



WOMEN'S LAND RIGHTS



Produced by

Kituo Cha Sheria (Legal Advice Centre)

With support from MISEREOR

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Preface

The status of women in relation to the ownership and control of land has been a thorny issue in Kenya from pre- and post-independence. The problem stems from many issues. Firstly, cultural norms and practices do not support women's access to and control and ownership over land as individuals. Women were themselves viewed as property and hence incapable of owning land. They were only producers and users of land. While the Kenyan society has evolved, some negative cultural norms remain alive and contribute greatly to inaccessibility of land resources for women. In a report recently launched by the Food and Agriculture Organization, 70 percent of Kenyans believe that women have a right to access land and agrifood systems. The 30 percent nay-sayers have a huge impact on women's realities in owning and controlling land resources.

Secondly, historically the law did not specifically provide for women's unique right to own property. Prior to the National Land Policy (2009), the gendered questions relating to land rights remained silent and invisible in legal and policy documents. With the advent of land reforms initiated by a progressive National Land Policy, Constitution of Kenya 2010 and land and property legislation, we can affirmatively argue that Kenya now has a robust and extensive framework for the protection and promotion of land rights for women.

Unfortunately, even despite an elaborate legal and policy framework, we find that only 1 to 2 percent of women in Kenya have registered titles to land. Majority of women continue to use and access land through their fathers, husbands, sons and other male relatives. The implementation of legal safeguards to address this imbalance has remained weak and disjointed. Further, the contribution by women towards development of land has been undermined through the non-recognition of unpaid family work, gender-based violence in the market place, harmful cultural practices and retrogressive interpretation of law. As a result, majority of women have remained disempowered, impoverished, indigent and marginalized. This is especially so in a land-based economy such as that of Kenya.

Kituo cha Sheria -Legal Advice Centre (hereinafter "KITUO") has, for now fifty years, strived to enhance land justice for poor and marginalized



communities such as women through its legal empowerment approaches. Legal literacy is important in empowering women to understand their entitlements and thereby build a sense of consciousness for the agitation of those rights. As an organization, we have been at the forefront in the development of simplified legal information for community consumption whilst remaining alive to the fact that “ignorance of the law is no defence.”

The booklet is designed to provide a deep yet insightful snapshot of the legal framework of women and land rights especially upon the promulgation of the 2010 Kenyan Constitution. We expect that the booklet will be utilized by women themselves, community-based paralegals, practitioners, stakeholders and the general public for awareness raising and capacity building. More importantly, we hope that the information provided shall empower women from all walks of life to take bold steps and claim their legal and unfettered entitlements to land and property.



Dr. Annette Mbogoh

Executive Director



Acknowledgement

The development of the booklet has been a collaborative and concerted effort by various departments within Kituo cha Sheria - Legal Advice Centre and independent consultants. The initial text was initially developed before the elaborate land reforms and hence could not go to print without an in-depth review and update.

We wish to acknowledge the contribution that was made by Elmad Omollo, Faith Ochieng and Mourine Audi to develop the very initial draft. The draft was rewritten, expounded and reviewed by Ms. Jemimah Aluda, an independent consultant who has extensive experience within the area of women's rights. We truly appreciate her dedication and tireless effort to re-design the text.

We also acknowledge the contributions that were made internally by the Kituo cha Sheria team led by Dr. Annette Mbogoh (Executive Director), John Mwariri (Legal Aid and Education Programme Coordinator), Diana Owiyo (Legal Intern) and Tobias Mwadime (Research, Communications and Knowledge Management Programme Coordinator). The booklet was enriched by their insightful comments, feedback and reviews including the development of the layout for printing.

Finally, we wish to sincerely appreciate the kind support of Misereor, our development partner, that financed the printing of the booklet. This process would not have been possible without their kind and generous support. We specifically wish to mention Dr. Kamila Krygier, Katharina Götte, Antje Hauten and Caroline Lunani, our points of contact at Misereor office during the project period.

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Abbreviations

ADR	Alternative Dispute Resolution
CEDAW	Convention on Elimination of Discrimination Against Women
CAJ	Commission on Administrative Justice
KNCHR	Kenya National Commission on Human Rights
KNCHREC	Kenya National Human Rights and Equality Commission
LRA	Land Registration Act
NGEC	National Gender and Equality Commission
NLC	National Land Commission
NLP	National Land Policy
UDHR	Universal Declaration of Human Rights



Introduction

Land is not only the most important factor of production but also a very emotive issue in Kenya. As a matter of fact, 80% of our population relies on agriculture, yet only 20% of the land mass comprises arable land. It not only serves as a means of production for supporting community livelihoods, but also embodies the social, cultural, and spiritual identities of more than 40 Indigenous and local communities who call Kenya home. Unequal property rights and harmful customary practices violate international laws which recognize the rights of women as equal to those of men.

How many women have access, control or own land in Kenya?

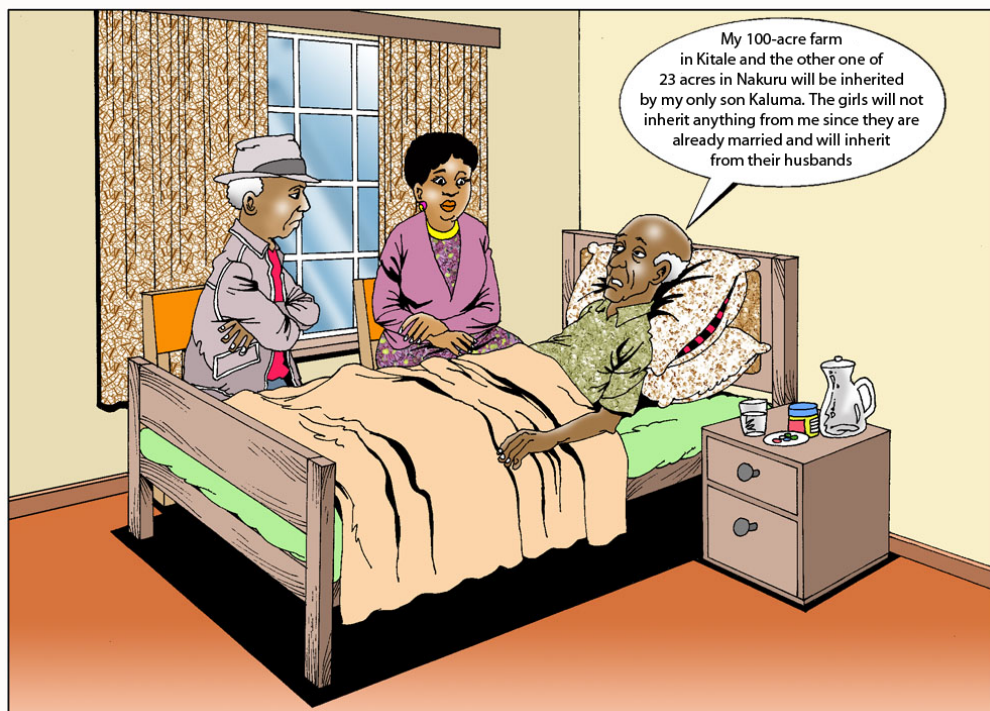
Among Kenyan communities, women ordinarily do not own land or movable property. At best, their rights are hinged on their relationship to men either as their husbands, fathers or brothers who own and control land, while women are relegated to the right of use only.


According to the National census report of 2019, female population in Kenya stands at 24,017,716 while male population is 23,548,056. Of these figures, the women constituted the larger fraction yet, the land question is grimmer in the case of Kenyan women. In 2018, an analysis by the Kenya Land Alliance found that out of the one million title deeds issued by the Kenyan government between 2013-2017, only 103,043 were given to women equating to 10% of the total titles issued by the government. In terms of hectares, out of 10,129,704 ha of land titled; women got 163,253 ha representing a paltry 1.62 percent, while men got 9,903,304 ha representing 97.76 percent. Thus, women's ownership to land in Kenya still remains widely a mirage and far from being attained.

Globally women own less land and have less secure rights over land than men. Women make up on average less than 20 percent of the world's landholders, but make up an estimated 43 percent of the agricultural labour force. Unless gender equality extended to land rights and ownership, the 2030 Agenda for Sustainable Development would become an impossible vision.

What are the barriers to women's land rights?

- i. Land administration and management structures tend to be dominated by men at national and various sub-national government levels. Women's participation in decision-making processes is pivotal in addressing gender inequality in the land sector;
- ii. Even though laws such as Law of Succession Act (LOSA) are gender-neutral on property ownership (such as the Law of Succession Act) and have prohibited many women from owning land because of structural barriers such as access provisions around right to life interest for male spouses against the female spouse who can only inherit as long as they remain feme sole. Also the inclusion of customary law and use of Muslim law for inheritance allows gender insensitive provisions. But it would be interesting to point out how the amendments to LOSA have in any way changed this position. Women can now buy and register land individually and they can inherit land from their parents and husbands because of the Matrimonial Property Act.



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- iii. Women are under-represented in institutions that deal with land, their rights under communal land ownership are not defined thereby invariably allowing men to dispose off family land freely. Very few women have land registered in their names as lack of financial resources restricts them from entering the land market;
 - iv. Women do not have equal rights to matrimonial property, as culture and traditions continue to support male inheritance of family land and discriminate against women's access to land;
 - v. Women's land and property rights have direct links to national development and the lack of recognition of women's unpaid labor, which if addressed can contribute immensely to food security;
 - vi. Lack of security of tenure for women's land rights leads to their vulnerability to domestic violence and HIV/AIDS among others; and
 - vii. Matrimonial Property Act, which was duly gazetted into law on 10th January 2014, still has clauses deemed by some to be discriminatory with regards to women's rights to land and property in Kenya. The Act, in brief, defines matrimonial property as only property that is jointly owned by the spouse, and disallows women the right to marital property upon the death or divorce of their spouse by requiring them to prove their contribution to the acquisition of the property during the marriage. This becomes a challenge for most women are not in formal employment and contribute non-monetary part which cannot be equated to the direct monetary contribution.
 - viii. There are also gender stereotypes on the roles of women and men which push women away from land matters and decision making table even at the family level and giving the women the role of the kitchen.



What has changed in the current Constitution?

The Kenyan Constitution 2010 contains one of the most comprehensive and progressive Bill of Rights and devotes a chapter to provisions on land and the environment. The world over, the Bill of Rights section of the Constitution is fundamental in the sense that it outlines fundamental entitlements for all citizens in line with the 1948 Universal Declaration of Human Rights (UDHR).


Among other things, the Constitution:

- i. Regards as void or invalid customary or religious laws that are in contradiction with the provisions of the Constitution. This is important since the previous Constitution legitimized subordination of women as it embraced legal pluralism which embodied customary and religious laws that were discriminatory to women-Art. 27 (4);
- ii. Legislates international laws ratified by Kenya to form part of our law-Art. 2 (6). In the past women's rights advocates have struggled with domestication of progressive treaties/conventions chief among them being Convention on Elimination of Discrimination Against Women (CEDAW) that the Kenya government had ratified with limited success, the Protocol to the African Charter on Women and Peoples Rights (Maputo Protocol) among others;
- iii. Empowers women representation and appointments through the two-thirds gender principle. Over the years, women in Kenya have decried their minimal representation in public office. Attempts to put in place affirmative action measures in regard to women's representation have been futile, a mere lip service despite the fact that the Constitution comprehensively provide for the two-thirds gender principle. Women representation in all decision making organs is a fundamental issue in advancing gender equality-Art. 81 (b) and 90 (1). Even though women have challenged the legality of any government body that does not observe the one-third representation of women-Art. 3, 27 (8), the court decisions have not been implemented;
- iv. Recognizes equity and non-discrimination as part of the value

systems and principles of social justice in our society thus accelerating gender justice for women - Art. 10 (2);

- v. Mandates all state organs and public officers to address the needs of vulnerable groups within the society including among others women and children - Art 21 (3);
- vi. Provides that every person has a right to property either individually or in association with others - Art. 40;
- vii. Recognizes the rights of women and eliminates gender discrimination in land and property, - Art. 60(1)(f);
- viii. Prohibits gender discrimination and specifically provides that women and men both have a right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Moreover, any law, culture, custom or tradition that undermines the dignity, welfare,





interest or status of women is prohibited - Art. 27 (3) and (4);

- ix. Proposes to establish a vibrant Kenya National Commission on Human Rights (KNCHR) and National Gender and Equality Commission (NGEC). A merger of the current KNCHR and the NGEC would have been most welcome given the challenge of financing that has held back the latter - Art. 56, Art. 250;
- x. Provides a framework that will promote women's participation in the devolved government. Articles 175 (c), 177 (1) and 197 (1) seek to ensure gender parity in the proposed devolved structure

What are the International Instruments promoting women land rights?

As established by international standards, women have the right to equality in the enjoyment of all their rights, including the right to access, use, inherit, control, and own land. To achieve gender equality, States shall fulfil their obligation to eliminate all forms of discrimination against women. Under Article 2 of the Constitution of Kenya, the international instruments are recognized as laws in Kenya by virtue of ratification.

Thus, Women's equal rights to land and property are grounded in core international human rights instruments including:

- The Universal Declaration on Human Rights,
- The International Covenant on Economic, Social and Cultural Rights,
- The International Covenant on Civil and Political Rights
- The Convention for the Elimination of All Forms of Discrimination Against Women.

Furthermore, the United Nations Declaration on the Rights of Indigenous People; the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security; and the World Conference on Women's Beijing Declaration and Platform of Action all stress the need to achieve equality in the enjoyment of land



and property rights.

They are also embodied in the African Regional Instruments such as:

- i. African Charter on Human and People's Rights
- ii. The Maputo protocol
- iii. The 2004 Solemn Declaration on Gender Equality in Africa

Does the National Land Policy secure women's land rights?

The National Land Policy (Sessional Paper No. 3 of 2009) aimed to secure women's land rights (and all socio-economic groups: pastoral communities, residents of informal settlements and other marginalized groups) through formulation of legislation and by repealing laws and traditional practices that discriminate against women in relation to land. In turn, this was aimed at enhancing food security; investments and poverty reduction in line with the government's overall development plans, key among them the Vision 2030 flagship project.

The adoption of the National Land Policy, recognized the role of women in land matters as a significant step in gender equality. It proposed the review of succession, matrimonial property and other related laws to ensure gender equity and the enactment of specific legislation governing division of matrimonial property to replace the English Married Women's Property Act of 1882. It provided for the protection of the rights of widows, widowers and divorcees through enactment of law on co-ownership of matrimonial property.

In this regard, the National Land Policy provides for the following:

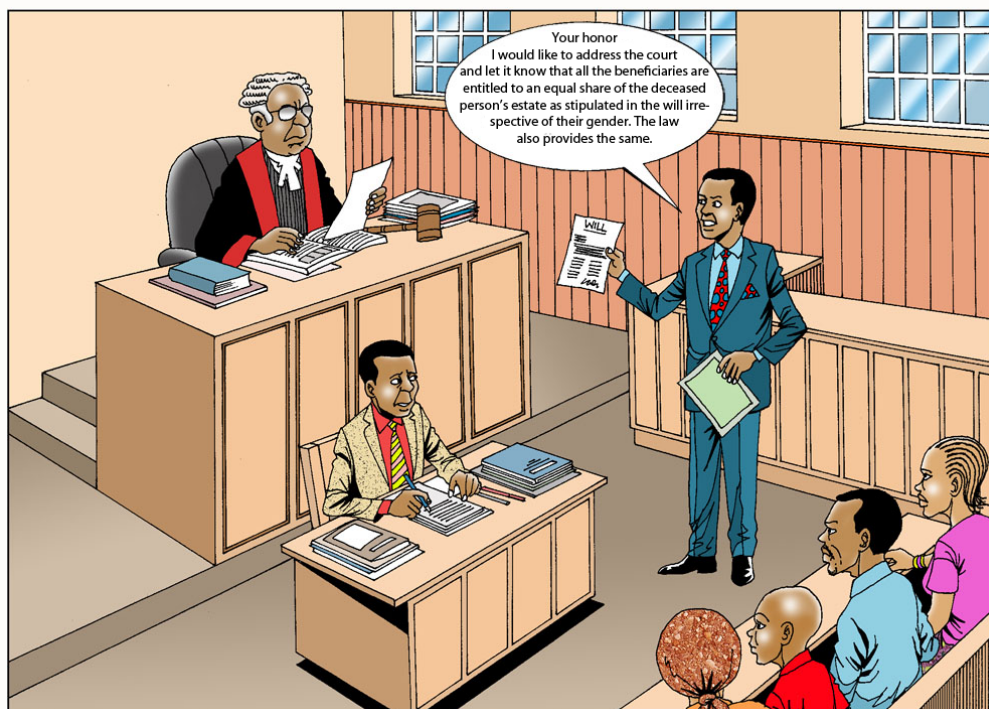
- Gives women access to matrimonial property so that in case of divorce or death of the husband, the woman cannot be disinherited. These provisions need to be safeguarded by law and enforced through the proposed institutional framework. This is fundamental given the high rates of women disinheritance and its consequences-Arts. 223 and 225 of the National Land Policy;



- Reiterates the guiding values observed during the National Land Policy (NLP) formulation process reflect the national values and principles outlined in Art. 10. Similarly, land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with among other principles, elimination of gender discrimination in law, customs and practices relating to land and property-Art. 60 (1), 68(iv); and
- Appropriates legal measures to ensure that men and women are entitled to equal rights to land and land-based resources during marriage, upon dissolution of marriage, and after death, and development of mechanisms to curb selling and mortgaging of family land without the involvement of spouses.

What are other laws that govern Women Land Rights?

- i. The National Land Commission Act established the National Land Commission (NLC) that took over the management of land on behalf of the national and county governments, thus removing the discriminatory cultural practices under which communal land is currently managed. Under the Act, the NLC is guided by the national values and principles of governance contained in Article 10 and 60 of the Constitution respectively. The NLC Act provides a framework for ensuring that land reform initiatives guarantee the equal right of women to possess, inherit, access, and transfer their land to persons of their choice;
- ii. The Matrimonial Property Act states that marriage between a man and a woman rests on a foundation of equality. It recognizes spouses as equal property owners and protects women's rights to land ownership during marriage, divorce and separation. Despite the Act's intentions of creating greater land equality, the Act does not recognize couples who are unofficially married although many Kenyan couples are not legally registered in their counties, disbarring them from protection under the law;
- iii. The Community Land Act gives effect to Article 63 (5) of the Constitution that provides for the recognition, protection and

- registration of Community land rights. Working with rural women, holding sensitization workshops for women, women only programs, men and women programs of enlightenment on women land rights and inclusion in the community land register and to be elected leaders of community land;
- iv. The Law of Succession Act, 2018 now recognizes the legitimacy of both boys and girls in property inheritance and land rights. The law of Succession Act seeks to give both men and women equal rights of inheritance, however, it contains several discriminatory provisions;
 - v. The Land Act provides for the designation of land into public, community and private land and lay out mechanisms to govern dealings with these categories of land and the attendant processes for moving land from one category to the other. This law deals with land tenure to ensure security of the rights of all holders of land in the country. The Land Act focuses on revising, consolidating and






rationalizing land laws and eliminate culturally biased practices that hinder women's participation in the control of land. It also seeks to provide for sustainable administration and management of land and land-based resources and for the connected purposes. Article 5 (2) of the Act provides for "equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems;

- vi. Land Registration Act (LRA) provides for one law with different folios for registration of public, community and private land. The LRA has been enacted to revise, consolidate and rationalize the registration of titles to land and to give effect to the principles and objects of devolved government in land registration, and other related purposes. All land registered or deemed to be registered under the LRA must comply with the provisions of the Act. Accordingly, traditions and customs that could be detrimental to women's property rights cannot be applied when dealing with land governed by the LRA. Under these new regimes, a spouse is deemed an owner though not on title if she can prove contribution in management of the land and a sale or charge or any other transfer of the land is deemed null and void if no spousal consent was obtained;
- vii. The Land Sector Gender Policy monitors the progress of women land rights in Kenya; and
- viii. The National Spatial Plan 2015 – 2045 has been developed to address the unequal access to resources by the women in the rural areas. The same acknowledges that rural women make up to almost half of the developing world's farmers. The plan makes provisions for the emerging women land rights advocates, women claiming their land rights and partnerships with CSO on women land rights.


Which institutions will drive these reforms?

- i. The National Land Commission (NLC) is a constitutional body provided for in Article 67 of the Constitution as the key institution in the governance of land and land-based resources in the country. The NLC will among other functions: manage public land on behalf of the National and County governments, advise the national government



on a comprehensive programme for the registration of title in land throughout Kenya and also to investigate present and historical injustices and recommend appropriate redress. The Commission has devolved its services to all the 47 counties for efficient and effective service delivery especially for women in rural areas since they can access the services remotely.

- ii. The National Gender and Equality Commission (NGEC) is one of the three (3) successor commissions (NGEC, Commission on Administrative Justice (CAJ) and KNCHR) to the Kenya National Human Rights and Equality Commission (KNHREC) established in Article 59 of the Constitution of Kenya 2010. NGEC has a responsibility of mainstreaming issues of gender and women in National and County policies, laws and administrative rules as well as private and public sector. Gender mainstreaming is one of the core functions of NGEC and entails ensuring that the concerns of women and men form an integral dimension of the design of all policies, laws and administrative procedures, in all political, economic and societal spheres so as to ensure that they benefit equally. This is guided by development of gender sensitive standards and indicators, guidelines, tools and facilitating integration of gender equality and freedom from discrimination principles.
- iii. The State Department for gender executes gender functions in the government through four technical directorates, County Gender Offices, Gender Focal Points and Administration. The Gender Function entails: Developing, reviewing, interpreting, implementation and monitoring of gender policies, programmes and plans; Designing and facilitating programmes/projects that promote gender equality; Coordination of gender mainstreaming into the national development agenda; Institutionalization of gender mainstreaming in Ministries/Departments, Counties and Agencies (MDCAs); and Promotion of gender socio-economic empowerment;
- iv. The ministries and public offices including County Governments



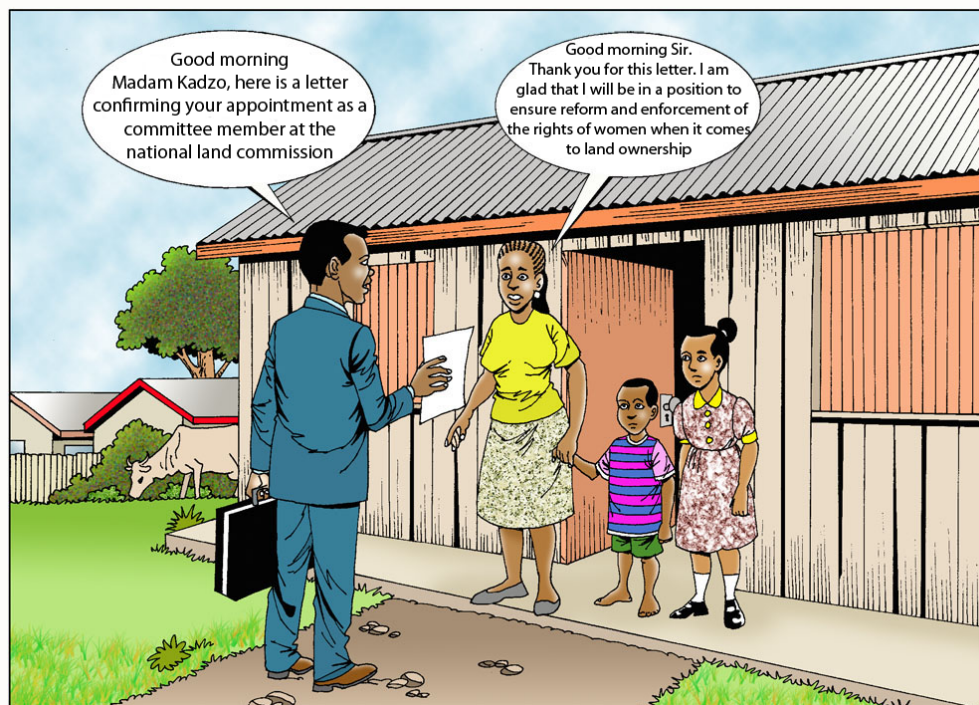
have Gender Mainstreaming Committees with the following terms of Reference: Participate in and/or facilitate institutional gender analysis and gender audits; Ensure existence of an elaborate and institutionalized gender mainstreaming implementation structure; Spearhead review of all institutional policies for gender responsiveness; Coordinate reporting on the status of gender equality to relevant structures on behalf of the institution; and Regularly review progress of planned gender mainstreaming interventions within the institution.

- v. The Civil Society Organizations (CSOs) on gender issues have empowered women on various laws and policies on land and gender rights and have advocates for the implementation of the existing laws and policies that realise women's rights.

Where should the community particularly women get involved?

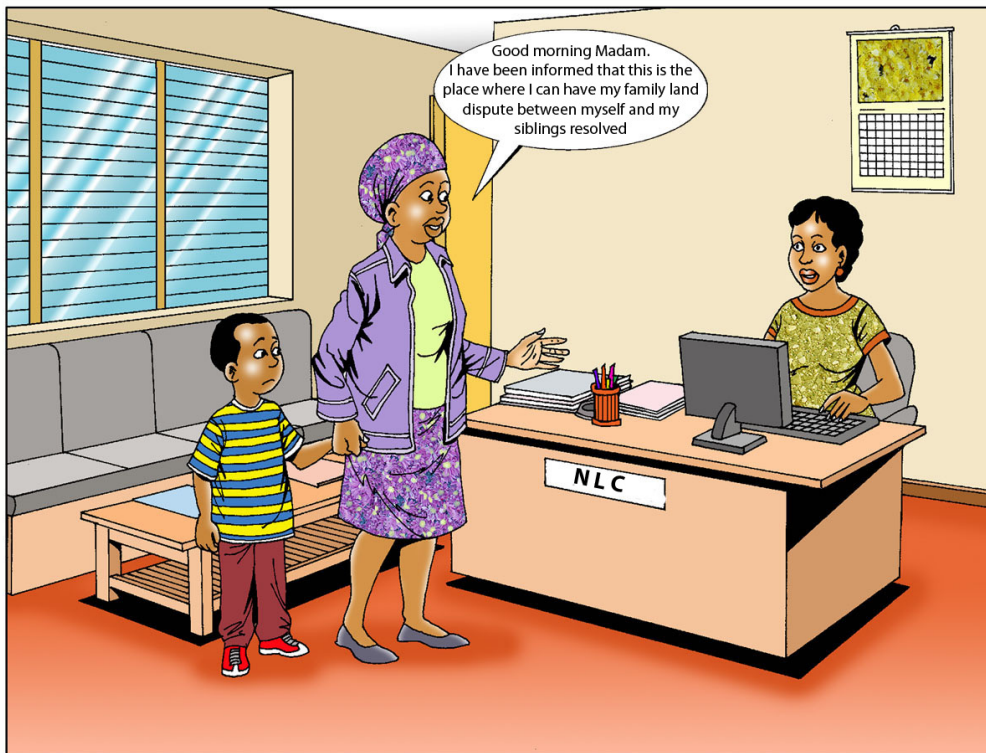
- i. Women have to participate in advocating for implementation of the various laws already enacted and that deal with discrimination of their rights to land, and this is a cause for concern as far as land in Sections 223 and 225 of the NLP are concerned. If the necessary laws giving effect to the Constitution and the NLP are implemented, the momentum for land reforms can easily be lost;
- ii. Women have to be involved in the administration of land at the grassroots and county levels by offering themselves for nomination or election in key land bodies and as representatives of the people during general elections. Bearing in mind that Art. 197 of the constitution provides that not more than two-thirds of the members of any County Assembly or County Executive Committee shall be of the same gender;
- iii. The NLC should have more teeth in enforcing the decisions as the court process takes ages to conclude;
- iv. Advocate for devolution of land administration to the lowest level,

- namely community level. Mechanisms for land administration below
- v. the County government should be devised if community land rights and access to land by women is to be realized;
 - vi. Lobby for adoption of Alternative Dispute Resolution (ADR) mechanisms by the NLC in land conflicts as provided for in the Constitution. This method of solving disputes is preferable as opposed to litigation which takes long and is not available to many women due to cost and illiteracy;
 - vii. Advocate for repeal of laws relating to marriage, property ownership and laws on citizenship. These laws and others need to be revised and aligned to the current Constitution and the NLP; and
 - viii. Women should actively engage the men folk who still hold onto outdated cultures to change their ways of thinking and appreciate the relevant provisions of the NLP and the Constitution.



What can you do when faced with land rights violation?

You can seek legal redress from human rights organizations such as Kituo cha Sheria that fight for the rights of the poor and marginalized in accessing justice and equality. Alternatively, you can approach the Environment and Land Court; National Environment Tribunals; Gender, Human Rights and Equality Commissions as well as employ ADR mechanisms in line with Article 159 (2) (C) and Article 60 (2) (g) the Constitution.





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