



# Strengthening women's voices in the context of agricultural investments: Lessons from Kenya

Man-Kwun Chan, Annette Mbogoh



Kenya Land Alliance

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## Acronyms

ASDS	Agricultural Sector Development Strategy 2010-2020
CLMB	Country land management board
CSO	Civil society organisation
EIA	Environmental impact assessment
EMCA	Environmental Management and Co-ordination Act of 1999
FGD	Focus group discussion
IIED	International Institute for Environment and Development
KII	Key informant interview
KLA	Kenya Land Alliance
LRA	The Land Registration Act No.3 of 2012
LSA	Law of Succession Act of 1981
LSLA	Large-scale agricultural acquisition
MPA	The Matrimonial Property Act No. 49 of 2013
NEMA	National Environment Management Authority
NIB	National Irrigation Board
NLC	The National Land Commission Act No. 5 of 2012
NLP	National Land Policy
TARDA	Tana Athi River Development Authority

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## Executive summary

This report constitutes one of four country-wide assessments produced under the International Institute for Environment and Development (IIED)'s "Gender, land and accountability in the context of agricultural and other natural resource investments" initiative, the goal of which is to strengthen rural women's livelihood opportunities through empowerment in community land stewardship and accountability in agricultural investments in East and West Africa. The main aim of the report is to provide a backdrop on relevant policies and practice. The report draws on a literature review conducted by the Kenya Land Alliance (KLA) with additional inputs from IIED, as well as on primary field research conducted by KLA in April 2016.

Investor interest in large-scale land deals for agribusiness has raised commercial pressures on land and livelihoods across sub-Saharan Africa. While such projects can potentially benefit local communities, research suggests that investments can often have negative consequences and vulnerable groups, in particular women, tend to suffer disproportionately. This is because such investments tend to re-inforce or even exacerbate underlying gender discriminatory attitudes and practices that are rooted in customary norms. Such norms remain prevalent in many rural areas in Africa despite the introduction of progressive laws and policies in many African countries. Understanding these customary norms, as well as the opportunities and challenges presented by existing statutory laws relating to land and investment, is therefore crucial in developing appropriate and effective interventions to strengthen women's voices and accountability in land and investment governance. This report provides a gender analysis of the legal and policy framework governing land and investments in Kenya. Key findings and recommendations are summarised below.

Kenya has taken substantial steps to adopt gender equality principles in the broad regulatory framework, including the adoption of the constitutional affirmative action principle that no more than two-thirds of all elected and appointed bodies should be of the same gender. However, implementation has been weak overall, with more progressive gender laws including the "two-thirds rule" having had limited effectiveness to date. Patriarchal norms remain prevalent throughout society, resulting in the persistence of strong gender inequalities in many spheres of life, particularly in rural areas. Moreover, significant legal and policy gaps remain, in particular the exemption of Kadhi (Islamic) courts from constitutional gender equality provisions and inconsistent inclusion of constitutional gender equality principles in sectoral laws. Therefore, key policy priorities going forward are to more effectively challenge patriarchal attitudes and practices in particular in rural areas, and to invalidate gender discriminatory aspects of Islamic law.

Kenya's statutory legal framework governing land provides some important protections for women, particularly in relation to wives' rights to marital property including in the case of divorce or separation. However, implementation of land-related statutory laws has overall been weak. As a result, customary land laws and practice continue to predominate. On the whole these are strongly gender discriminatory, with women having only secondary, insecure and limited rights to land which are dependent on husbands or male relatives.

Moreover, significant legal and policy gaps remain. The lack of a specific governance framework for community land, coupled with the absence of any gender equality provisions as regards access to community land, are especially problematic. Other significant weaknesses include the limited inheritance rights of widows, and the exemption of Muslim communities from both marriage and inheritance laws and the gender protections contained therein. Looking forward, enactment of a gender-inclusive community land law is thus an urgent priority. Also important are legal reforms to ensure equal inheritance rights for widows and to invalidate gender discriminatory aspects of Islamic marriage and inheritance laws.

The existing regulatory framework contains some significant measures to promote women's representation in land governance structures. As well as the overarching two-thirds provision contained in the Constitution, several land-related laws and policies contain explicit provisions for gender equality in the composition of specific land governance bodies. However whilst some efforts appear to have been made to implement these gender equality provisions, many land governance institutions continue to fall short of the two-thirds gender threshold and the quality of women's participation both in governance bodies and wider land-related public fora remains low. Moreover, customary land governance structures remain highly influential in rural areas, and women's representation in these bodies is very weak. A key barrier to women's representation and participation in both formal and customary structures is the persistence of patriarchal cultural and religious norms.

The most critical legal/policy gap as regards women's representation is the lack of a legislative framework for governance of community land, and the lack of specific measures to ensure women's representation in such governance. This legislative vacuum effectively leaves it wide open for gender-discriminatory customary land governance institutions to prevail. Therefore, a key policy priority is to ensure that future community land legislation incorporates strong affirmative action measures to ensure women's representation in all levels of community land governance. In addition, implementation of the two-thirds rule must be strengthened, and measures to address underlying constraints to women's involvement in governance also need to be adopted.

The regulatory framework governing investments has some notable strengths as regards gender considerations. In particular, the law governing compulsory land acquisition explicitly provides for the inclusion of wives of both registered and unregistered occupants in consultation and compensation procedures, and gender impacts must be considered in compulsory environmental impact

assessments (EIAs). In practice however, implementation of both these provisions has been problematic. Moreover, there are key legal and policy gaps that need to be addressed going forward. Existing legislative provisions need to be expanded to include gender-inclusive compensation procedures, and affirmative action measures to ensure women's representation in investment-related consultation procedures and decision-making bodies. Further, all relevant provisions need to be directly incorporated into investment regulation and/or their applicability both to (foreign) private investment and to the acquisition of community land needs to be made explicit.

Finally, it will also be essential to raise awareness of women's legal rights at all levels and to strengthen the women's movement, so that women are better able to claim their rights and the government and investors can be held to account as regards the implementation of all relevant gender-progressive laws and policies.

## 1. Introduction

### 1.1 Background and aims of this report

This report has been produced as part of the International Institute for Environment and Development (IIED)'s 'Gender, land and accountability in the context of agricultural and other natural resource investments' initiative, the goal of which is to strengthen rural women's livelihood opportunities through empowerment in community land stewardship and accountability in agricultural investments in East and West Africa. In particular, the project has been seeking to increase knowledge of best practice in gender-sensitive approaches to protection of community lands amongst key stakeholders working on rural land tenure security and responses to 'land grabbing' in Senegal, Ghana, Kenya and Tanzania, including relevant civil society, grassroots organizations and governments. The project is also seeking to test new approaches to enabling local voices and lessons from local innovations to inform relevant national policy processes in these four countries.

This report, which focuses on Kenya, constitutes one of four country-wide assessments produced under the overall project. It draws on a literature review conducted by the Kenya Land Alliance (KLA) with additional inputs from IIED, as well as on primary field research conducted by KLA in April 2016 (see Section 1.2 for further information about the research methodology). The primary aim of this report is to inform practitioners, policy makers and researchers about key governance issues relevant to the strengthening of women's empowerment in community land stewardship and accountability in agricultural investments in Kenya.

### 1.2 Research methodology

#### 1.2.1 Literature review

The literature review was conducted by KLA with additional inputs from IIED, and included a review of:

- 20 original laws, draft bills, and government policies and strategies relevant to the scope of the study;
- Over 10 secondary literature sources that variously provided analysis of relevant statutory laws and policies, description and analysis of customary land laws and practices, and evidence of their actual implementation and impact on the ground.

## 1.2.2 Field research

### Objectives and scope of field research

The field research, which focused on selected communities in Tana River County, was designed to complement the literature review by providing an in-depth case study of the application of statutory and customary laws affecting women's access to and governance of land. Tana River County was selected as a location for the case study because the County has experienced high levels of large-scale agricultural acquisitions (LSLAs) resulting in local communities losing access to substantial areas of land<sup>1</sup>. Thus it was hoped that Tana could provide insight into women's access to and governance of land in the context of high commercial pressures on land. The field research also aimed to ensure that the perspectives of rural women and men on these issues could be captured and shared with wider stakeholders.

To address these broad aims, the field study explored the following specific issues: women's and men's knowledge of statutory land rights; women's rights and access to land under customary land laws; the level and nature of women's participation in both formal and customary land governance institutions including dispute resolution structures, and the barriers to women's participation; and finally the context of LSLAs in Tana and the extent of accountability of these investments towards local communities.

As well as being selected due to the high concentration of LSLAs, Tana River County was also considered to be of particular interest for the field research because the area features strong traditional dispute resolution structures for community land that have further made notable efforts to incorporate the role of women within these structures. Moreover, Tana was selected because KLA has a strong local presence, with a satellite office in Garsen town and having carried out a number of programmatic interventions in the County including initiatives to raise women's awareness of their legal rights. Given the resource constraints for the field research (see below), the ability to draw on well-developed networks was seen as important to maximise the efficiency of the research process.

### Data Collection Methods

As indicated, only limited resources were available to conduct the field study, thus the scope and logistical parameters of the research were designed to work around these constraints. Field research was therefore conducted over a period of five days only, from 1<sup>st</sup> to 5<sup>th</sup> April 2016. To make the most of the time available and to avoid losing time through travel, all data collection took place in the County capital, Hola town.

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1. Large tracts of land in the county have been acquired by the government at the expense of local communities. Examples include the Tana and Athi Rivers Development Authority (TARDA), the National Irrigation Board (NIB), and the Galana-Kulalu Food Security Project, among others.

The research approach was qualitative rather than quantitative, which was considered most appropriate given the open-ended and exploratory nature of the research questions and the need to probe for underlying motivations behind certain practices. The specific research methods used were key informant interviews (KIIs), observation and focus group discussions (FGDs). In total, 15 KIIs and 4 FGDs were conducted, involving a total of 48 respondents. Respondents were purposively sampled with assistance from KLA staff in Garsen; respondents were selected based on their ability to address the key research issues from a range of different perspectives.

KIIs were conducted with the following key stakeholder representatives: 3 lawyers and magistrates; 3 staff from civil society organisations (CSOs) working on land, gender and human rights issues in Tana; 1 female community leader; 3 representatives from investment companies operating in Tana; and 6 officers from relevant county level government bodies (2 officers from the County Executive Lands, Planning and Housing Office; 2 from the County Assembly Lands Committee; and 2 from the County Land Management Board). Of the 15 key informants, 12 were male and 3 were female. Interviews were semi-structured in nature, and each interview was between 1.5 and 2 hours in duration.

FGDs targeted communities who have been directly affected by LSLAs, with two FGDs involving traditional leaders and two FGDs involving general community members. Participants across the 4 FGDs were selected to ensure representation of the key socio-economic characteristics in the area. Thus, participants included a mix in terms of age and gender (19 men and 14 women), and also included members of the main ethnic groups in the County including both farming communities (Pokomo) and pastoralist communities (Orma, Wata and Wardei). Participants were drawn from 8 different "locations", namely Hola, Watta, Mazuni, Bondeni, Kibuyu, Ng'omeni, Laza and Makaburini. Each FGD was approximately 2 hours in duration. Specifically, the composition of each FGD was as follows:

- One FGD comprising 6 male Pokomo Elders (*Gassa*);
- One FGD comprising 10 male Orma and Wardei Elders;
- One mixed-gender FGD comprising 4 men and 3 women representing both pastoral and farming communities;
- One women-only FGD comprising 10 women from both pastoral and farming communities<sup>2</sup>.

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2. A women-only FGD was held to provide women with a "safe space" where they could freely share their experiences without the cultural and/or religious barriers to participation typically faced by women in mixed-gender groups.

### 1.2.3 Limitations of the study

The field study faced several methodological limitations, in large part due to the resource constraints and the resulting requirement to conduct all KIs and FGDs within a five-day period. As already noted, this meant that the geographical scope of research was limited to a single County; the field research findings are therefore not necessarily representative of the situation nationally. Moreover, the time constraints combined with poor transport infrastructure also prevented the researcher from conducting interviews with relevant key informants based in Garsen and Nairobi. It was also not possible to interview the County Executive Committee member on Land and the County Adjudication and Settlement Officer who, although based in Hola town, were not available within the limited timeframe of the field study.

The national representativeness of the field research findings is also compromised by the fact that Tana has been the object of targeted efforts to promote women's representation in traditional leadership structures, and has further benefited from legal awareness raising initiatives supported by KLA and other external organisations. Further, the quality of discussions within the FGDs was at times constrained because some participants were not conversant with the issues being discussed; this was the case for example in the mixed sex FGD. Moreover some FGD participants, for example two pastoralist community leaders, were not fluent in Kiswahili and were thus unable to contribute fully to the discussion.

Despite these limitations however, the authors believe that the field research findings provide a reliable snapshot of the situation in Tana River County as regards the key research questions. Moreover, the literature review has sought to review law and policy implementation in other parts of Kenya in order to set the findings from Tana in a broader geographical context.

## 1.3 How the report is structured

The remainder of the report is structured as follows:

- Chapter 2 sets the scene for the main sections of the report, providing an overview of LSLAs, their impact on local communities in Africa, specific gender implications, and the underlying governance constraints that prevent more positive outcomes;
- Chapter 3 explores the status of women and gender equality in Kenya in broad terms, briefly reviewing the wider policy framework and the extent to which progressive laws and policies are implemented in practice;
- Chapter 4 addresses the legal framework governing women's access to land, including under customary and well as statutory law. It also explores the extent to which gender equitable policy elements are implemented in practice, and the challenges involved;

- Chapter 5 explores the regulatory framework governing women's representation in land governance structures, the extent to which progressive measures are implemented in practice, and the impact of these measures in terms of ensuring effective participation. It also considers women's representation and participation in customary land governance structures and the extent to which these institutions remain influential;
- Chapter 6 describes the legal and policy framework governing large-scale agricultural investments, and analyses the key gender implications involved;
- Chapter 7 presents brief conclusions and recommendations for practitioners, policy makers and researchers.



## **2. Setting the scene: LSLAs, community, gender impacts and underlying governance constraints**

### **2.1 Introduction**

This brief context-setting chapter provides an overview of LSLAs in Africa, the increased commercial pressure on land that this exerts, and the impacts on local communities. It then looks at the specific gender implications of LSLAs, and the underlying governance constraints that drive gender unequal outcomes. Section 2.2 explores key trends across sub-Saharan Africa as a whole, whilst Section 2.3 briefly reviews available evidence in the Kenyan context.

### **2.2 Commercial pressures on land, local communities and gender impacts in sub-Saharan Africa**

Recent years have seen a renewed investor interest in acquiring farmland for agricultural investments in the global South, largely driven by a fast evolving global context that has resulted in more volatile agricultural commodity prices. Africa has attracted a great deal of investor interest and accounts for a large share of recent land acquisition. Several sub-Saharan African countries have experienced strong interest from foreigners interested in buying land.

While investment in agriculture can create jobs, improve access to markets and develop infrastructure for agricultural development, many LSLAs have been associated with negative impacts for local populations, including the loss of land and other resources. Since many villagers depend on land and natural resources for their food security and livelihoods more generally, ill-conceived land acquisitions can have major, lasting negative repercussions for local livelihoods. Alongside demographic and climatic pressures, commercial pressures on land are therefore putting those with weak security of tenure at greater risk of displacement to more marginal land or outright dispossession. Those who rely on common property resources – often accessed for food, fuel and medicinal products – are the most at risk; and weak security of tenure combined with weak social and environmental safeguards in investments conspire to deliver few social benefits.

Attempts to protect community land rights in response to these threats have often taken limited or no account of gender relations and women's land rights are often misunderstood or go unrecognised. While many guidelines on land governance and responsible investment promote the need for more sensitivity to gender relations, and many statutory laws guarantee women equal property rights, the evidence suggests that implementation is often weak. Women often lose out on the potential benefits of investments and bear a disproportionate share of the negative impacts.

Moreover, land rights – who holds them, how strong they are – are one of the key factors influencing who participates in land investment negotiations within communities, and who may ultimately benefit from them. This means that women's weaker land rights can make them more vulnerable to losing out in investment processes.

Changes in land use tend to affect men and women differently. Where investments result in communities losing land, women are likely to be disproportionately affected. Although impacts on women and men are varied and context-specific, initial research suggests that changes in land use and/or control can result in:

- Land traditionally used by women being given away. Communities might allocate land traditionally used by women to investors, or men may take control of crops previously in a female domain once they realise the crops have risen in value;
- Women working longer hours to provide food and water for the household. As land becomes scarcer, women tend to have to work longer hours and walk longer distances to farm and collect water and wood. Since women tend to be the main food providers, this has a greater impact on them than it does on men and cuts their productivity;
- Further erosion of women's rights. Evidence indicates that as pressures on land increase, women's land rights become even weaker. In Uganda and Tanzania, studies have shown that increased competition for land can cause a breakdown in customary rules, especially those related to managing communal land resources. This results in a reinterpretation of those rules that further weakens women's access to, use of, and ownership of land;
- Men benefiting more than women from new employment opportunities. Although investments can result in new job opportunities for local communities, these jobs tend to benefit men disproportionately. In the Philippines, for example, the investor Vergara acquired land along coastlines for shrimp farms, which resulted in new seasonal employment opportunities for men but not for women.

Customary norms and practices often also greatly influence how investment projects impact a community. While contexts differ, customary norms and practices often undermine women's rights when land is commoditised or when outside interests are present:

- Women's customary land rights are more vulnerable. Even where customary tenure systems recognise women's land rights and both men and women report a relatively high degree of joint ownership, women's names are rarely on the documents, making them more vulnerable to losing their rights;
- Women have limited participation in decision-making processes. Customary practices often obstruct women's participation in decision-making processes over land governance and benefit-sharing from land investments;

- Women are often excluded from negotiations and benefit sharing. Women's exclusion from community discussions about land governance in turn limits their participation in community consultations with potential investors. This affects how land is valued, how and to whom compensation is paid, and how benefits from the investment are shared. Even if women participate in a contract farming scheme, they often do not control the profits they make as men typically control the allocation of household income.

Since customary norms reinforce gender inequalities when it comes to land, investments are likely to result in differentiated outcomes for men and women. These barriers can make it very difficult for investors to create better outcomes for women, since local issues around gendered land ownership are often highly complex.

### 2.3 LSLAs in the Kenyan context

Over the last decade, the Kenyan government has sought to promote foreign direct investment (FDI) including specifically in the agricultural sector through a range of investment promotion and agricultural development policies (see Section 6.2). As a result, the country's net FDI more than tripled between 2008 and 2012, rising from USD 51 million to USD 184 million during this period (ActionAid, 2012). Agriculture is one of nine sectors specifically targeted for investment by the Kenya Investment Authority; specific sub-sectors promoted include horticulture, floriculture, tea, coffee, large-scale animal production and fisheries development, as well as processing<sup>3</sup>.

Reliable data on the number and scale of LSLAs in Kenya is difficult to obtain due to the unwillingness of both governments and private investors to divulge detailed information about specific deals (Nunow, 2011). However from the sources reviewed, the agricultural sector is a primary target for investment, with priority crops appearing to include *Jatropha*, sugarcane and horticulture (ActionAid, 2012; Nunow, 2011; Makutsa, 2010). As regards estimates of the numbers of land deals involved, data suggests that Kenya as a whole was subject to eight large-scale land acquisitions between 2000 and 2012, seven of which were agriculture-related (according to International Land Coalition data compiled by ActionAid, 2012); according to another report, in 2011 Tana River County alone had at least six ongoing or proposed LSLAs, five of which were in the agriculture sector (Nunow, 2011). European investors are strongly featured but companies from North America, China and Japan amongst others have also been involved (ActionAid, 2012; Nunow 2011).

The impact of LSLAs on local communities in Kenya has been substantial given the country's high population density and high degree of land tenure insecurity in rural areas (see Chapter 4). In Tana River County for example, negative impacts of

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3. <http://www.investmentkenya.com/opportunities/agriculture>

LSLAs have been predicted to include loss of livelihoods for numerous pastoralists and wider impacts resulting from environmental degradation of an area that is ecologically important for the country as a whole (Nunow, 2011; Makutsa, 2010). NGO reports suggested that just two particular LSLAs could lead to a loss of livelihoods for tens of thousands of farmers and at least 2,000 pastoralist families (FIAN, 2010).

These impacts are exacerbated by the fact that existing investment regulations are poorly implemented in practice. In particular, legally required public consultation processes are frequently manipulated or even by-passed altogether. Even where consultations are conducted, local communities may only be given very limited information about the proposed investments (Makutsa, 2010). There have also been reports of bribery of community leaders and local government officials, rigging of outcomes of public consultation meetings, and organisation of mass pro-investment demonstrations by investors and local politicians (Makutsa, 2010; FIAN, 2010).

Similarly, mandatory EIAs appear to have had limited impact in curbing controversial investments. In some instances the EIA process has been by-passed altogether. Examples were also cited of investment activities being substantially expanded following approval of an EIA (FIAN, 2010), and of EIAs being approved despite strong objections from local communities (field research findings).

Moreover, evidence suggests that only a small fraction of those entitled to claim compensation actually receive any payment; and those who do receive compensation receive sums that are well below market rates (Makutsa, 2010; field research findings). Finally, actual benefits and opportunities provided to local communities have often fallen far short of initial promises (Nunow, 2011).

No gender impact assessments of LSLAs in Kenya could be identified, and therefore very little evidence was found of specific gender impacts. However, the field research findings indicate that women tend to lose out on compensation (see Chapter 6); and the field research also provided an example of women not being able to benefit from leasing opportunities provided by one investor in Tana River County (field research findings). Whilst generalisations cannot be drawn from this limited evidence, the continued predominance of gender discriminatory customary land tenure practices, and the limited effectiveness of the existing land and investment regulatory frameworks in tackling such discriminatory practices, would suggest that overall there is a high risk that women will suffer disproportionately from LSLAs in Kenya.

## 3. Gender equality and governance: the broad regulatory framework

### 3.1 Introduction

The status of women in Kenyan society as a whole, and the extent to which the broad regulatory environment promotes gender equality across different spheres of life, provide an important backdrop in terms of understanding and addressing gender equality in land and investment governance. This chapter therefore provides a brief overview of the national legal and policy framework and the extent to which it promotes gender equality across society as a whole (Section 3.2). It then considers the extent to which progressive policy elements are implemented in practice, and in particular the extent to which existing measures have been effective at challenging underlying patriarchal attitudes and practices (Section 3.3).

### 3.2 The statutory legal framework

Kenya is party to a significant number of international conventions and regional instruments that promote gender equality. For example, it has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979), the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966), and the African Union Protocol on the Rights of Women in Africa (2005) (Equal Rights Trust, 2012; Gaafar, 2014). Moreover, the Constitution provides that any treaty or convention that Kenya has ratified shall form part of its laws (Constitution, Sections 2(5) and 2(6)).

At national level, Kenya has also taken significant steps to incorporate general gender equality and non-discrimination principles directly into national law, notably in the 2010 Constitution, which addresses gender comprehensively, and the Political Parties Act 2011 (Constitution; The Nature Conservancy, 2013). The Constitution clearly delineates women's right to non-discrimination (Section 27(4)), provides that women have a right to equal treatment, protection and benefit of the law (Section 27(1)), and that women have the right to equal opportunities in the political, economic, cultural and social spheres (Section 27(3)). Moreover, whilst customary law is recognised including in the use of alternative dispute resolution mechanisms, the Constitution explicitly provides that any customary law that is inconsistent with the Constitution – and hence any gender discriminatory customary law – is considered void (Constitution, Sections 2(4) and 159; CEDAW 2011).

The Constitution and Political Parties Act also provide strong affirmative action measures to promote women's representation in public bodies including in Parliament. Thus, Section 27(8) of the Constitution provides that *“the State shall*

*take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender*". The Constitution also specifically provides that this two-thirds rule applies to local government bodies, i.e., the County Executive and County Assembly (Constitution, Sections 175-177); and the Political Parties Act also specifies that the two-thirds rule applies to the governing body of any registered political party (Equal Rights Trust, 2012).

Significant gaps remain however, as regards mainstreaming gender within the national legal and policy framework. Firstly, whilst the Constitution provides for the overriding of gender discriminatory aspects of customary law, the same does not apply for Islamic law. Under the Constitution, the Kadhi's courts, which are recognised as a separate subsidiary court for the hearing of Muslim family law matters, have exemptions from the gender equality provisions contained elsewhere in the Constitution (CEDAW, 2011). Secondly, beyond the Constitution, coverage of gender equality and non-discrimination principles is piecemeal in other legislation including in key sectoral laws. Thus whilst the Employment Act includes fairly comprehensive provisions on gender equality and non-discrimination, and the Children Act also contains an explicit provision prohibiting discrimination on any grounds including sex, legislation in other fields – including in education and healthcare – do not contain any provisions against gender discrimination (Equal Rights Trust, 2012).

As regards specific policy measures to address patriarchal norms and practices, the National Policy on Gender and Development (NPGD) adopted in 2000 sets out a number of specific objectives that include undertaking gender sensitisation aimed at changing customs and practices that perpetuate women's restricted access to economic resources. In terms of addressing gender-based violence, the Sexual Offences Act 2006 introduced a number of new offences which broadened the protection against sexual abuse and harassment beyond that provided under the Penal Code; however, the Act has important limitations in that it does not recognise domestic violence or marital rape and assault as offences (Equal Rights Trust, 2012).

As regards the national machinery for implementation of gender laws and policies, the Ministry of Gender, Children and Social Development was set up in 2008 with this remit and is responsible for promoting gender equality and women's empowerment in Kenya. It incorporates the National Commission on Gender and Development, which was established under the NPGD 2000 to coordinate and implement gender mainstreaming across government and society as a whole, as one of three semi-autonomous government agencies (MGCSA, 2011; Equal Rights Trust, 2012). Further, the National Gender and Equality Commission was established in 2011 under the National Gender and Equality Commissions Act 2011 with the wider responsibility of addressing gender and other forms of discrimination (Equal Rights Trust, 2012). No mention was found of any gender

focal points or similar machinery to facilitate mainstreaming of gender priorities within other government bodies.

### 3.3 Implementation

Overall the implementation and enforcement of gender equality laws and provisions in Kenya has been weak, with women remaining in a disadvantaged position and subject to gender inequalities in many key spheres of life (Equal Rights Trust, 2012; CEDAW, 2011). As a result, the two-thirds gender threshold remains largely unimplemented, with women remaining substantially underrepresented in public and political life. For example, in the 2013 general elections, only 5.5% of the elected National Assembly members and 6% of ward level representatives were women; further, no women at all were elected as senators or governors (CEDAW 2011; IED, 2015). Moreover, despite the relatively progressive gender equality provisions in the Employment Act 2007, as of 2011 the rate of female engagement in paid work remained low at only 30% whilst the gender pay gap remained high. Female-headed households are disproportionately represented amongst the chronically poor and households moving into poverty. Finally, there is a high prevalence of violence against women, with 45% of ever-married women having reported experiencing physical or sexual violence perpetrated by a husband or partner within a 12-month period (CEDAW, 2011; The Nature Conservancy, 2013).

Gender inequality in rural areas is a particular concern, although there are significant regional variations (The Nature Conservancy, 2013). Rural women continue to experience severe constraints to accessing land and other productive assets (women benefit from only 7% of agricultural extension services, for example); face higher levels of illiteracy (30% as compared to 18% for rural men as at 2007); have difficulties in accessing health and social services; and are excluded from decision-making processes at the community level. Furthermore, household division of labour remains highly gender-segmented with women still largely responsible for childcare and housework (CEDAW, 2011; The Nature Conservancy, 2013).

A number of factors have prevented more effective implementation of existing gender laws and provisions. A critical underlying constraint is the persistence of patriarchal attitudes and practices in all spheres of life, and the fact that the government has not taken sustained or systematic action to challenge these norms (CEDAW, 2011; IED, 2015). Very limited awareness of women's legal rights amongst the judiciary, government officials and society in general further exacerbate this problem (CEDAW, 2011; The Nature Conservancy, 2013). Whilst the government and CSOs have made efforts to promote legal awareness and strengthen access to legal aid including in relation to gender rights, overall women's ability to access justice remains limited due to high legal costs, the persistence of traditional justice systems, illiteracy and other practical difficulties in

accessing courts. Insufficient human, financial and technical resources for effective functioning of the national machinery has also been a constraint, at least prior to 2011 (CEDAW, 2011). Finally, persistence of negative cultural attitudes towards women as leaders has played an important part in preventing women taking part in governance structures (The Nature Conservancy, 2013; USAID, 2015).

### **3.4 Key policy implications going forward**

Kenya has made substantial steps in terms of adopting gender equality principles in the national regulatory framework. In particular, the Constitution, the Political Parties Act and the Employment Act are relatively strong in terms of addressing gender equality, and the Constitution and other supporting legislation have adopted progressive affirmative action measures based on the principle that no more than two-thirds of elected and appointed bodies should be of the same gender.

However, implementation has been weak overall, with more progressive gender laws including the two-thirds rule having had limited effectiveness to date. Patriarchal norms remain prevalent throughout society, resulting in the persistence of strong gender inequalities in many spheres of life, particularly in rural areas. Moreover, significant legal and policy gaps remain, in particular in relation to the exemption of Kadhi's courts from constitutional gender equality provisions and as regards inconsistent inclusion of constitutional gender equality principles in sectoral laws.



## 4. The legal framework governing women's access to land

### 4.1 Introduction

Women's rights to access, use and control land under statutory and customary laws clearly have a direct influence on rural women's livelihood options. These rights also indirectly influence women's ability to benefit from LSLAs, as Chapter 2 has shown. Further, they can influence the extent to which women can participate effectively in land-related governance structures; for example, women's lack of recognition as "land owners" often leads to their marginalisation in community discussions and decision-making concerning land (see Chapter 5). This chapter therefore reviews relevant land laws and policies in Kenya and their implementation. Section 4.2 reviews women's land rights under statutory law, including women's general land rights and their rights through marriage and inheritance; whilst Section 4.3 consider women's land rights under customary law. Section 4.4 considers the extent and challenges to implementation of statutory land laws, and Section 4.5 presents key policy implications.

### 4.2 Women's land rights under statutory law

#### 4.2.1 Overview of the legal framework governing land

The current legal framework governing land has its roots in the extensive legal reforms that took place after the electoral violence in 2007-2008. Long-standing and unresolved historical conflicts over land were identified as a key driver of this conflict, therefore land reforms were identified as a necessary way forward (Waki Commission Report, 2008). The resulting land reforms agenda included the adoption of the National Land Policy in 2009 and the new Constitution of Kenya in 2010. These were followed by enactment of the Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012, and the National Land Commission Act No. 5 of 2012 (Gaafar, 2014).

The 2010 Constitution categorizes land into three classifications, namely public, private, and community land. Public land refers to government-owned or occupied land; and private land consists of registered land under freehold and leasehold tenure. Community land includes: land legally registered to a group, transferred to a community through a legal process, or declared community land by an Act of Parliament; lands traditionally occupied by hunter gatherer communities; lands used by specific communities as "*forests, grazing areas, or shrines*" and land held in trust by a county government for a specific community (Constitution Sections 62-64). Community land is estimated to comprise about 65-70% of land in Kenya (Gaafar, 2014).

The Land Act provides the overarching legal framework for the governance of land in Kenya (Gaafar, 2014), and its overall application is specifically stated to include community land as well as public and private land (Land Act, Section 3). There are several parts of the Act that appear to apply to all three categories of land, including notably Part VIII on the Compulsory Acquisition of Interests in Land (Sections 107-133) (see Chapter 6), although no explicit reference is made to community land. However, whilst the Act provides specific legal frameworks for the management of both public and private land, it does not define a specific legal framework for the management of community land, leaving this to be determined by community land law that has as yet remains un-enacted (Land Act, Section 37). This presents a very significant gap in the legal framework as regards the clarification and protection of women's and men's rights to land in rural areas, as the next sub-Section highlights.

#### 4.2.2 Women's general land rights under statutory law

The Constitution and National Land Policy (NLP) provide some broad guarantees and policy statements as regards women's generic land rights. Thus, the Constitution provides that "*the right to acquire and own property is guaranteed to all Kenyans*" (Section 40(1)); and elimination of gender discrimination in law, custom and practices related to land and property is stipulated as one of six guiding principles for land management (Section 60(1(f))). Further, the NLP acknowledges the gender discriminatory nature of customary practices as regards land and the resultant conflict with international and constitutional provisions on gender equality, and specifically identifies improvement of gender equity in land use, management and ownership as an issue that needs special intervention (NLP, paragraphs 222-5).

However beyond these general provisions and statements of intent, Kenya's statutory legal framework actually provides few concrete guarantees and protections for women's *generic* land rights (although women's specific rights to land through marriage and divorce are substantially addressed in several statutory laws – see sub-Sections 4.2.3 and 4.2.4). The Land Act itself is notably weak in this regard, providing little by way of additional protections for women's land rights on top of what's already provided for in the Constitution (Land Act). Moreover, at present statutory law does not provide any specific protections for women's rights to community land. As already mentioned, the underlying constraint here is the lack of a legal framework for the management of community land in general. Given that women's land rights under customary law and practice are very weak (see Section 4.3), this leaves rural women highly vulnerable and unprotected as regards their land rights.

### 4.2.3 Women's rights to land through marriage

Women's rights to land through marriage are governed by the Matrimonial Property Act No. 49 of 2013 (MPA), with relevant provisions also contained in the earlier Land Registration Act of 2012 (LRA). These two laws provide a number of important protections for married women as regards their right to land, as follows:

- Married women have equal property rights to those of married men. The MPA includes the explicit provision that *"despite any other law, a married woman has the same rights as a married man...to acquire, administer, hold, control, use and dispose of property whether movable or immovable"* (MPA 2013, Section 4(a));
- Wives have a legal right to land that is co-occupied and/or used by both husband and wife. The LRA provides that *"if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses– (a) there shall be a presumption that the spouses shall hold the land as joint tenants"* (Section 93(1)). Further, both the LRA and the MPA provide that in the case of land that is held in the name of one spouse only (whether acquired before or during marriage), the other spouse acquires a legal interest in that land if he/she has made a contribution towards the productivity, upkeep or improvement of that land (MPA, Section 9; LRA, Section 93(2)). Moreover, the MPA explicitly defines "contributions" to include non-monetary as well as monetary contributions, and specifically includes the type of non-monetary contributions typically made by wives including domestic work, household management, and child care, as well as farm work (Section 2);
- A husband cannot dispose of land without the consent of his wife/wives. The MPA provides that *"an estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise"* (Section 12 (1));
- On separation or divorce, women have a right to a share of marital/joint property. The MPA provides that *"ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved"* (Section 7).

Despite these significant protections however, there are notable gaps as regards the land rights of married women under statutory law. Firstly, Muslim women are excluded from the scope of the MPA and the protections it provides: the Act states explicitly that *"A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property"* (MPA, Section 3). Secondly, inherited customary land is excluded from matrimonial property. The MPA states that *"trust property, including property held in trust under customary law, does not form part of matrimonial property"* (Art 6(2)). Gaafar (2014) appears to interpret this to mean that the MPA effectively excludes inherited customary or

ancestral land from matrimonial property, which clearly undermines the relevance of the various protections contained in the MPA for married women in rural areas.

Furthermore, customary law must be taken into account in the division of matrimonial property on divorce. The MPA provides that *“during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (...) the customary law relating to divorce or dissolution of marriage”* (MPA 2013, Section 11(a)). Whilst this Section includes the qualification that such customary law must be in line with constitutional principles, it nevertheless weakens the otherwise clear provisions in the MPA on this issue, since customary law clearly discriminates against women in this regard (see sub-Section 4.3.3).

#### 4.2.4 Women's rights to inherit land

The Law of Succession Act of 1981 (LSA) provides the main legal framework governing inheritance in Kenya (Gaafar, 2014). The LSA provides some protections for widows as regards land rights, including protections that go beyond those typically provided under customary law (see Section 4.3). Firstly, as regards a widow's share of the deceased husband's estate, under the LSA widows are entitled to inherit the full estate of their deceased husband, whether or not the deceased leaves any children. In case of multiple wives, those wives with children inherit most, but childless widows are guaranteed a portion. Thus, the LSA affords specific protections to childless widows, who are particularly vulnerable under customary law.

Secondly, daughters have equal inheritance rights to those of sons. As noted above, the LSA provides that spouses inherit all land if they survive the deceased, leaving children with no immediate inheritance. However in cases where there is no surviving spouse, the LSA provides for the estate to be shared equally amongst all children. There is thus no discrimination between daughters' and son's inheritance rights, and contrary to the situation with widows (see below), there is no restriction preventing daughters from inheriting outright (LSA, Section 38). The LSA therefore affords daughters substantially stronger inheritance rights than that provided under customary law, where daughters are frequently excluded from inheritance altogether (see sub-Section 4.3.4).

The LSA also has significant limitations, however. Most importantly, the LSA directly discriminates against women in terms of the security of widows' inherited land rights. The LSA explicitly distinguishes between the inheritance rights of widows and widowers in this regard. Whereas widowers inherit property outright, widows' *“life interest”* in the property expires if she remarries, and she must then give all the land to the children. The only exception is where the deceased leaves no children, in which situation the wife is entitled to inherit 20% of the estate outright (or the first 10,000 shillings of the estate, if greater) (Gaafar, 2014).

Secondly, as with the MPA, Muslim women are excluded from the scope of the LSA and the protections it provides: Section 2(3) of the LSA provides that Islamic law shall be applied in the determination of inheritance matters if the deceased is a Muslim. This is significant because Islamic inheritance laws are strongly gender discriminatory in many respects, with women generally only entitled to inherit a much smaller portion of the estate compared to men (field research findings). Finally, the Succession Act also exempts agricultural land and livestock in 12 specified districts (now counties) from its rules. In those areas, located in the Rift Valley, Eastern and Coastal Kenya, succession is determined by the relevant customary law (Gaafar, 2014).

### 4.3 Women's land rights under customary law

In Kenya, customary land law remains very influential and predominates in the governance of land in rural areas, despite the fact that the Constitution places community land under the formal administration of county governments. In Tana River County for example, community land in farming communities is largely managed and administered by customary leaders using customary law (field research findings). The influence of customary law is further bolstered by its recognition under statutory law; for example the Constitution recognises the application of customary law including in relation to alternative dispute resolution (Section 159 (2(c))), and as noted the MPA acknowledges customary law as regards distribution of matrimonial property (see sub-Section 4.2.3).

Kenya has 42 different tribes, each of which has its own customary laws and practice governing land tenure; there are broad similarities between most of these systems however. In particular, these systems are predominantly patrilineal (Gaafar, 2014); in Tana River Country for example, all of the five main ethnic groups (including both pastoral as well as farming communities) are patrilineal in nature (field research findings).

With respect to women's land rights, the continued dominance of customary land law is problematic because it is strongly gender discriminatory in many respects. Firstly, patrilineal tenure systems inherently discriminate against women's rights to own and inherit land, since land is passed only through males and women can only acquire indirect or secondary rights to land through husbands or male relatives (Gaafar, 2014). Amongst the Pokomo (farming) communities in Tana River County for example, there are two types of community land – *mafumbo* (fertile land on the riverbank) and *muhema* (land located away from the riverbank and set aside for men). Whereas men can be allocated both types of land, women can only access *mafumbo*; and even then, *mafumbo* land is never allocated directly to women but can only be accessed via husbands or fathers (field research findings).

Secondly, due to the indirect nature of their land rights, women's rights are intrinsically dependent on their relationships with men; and since women commonly gain access to land through their husbands, women's rights are insecure in that

they become vulnerable if the relationship breaks down (field research findings). Furthermore, women tend only to be given incomplete, use rights to land. Women are permitted to use the allocated land for prescribed purposes, but do not have full control over its use (see Section 5.3).

As regards women's land rights through marriage, most customary marriage practices are patrilocal, whereby wives leave their natal families and relocate to live with their husbands' communities on marriage. Wives are typically allocated indirect use rights to land by their husband's family as outlined above. A significant problem for women is what happens in the case of divorce or the dissolution of their marriage. Customary practices make it very difficult for a woman to leave her husband's family; for example, a divorce often requires the approval of customary leaders and/or repayment of the bride price, with the wife forced to stay with the husband if her family can't afford to repay it. Moreover if a woman does decide to leave her husband, she becomes highly vulnerable to losing her rights to land, with divorced or separated women rarely receiving a share of the husband's property (Gaafar, 2014).

Widow's inheritance rights under customary law are also precarious and severely restrict widow's life choices (Gaafar, 2014). In Tana River County for example, the field research found that widows are frequently dispossessed of land and left to fend for their children alone. Moreover, any inheritance rights to land are almost invariably withdrawn if the widow re-marries outside the husband's clan (Gaafar, 2014; field research findings). In some areas, widows only retain rights until their sons reach a designated age, at which point widows must hand over the land to her sons. The extent of a widow's inheritance rights is dependent on a range of factors, notably her age (linked to her likelihood of remarrying); the number of children she has, especially sons; and her relationship with the husband's family. Young widows with no sons are particularly vulnerable to losing their rights to land (field research findings; Gaafar, 2014).

In effect, widows are often pressured to re-marry another man within the husband's clan in order to retain her rights to use the husband's land (Gaafar, 2014); wife inheritance is practised in the Pokomo community in Tana River County for example (field research findings). Some communities also practice "wife cleansing" whereby the widow is required to have a sexual relationship with a social outcast before she can remarry into the clan. Both these practices of wife inheritance and wife cleansing involve placing severe restrictions on a widow's freedom of choice, especially given that widows are rarely allocated land by their natal families (Gaafar, 2014).

Finally, women also face severe restrictions on inheritance as daughters. Daughters are often excluded from inheritance of land, although unmarried daughters are more likely to gain use rights to natal land. In many communities, if a man dies and leaves only daughters, his property reverts to his father or other male family members (Gaafar, 2014).

## 4.4 Implementation of statutory land laws

### 4.4.1 Women's access to land in practice

Implementation of the gender equitable elements of the statutory legal framework governing land (including marriage and inheritance laws) has overall been weak (Gaafar, 2014), with the result that women remain strongly disadvantaged in access to land compared to men (see Chapter 3). In Tana River County for example, the field research findings indicate that women continue to have weaker access both to titled land and to customary land.

As regards titled land, the field research found that in the case of married women, any registered land would be registered in the name of the husband. As reported by one male respondent from the farming community: *"Land always remains with the woman. She is the main stakeholder. [But] Us men provide the name for registration..."* This situation appears to be representative of the wider national context: national level statistics indicate that only 1% of land is titled in the name of women, and only 5-6% of land is jointly titled to women and men (Gaafar, 2014).

As regards women's access to customary land, the field research found that in Tana River County, individual allocation of land by Elders to women was still rare. Female participants in one FGD explained the situation as follows: *"The elders do not give women land for projects such as for planting trees or sisal... Land is like honey. It is only for a few people and women are not included amongst them."*

### 4.4.2 Barriers to implementation of gender provisions in statutory land law

The field research findings and secondary literature point to a wide range of barriers that have prevented more effective implementation of the gender equitable elements of statutory land laws, and/or have reinforced gender discriminatory aspects of customary land law. These barriers include the following:

- The legislative gap as regards governance of community land. This hinders the implementation of existing gender equality principles contained in statutory land law because firstly, women's statutory land rights are not explicitly defined in relation to community land, and secondly, gender discriminatory aspects of customary land law are not directly challenged;
- Limited awareness of women's statutory land rights, exacerbated by high illiteracy rates and language barriers. In Tana River County, in general neither community members nor traditional leaders were aware of land laws and policies despite efforts made by KLA and other external organisations to raise awareness of relevant laws and policies in the County. Women faced particular barriers in this regard due to low literacy levels, and in some cases limited knowledge of the national languages (field research findings);

- Barriers to accessing the formal justice system. Few women seek to resolve land disputes through the formal courts due to the high costs involved. For example, one key informant in Tana River County stated that *“people are too poor to go to court for issues such as advocating for women’s representation. They cannot afford advocates fees and they are not aware of legal aid organisations that can provide legal services for free”* (field research findings). Moreover, the State does not provide legal aid in civil cases concerning land; and the few NGOs that do seek to provide such services for women are under-resourced (Gaafar, 2014). Socio-cultural barriers can also be influential. Whilst both men and women in rural areas tend to face disapproval from their communities if they take disputes to the formal courts, women in particular are likely to receive negative and sometimes violent backlash from family and/or community members (Gaafar, 2014);
- Strong reliance on local customary leaders/institutions to resolve land-related disputes. Traditional leaders are often the first port of call for resolving a dispute over customary land (field research findings; Gaafar, 2014). This tends to militate against the implementation of gender equitable elements of statutory land law and also reinforces gender discriminatory aspects of customary law. This is because community leadership typically adjudicates land cases using customary or Islamic law rather than statutory law (field research findings). Also, traditional leadership positions are overwhelmingly held by men, which often leads to the reinforcement of gender discriminatory aspects of customary land law (see Section 4.3).

#### 4.5 Key policy implications going forward

Kenya’s statutory legal framework provides some important protections in relation to women’s land rights. The Constitution and the National Land Policy provide certain basic guarantees as regards women’s general property rights and emphasise the need to address gender discrimination in customary land laws and practice. Further, laws relating to marital property provide substantial protections for wives in terms of their rights over husbands’ and marital property, including in the case of divorce or separation. Finally, the Law of Succession Act provides stronger protections for women as compared to customary inheritance law, including in relation to the inheritance rights of daughters and childless wives.

However, overall implementation of land-related statutory laws has been very weak, with the result that customary land laws and practice continue to predominate. On the whole, customary land laws are strongly gender discriminatory, with women having only secondary rights to land which are dependent on husbands or male relatives. Further, these rights are both constrained and insecure, with women’s land rights being particularly vulnerable in the case of divorce or widowhood.



Finally, significant legal and policy gaps remain. The lack of a specific governance framework for community land, and linked to this the absence of any gender equality provisions as regards rights to community land, is especially problematic. Other significant weaknesses include the limited inheritance rights of widows, and the exemption of Muslim communities from both marriage and inheritance laws and the gender protections contained therein.

## 5. Women's representation and participation in land governance institutions and decision-making processes

### 5.1 Introduction

As well as the regulatory framework governing women's access to land, the extent of women's involvement in land governance structures clearly has an impact on women's ability to influence the outcomes of land allocation and investment decisions, and is also central to the overall aim of the project. This chapter therefore reviews women's representation and participation in land governance and decision-making in Kenya. Section 5.2 assesses the statutory legal framework in this regard, and explores the extent to which women are represented and effectively participate in practice; Section 5.3 briefly addresses women's representation in customary land governance structures, since these remain highly influential in the management of land in rural areas; and Section 5.4 identifies some key barriers to women's more effective involvement in land governance in general. Finally, Section 5.5 concludes by summarising key policy implications going forward.

### 5.2 Women's representation and participation in formal land governance structures

#### 5.2.1 Statutory legal framework

As discussed in Chapter 3, Kenya has progressive overarching legislation as regards the promotion of women's representation in governance structures, and this principle has to some extent been specifically applied in relation to land governance institutions. Thus, the National Land Policy recognises that women are insufficiently represented in institutions dealing with land, and therefore directs the Kenyan government to ensure the proportionate representation of women in land institutions at all levels (NLP, paragraphs 223 and 225h) (Gaafar, 2014). Further, the National Land Commission (NLC) Act 2012 specifies that the NLC should not have more than two-thirds of its members to be of the same gender (NLC Act 2012, First Schedule), and that the County Land Management Boards (the devolved County level bodies for the NLC) must "*reflect gender equity (...) within that county*" and provide women and men with equal opportunities for appointment and promotion (NLC Act 2012, Section 18(6)). Finally, the Land Act provides that in the case of land settlement schemes, beneficiaries are to be identified by a sub-county selection committee that must include one women's representative elected by a local women's organisation (Land Act, Section 134(4(f))).

However, as a result of the overall gap in legislation on community land, there is a lack of specific legislative measures to promote women's representation in the management and administration of community land. This is clearly a significant concern for land governance in rural areas. Moreover, the draft Community Land Bill 2015, which was under consideration at the time of research, does not include any specific provisions to ensure women's participation in decision-making in administration and management of community land (Community Land Bill 2015, Part III). Nevertheless it should be noted that until a community land law is enacted, theoretically the responsibility for un-registered community land is vested in county governments (Constitution, Section 63(3)), and the Constitution specifically provides for membership of both the County Executive and County Assembly to be subject to the two-thirds gender rule. In practice however, community land remains predominantly managed by customary institutions (see Section 4.3); thus the relevance of these provisions to the management of community land is likely to be limited.

### **5.2.2 Implementation of statutory provisions and women's involvement in formal land governance mechanisms in practice**

No reports or statistics were found on women's representation in formal land governance structures across Kenya as a whole. However, the available evidence indicates that implementation of relevant statutory provisions has been mixed. At the national level, the NLC almost meets the two-thirds gender quota, with three of the current ten commissioners being female<sup>4</sup>; and at the county level, of the three county land management boards (CLMBs) for which relevant data could be identified, two of the boards (the Nakuru and Samburu Board) appeared to comply with the two-thirds gender rule<sup>5</sup>, with the Tana CLMB being the exception with only one of nine members being female (field research findings).

In contrast, evidence from the field research findings show that in Tana River County, implementation of relevant statutory provisions has been weak overall. Of the four county level land-related governance bodies for which data was available, the County Assembly Land Committee was the only one found to comply with the two-thirds rule, with women comprising one-third of the twelve-strong Committee. Female representation was much lower in the other three bodies. In the County Executive's Land Ministry, the Minister and all six staff were male, and in the Boundaries Dispute Resolution Committee established by the County Executive only one of sixteen committee members were female. As noted, only one of nine members of the CLMB was female, despite the fact that at least three women applied for the positions (field research findings).

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4. [http://www.landcommission.go.ke/?page\\_id=83](http://www.landcommission.go.ke/?page_id=83)

5. <http://www.nakuru.go.ke/2015/05/19/governor-unveils-nakuru-county-lands-management-board/>; and County Assembly of Samburu, 2014

As regards women's participation in public consultation meetings and fora on land issues, the field research found that in Tana River County both men's and women's participation and engagement in such fora is low. As explained by the Chairperson of the Land Committee in the County Assembly: *"People do not see the need to participate. They think that the government wants to benefit. Not many people come for the public fora."* However, women's participation was found to be particularly low. For example, the FAO programme officers interviewed shared that they needed to take proactive steps to ensure women took part in training sessions on land rights, and even then they received resistance towards women's involvement (field research findings).

Moreover, even when women do participate in formal land governance institutions and/or decision-making fora, women tend not to contribute proactively to discussions and defer to men's perspectives. For example when asked about women's participation in land-related public hearings, the Chairperson of the County Assembly Land Committee stated: *"Women do not understand that they are expected to contribute. We have to deliberately call for women to talk. They would say, 'What our wazees (men) and youth have said is enough; we do not have any more to say...'"* (field research findings).

### **5.3 Women's involvement in customary land governance and decision-making structures**

As previously noted, customary land governance structures remain highly influential in the management of community land; therefore, the extent of women's representation in these institutions is important in determining rural women's access to land in practice. In general, women remain strongly under-represented in such structures (Gaafar, 2014). For example, women in Tana's pastoral communities are explicitly excluded from the main community leadership body. Whilst women have their own leadership group, its remit is limited to discussing issues of specific concern to women (such as parenting concerns); whereas it is strictly the preserve of the male community leadership structure to deliberate and make decisions on key strategic issues affecting the community as a whole, including land (field research findings).

As indicated earlier, the Pokomo communities in Tana are somewhat atypical in that they have made proactive efforts to include women in their traditional leadership structures. Moreover, these structures have been devolved to the locational level, which is also likely to facilitate greater participation of community members, including women, in governance matters. Nevertheless, progress has been slow. For example, one female leader reported that she was the only female member of the council of elders in her community; moreover, she has faced significant barriers to full participation in decision-making as described further in Section 5.4.

Women's representation and participation in customary dispute resolution processes is also problematic. In some communities, including the Orma and Wardei communities in Tana River Country, cultural practices do not even allow women to appear before the Elders as complainants, let alone to take part in decision-making. As explained by traditional leaders in the field research: *"Women are not allowed to speak or bring a complaint in their own right to our council of elders. They can only bring their complaints through her family."* (Gaafar, 2014; field research findings). Even where women are permitted to represent themselves in such hearings, they may suffer harassment and violence for making a complaint and/or face gender discrimination in the hearing itself (Gaafar, 2014).

Finally, women are marginalised in household governance structures. Men are traditionally considered to be the heads of household and "owners" of the family's land; as a result, women are often excluded from decision-making as regards how household land is allocated and managed, and how proceeds from the land are distributed (Gaafar, 2014). This was found to be the case in Tana River Country, where all FGD respondents confirmed that women did not have absolute rights to land, with the man of the household retaining ultimate control of land including decisions concerning the disposal of produce from the land. As one male FGD respondent explained, *"I am the one with expertise on land and farming, not the woman. I am the one who purchases the farm inputs like fertiliser, seeds etc. Because I incur these expenses, I should have the final say"* (field research findings).

#### 5.4 Barriers to women's representation and participation in both formal and customary land governance structures

The field research findings firmly indicate that patriarchal attitudes influenced by cultural and religious norms constitute the key set of barriers to women's full representation and participation in both formal and customary land governance structures. Negative attitudes towards women taking on leadership roles have a strong influence in this regard, leading to women facing strong barriers to entry and/or being marginalised in decision-making. One female member of a Pokomo Council of Elders in Tana River County describes these attitudes as follows: *"Women are not always given a role. Due to culture, they are treated as if they do not understand leadership. Their role is meant to be in the kitchen whilst men are the ones who plan and make decisions on critical issues such as land."* FGD participants further confirmed such perspectives, reporting that women who present themselves for leadership receive backlash from the community. They are labelled as *"wrong number"*<sup>6</sup> and sometimes told to sit down and watch as the discussions proceed (field research findings).

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6. A local expression used to refer to a woman who is considered to be of wayward and disrespectful ways.

Moreover, the fact that land governance tends to be perceived as a male rather than female concern is also a significant constraint to women's effective participation in land governance. This gender division of roles can be directly imposed by men: this is the case for example with the pastoralist communities in Tana River County, whereby women are directly excluded from the community leadership structure that deals with all land issues. "Self-censorship" by women themselves can also play a part, as observed by the Chief Officer of the Tana County Government's Land's Department: *"We have noted that when land is discussed, women choose to take a back seat and leave the men to dominate"* (field research findings).

Evidence from the field research in Tana further suggests that underlying these specific views as regards women's role in land governance is the belief that women are fundamentally inferior to men. The persistence of such beliefs within traditional leadership structures is demonstrated by the response of one Orma Elder when he was asked why women could not participate in decisions concerning land: *"Women are like children, it is only their feet that are bigger. (...) Women are viewed as children as they cannot go to war so they cannot be given leadership"* (field research findings).

Additional barriers to women's representation and participation in *formal* land governance structures were also identified as follows:

- Women's representation in land governance is not prioritised by government officials. For example, when the County Governor was asked what action would be taken to address women's under-representation in the County Executive's Boundaries Dispute Resolution Committee, the Governor failed to respond to any of the queries (field research findings);
- Mechanisms used for advertising forthcoming land governance fora are not effective at reaching women. In Tana River County, the field research found that the government used local newspapers and local area chiefs to inform the public about forthcoming meetings on land governance issues. Neither of these communication channels were found to be effective at reaching rural women and men, since few people read newspapers and local chiefs tend only to invite the people they know (field research findings). Women in particular are likely to be excluded due to lower literacy levels and more limited social networks;
- Lack of specific affirmative action measures to promote women's representation in community land governance. The lack of a clear legislative framework for the governance of community land in general, and for women's representation in its governance in particular, clearly present a significant barrier to women's representation in formal land governance structures in rural areas.

## 5.5 Key policy implications going forward

The existing regulatory framework contains some significant measures to promote women's representation in land governance structures. As discussed in Chapter 3, the Constitution provides a strong overarching provision for women's representation (the two-thirds rule), which implicitly includes land governance bodies; moreover, the National Land Commission Act expressly provides that the composition of the NLC complies with this rule. Furthermore, the National Land Policy underlines the need to ensure women's proportionate representation in land governance institutions in general, and CLMBs are required under the NLC Act to address gender equity in the appointment of their members.

As regards implementation of statutory provisions promoting women's representation, results have been mixed. Although there appear to have been some efforts to implement the two-thirds gender rule in relation to national and county-level land governance structures, many such institutions – including the NLC itself – fall short of the one-third female representation threshold; moreover both the quantity and quality of women's participation in wider public fora is low. Customary land governance structures remain highly influential in rural areas, and women's representation in these structures remains very weak. The main barriers to women's representation and participation in both formal and customary structures are patriarchal cultural and religious norms, and limited political will to implement gender provisions.

The most critical legal/policy gap is the lack of a legislative framework for governance of community land, and the lack of specific measures to ensure women's representation in such governance. This legislative vacuum effectively leaves it wide open for customary land governance institutions to prevail, and these remain strongly male dominated. In addition, there are inadequate policy measures to address the underlying drivers of the low quantity and quality of women's participation in land governance structures and decision-making fora, including limited measures to address underlying cultural and religious barriers.

## 6. The legal framework governing investments: gender implications

### 6.1 Introduction

Whilst underlying laws and policies governing gender equality practices, women's land rights and women's representation are critical in determining gender outcomes of LSLAs, the specific regulatory framework governing agricultural investments can also influence these outcomes. This chapter therefore reviews these policies and their implementation in Kenya. First, relevant investment promotion policies and the extent to which they address gender concerns are reviewed in Section 6.2; Section 6.3 then considers the regulation of land acquisition and investments and key gender implications. Finally, Section 6.4 concludes with key policy implications.

### 6.2 Investment promotion policies

Published in 2008, Vision 2030 provides the overarching long-term development blueprint for Kenya from 2010-2030. In recognition that agriculture remains the backbone of the Kenyan economy, Vision 2030 places the development of the agricultural sector at the heart of its economic growth strategy for the country. Thus, *"increasing value in agriculture"* is one of six sector development goals included under the Vision's *"economic pillar"*, a goal which is expected to be achieved through *"an innovative, commercially oriented and modern agriculture (...) sector"*, with increased foreign investment identified as a key underlying driver for the economic pillar as a whole (Government of the Republic of Kenya, 2007).

Vision 2030 addresses gender issues to some extent. In particular, Section 5.6 on "Gender, Youth and Vulnerable Groups" states that strategies will be developed to increase *"the participation of women in all economic, social and political decision-making processes"*, and to improve access of all disadvantaged groups to business opportunities, justice and essential services. Moreover, one of six flagship projects earmarked for 2012 included strengthening the "Women Enterprise Fund" (Government of the Republic of Kenya, 2007; Equal Rights Trust, 2012).

However, given that Vision 2030 is comprehensive and detailed, its coverage of gender issues is both brief and limited in scope. Firstly, gender is largely relegated to one sub-section of the social pillar; in contrast, mention of gender is virtually absent from the economic pillar in general and the agriculture section in particular. The underlying assumption appears to be that economic development strategies are gender neutral, thus the Vision fails to specifically address underlying inequalities in access to productive assets that would need to be addressed to ensure women benefit equally from agricultural development measures. Secondly, whilst Section 5.6 recognises the need to tackle gender inequalities broadly across



all key spheres, it does not identify any institutional or process mechanisms to ensure this takes place. Overall therefore, whilst Vision 2030 gives gender a place, it fails to consider the need for mainstreaming of gender issues across key strategy areas (Society for International Development, 2010; Government of the Republic of Kenya, 2007; Equal Rights Trust, 2012).

The Agricultural Sector Development Strategy (ASDS) 2010-2020 was launched in 2010 in part to build on successes of the previous sector strategy but also to provide a strategic framework to deliver on expectations from the agricultural sector under Vision 2030. The ASDS addresses gender in the section on cross-cutting “enabling factors” and includes a statement of intent to identify a gender policy for the agricultural sector. However, this is a relatively short section in a lengthy and detailed document, and the Strategy does not include gender targets under the proposed intervention plans for crucial sectors/issues such as that on access to land (Government of Kenya, 2010a).

Gender receives further mention in the ASDS’s Medium Term Investment Plan (MTIP) 2010-15. In this five-year investment plan for the ASDS, gender is identified as a cross-cutting issue that needs to be addressed across all six pillars of the MTIP’s framework. Under the specific section on gender, the plan re-iterates the intention to develop a gender policy for the agricultural sector “to ensure women’s empowerment, and mainstream the needs and concerns of women, men, girls and boys, so that they can participate and benefit equally from development initiatives”. Under this section, the MTIP further commits to “promote continued progress in gender sensitization and mainstreaming in agricultural initiatives”, integrate gender analysis and gender-based budgeting into each of the MTIP investment pillars, and monitor and evaluate progress toward gender equality (Government of Kenya, 2010b).

Unfortunately, no information could be identified on the implementation and impact of gender elements of Vision 2030 and ASDS. However, a brief internet search for the planned agricultural sector gender policy did not return any relevant results, indicating that no such policy has yet been developed or published.

## 6.3 Regulation of land acquisition and investment

### 6.3.1 Overview of regulations governing the formal land acquisition process for (foreign) investors

The main laws and regulations governing large-scale agricultural investments and land acquisition in Kenya include the Investment Promotion Act (IPA) 2004, the Constitution 2010, the Land Act 2012, the Environmental Management and Co-ordination Act (EMCA) 1999, and the Environmental (Impact Assessment and Audit) Regulations (EIAA Regulations) 2003. Relevant government authorities involved in promoting and regulating LSLAs in Kenya include: the Kenya Investment Authority, which is the country’s official investment promotion agency; the

National Land Commission, whose remit includes national oversight of land use planning and of the alienation of public land (NLC Act 2012, Section 5(1(h)) and Section 5(2(a))); and the National Environment Management Authority (NEMA), who has responsibility for EIA licencing.

The laws and regulations outlined above provide a range of protections for local communities in the face of LSLAs, including restrictions on foreign ownership of land, screening of the potential social impacts of investments, requirements for public consultation, and provisions for compensation of previous land users. Each of these areas are addressed in the sub-sections below.

### Restrictions on foreign ownership of land

The law prevents foreigners from owning land outright, restricting them to acquiring land on a leasehold basis only and with the duration of leases capped at a maximum of 99 years (Constitution, Section 65(1)). However, Section 13(1) of the Land Act provides that if the investor is a Kenyan citizen, the NLC may offer the existing leaseholder a pre-emptive right to renew the lease as long as the land is not required for public purposes. This may effectively mean that the government could grant a renewal of a lease even if the local community objects to the investment.

Moreover, in theory community land is legally protected from being acquired by investors under any circumstances: this is because Section 9(2) of the Land Act provides that community land can only be converted to public or private land under a community land law. Given that such a law is as yet unenacted, the implication is that there should be a complete freeze on the acquisition of community land until this law is passed. In practice however, this ban has been violated on a number of instances (see Chapter 2).

### Screening of investments

The current legal framework provides a number of protections in terms of the screening of potential agricultural investments. Firstly, the IPA (Section 4(1)) provides that an investment certificate can only be obtained if *“the investment and the activity related to the investment are lawful and beneficial to Kenya”*. Section 4(2) further elaborates the particular criteria that should be considered in determining whether the proposed investment will be *“beneficial”*. Whilst benefits to local communities are not specifically mentioned here, some of the included criteria have the potential to benefit local communities. For example, the criteria include the creation of employment for Kenyans, the acquisition of new skills for Kenyans, the use of domestic raw materials and services, and the contribution to value addition through processing of *“local, natural and agricultural resources”*.

In addition, the Constitution and the Land Act also provide explicit protections for local communities. Thus, Section 66(2) of the Constitution provides that legislation shall be enacted to ensure that investments specifically benefit local communities and their economies. Moreover, the Land Act requires that when allocating public land for investment, the NLC must ensure that such investments benefit local

communities and their economies (Sections 12 (3) and (4)); and further, the Land Act specifically allows the NLC to make regulations for allocation of public land that prescribe *“mechanisms of benefit sharing with local communities whose land have been set aside for investment”* (Section 12 (12) (e)).

Importantly, any LSLA must also undertake and pass an environmental impact assessment (EIA) before it can proceed. Thus, the EMCA requires that any project or investment involving *“large-scale agriculture”, “food-processing plants”* and/or other *“activity out of character with its surrounding”* must undergo an EIA before the project can be financed or commence activities (EMCA, Section 58 and Second Schedule). Moreover, the EIAA Regulations 2003, which set out the assessment and reporting requirements for EIAs carried out under the EMCA, require that an EIA must assess and report not only standard environmental criteria, but also on certain social criteria. For example, the Regulations state that the EIA report shall include *“an economic and social analysis of the project”* (paragraph 18(1(o))); and in making a decision about whether to grant an EIA licence, NEMA should give consideration to the validity of the EIA report *“with emphasis on the economic, social and cultural impacts of the project”* (paragraph 23(3(a))).

### Consultation with local communities

Both the Land Act and EIAA Regulations provides for consultations with local communities as regards proposed LSLAs.

The Land Act, under Articles 107-133 which address the compulsory acquisition of land, provides that the government must inform all *“interested parties”* of the proposed acquisition at least 30 days prior to a public inquiry being held to discuss compensation. The Act further specifies that interested parties must be informed via notices in the national and county Gazette and through delivery of a copy of the notice to *“every person who appears to the [National Land] Commission to be interested in the land”*. Interested parties are specifically defined to include not only those with official title to the land but also those who occupy the land unofficially; further, spouses of both registered and un-registered occupants are also included. In addition, Section 14 of the Land Act provides for similar consultation measures in the case of proposed allocations of public land, specifically providing for consultation with *“marginalised communities and groups living in the general vicinity of the public lands being proposed for allocation”*.

Whilst the abovementioned provisions in the Land Act clearly provide some protections as regards community consultation, several concerns remain. Firstly, the applicability of the provisions under Articles 107-133 to the compulsory acquisition of *community land* is not explicitly stated. The inclusion of community land is implied in that the overall scope of the Land Act includes community land, and there is nothing in this Section of the Act that explicitly excludes community land; however, its inclusion in scope is not made explicit. Similarly, these provisions are not referenced or reiterated in the Investment Promotion Act, hence their applicability to acquisition of land by (foreign) private investors is not entirely clear.

Finally, whilst the Land Act makes clear that interested parties must be informed of the proposed acquisition for the purposes of claiming compensation, it does not appear to provide an explicit power of veto to affected local communities as regards whether the investment should go ahead.

The EIAA Regulations also provide strong provisions as regards community consultation. Paragraphs 17 and 21 require that as part of the EIA process, assessors should “seek the views of persons who may be affected by the project” and that these persons should be consulted using a variety of mechanisms which, when compared to the consultation processes outlined in the Land Act, are much more likely to be inclusive of rural communities (see sub-Section 6.3.2). Further, Paragraph 23 provides that in making a decision about the EIA report, NEMA must take into account the findings from public hearings and any comments made by interested parties.

### Compensation procedures

The Constitution and Land Act afford some protections as regards payment of compensation to land occupants affected by LSLAs. In Section 40, the Constitution provides that in cases of compulsory acquisition of land by the State, all those with interest or rights in the land, including those with no official land title, should be paid prompt and just compensation. The Land Act further elaborates on who is entitled to compensation, providing that all interested parties are entitled to claim compensation, with interested parties defined to include unregistered occupants and additionally spouses of both registered and unregistered occupants. The Land Act also establishes a process for dealing with claims for compensation, whereby the government must hold an inquiry to hear any claims for compensation from any “interested persons”. These claims must be submitted in writing before the inquiry, and “every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry” (Land Act, Sections 107-133).

However, as is the case with the legal protections concerning community consultation, the applicability of the above compensation provisions to the acquisition of *community* land, and further their applicability to land acquisition by *private* investors, is not made explicit. Further, whilst the Land Act calls for the NLC to develop specific guidelines and criteria for allocation of compensation, such guidelines have yet to be developed and therefore the criteria for determining applicants' entitlement and amount of compensation remain unspecified.

### 6.3.2 Gender implications of land acquisition regulations and process

Some important protections are provided to women in the legal provisions for community consultation and compensation, as well as in the regulations governing EIAs. As noted above, the Land Act specifically provides for spouses of both registered and non-registered users of land to be informed of the proposed acquisition, and also provides for their entitlement to claim and be considered for

compensation. Given that recognised primary occupiers – whether registered or not – are most likely to be male (see Chapter 4), the explicit inclusion of “*spouses*” in these provisions provides important protections for wives in particular. Moreover, the specific recognition in both the Constitution and the Land Act of the rights of *untitled* occupants as regards consultation and compensation are also important for women in general including female-headed households, given that the vast majority of female occupiers of land do not have formal land titles (see Chapter 4).

In terms of the EIA process, the EIAA Regulations specifically require that the social analysis to be conducted of the proposed project/investments must address gender considerations. Thus, a “*social analysis*” is specifically defined to encompass an assessment of the social consequences of the proposed project/investment including in relation to “*social justice and equity*” and “*gender disaggregation*” (EIAA Regulations, paragraph 2). Moreover, as noted, the public consultation mechanisms stipulated as part of an EIA process are relatively progressive and include specific measures that are likely to facilitate women’s inclusion in the consultation process (although women’s inclusion is not made explicit – see below). For example, the Regulations require that notices of the proposed acquisition must be broadcast via radio as well as newspapers, and that at least three public hearings must be held during which means must be provided for recording oral as well as written comments. Specific provisions are also made to ensure that the venue and timings of public hearings are convenient for rural communities, and that comments provided in local languages can be received and documented. Whilst such provisions do not guarantee women’s participation, they facilitate women’s involvement because they address a range of key barriers women typically face in participating in official fora on land matters.

Nevertheless, the existing regulatory framework for investments has substantial gaps in terms of addressing gender concerns around LSLAs. As regards the provisions for inclusion of spouses in the consultation and compensation mechanisms outlined in the Land Act, the stipulated communication mechanisms here are likely to exclude the majority of rural women in practice due to their low literacy levels and other access constraints. Whilst the designated consultation methods for the EIA process are much better in this regard, there remains the lack of any affirmative action measures to ensure women’s inclusion in the EIA consultation process.

Moreover, apart from the general reference to gender considerations made in the EIAA Regulations, the legal and policy framework governing agricultural investments is otherwise silent on gender. In particular, gender considerations are not explicitly addressed in terms of the types of business models to be considered or promoted through investments. Further, the investment regulation framework also fails to promote women’s representation in the governance structures that deal with investment regulation. Presumably public investment authorities are theoretically covered under the overarching two-thirds gender rule provided for in the Constitution. However, unlike the NLC, the Kenya Investment Authority is not

subject to any specific legislative requirement to comply with the two-thirds rule or to otherwise address gender equity considerations in the appointment of its members (Investment Promotion Act). Likewise, the EMCA does not provide for any specific gender quotas or other affirmative action measures as regards the composition of the NEMA (EMCA).

Furthermore, the official regulations governing investments are frequently not complied with (see Chapter 2), and this lack of compliance can have specific negative gender implications. For example, as noted in Chapter 2, the EIA process can be bypassed altogether. Given that the EIA is currently the only part of the investment screening process where consideration of gender issues is explicitly stipulated, the limited compliance with EIAs clearly has negative implications for the consideration of gender concerns in investment screening.

Finally, where existing regulations do not provide clear guidance on gender considerations, their implementation can act to reinforce underlying gender inequalities. For example, in the absence of detailed guidelines for compensation procedures, actual compensation practices appear to reinforce existing patriarchal systems leaving many women failing to benefit from compensation. Since traditionally men rather than women are recognised as the primary “owners” or occupants of land, compensation awards tend not to be paid directly to female users or occupants of land, but rather to their husbands, fathers, brothers or uncles. Moreover, these men often fail to invest the proceeds in their families (field research findings). These tendencies were confirmed by participants in the women-only FGD in the Tana field research, as encapsulated by one respondent: *“Whenever compensation is paid, it is the men who take it. We women do not get anything”* (field research findings).

## 6.4 Key policy implications going forward

The regulatory framework governing agricultural investments has some notable strengths as regards gender considerations. In particular, the law expressly provides that in the case of compulsory acquisition of land, wives are to be included in the consultation and compensation procedures in that spouses of both registered and unregistered occupants of targeted land are specifically included as interested parties that should be fully involved in these processes. In addition, EIA regulations require that assessments consider and report on gender disaggregated social impacts of proposed investments. In practice however, implementation of both these provisions has been problematic. When women have been awarded compensation, payments tend to be made to husbands or male relatives with women often receiving little benefit themselves; and overall implementation of EIAs has been weak.

Moreover, key legal and policy gaps remain. In the first place, detailed guidelines for payment of compensation remain undeveloped, yet comprehensive criteria to ensure fair compensation of secondary users of land are likely to be needed if

women are to fully benefit. Secondly, there is a lack of affirmative action measures to ensure women's representation in investment-related consultation procedures and decision-making bodies, including the Kenya Investment Authority and NEMA. Specific provisions to ensure that ensuing business models are inclusive of women are also absent from current legislation. Finally as regards the provisions around consultation and compensation contained in the Constitution and the Land Act, their applicability both to the acquisition of *community* land and to the acquisition of land by (foreign) *private* investors are not made explicit.

## 7. Conclusions and recommendations

Kenya's regulatory framework for land and investment governance has some notable strengths as regards gender considerations. In particular, there are strong gender provisions contained in overarching legislation and notably in the Constitution. These include strong affirmative action measures to promote women's representation in public bodies (including the two thirds rule) and further provisions that confirm the specific applicability of these measures to key land governance bodies including the NLC, CMLBs and county governments. Moreover, the existing legal framework affords significant protections for women's land rights through marriage and divorce, including a guarantee of wives' legal interest in land whose upkeep they have contributed to, and an entitlement to a share of matrimonial property on divorce. Regulation governing agricultural investments also recognises women's rights to some extent, including the recognition of wives' rights to consultation and compensation and the requirement to address gender concerns in mandatory EIAs.

Unfortunately however the implementation of these gender equality provisions has been weak overall. The affirmative action measures for women's representation in governance have been poorly implemented in general terms, and implementation has been mixed in relation to land governance bodies specifically. Likewise, there has been weak implementation and limited impact of statutory protections for women's land rights under marriage and inheritance laws, with customary land, marriage and inheritances practices prevailing in most rural areas. Investment regulations, including specific gender provisions, have also been poorly enforced. The prevalence of customary land law and practice is problematic from a gender perspective because these systems are gender discriminatory in many respects. The dominance of patrilineal systems mean that in the majority of cases women only have indirect and insecure rights to land, and customary marriage and inheritances practices are such that women are particularly vulnerable in the case of divorce and widowhood.

Key barriers to implementation of statutory gender equality provisions include the legal gap in community land law (see below), limited awareness of gender and land laws, and the strong reliance on traditional dispute resolution mechanisms. Moreover, underlying hindrances are the persistence of patriarchal norms and practices, and limited political will and resources to implement gender equality laws.

Moreover, several significant policy gaps remain. A critical underlying weakness is the lack of a legal framework for the management of community land. This legal gap weakens the application of many existing gender provisions contained in relevant law, including those related to women's representation in land governance structures, because their applicability to community land remains unclear. Moreover, the strong statutory recognition of Islamic law, and to a lesser



extent of customary law, is problematic in that it creates a conflict with broader gender equality provisions provided under statutory law including those relating to women's property rights through marriage and inheritance. Further, inheritance law remains gender discriminatory in that widows' property rights (but not those of widowers) are withdrawn on remarriage; and there are also limited policy measures in place to improve the *quality* of women's participation in land governance.

Finally, investment regulation remains weak in several areas including the lack of explicit measures to ensure women's inclusion in decision-making around investment screening and also in business models supported by investments. Overall, relevant regulations are poorly integrated and their application both to (foreign) private investors and to the acquisition of community land are not explicitly stated.

Based on the analysis above, the following policy recommendations can be made:

- Enact a gender-inclusive Community Land Act as an urgent priority. This means firstly prioritising the enactment of such a law, and secondly ensuring that the draft bill currently under consideration is comprehensively reviewed to ensure critical gender issues are addressed. In particular, the Act must include provisions to ensure that women play a strong role in all levels of land governance including structures at community level. The Act must also explicitly provide for women's equal access and rights to community land including in relation to inheritance;
- Invalidate gender discriminatory aspects of Islamic law. As a minimum, amendment of all relevant laws is needed to ensure that Islamic law is subject to the same caveats as customary law, i.e., that all Islamic law that contravenes the gender equality provisions contained elsewhere in statutory law will be considered invalid;
- Remove the gender discriminatory elements of existing inheritance law. The Law of Succession Act must be revised to ensure that widows are afforded equal inheritance rights as widowers, i.e., that widows are entitled to inherit property outright and that these rights are not affected by remarriage;
- Strengthen the quantity and quality of women's representation in key governance structures, including those relating to land. Efforts must be strengthened to effectively implement the two-thirds gender rule and other existing affirmative action measures, ensuring buy-in to these measures across the public sector including at County level. This should include specific efforts to implement these measures in land governance structures; further, additional policy initiatives are needed to improve the quality of women's representation, for example through activities to strengthen women's leadership confidence and skills and combat cultural and religious barriers to female leadership;

- Consolidate and strengthen investment regulation as regards gender inclusion. Existing legislative provisions need to be expanded to include gender-inclusive compensation procedures and specific provisions to promote gender inclusion in investment governance structures and business models. All relevant provisions should also be directly incorporated into investment regulation and/or otherwise clarified in terms of their applicability to (foreign) private investment and the acquisition of community land;
- Address underlying patriarchal attitudes and practices in rural areas, including in particular negatives attitudes towards women being leaders, through development of tailored policy initiatives and awareness-raising programmes. Such programmes should target adult rural men and women, schoolchildren and traditional leaders, as well as local government;
- Raise awareness of women's legal rights at all levels and address women's barriers to accessing justice. This includes raising awareness with rural women and men, traditional leadership, the judiciary and all levels of government. More resources also need to be allocated to provision of legal aid to rural women and men and to supporting adult literacy programmes in rural areas;
- Strengthen the women's movement in order to build pressure and hold the government and investors to account. Finally, efforts must be made to strengthen alliances between CSOs working to promote women's land rights and build their capacity, so that they are collectively better able to hold the government and investors to account to ensure women's voices are heard and women's land rights protected.

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# Strengthening women's voices in the context of agricultural investments: Lessons from Kenya

This report constitutes one of four countrywide assessments produced under the International Institute for Environment and Development's (IIED) 'Gender, land and accountability in the context of agricultural and other natural resource investments' initiative. The goal of the initiative is to strengthen rural women's livelihood opportunities by empowering them in relation to community land stewardship and increasing their ability to hold agricultural investors in East and West Africa to account.

Focusing on Kenya, this report's primary aim is to provide a backdrop on relevant policies and practice, and to inform practitioners, policy makers and researchers about key governance issues relevant to the strengthening of women's empowerment in community land stewardship and accountability in agricultural investments. It draws on a literature review by the Kenya Land Alliance (KLA) with additional inputs from IIED, and on a complementary primary field research. Conducted by KLA in April 2016 on selected communities in Tana River County, the latter provides an in-depth case study of the application of statutory and customary laws affecting women's access to and management of land.

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