the matrimonial home during and at the termination of marriage.

Article 86 (Legislation on land)

(d) regulate the recognition and protection of matrimonial property and in particular; the matrimonial home during and at the termination of marriage.

(j) protect the dependants of the deceased persons holding interests in any land including the interests of spouses in actual occupation of land

It is not certain that the new proposed constitution will be voted in. If and when it is passed then we expect that all laws which discriminate against women with respect to land, shall be repealed, struck down or amended to conform to international human rights law.

Laws which privilege customary law over constitutionally protected anti-discrimination law in the context of land, matters shall also be repealed or struck down. But this shall not be

easy. Traditions die hard. Already there is controversy over the girl child inheriting land. The member of parliament for Elgeyo Marakwet Jebii Kilimo stated that the proposed constitution does not conform with the culture of her people and that they cannot accept it. It is Ironical that the member of parliament who has been championing for the rights of the girl child could take that direction.

New statutes are required. The customary law is biased and just as elsewhere in Africa, Kenya's customary laws will die hard. There is need for legislation that defends firm land rights for women. Indeed it is worth remembering that even good legislations are not enough in Kenya in the absence of civic and gender awareness, and a supportive democratic government

The land tenure and land administration specialists are likely to encounter a wide range of policy issues when formulating a gender sensitive national land policy. These issues are;

- The positive aspects of the customary norms which ensure women's rights to land and enhance security of tenure over family or community land are not recognized by statutory land law.
- Women's rights to land continue to be determined by their marital status and by laws of inheritance, succession and divorce. Women have limited economic resources in their hands and also lack decision making power at the household level to buy land independently of their spouses.
- Trust lands are increasingly being privatized into individual hands and title deeds given to individual male owners. This has an adverse effect on the pastoral communities. Women access these lands for food, fodder, firewood, building material, medicine and herbs.
- Culture and customs continue to support men inheritance rights to land. Women are regarded as strangers in their natal home and also in their marital clan. Fathers transfer land to son's, wife's inheritance rights to husbands land is not a guarantee, while widows are often dispossessed by their in-laws and rendered homeless. The adjudication and land titling process is being conducted in favour of the already established male inheritance patterns thereby denying women their share in family land.
- The Islamic law recognizes women's rights of inheritance although her share is usually smaller than that of a male relative. On marriage to a man in another village, women are often obliged to leave land in the hands of male relatives and may find it difficult to exercise their rights over land.
- Provisions for succession and Matrimonial Property. Although the law of succession Act provides for wives and all children, including daughters the right to inherit property and titles, specific soci-cultural factors hinders them from enjoying this right. Often women have been forced to surrender their titles to male relatives, relinquish their inheritance rights or sell land cheaply as a result of social pressure.
- Land reforms are based on liberalized land markets where purchases are directly negotiated with the land owners who are usually male household heads based on the principle of willing buyer willing seller. Registered land titles in individual male names also implies that the man has a theoretical and practical legal right to dispose the land by sale or any other means without necessary recourse to community elders.

- In the post conflict situation the issue of provision of emergency shelter and housing to those who have been displaced from their land and homes is a factor on its own. There is need to develop a housing strategy for returning refugees and Internally displaced persons
- Unauthorized occupations of land are an unavoidable part of post-conflict circumstances. They may not necessarily be a problem and may provide shelter and a source of food production for people who have no other alternative. But problems arise in the medium to long term if a solution to unauthorized occupations is not found. Establishment of procedures to compensate people for whom restitution is not possible should be considered while formulating the land policy.
- Compensation for people who cannot have their land restituted. The compensation may be equivalent land located elsewhere. Compensation schemes in the form of money have been less successful as national governments typically have scarce resources following a conflict and donors are reluctant to capitalize compensation funds.
- Evictions are a necessary part of land administration following a conflict. An eviction process should set clear standards for responsibilities for carrying out evictions and for the conditions in which they will occur in order to prevent misuse or create further problems of displaced people. For example, criteria for eviction may include that alternative accommodation is available for the occupants and that the property will be put to immediate use following the eviction.
- The need to provide land for people who are landless or who cannot return to their homes is unavoidable. The challenge is to find land that is available for resettlement purposes. Rural to urban linkages should be examined as many people may move from rural areas to urban centers in order to seek a living.
- Public land , whether abandoned or unused is likely to be part of the longer-term solution. Public lands may be administered by a number of different agencies. Mechanisms may have to be developed to transfer control of the lands for the purpose of resettlement. This may not be a simple matter if the agencies controlling the public lands consider themselves to be the owner and view the land as part of their own assets and a source of their power and prestige. Public lands may also be controlled by local governments.
- Claims for restitution and other land disputes require decisions over rights to property. Whether such decisions can be made by a judicial court or by an administrative land agency may be defined in the constitution. If a judicial arrangement is required it may be necessary to create special land court if the court system is overburdened with criminal and other civil cases.

There are a number of ways by which the Kenya Government could deal with the above policy issues; One is by concentrating on the creation of accessible and independent enforcement mechanisms of the new laws. These laws should be the basis of which women can seek redress where they are denied rights of inheritance.

Secondly, is by showing respect for cultural identity. The design of policies and legislation which do not respect cultural identity lead to laws which can neither be implemented nor become effective. This is also true for legislation aimed at improving the gender balance in land tenure. On the one hand policies which provide for the strengthening of indigenous

communities without accommodating changes in the socio-economic environment can lead to ever increasing social conflict. Women in particular may or may not share the interests and aspirations of traditional leaders.

Thirdly, different land tenure systems be it customary, statutory or community should be recognized as far as they conform to the principle of equality between women and men. The problem is that customary rights are often not documented and the destruction of land records may not be critical for areas governed by customary law. Where the customary structures still in place, customary leaders should continue to provide the institutional memory of who holds what rights, and should allocate land and adjudicate disputes. There may be a gap of knowledge if customary leaders have been killed or displaced. A further problem is that lengthy conflict may weaken customary institutions and erode the credibility of leaders. This may occur in cases where a leader lacks respect from members of the community because the leader manipulated the conflict to acquire the position.

Fourthly, Affirmative action measures should be adopted in land distribution, resettlement schemes and provision of credit facilities to improve women's land ownership and security of tenure. Proportionate representation of women and men should be made in all structures dealing with land re-distribution programmes. There should be equal representation and effective participation of women and men on Land commissions, Land tribunals; Boards and committees.

Five, The Trust Land Act should be reviewed, while all public land previously privatized should be immediately reverted to public tenure particularly if it adversely affects the pastoralist/nomadic communities and especially women's source of livelihoods and means of survival. Community based management boards should be established with equal representation of women and man to manage community lands. All the so called communal lands should be used to benefit both men and women in that particular community. The community members should be consulted whenever this community lands have to be privatized.

Equal inheritance rights of family land by daughters and women and right to pass it on as inheritance should be guaranteed. Provisions should be made to encourage daughters to seek redress where they have been unjustly deprived of such land inheritance rights.

The principle of co-ownership should be applicable at all times. This will help in protecting the widows/widowers and divorcees. The widow/widower can then inherit at least part of the estate and eventually transfer the property to the children whenever she decides to do so. The divorcee on the other hand shall be able to retain a fair portion of the household estate depending on the continued occupation and use of that estate for livelihood. In this case family land and matrilineal property should be specifically defined.

Government should restrict commercial transaction affecting matrimonial property and family land unless such transaction is in the interest of the family. Married women should give their consent before land is disposed either through sale, mortgaging, pledging or leasing in writing through the courts, district land tribunal or divisional land control boards. Close consideration should be given to whether the transaction will render a woman and her children homeless or deprive them of their means of livelihood.

Developing policies and programmes in anticipation of conflicts that may be generated by the internal migration. New laws related to land, drafted in the reconstruction period, must include specific provisions which recognize and protect independent rights to land for ALL.

4.1.3 Conclusion

It is evident Peace cannot co-exist with inequality and injustice. As long as women are unequal (legally, socially, ideologically, subordinate) and as long as class caste, gender, communal sectarian and ethnic inequalities characterize society, conflict is likely to erupt.

While gains are being made on the legislative front, with women's right to be free from discrimination appearing in Constitutions and women's rights to land, beginning to appear in land and reform and other statutory legislation, women continue to lack access to and control over land, both during and post conflict. The laws and policies and frameworks can only go so far. The attitude must change. Men continue to ignore women's rights in land, and deny women access to and control over land, particularly in the context of return and, as a result, women are increasingly rendered homeless and landless during conflict and reconstruction. For this change to happen there is need for sustained partnerships, monitoring and resources especially at the national and regional levels, the sharing of good practices among agencies, civil society organizations and NGO's on the ground.

The eco-feminist understanding that the environment problems derive from the actions of large scale institutions and cultural arrangements that create ecological stress is factual. This study has shown that many of the barriers that women face is because of the cultural arrangements and customs, traditions that the society practices in regard to the women. The issue of customary land laws should therefore be researched into and codified by the national land authority to facilitate identification of mechanisms for settlement of land disputes. Customary land disputes should always be determined, in the first instance by institutions that have authority over the community in accordance with custom and tradition. Because inheritance disputes are socially the most fractious, consideration should be given to the possibility of enacting a set of uniform rules for the inheritance of land throughout the country. In order to discourage the progression of certain customary land disputes from generation to generation, a record of the final determination of any dispute should be maintained by the relevant community organs; Women's rights to land should become part of the fundamental principles of the National Land Policy.

The institutions responsible for making policies should engage in policy dialogue that aims at ensuring gender equity with respect to access and control of resources and land; A proportionate number of women representation should be constituted in all the land bodies at all levels; equality of men and women before the law; equal application of basic rights and human rights; Transformation of UN declarations into national gender related policy and law; freedom of opinion and association and the enactment of secondary rights such as nobody to be evicted from his or her home without legal order.

The procedural laws should ensure equal access to courts for men and women and the possibility to register property in the name of groups, married or unmarried couples, and married individuals. The private law on the other hand should contain the legal status of women in all law relating to land.

Women have been known to be peace makers in world history. Their love of nature is evidenced by their liking over flowers, and a good environment that brings peace in their minds. No wonder land has always been a priority to the women because it contains most of the valuable natural resources that benefit the women.

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