

LENDING A VOICE TO ORAL REGISTRIES – LIS as a Potential Tool for Validating Customary Leaseholds

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INTRODUCTION

In Africa land information systems have always been associated with demarcation, individual ownership and attributing certain proprietary characteristics to a parcel of land. Computerised systems are seen as a way of rationalising and making use efficient traditional cadastres so that they can cope with the demands of the modern economy. They are thus used as a means of strengthening statutory tenure systems which are deeply rooted in colonial conceptions of land ownership and pay little attention to traditional communal tenures which are a basic and ineluctable feature of life in Africa societies. In spite of concerted efforts by development economists and free market adherents there is mounting pressure among reformists and radical thinkers to retain communal lands under a modified traditional management system so as to create a buffer against landlessness and destitution which could result from wholesale individualisation and commercialisation. Newly entitled owners, especially poor people, are vulnerable and seriously exposed to market predators and money lenders. Original owners can be quickly replaced by rich people and speculators ("investors") from other communities. With the new international trade and investment order the threat is even greater as land markets become globalised and there are few safeguards to protect local communities.

Tenures such as "mailo" land in Uganda, stool land in Ghana, tribal land in Botswana, Swazi nation land in Swaziland and trust land in Kenya cover a large proportion of the national land area and constitute a powerful testimony of the importance of traditional ownership patterns. Yet the ownership of such lands cannot be captured by electronic information systems unless converted to "modern" statutory tenure.

Since customary title is recorded in the clan's collective memory whose contents are transmitted verbally from generation to generation, can a way be found of documenting and preserving these verbal registries without resorting to conventional cadastral methods? This is one of the questions which arose when we were investigating customary tenancies in the urban and peri-urban of Mombasa District in Kenya. The study was part of an international research project on innovative approaches to tenure. Mombasa is Kenya's second city and the largest port on the east coast, and it is an important hub of international marine traffic with a hinterland extending as far as the eastern Congo. With a population of about a million, it is also an important tourism centre. Its international-class beach hotels and recreation complexes attract visitors from all over the world. In spite of the appearance of a modern bustling port city, it is amazing to find that traditional methods of owning and

dealing in land are still widespread, operating shoulder-to-shoulder with the more conventional modern techniques.

OVERVIEW OF LAND TENURE IN KENYA

The current land tenure system is a combination of English land laws and African customary laws. The system seemingly evolved out of the initial super-imposition of a settler economy over a territory in which various land laws and tenure systems already existed, and the subsequent need to transform a former colony into a modern state where land and other resources are controlled by nationals. There are three types of land tenure in operation in Kenya, as outlined below.

Private land

This refers to individual/ private tenure where land is owned exclusively by individuals or companies. It is either freehold, where the holder has absolute ownership, or leasehold for a term of years subject to the payment of a land rent and certain conditions on development and usage. The bulk of land in this category was located in the white settler areas and townships i.e. the former Native Reserves, which were adjudicated and registered for Africans.

The conventional method of converting land under customary tenure to modern tenure has three stages. These are:

- (i) Adjudication of individual or group rights under customary tenure under the Land Adjudication Act.
- (ii) Consolidation where each individual or group has rights and allocation of a single consolidated piece of land equivalent to several units under the Land Consolidation Act.
- (iii) Registration and entry of rights in the Record of Existing Rights or Adjudication Register in the Land Registry and issuance of a certificate of ownership.

Customary land

Land under customary tenure is held communally. It is also known as trust land. Under customary tenure, absolute rights over land were vested in the family group while individuals only enjoyed the right of occupancy for subsistence purposes. This type of tenure exists in areas that have not yet been transferred (or "alienated") through registration. It is administered under the Trust Land Act 1965 which deals with all trust land.

Though customary tenure is slowly thinning out, it is still the most widespread tenure system in the country especially in the arid and semi arid lands. This land is held under trusteeship by various county councils for its residents. The communal nature of this type of tenure is also said to discourage individual investment in land and its proper management, although there is not sufficient evidence to support the argument.

Public land

Public tenure refers to land which is owned by the state for its own purposes or that which is unutilised or un-alienated and is supposed to be reserved for public purposes until privatised. It is administered under the Government Lands Act (GLA) 1965. The phenomenon of government land originated from the Crown Land Ordinance of 1902 which declared all "waste and unoccupied land" in the protectorate as "Crown Land". The categories of government land include forests, water bodies, national parks, alienated government land and un-alienated government land. The Government Lands Act empowers the president to make grants or dispositions of any estate, interests and rights in or over un-alienated government land.

Recently, there has been a rapid loss of public utility land as a result of allocation through presidential grants. This arbitrary allocation of public land is commonly referred to as the land-grabbing phenomenon. The Commissioner of Lands deals with disposal of government land which is then registered under the Registration of Titles Act or the Registered Land Act. Table 1 summarises the main characteristics of the three types of tenure.

Table 1: Basic categories of land in Kenya

Land Category	Ownership	Type	User	Government legislation
Government Land	Government on behalf of the public	- Utilized - Un-utilised - Unalienated - Reserved	Government use General public use	Government Land Act Cap 280 Administered by the Commissioner of Lands
Trust Land (Communal)	Trusteeship under county councils, (customary laws and rights)	Utilized Un-utilised	Local residents, various uses. e.g. agriculture, pastoral, self- etc.	Trust Lands Act Cap 288 Constitution of Kenya
Private Land	Private Individuals	Freehold and leasehold tenure	Registered Individuals and organizations, various uses	Registered Land Act Cap 300.

Source: Republic of Kenya, 1999

Land Registration Legislation

Land can be registered in Kenya under one of the following statutes:

The Registration of Documents Act, Cap. 285(1901)

This act was enacted in 1901, intended to create a register of documents. Any document can be registered at the option of the owner although at the time of its enactment the most important documents were those relating to land, mainly grants of land. The most common

documents registered include building plans, wills, powers of attorneys and deed polls. A fee is charged for registration of each document.

Land Titles Act, Cap. 282 (1908)

This Act only applied to the coastal areas since in the hinterlands the Crown Lands Ordinance had been enacted in 1902. The act created a Land Registration Court presided over by recorder of Titles, to which all persons claiming land may redress their claims.

The Government Land Act, Cap. 280 (1955)

Before the enactment of this Act, all grants of government land and transactions related thereto were required to be registered under the RDA. The act provides for deed plans and registration of covenant grants. All transactions in the past registered under RDA had to be re-registered afresh under this Act. The Act further lays out procedures for leasing and regulations to guide in the disposal of government land and other dealings and transactions.

Registration of Titles Act, Cap. 281, (1920)

The Act provides for the transfer of land by registration of titles. Registration under the act conferred on the landowner an indefeasible title which is guaranteed by the state. The Act provided that all government grants and certificates of ownership at the coast are registered under the Act and that those lands registered under the GLA and LTA would apply for the new registration. However, many landowners did not apply and these three Acts continue to operate side by side.

Registered Land Act, Cap. 300, (1963)

Registration of land under the earlier Acts required preparation of an accurate survey and deed plan. This procedure was expensive and time-consuming. The land Registration Act provided for issues of titles to Africans for land in African reserves without recourse to survey or separate deed plans. By 1962, there were four different forms of land registration. The RLA was passed in 1963 with the aim of bringing all these registrations together.

Registered Land Act requires the preparation of a registry index map in which all pieces of land are shown and numbered. Each piece of land has a parcel card showing details of size, ownership and encumbrances.

CUSTOMARY TENANCIES

Research Methodology

Mombasa District was chosen as a pilot study area for a number of reasons. For one, it has almost all types of land holding (state, trust land, private, etc). One can therefore find all the varieties of land tenure systems in one place. For another, it is at the center of the squatter problem that is endemic in the whole region. There are squatters right in the central business district of the town!

Another reason favouring Mombasa's choice is the long and varied history of land occupations that gives contrasts and comparisons hardly found anywhere outside the coastal region. Remnants, artifacts and evidence of the legacy of different rulers and landowners are still found in the district. And perhaps more importantly is the fact that Mombasa District is home to a variety of people of different races and tribes, with different land-oriented aspirations, leading to divergent land use patterns and developments. It is rare to capture such scenarios in one site, especially given that the bulk of the district is occupied by indigenous communities that have refused to let go their age – old traditional land – holding and distribution systems.

Mombasa District has a large number of informal settlements. Some are of poor quality housing while others are of relatively good quality TRADITIONAL Swahili houses. On the island are found the latter type namely Majengo, Kibarani, Mwembe Tanganyika, Kaloleni, Kiziwi, Sarigoi/Mwembe Tayari, Muoroto California, Muoroto Paradise and Muoroto Kafoka. Mombasa west mainland has fifteen informal settlements, Mombasa north has fourteen and the south mainland has seven.

The section is based on data from two sources; primary data collected in the field and secondary information from official documents and other records. These records were found in libraries in the Coast Development Authority, Kenya Wildlife Service resource centres and records from the Provincial Lands Office and the Valuation Section of the Municipal Council of Mombasa. Other references were sourced from Nairobi in the University of Nairobi, Kenya National Archives and African Urban Quarterly publications.

Out of all the thirty six informal settlements, five were selected for study on the basis of their geographical spread (each represents a section of Mombasa), inter-ethnic crises, security of tenure and the percentage of the poor and very poor, which was two thirds in all the areas. The five were Jamvi La Wageni and Mweza in the south, Kiziwi on the island, Maweni in the north and Ganaola in the west mainland.

A total of 92 respondents were interviewed, and these consisted of squatters, landlords, room tenants, house owners, farmland tenants, house tenants, landlords-cum-houseowners and sub-tenants. At first, systematic sampling was used to get the required respondents. Later, however, simple random sampling combined with convenience and judgement sampling had to be employed. This is because of the inability of the systematic method to give the targeted groups.

Land owners

In all areas where landlords were found, their common problems revolved around the occupation of their lands by squatters, defaulting land tenants (in terms of rent), and lack of proper infrastructure such as roads, street lights, sewage, refuse disposal systems and other services. Being areas which are referred to as squatter settlements, it is not a surprise that most infrastructural services and facilities are not provided therein. Solid and liquid waste disposal is a major problem in all these areas.

Other common problems included boundary disputes and tenants who have rented land but do not utilize the land for long periods. In Ganaola, the rugged land terrain was seen to be a major handicap to the landowners, developers and users. Boundary and other land disputes are usually sorted out with the help of local chiefs and elders. Respondents confirmed the no political leaders have helped them in solving their land problems in the entire study area.

Despite the prevailing situation, all the landlords interviewed still insisted that owning land has made them better than the landless. Indeed all of them rejected any suggestions to sell off their land parcels in the near future.

Land Tenants

Included in this category are those who own houses on land rented from landowners and also those who rent farms. House owners totalled 30 and these were also house owners who claimed to "own" the land on which their houses were built. In reality, even these were mere tenants because some occupy land owned by absentee landlords and others are on government lands. They claimed to be 'landowners' because for a long time they have not been questioned on their legality to own the land or otherwise.

Of all the 30 house owners (land renters), only six produced documentary evidence of the houses or proof that a relationship did exist with their landlords. The rest only showed either monthly receipts for ground rents paid or merely relied on "tales of trust" between them and their landlords. Others had house plans approved by the Mombasa Municipal Council as the only evidence of owning the houses. There were other instances where the house owners had some kind of written agreements with landlords, but these were merely pieces of paper signed by the two only. No official recognition can normally be accorded to such chits, since the agreements are not registered in the deeds registry. However, the agreements are recognised within the community. Many landlords have rented their entire landholdings to such house owners indefinitely.

Similarly, renting the land appears to be for an indefinite period, with none of the house owners interviewed giving away a time frame for their leases. What this means is that the land is in the hands of the tenants save for the paltry monthly ground rent, although the landowner is this real owner in the eyes of the customary law.

House Owners

Like with landowners, the house owners interviewed provided list of problems (Table 2) that they frequently encounter

Table 2: Problems Encountered by House Owners

<i>Problems</i>	<i>Frequency of responses</i>
1. Frustrations over absentee landlords	10
2. Encroachment by other buildings due to poor physical layouts	8
3. Boundary disputes with neighbours	-
4. Grabbing (misallocation) of public open spaces	7
5. General Insecurity (discomfort) over tenure	11
6. Lack of services and facilities	3
7. Frequent repairs and maintenance of houses	4
8. Late or non payment of rent by tenants	12

The most cited problems by house owners is late or non-payment of rent by their tenants. This is of importance to the houseowners because it contributes to their livelihood. However, the next most commonly cited problems both relate to security of land tenure. The case of absentee landlords, for example, makes houseowners indefinite life tenants on lands whose owners they cannot see and renegotiate with. All the house owners feel that they are made to take huge risks by continuing with the present arrangements with their landlords, in most cases without any form of legal agreement or documents. It is such bitterness that incites house owners at times to refuse to pay the monthly ground rents to their landlords. The problem of encroachment by adjacent buildings could be partially solved if landowners took advantage of the municipal council's Village Layout Scheme facility. Assistance to prepare planning layouts is not welcomed by landlords these days because they view the generous wayleaves as a waste and would like to lease out every square metre of land. Some layouts are submitted for approval after the fact.

All house owners were unanimous that the procedures for land allocation and even lease agreements with their landlords are tedious and time consuming. They need rules to be changed in order to formalise their relationship with landlords and also to allow them to purchase and own the land on which they have built their houses, which is probably an unrealistic aspiration for most tenants (i.e. house owners) since the plots would be quite expensive if sold at market prices.

Room Tenants

Like with the other types of tenants, those who rent rooms in houses in the study areas mainly rely on trust in their tenancies. Out of all the twenty-seven sampled house/room tenants, only three had written agreements with their landlords. Another three produced monthly receipts as the only proof of their tenancies while the rest had no documents to prove tenancy or formal agreements with their landlords, although rent control legislation says every tenant must have a rent book.

When asked about the reasons for this scenario, tenants gave the following:

- a) Tenants usually come and go at a high rate
- b) Did not know of such procedures

- c) Was desperate to get into the house/room
- d) The house itself is on government land, therefore illegal
- e) Good relations with the landlords

By far the most common condition is the prompt payment of the monthly rent, preferably before every fifth day of the month. Fines and penalties are posted against perennial defaulters.

Disputes between landlords and their tenants are relatively few and these are usually sorted out by village elders or the local chief. Indeed, many tenants confirmed very few cases of disagreements with their landlords and even amongst themselves.

Squatters

Squatters in the study area were divided into those occupying government/public land and those on private land. Public land also included trust land. This categorization was mainly meant to facilitate data analysis; otherwise even most of the so-called house owners are also squatters.

There seem to be little difference between squatters on public land and those on private land. Both types of squatters faced similar problems. Their characteristics can be summarized as follows:

- Most of them do not know who the legal owners of the lands are, what they know is that the land is now under their use.
- Some of the squatters have stayed or occupied the land for so long that they now sub lease to others. The average length of stay was 25 years.
- Very few of private squatters have been threatened with eviction by the legal landowners, because the majority of owners are either absent or are not interested in the lands occupied.
- More than 80% of the squatters interviewed used the land for residential purposes, with the rest using it for agriculture.
- In many instances, squatters' disputes and grievances are handled by the local elders, assistant chiefs and chiefs, who at times encourage squatters to stay on while at other times they protect them from legal landlords or the government.
- Being a squatter is so common in all the areas that more than 92% of the respondents did not realize that they were squatters.
- Squatters present their land grievances to almost anybody who is ready to listen, and in many cases they involve all the local, administrative and political leaders in trying to solve their issues.

- Some squatters have organized themselves into youth or "take-over" groups that aim at occupying any vacant land that they deem to belong to their ancestors.

These groups were mainly found in Mweza and Jamvi La Wageni on the south mainland, and now have found some kind of official recognition from the district authorities. They develop the land with structures and also engage in farming and fishing. Most of them are former drug addicts and loiterers. At least 40% of these youths are either illiterate or school dropouts. Youth groups such as Bofu Maskani and Tumaini have become so well organised that they pose a threat to the authorities and are beginning to find it difficult to gain official recognition.

FINDINGS

1. It was found that Mombasa District has a large percentage of its urban land owned by private bodies. These consisted of companies and individuals most of whom were either of Arab, Asian and European decent or from up country. A very small percentage of indigenous coastal people legally own land in the District.
2. There is a sizeable area of land held as trust or government land in all parts of Mombasa District. This land is mostly occupied by squatters, representing people from all over Kenya but mainly from the Coast.
3. In all the study sites, there were found large chunks of land owned by absentee landlords, including Europeans or up-country Kenyans. These lands similarly occupied by squatters of different ethnic backgrounds.
4. Only one indigenous landowner interviewed in Jamvi La Wageni had a title deed. The other indigenous 'landowners' were found not to have any titles for various reasons.
5. History has played a significant role in the current patterns of land ownership in the district. Communities which once ruled the coastal region were found to be the majority of landlords.
6. A variety of customary land holding and renting systems continue to operate in the District despite there being a legal and modern system of land ownership. The customary systems operate mainly in the squatter settlements and in those lands where official titles have not been issued. Of these, "rehani" of land (i.e. borrowing) is the most popular form that has enabled thousands of people at least to construct houses on lands 'owned' by others.
7. The inhabitants of the informal settlements originate from all over Kenya although the majority are from the coastal region. These inhabitants engage in different economic activities and occupations supplemented by other sources of income, especially when they have to construct houses.
8. Education levels of the residents of the study area are relatively low, with more than 50% being of primary school level and below. However, the quest for land ownership knows no educational/academic standards; everybody was heard to lament the need to own land. The reasons for the low levels of education could not be clearly established, because there are enough primary schools in the region.
9. The bulk of the housing stock is the Swahili type but other conventional types were also found. Most of these houses were of relatively better quality than those found in similar informal settlements in other urban areas in Kenya. However, dilapidated and

mud-and-wall structures were commonly found in all sites, some constructed in gullies and hills, precariously situated against all odds.

The need to harmonise the land delivery and registration process was openly felt and aired in the entire study area. Respondents complained that it has taken them decades to convince the concerned authorities on their plight. Many still had hopes that one day they would own their land.

IMPLICATIONS FOR SPATIAL INFORMATION

Urban expansion and infrastructure development are severely constraining the poor's access to resources they have enjoyed for centuries, such as fisherman's access to the waterfront and the ocean rights to mangrove forests, estuaries and water courses, and traditional development rights. Their readiness to combat the onslaught of market process could be considerably strengthened if communities were enable to compile and maintain their own registries. Such community registries could be designed to facilitate the following:

- Inventorying of land under customary tenure in peri-urban and rural areas
- Compilation of historical and cultural information relevant to land ownership
- Analysis of traditional economic systems and their relevance to today's needs
- Documentation and management of religious endowments (such as Islamic Wakf endowments) and traditional holy places
- Monitoring of abandoned land and half-completed buildings
- Developing models partnership and land sharing between owners, tenants, squatters and the public sector
- Documenting and inventorying various types of assets e.g. building, trees, crops, water rights, graves, shrines, monuments and other belongings held with or without the land
- Monitoring the growth of informal settlements and designing improvement measures
- Monitoring the use and management of traditional easements e.g. rights to pastures, water and woodlands.

The creation of such registries will require the skills information scientists trained in the social sciences or at least able to work with historians, anthropologists and community workers.

CONCLUSION

The legal status of the type of registries proposed above is yet to be resolved. To begin with the mere fact that the information is available will make the people better able to deal with officialdom and less prone to be exploited by land speculators and developers. Even if community registries merely had an advisory and informational role they would still be very useful. The general trend towards devolution (see for instance Tanzania's Village Land act 1999) means that this approach will soon become common practice.

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BIOGRAPHICAL NOTES

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