CONFLICTING CLAIMS TO CUSTOM: LAND AND LAW IN CENTRAL PROVINCE, KENYA, 1912–52

FIONA MACKENZIE*

INTRODUCTION

In antithesis to legislation on land tenure introduced through the Land Registration Act, 1959, premised on the notion in English common law that the right to allocate land was equivalent to exclusive ownership, "ownership" under customary tenure in Kenya was "essentially heterogeneous and divisible". People differentiated by age, gender and wealth had bundles of rights defined, in Okoth-Ogendo's words, by "the status differentia which a particular category of membership in a production unit carries". The complexity and elasticity of customary land law, Okoth-Ogendo demonstrates, derived from its separation of access rights from allocative rights, and the subjection of the latter "to the economic tasks required of the former". This distinction and the ensuing visibility in legal discourse of both use rights and rights of allocation was critical, as Okoth-Ogendo indicates, in ensuring "the proprietary position" of women, the primary agriculturalists, in societies such as that of the Kikuyu, which are frequently classified as patrilineal.

The objective of this article is to trace how the visibility of use rights to land was extinguished not just by the introduction of statutory law and the registration of title in the 1950s and 1960s, as had been argued by, for example, Palo Okeyo, but as part and parcel of a struggle over who could define "custom" within the colonial political economy. In the public transcript, to draw on James Scott's conceptualization, the struggle was initially one between African and European in the face of the massive alienation of fertile land to white settlers and the restriction of Africans to reserves. It took place in forums organized by the colonial state, the Committee on Native Land Tenure in Kikuyu Province of 1929 and the Kenya Land Commission 1932–34, in a context of growing political consciousness among Africans of racial inequity. Masked by this struggle was a class struggle as wealthier Kikuyu protagonists of Central Province, individually or as

* Department of Geography, Carleton University, Ottawa.

1 The Land Registration Act was introduced subsequent to land tenure reform initiated under the Swynnerton Plan in Central Province in the mid-1950s as the state's response to the political upheaval which culminated in Mau Mau. See M.P.K. Sorrenson, Land Reform in Kikuyu Country: A Study of Government Policy, London, 1967.


representatives of *mbari* (subclan)9 claims, presented “customary” land rights to their strategic advantage. “Custom” is here not autonomous, ahistorical, the product of a “self-contained particularity”, to use a phrase of Fitzpatrick’s10; it is not “constructed out of the whole cloth”, but is rather “a recognizable but partisan facsimile of earlier values and practices drawn up to legitimize essential class interests”.11 Subject to continuous renegotiation, customary law, in Martin Chanock’s words, becomes a “weapon” describing “not regular behaviour but what some people want others to do”.12 As rights to allocate land were those recognized by English common law, and thus were the only ones acceptable to the British commissioners who manned (literally) the inquiries of 1929 and 1932–34, it was these that formed the text of Kikuyu representation.

This article argues that, while this guise of customary land law may have served the strategic interest of Africans in a contest for land defined in terms of race, and of wealthier Kikuyu who used such public occasions to advance a class position, it rendered less visible the rights of women and of others guaranteed through various tenancy arrangements to usufruct in the struggle for access and control of land. In the reconstruction of customary law, through these forums, and through the courts (Native Tribunals) in the reserves, the separation of the allocative principle from that of use, without any formal codification of customary law, distanced the proprietary interests of women and others such as tenants from claims on “custom”. As indicated in the final section of the article, women were not without recourse to “custom”, but theirs was very much a discourse of resistance, a reverse or oppositional discourse.13

**THE SEARCH FOR “ORIGINAL CUSTOM”**

The legitimacy of the colonial state’s claim to “unoccupied land” for alienation to European settlers at the turn of the century relied on an interpretation of African tenure that precluded any notion of “ownership”, whether communal or individual. There was, John Ainsworth, then Sub-Commissioner in Ukamba Province, stated in 1899, considerable room to “stretch” customary rights “to almost any meaning within their reasoning”14 and certainly sufficient room to draw from customary law an interpretation congruent with a view of Africans as “practically savages”, to cite a Foreign Office report of that year.15 To accord any recognition of a coherent system of land tenure among Africans would jeopardize the colonial project.

---

9 The basic political and social units in Kikuyu society. See G. Muriuki, *A History of the Kikuyu 1500–1900*, Nairobi, 1974. Central Province comprises the districts of Kiambu, Murang’a (then Fort Hall) and Nyeri.


Thus it was that the author of the first comprehensive analysis of Kikuyu land tenure was severely censured and then forced to retire upon publication of his findings. Mervyn W.H. Beech, District Officer in Kiambu District, Central Province, in 1912, was convinced as a result of extensive fieldwork involving the examination of “several thousands of witnesses . . . individually or collectively”, that the Kikuyu had a well-developed set of legal principles which defined land rights.16 First, unlike his contemporaries as well as a much more recent analyst, Kitching,17 he saw no incongruence between recognizing multiplicity and non-exclusivity in rights to land and flexibility in balancing different claims in the process of dispute resolution on the one hand, and on the other, the evident precision of individual claims and territorial definition of these claims.18 Secondly, in recognizing regional differences in some practices, such as the redeemability of land “sales” in Murang’a (then Fort Hall) and Nyeri District but their irredeemability in Kiambu, he accumulated evidence of Kikuyu purchase of land from Dorobo into whose territory Kikuyu migrated in Kiambu. Thus, he argued, in the case of Kiambu there was evidence of individual “ownership” of land.19

Thirdly, his research documented the critical position of women in land tenure. He quotes from G. St. J. Orde-Browne, Assistant District Commissioner for Chuka and Mwimba, to make the point:

“The question of land tenure is closely bound up with the question of women in native society, and also with the general laws of inheritance: it appears to me that a proper understanding of the land laws can only be obtained by regarding the land as being closely connected with the women of the community.”20

Although he cites the view that women could not inherit or “own” land,21 he doubted whether this was “an infallible rule”.22 But most importantly, Beech recognized women’s “life interest” in land, accruing to them from their rights to cultivate. Any negotiation of land, whether involving an irredeemable or redeemable sale, he pointed out, would require “endless settlements to make as regards women and children, and a Kikuyu woman can be exceedingly obstinate over her rights”.23

These findings were a far cry from what could be accepted within the “totalizing classificatory grid”24 of a colonial state which had embarked on a policy of massive alienation of land to European settlers. And it fitted ill with an ideology of “paternalistic authoritarianism”25 which informed administrative policy towards the reserves.

In response, and to allay Kikuyu fears for their land which followed the Crown Lands Ordinance, 1915, Ainsworth, as Chief Native Commissioner, set out in

---

20 Beech, 1918, 138–139.
21 Beech, 1917, 56.
22 Beech, 1918, 136.
23 Ibid., 142–143.
July 1920 to obtain “a correct interpretation of the native’s views”. From meetings with elders, held on only two days, he concluded on the basis of “apparent differences of opinion” among the witnesses that “the Akikuyu had no definite customs dealing with the occupation of the land . . . [and that] this was due very largely to the absence of any regular form of tribal control or organization.” What Beech had interpreted as flexibility, complexity and the overlapping nature of rights became, for Ainsworth, vagueness and imprecision, opening the door for such interpretation of custom as was politically expedient. It was this view of “custom” that witnesses before the Committee on Native Land Tenure in Kikuyu Province (NLTKE), 1929, and the Kenya Land Commission (KLC), 1932–34, were so concerned to refute.

**KIKUYU EVIDENCE: 1929, 1932–34**

The inquiries took place in the context of growing unrest in the Reserve. This was fuelled by high mortality rates for men conscripted to the Carrier Corps in the First World War, the raising of taxes by a third in two consecutive years, a series of labour circulars introduced by Governor Northev to lay the ground for forced labour and the Registration of Natives Ordinance, 1915, brought into operation in 1919–20, which required the *kipande* (registration certificate) to be carried by all adult males and which, as a symbol of servility, was bitterly resented. Unrest was exacerbated by a slump in the Kenyan economy linked to low prices on the international market for Kenyan goods. But most particularly it was linked to the growing politicization of the land question, subsequent to the Barth judgment of 1922 (Civil Case No. 626) which, in interpreting the Crown Lands Ordinance of 1915, confirmed that Africans were indeed “tenants at will” of the Crown. The crisis over “female circumcision”, which came to a climax in 1929, and which centred, in the discourse of the Kikuyu Central Association, on the integrity and inviolability of Kikuyu custom and, in turn, the land, brought the matter to a head.

---


27 Ainsworth, ibid.


30 Berman, 146–148; Clough, 47.


32 The KCA, formed in 1924, was both a more populist organization than the Kikuyu Association and a more militant one. See Clough, op. cit., 48–53, 122–123.

Into the increasingly volatile political climate in the Kikuyu Reserve, the Committee on NLTKP, chaired by G.V. Maxwell, Chief Native Commissioner, investigated land rights as a basis for government policy. In this forum, as well as subsequently in the much more broadly based Kenya Land Commission chaired by Morris Carter, formerly Chief Justice, Uganda, Kikuyu men (and it was exclusively men who appeared as witnesses) drew on two apparently contradictory elements of “customary law” to legitimate claims to Kikuyu territory. For the argument presented here it is necessary to note that both privileged allocative rights at the expense of rights of access or use. They thus drew on only one of two sets of latent tensions in Kikuyu land law: the first concerning the relationship between individual and mbari (subclan) or kin corporate rights, what the Committee on NLTKP referred to as the “warp and woof” of the system\(^{34}\); the second, obscured through the androcentrism of anthropological and colonial enquiry, involving the relationship between women who, as wives, were producers yet non-members of the mbari and men, as husbands, who were with respect to agricultural production essentially non-producers, but members of the mbari.\(^{35}\) In both forums, Kikuyu claims to land rested on “kinship consciousness”, to use a phrase of Cowen’s,\(^{36}\) and this notion became the basis for a “reverse discourse” in the bid to counter a distribution of land based on race.\(^{37}\) The precise idioms used to present claims, however, varied by region. Those in the older settled parts of Kikuyu territory, Murang’a and Nyeri, framed their claims within the symbolic grid of the mbari with its implicit principle of balance between individual and kin corporate allocative rights. They emphasized mbari control, patrilineality and the redeemability of land sales as key components of Kikuyu land law. In contrast, in more recently settled Kiambu an ideology of individual control legitimated through the idiom of muramati (the custodian or nominal head of the mbari), determined through genealogical depth, became the key discursive element in claims to specific territory. Land purchase from Dorobo, the irredeemable sale of land and greater individual vis-à-vis mbari control were part and parcel of this line of argumentation.\(^{38}\)

From the several hundred pages of evidence of Kikuyu testimony (particularly extensive in the case of the KLC), three sets of implications of the evidence are drawn upon for the argument of this article. First, Kikuyu, regionally differentiated as indicated above, constructed a case, intelligible to European commissioners, based on rigid rules and inflexible principles. Two examples illustrate the strategy. Kikuyu from Kiambu in 1929 and again before the KLC insisted on homogeneity rather than diversity of origin and of exclusionary outright purchase of land

---

\(^{34}\) NLTKPC Report, 9.


\(^{38}\) For example, NLTKPC Report, 48–51, 65; KCL Report, 221–251.
when evidence from Muriuki, Kershaw, and Routledge and Routledge indicates substantial interdependence and intermarriage between the two communities and the coexistence of Dorobo hunting rights with Kikuyu rights to cultivation.\textsuperscript{39} To accept heterogeneity of origin or multiple claims to the land would weaken a case before Europeans with their own notion of inalienable rights and lay open claims for land redemption by Dorobo. In a real sense, Kikuyu identity as homogeneous was fabricated for strategic purposes.

As a second example, witnesses from Murang'a and Nyeri insisted that contractual arrangements for various forms of tenancy such as ahoi (tenants at will) and athami (resident tenants), as well as a practice such as the redeemable sale, were always sanctioned by the mbare and subject to mbare control,\textsuperscript{40} when there are substantial grounds for suggesting that the relationship between the mbare and the individual was constantly open to negotiation, and individuals frequently tried to thwart the bid to control by other mbare members. In Santos\textsuperscript{41} language, what had been “porosity” or permeability in customary law was muffled at a time when corporate control was increasingly under threat from social and economic differentiation within Kikuyu society. Thus, the mbare was created as part of the strategy to regain lost territory.

But the recreation of the mbare in the case of Murang’a and Nyeri, or of genealogical depth traced back to a muramati in the case of Kiambu, served another purpose, the second point to be drawn upon for this article. Kinship ties were reactivated to fight a racial struggle for land, but they were also integral to the process of accumulating land. Behind the publicly voiced discourse of the return of lost land outside the Reserve was the growing struggle for individual control of land within it: mbare membership became the means whereby exclusion from the land and accumulation of land were fought.\textsuperscript{42} In Gretha Kershaw’s words:

“A people for whom a line of descent, traced with precision to delineate legal access to land had always been of minor importance went in search of lineages in a fight for survival, claiming precise and invariable traditional rights emanating from the reconstructed position.”\textsuperscript{43}

Witnesses before the Committee on NLTKP and before the KLC were not neutral observers of historical process; they were deeply implicated in social differentiation. The spokesmen were, in the majority of cases, those who had accumulated large holdings. Chiefs Koinange and Kinyanjui in Kiambu, Njiri and Muriranj’a in Murang’a, are examples.\textsuperscript{44} Through the class position of individual protagonists and the creation of mbare adhesion through a fiction of descent, the following sections will argue, the parameters of a battle for land within the reserve were prepared.

Thirdly, through the establishment of a discourse of customary law which defined rights solely with reference to an allocative principle, women’s use rights


\textsuperscript{40} NLTKPC Report, 37, 40, 53.


\textsuperscript{43} Kershaw, op. cit., 18.

\textsuperscript{44} KLC Report, also Njonjo, op. cit., 49.
to land became invisible. While there is no discussion of women’s rights to land in Kikuyu testimony before the KLC, there is an interesting commentary on the practice of *mwendia ruhiu* in the *Evidence and Report* of the Committee on NLTKP. In response to the question, “is there any inheritance through the female line,” an elder from Murang’a replied, “definitely not,” but an elder from Kiambu spoke as follows:

“There is no inheritance of land through the female line except in one case. When a man has a child by a woman before marriage and without payment of marriage price the father of the woman may adopt him as *Mwendia Ruhiu* (the man who sells his sword). In that case the child or children remain members of the mother’s clan and inherit from her father. There is no ceremony and in such cases he is not subject to penalty for seduction. If he subsequently pays the marriage price before the children attain puberty, the children belong to their father’s and not to their mother’s clan.”

In its *Report*, the Committee noted the difficulty in probing this issue further, attributing a reluctance on the part of Kikuyu men to talk about it to the reason that “it is a relic of mother-right which is a custom fast disappearing, and which the natives no longer wish to admit as custom”. In the *Appendix* to the Report, Note 10 states:

“Since Chapter II was written we have found out that the custom of *Mwendia Ruhiu* is also known in Nyeri and Fort Hall [Murang’a]. But it is a practice which they wish to discontinue as soon as possible because it is a relic of matrilineal and matrilocal customs which have fallen into desuetude.”

With a lack of recognition of their use rights in land, and a reluctance to admit some flexibility in what were labelled patrilineal lines of intergenerational transmission of land, women were effectively ruled out of the sphere of a legal discourse over what was customary in land rights. Their interests were clearly not seen as strategically admissible in the struggle to establish Kikuyu territory. Yet, curiously, the Committee on NLTKP took place at the height of the crisis over “female circumcision”, and the KCA promoted its political campaign for land through the conflation of the integrity of custom, here female clitoridectomy, with the integrity of territory. It is ironic that, in the discourse to legitimate Kikuyu land rights by the KCA, women’s key position in the land tenure system was implicitly recognized as, simultaneously, their interests were silenced in the struggle to combat land alienation.

**NATIVE TRIBUNALS, MURANG’A DISTRICT**

Within the reserve, the struggle for land and the definition of custom took place both within the courts system and outside this forum. It was largely through litigation in the Native Tribunals, organized in Murang’a after Governor Percy Girouard’s visit in 1910, that the process of land accumulation was fought, while...
the struggle for women for use rights land was found in the day-to-day disputes outside the courts.

The Native Tribunals, in Girouard’s conceptualization, were to be modelled on the kiama, a forum of elders, but it was clear from their inception that any resemblance to former judicial practice was illusory. Symbolically, the kiama conjured a judicial past that was integral to Kikuyu society, but the material evidence of the proceedings belied this. Justice was removed from day-to-day negotiation to something dispensed by elders no longer accountable to the political immediacy of the mbari, within whose territorial purview disputes over land had previously had meaning.

Native Tribunals were initially established on a locational (that is administrative) basis, but were reduced in number to four, corresponding to each of the Divisions within Murang’a in 1926: Kandara, Kigumo, Kiharu and Kangema.50 Before 1930, appeals were heard as original cases in a subordinate (Magistrate’s) Court and thence on appeal to the Supreme Court.51 Under the Native Tribunals Ordinance No. 39 of 1930, appeals were routed, first, through a Native Court of Appeal (the Superior, or later, Appeal Tribunal in Murang’a), then to the District Commissioner, and on further appeal to the Provincial Commissioner. Except for certain cases, and these excluded cases concerning marriage and inheritance, no appeal to the Supreme Court was allowed.52 Upon reorganization in 1938, the four divisional tribunals in Murang’a sat throughout the year, chiefs were no longer allowed to serve, and elders were elected locally.53

Elders were the keystone on which this judicial edifice was built. Girouard aimed to rescue those men from the social obscurity in which they found themselves as the administration created the position of chief and headman, respectively, in the organization of Locations and Sublocations. Elders were to become the interpreters of “tradition” which, having “lost its significance”, was to be “built up” with “government support”.54 Yet, as Throup has shown, they were not impartial observers of social process, committed to some mythical “egalitarian Kikuyu communalism”.55 As arbiters of “tradition”, they were in a strong position to define the past and he (literally) who defined the past was in a powerful position to negotiate the present to his advantage. Elders were deeply implicated in the process of social and economic differentiation.

Their “impartiality” was continuously under scrutiny by the administration. In 1918, “bribes” may not have been seen as necessarily influencing judgment, but by 1929 the District Commissioner (DC) S.H. Lafontaine considered some

50 Kenya National Archives (KNA) History of Fort Hall District, 1918, 18; Fort Hall District Annual Report (FHDAR), 1926, 11–12.
51 E. Cotran, “The development and reform of the law in Kenya”, [1983] J.A.L. 42. The Supreme Court and some of the first class subordinate courts were presided over by professional, British-trained lawyers. Other subordinate courts were “manned” by administrative officers.
52 KNA, Native Affairs Department Annual Report, 1930, (NADAR) 32–32, 84; 1931, 38–39. The one visible attempt in the district record to take a land case to the Magistrate’s Court, Macharia v. Nguru wa Kairu, Civil Case No. 3 of 1941, was thrown out on the grounds that there was “no such thing as individual tenure, other than tenure within the clan” (KNA FHDAR 1941, 11). For further discussion, see Y.P. Ghai and J.P.W.D. McAuslan, Public Law and Political Change in Kenya. A Study in the Legal Framework of Government from Colonial Times to the Present, Nairobi, 1970.
53 KNA FHDAR, 1938, 10–11. This situation remained in place until the African Courts Ordinance of 1951. Native Tribunals became “African Courts” with appeals to an African Appeal Court and then to the DC. From that, appeals were heard in a new Court of Review, not by the Provincial Commissioner (Cotran, op. cit., 49).
54 KNA, History of Fort Hall District, 1910, 11–12.
Table 1: Cases heard before the Appeal Court, Murang’a District, 1951

<table>
<thead>
<tr>
<th></th>
<th>Kandara</th>
<th>Kigumo</th>
<th>Kangema</th>
<th>Kiharu</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Land</td>
<td>Other</td>
<td>Land</td>
<td>Other</td>
<td>Land</td>
</tr>
<tr>
<td>Dismissed</td>
<td>77</td>
<td>57</td>
<td>44</td>
<td>56</td>
<td>107</td>
</tr>
<tr>
<td>Upheld</td>
<td>23</td>
<td>19</td>
<td>20</td>
<td>31</td>
<td>42</td>
</tr>
<tr>
<td>Varied</td>
<td>7</td>
<td>6</td>
<td>8</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Total</td>
<td>107</td>
<td>82</td>
<td>72</td>
<td>97</td>
<td>199</td>
</tr>
<tr>
<td>% of total cases</td>
<td>56.6</td>
<td>43.4</td>
<td>42.6</td>
<td>57.4</td>
<td>43.8</td>
</tr>
<tr>
<td>% of total cases</td>
<td>56.6</td>
<td>43.4</td>
<td>42.6</td>
<td>57.4</td>
<td>43.8</td>
</tr>
</tbody>
</table>

Source: Calculated from FHDAR 1951.

Note: 186 cases were appealed to the District Officer, of which 128 were dismissed, 36 upheld and 22 varied; 34 were appealed to the Provincial Commissioner, of which 29 were dismissed, 6 upheld and 9 varied.

Elders were particularly prone to influence, it would appear from the colonial record, in cases concerning land, and it was these that increasingly came to dominate the civil cases heard before the Tribunals.56 With few exceptions it is impossible to distinguish among the growing number of cases: 118 were heard before the Tribunals in 1919–20, of which 44 were for “illicit drinking”; there were 1,641 cases in 1929; 2,499 in 1939, of which 254, or 11.3 per cent involved land directly; and 2,499 cases in 1949.59 But at all levels of appeal, land cases predominated. As early as 1930 the DC, Vidal, considered that: “land is so much valued that the unsuccessful litigant will rarely give up the fight until the matter has been taken through each successive court to the highest court and even then if the decision goes against him, he will consider himself as an aggrieved person until his death”.60 By 1951, the only year for which detailed information is available (Table 1), land cases clearly predominated in the appeal process, and it was alleged by the DC that litigants used the process of appeals in order to delay being turned off a piece of land illegally occupied.61 The Provincial Commissioner considered such litigation to be “a hobby and even a trade”, allowing someone to remain in possession of land for an additional year or year and a half.62 The Chief Native Commissioner commented a year later, in 1951, that: “Every device to increase the speed and efficiency with which cases are heard seems . . . like pruning roses, to encourage new and faster growth”.63 In the disparaging words of one DC, the Tribunals resembled “an Irish Wake” rather than a court of law, visited for their entertainment value “much as the European patronizes the opera”.64

56 KNA History of Fort Hall District, 1918, 20; FHDAR, 1929, 14.
57 KNA FHDAR, 1948, 7.
58 KNA FHDAR, 1933, 17; 1948, 8; 1951, 7.
60 KNA FHDAR, 1930, 4.
61 KNA FHDAR, 1951, 7.
62 KNA NADAR, 1950, 10–11.
63 KNA NADAR, 1951, 39–40.
64 KNA FHDAR, 1939, 15.
They were, nevertheless, the forum in which skirmishes for land were fought within Murang’a, and these certainly provided the most contentious of cases.65 At issue were precisely those “principles” of customary law which had been presented with such incontrovertibility by men from Murang’a in the forums of 1929 and 1932–34: the transgenerational transmission of allocative rights through the male line and the redeemability of land transactions, both subject to mbari authority.

Access to the discourse of custom depended on social identity and litigants based their claims on a definition of kinship, but success also depended on wealth. The extent to which one could “resurrect” the mbari in the struggle for land depended on the material resources at one’s disposal. And it was the wealthier protagonists, or athomi in Cowen’s discussion of the process in Nyeri, who were able to do this: they became the “defenders” of mbari, that is corporate, interest, when the successful outcome of any dispute accorded them individual control of the land.66 Mbari membership was the means by which exclusion from the land and accumulation of land were achieved.

Within the tribunals, claims of the right to allocate land were central. Whether these claims involved a younger generation accused of disregarding agreements with ahoi or wealthier landholders involved in the process of accumulation of land over which they exerted greater individual control, the integrity of corporate interest was under threat precisely at a time when the mbari was created as a symbol of customary legal discourse. It was drawn on to legitimate claims to land by interest groups with very different relations to the state. Chiefs, while by no means an homogeneous group,68 by and large were able to benefit from the perquisites of state patronage by way of land purchase. Njiiri, for instance, had accumulated 207.9 ha. of land by the early 1950s, when the average holding size was under 2 ha.69 Members of the Local Native Council, a body created in 1925 to counter the political influence of Harry Thuku’s Young Kikuyu Association, drawn from an educated elite including chiefs, traders and others with substantial non-farm income, provided a second group of land purchasers.70 Thirdly, from the 1930s, members of the Kikuyu Central Association, and after 1946, its successor, the Kenya African Union, provided a rival faction to the former two groups, but again drawing from a group of well-educated men with access to relatively well-paid employment, successful trading businesses, or substantial income from cash crops.71

In Murang’a, conflict over what was “customary” climaxed in the mid-1940s as litigants struggled over the “redeemability” of land transactions. In the past in Murang’a land “sales” were occasioned by need, land acting as a mortgage for someone, for instance, who needed livestock for bridewealth. Sale was never outright. As Barlow explains, the practice was based on the principle of Githaka ni ngwatira, meaning “land is a loan” to everyone outside male mbari membership.72

---

65 KNA FHDAR, 1930, 4.
66 Cowen, op. cit., 73–74.
67 KNA FHDAR, 1932, 2.
68 Clough, op. cit.; also Tignor, op. cit., 54–55.
70 KNA FHDAR, 1925, 5. Also, see Kitching, op. cit., 188–190, 194–195; KNA FHDAR, 1947, 3.
72 Barlow, op. cit., 64.
In the words of a male farmer interviewed in 1984, "the land is not yours, you also inherited it". It was a practice, evidence suggests, that had always been the subject of negotiation between individual men and the mbāri, the discursive manipulation of the practice before the public forums of 1929 and 1932–34 notwithstanding. While men here argued that no one could "sell" land outside the mbāri without that body's permission, Fisher suggests that in practice an owner might try to circumvent mbāri control and negotiate outside the mbāri on the grounds that the land would be easier to redeem at a later date. She cites an elder from Murānga:

"When mwene [an owner] wants to redeem the garden the buyer may refuse and he will say the land is ours [i.e. of the mbāri]. But if he sells gardens to a person of another mbāri he cannot say the land is ours, and the garden may be redeemed without difficulty."

That sales were never final or outright in the past, however contentious the negotiation between individual and mbāri, meant that the social and spatial integrity of the mbāri was not threatened. But now cases involving land "which had changed hands before living memory" were brought forward, in addition to more recent cases, and conflict over mbāri territory increased dramatically.

Mbāri territoriality was "imagined into existence" in Chanock's language, as was mbāri solidarity in a context of deep social cleavage. The mbāri, a symbol of kin corporate identity, was recreated as a means of individual accumulation, and to mask a class struggle.

The contradictory interests within Murānga are strikingly revealed in the Minutes of the Local Native Council meetings in 1944 and records of subsequent public reaction. First, the Council adopted a resolution, by twelve votes to four, that three methods of land transaction would be recognized: outright purchase, redeemable purchase and tenancy. At a subsequent meeting, it was decided, by eleven votes to four, that all land sales, "past, present and future", where the purchase price exceeded ten goats, would be considered "outright" or irredeemable.

Public opposition to the decision was swift, "vociferous and determined". The majority demanded in barazas that the practice of redeemability define all transactions, leading the DC, Osborne, to comment:

"I believe that the protagonists of outright purchase (a minute proportion of the tribe) are entirely self-interested; mainly they are persons who have 'purchased' large areas of land which they are unwilling to allow to be redeemed."

The decision of the LNC clearly favoured the interests of those able to accumulate land. But what is interesting is that, by not ruling out the practice of redeemability, the discursive ground was laid for the continued manipulation of this practice to the benefit of this same group of wealthier landholders. In 1948, the DC, Coutts, observed that "certain unscrupulous persons are using the redeemable custom to take back land which had been made fertile by a younger more progressive person". The result, he continues, is an intensification of the struggle for land, "turning family against family and brother against brother in a mad

---

73 F. Mackenzie, Murang'a District Agricultural Histories (unpublished).
75 KNA FH DAR, 1944, 8.
76 Chanock, op. cit., 20.
77 KNA FH DAR, 1944, 8. A *baraza* is a meeting held at a chief's encampment or *boma*.
individualistic race for more acres of eroded soil”. Thus, under the guise of customary tenure, “redeemable sales” became one component in a “set of shifting symbols”, to use a phrase of Glazier’s, at once resonant of kinship ideology, while used strategically to extend individual control over the means of production. Whether the legal transaction concerned what were now deemed as irredeemable or redeemable, both contributed to the individualization of control, a move viewed by many administrators in the late 1940s as “beneficial economically and agriculturally and probably socially if not carried too far.”

Social differentiation, leading at one extreme to a class of wealthy accumulators and at the other to a landless class, proceeded, then, through the appropriation of “customary law” and specifically the contestation of the allocative principle within it. The evidence in Murang’a indicates that litigation did not involve, on one side, a class of accumulators basing their strategy on English land law and, on the other, members of junior lineages and adhui, defending their rights, as Throup contends. Rather, it is suggested, the porosity of customary law provided the discursive ground for both a class of accumulators and those less privileged: customary law, and the question of who had the power to allocate, became the site for contestation of power and resistance at all levels of society. Customary law was not “frozen” or fixed in this process, but provided the legal space for struggles over land to which there was increasingly differential access.

“THE LAW IS FOR THE MAN”: GENDER AND LAND, MURANG’A DISTRICT

Disputes over land have been discussed thus far in terms of what became the dominant discourse of customary law in Murang’a over the period 1910 to 1952 when, in October, the Emergency was declared. The dominant discourse concerned, in essence, the individualization of allocative rights, and it was these rights which became pre-eminent in a struggle that was based on race and on class. In the process, the discursive ground or legal space for negotiating use rights changed. No longer were allocative rights subject to the economic functions of use rights, a tension in customary law captured eloquently by the observation of a woman farmer in 1984: “Someone without a wife was not given land by his father. If he was given [land], who would cultivate it?” As Okoth-Ogendo has argued, women’s proprietary interests were no longer protected and the legal space which women could access was limited. Their claims to land became part of a reverse discourse created outside the Tribunals.

Women did use the courts, but not directly in the struggle for land. As the case of Rugonyi Ole Tibis v. Macharia wa Wamarea, heard before the Supreme Court...
in 1929, shows, men in Murang’a were very concerned that any case touching on “customary law” remain their preserve in the Tribunals or where they could more immediately influence appeals heard by a District or Provincial Commissioner. Although the dispute did not overtly centre on land, it is worth citing at length as it illustrates one dimension of the intertwining of race and gender in the struggle for land.

The original case was brought before a Tribunal by Nyairrore, a Maasai woman, for custody of her three children. She was adopted as a child by a Kikuyu family at the time of the famine of 1898 and had subsequently married Wariu, a Kikuyu. She was “inherited” by her stepson, Waria Mumba, after her husband’s death, at which time she ran away to a brother in Maasai country. The defendant’s case rested on an appeal to “customary law” where children, once bridewealth payments were complete, were considered members of the husband’s lineage. Further, the lineage had paid the plaintiff’s tax for 20 years. The judgment went against her at the Tribunal and later on appeal to the DC. She was awarded two oxen to compensate for her loss. Through her brother, Rugonyi Ole Tibis, she appealed the case to the Supreme Court, which reversed the earlier judgments and awarded her custody of her children.85

Response to this ruling in Murang’a was swift, and in October, the Chief Native Commissioner was given a written request at a baraza held at Chief Miriranja’s:

“We ask that native civil cases be removed from the jurisdiction of the Supreme Court which does not understand native law and custom. We want them dealt with by the Kiamas [Tribunals] and by the District Commissioner and Provincial Commissioner.”86

The view was supported by the DC, Lafontaine, arguing that “no evidence as to native law and custom was admitted”.87

The case is relevant here for two reasons. First, male hegemony in the construction of customary law was secure within the District, but was under threat when justice was administered under a different legal principle by the Supreme Court. This was especially disturbing at a moment when “custom” had become highly politicized by the crisis over “female circumcision”. In the racial struggle for land, it was vital for Kikuyu to define what was customary. Secondly, the case had a bearing on rights to land. At stake for Waria Mumba was the security of a claim to land farmed by the children’s mother, his stepmother, whom he “inherited” as wife. A leviratic marriage gave him rights to specific people and, through them, to land. In addition to land inherited directly from his father through his mother (that is land his mother had farmed), he would now have control over land farmed by his father’s second wife. If he did not “possess” the children, this land would be the site of difficult negotiation among brothers. As Chanock has explained, rights in people, however un-controllable with commoditization of agriculture, were still a strategic resource in the effort to secure property.88

Women’s use rights were clearly most under threat where husbands sold land because of poverty and they were most at risk where such sales led to landlessness, affecting an increasing percentage of the population in the 1940s. But a woman

86 KNA FHDAR, 1929, 10.
87 KNA FHDAR, 1929, 9–10.
88 Chanock, op. cit., 235–236.
was also now at risk where she had no children, or particularly no sons. One elderly woman explained in 1984 that in the past, “a woman’s land would not have been taken from her. Since she is married, the garden is hers.” But as land sales became frequent, “married women [were] being thrown out by the husband, and the garden now is not hers, especially if she has no child”. Another woman farmer related the following:

“Before I got married at Gaichangiru, I was given my mother’s land [to cultivate]. Now because I was giving birth to girls only, he [my husband] said he would marry another wife but his father told me, ‘Because I know you are not a lazy woman, even after you go to your home, you remain my daughter-in-law.’ So I came here [near Saba Saba] and I was bought land by my father.”

As subsequent discussion revealed, this woman had not been on bad terms with her husband but, desperate to ensure that his lineage rights to land were maintained and with insufficient land for two wives, he sent her away. Her use rights to land as a wife were dismissed; they were no longer ensured through collective authority.

As wives, women’s ability to negotiate security did depend increasingly, in part, on whether they had sons. It also depended on their ability to contribute to household wealth through their engagement in non-farm income, chiefly as wage labourers on nearby coffee and sisal estates or as traders. Some women, it is clear, were able to gain some economic clout in this way. But as a widow, a woman could exert greater leverage in rights to land through her exercise of “customary law”. Although there may well have been pressure to agree to a leviratic marriage, a widow could decide, if past childbearing age, to “marry” a woman, usually one who had sons, becoming a female husband or, if of childbearing age, invite a mwendia ruhiu to stay with her.

The practice of becoming a female husband was defined by an elderly man interviewed in 1984 as follows:

“If, for example, Kamande’s mother [my wife] doesn’t have a son, but only you, a daughter, who will marry and go away, that will be the end of our name. If we wish to retain our name, we can marry a girl and have her here, not as my wife. She would just stay here and she can bear children with whoever she wishes. She names the baby after me and the other after this one [my wife]. After our death, she would keep everything. Nobody could get this from her ... or a woman could marry a girl after the death of her husband.”

A woman farmer spoke in these words:

“She would bring another woman so that her home would not diminish. This was one of the Kikuyu customs. She would marry her so that she could give birth. If she does not have children so that her home would continue to exist and not be inherited by other people.”

A second woman commented: “Some of these women are very cunning and they don’t want their husband’s brothers to inherit the land, and so they are forced to marry another woman”.

89 Mackenzie, Strategies of Silence, ch. 6. Both activities provided women with a means to control resources in the face of growing polarization in economic relations and in the face of growing intra-household struggle over labour and its product.

The decision to become a female husband was sometimes made prior to the husband's death, but this was not necessarily the case. The practice was not subject to endorsement by the mbari. During interviews in 1984, it was generally considered that, while the practice was no longer common, it had previously been widespread. One woman interviewed was herself a female husband and her story illustrates the tension surrounding such marriage under conditions of growing land scarcity. In this case, WG, a woman then in her late 80s or early 90s, recalled her constant struggle to prevent her brother-in-law from "snatching" the land, even when, after land registration in the late 1950s, the land was registered in her name. Basing his case on a claim to mbari solidarity, the brother-in-law has continually and bitterly contested WG's right to the land. WG has managed to maintain control over the land, but she made it clear that the struggle had been a difficult one. The actions of the brother-in-law she likened to a "darkness that fell". 91

It is important to note here that, although WG has used a customary idiom to retain the land to which she had use rights, there has been no threat to final male control of the land or loss of mbari territory: the sons of WG's wife were recognized as legitimate heirs. This is similarly the situation of a woman who opts to invite a muwenda ruhiu to live with her, any children from the relationship belonging to a widow's deceased husband's lineage.

Unlike the practice of becoming a female husband, this second practice is viewed as very controversial in present-day Murang'a. Reluctance to talk about it was often accompanied by laughter. To one woman interviewed in 1984, "these were people who were useless . . . he neglected his people and went to another place". To a man, "he was not a good person as he did not have a wife or children". But one woman who considered a muwenda ruhiu as hopeless, stated that, "at times they were seen as good people as they . . . helped in every kind of work wherever they went to stay". There was ambivalence about how common the practice had been.

It is difficult on the basis of retrospective data, influenced by Christian views of morality in a context of a situation of increasing land scarcity, to assess the significance of the practice for women. But there is sufficient evidence to argue that the controversy around the practice suggests that women, as widows of childbearing age, could take this course of action and negotiate effective control of land. That women should have such control is bitterly fought today. While not naming the practice specifically, Leakey observes that women of childbearing age "could take lovers with a view to bearing sons to inherit property and keep the family name alive". 92 And there were occasions where a father without sons requested a daughter to "marry" without bridewealth, so that her sons would inherit through her, thus preventing the land being taken over by his brothers or brother's sons. 93

The fact that men and women interviewed in 1984 had no trouble in citing cases of both the practice of female husband and that of muwenda ruhiu indicates that women could legitimate their claim to land through recourse to "customary law". Both provided ways in which women gleaned some measure of autonomy

93 Kershaw, op. cit., 293-294.
as the struggle for land intensified. Both were instances of a reverse discourse, or a discourse of resistance, activated outside the Native Tribunals. Women drew on particular claims to land, for use, at a time when use rights had become invisible in the dominant discourse around "custom" in the Kikuyu reserve. Their struggle, as men’s, was a material one, but it was waged through "the appropriation of symbols, a struggle over how the past and present [should] be understood and labelled".  

It is important to note, in conclusion, that women’s action did not thereby jeopardize men’s rights of allocation. This threat materialized only with the purchase of land by individual women and was much more restricted in Murang’a than in Kiambu during the period under review. Land purchase reflected the ability of a very small minority of women to accumulate substantial savings on their own. Further research is needed to assess whether such women were unmarried, or widows, or whether some married women were able to exert this degree of autonomy within the household. The latter appears unlikely, as the purchase of land by a woman remains bitterly contested by men and is perceived by them as a direct challenge to a husband’s authority. "The law", one woman explained, "is for the man". But at issue in the broader political economy is a threat to the transgenerational transmission of land, through the male line, on which mbari solidarity and territoriality is based. And this “customary” idiom remains a powerful one in the adjudication of land claims in a contemporary context where women and men interweave their struggle for land through claims to both customary and statutory law.

94 Scott, op. cit., xvii.

95 Fisher (187) conducted field work in both Kiambu and Murang’a. Her comment that “many women” bought gardens needs qualification in the light of evidence collected later (see Mackenzie).