

Protecting Land Rights of the Aged

- Dealing with land theft among old people

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Key words: tenure; disposition; senior citizen

Abstract

Commencing from the fifth decade of the twentieth century African nations have invested a lot of thought, energy and money into land distribution, registration and regularization, both in rural and urban areas. The results have been relatively successful in most countries. Unfortunately the demographics dimension has not been adequately thought through. The growth of African populations is the fastest in the world, and young people form the largest category. They need not only food, education, and health facilities but also jobs when they leave school. They also need space. Older generations are inevitably squeezed or forced out of livelihoods and in some cases their own homes.

The aim of the paper is to collect and analyse data on the nature of land theft; the culprits and evictors, and the methods they deploy to disenfranchise elderly people in broad daylight. While on paper the law protects the assets of senior citizens, in reality there are so many devious ways in which a grandmother, senior wife or elderly farmer can be dispossessed and not realize the event until years later. Cases of violence between son and father are not rare. The study is based on case studies in research done in Kenya and Tanzania.

The findings will be able to guide governments, land managers and human rights activists to create suitable legal and administrative structures that will make the elderly better informed and equipped to protect their land-based assets.

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1 INTRODUCTION¹

Land registration is not the guardian of land tenure safety. On the contrary it often makes it easy for land grabbers and thieves to identify and get precise information on their targets. It also tempts the poor or their children to rush to the bank and get credit without weighing the risks involved. In a world where young people are rapidly increasing in numbers and national economies are not able to create enough jobs and satisfy other basic needs, they are tempted to look at the family property as a potential source of livelihood. Neighbors will encroach and agents find ways of forcing owners to sell their property, be it farmland or family house, at throwaway prices.

Admittedly open land markets generally facilitate development, wealth creation and growth of the financial sector. However if left unfettered they can have some unwanted consequences, such as aggravating inequalities, displacing the poor and small land owners, making housing unduly expensive and enabling intentional land grabs. It is for that reason that some countries resort to market regulation through transfer restrictions and scrutiny.

This paper presents the results of research done in Kenya and Tanzania on the manner in which elderly people are deprived of their property which has not only monetary value but also emotional and historical value accumulated over a long time. After an overview of the relevant land laws the discussion goes on to give examples of case studies from both countries. While in Kenya the focus is on the highlands and the western region, in Tanzania the attention falls on the Zanzibar archipelago.

2 OVERVIEW OF LAND LAWS

2.1 Kenyan Land Laws

Article 62, of the Constitution of Kenya, 2010, provides that all land in Kenya belongs to the people of Kenya, collectively as a nation, communities, and as individuals. The term land is classified as public land, private land and community land (Kenya government 2012).

Legislation worthy of particular mention would be the National Land Commission Act (2012), the Environment and Land Court Act (2011) and the Matrimonial Property Act (2013). The new legal framework of The Land Act (2012) and the Land Registration Act (2012) repeals a collection of colonial and post-colonial statutes ranging from the Indian Transfer of Property Act 1882 to The Registration of Titles Act (1967). The 1967 Land Control Act governing subdivision, sale, transfer, lease, mortgage or other transfer of

¹ The authors are grateful to Kituo cha Sharia (Legal Advice Centre in Nairobi, Kenya) and the Zanzibar Land Transfer Board in Tanzania for facilitating interviews and access to data.

interests or rights was not repealed but is implemented by the Land Control Regulations 2012.

The 2012 Land Act governs the management and administration of public, private and community land according to principles of equitable access to land and security of land rights; sustainable and productive control of land resources; transparent and cost-effective land administration; elimination of gender discrimination in land and property law, customs, and practice. It also encourages the settling of land disputes through recognized local community initiatives; promotion of accountable, democratic and participatory decision making; affording equal opportunities to members of all ethnic groups, and non-discrimination and protection of the marginalized.

The 2012 Land Registration Act applies to the registration of interests in all public, private, and community land. It defines the Chief Land Registrar and other Land Registrars' powers and provides for survey and mapping, certificates of title, and protection of persons receiving land. It further makes special provisions for the registration of leases and charges, places certain restrictions on dispositions regarding interests in land, and provides registration of rights regarding co-tenancy, partition, and easements.

The 2016 Community Land Act deals with the recognition, protection and registration of community lands, development of community land registers, outlines the nature of community land titles and rights associated with these, discusses the conversion of land and the special rights and entitlements related to community land.

2.2 Zanzibar Land laws

“No permanent transfer of land or long term lease shall take place until the transaction is reviewed and approved by the Land Transfer Board set up under the provisions of this Act”.

The basic legislation regulating land ownership and transactions is the Land Transfer Act no. 8 of 1994 as amended in 2007, together with the Regulations (LN 70 of 2011 amended in 2015); these have to be read together with the Land Tenure Act as amended. However a compilation of land laws published by the Department of Lands and Registration in 2012 lists some 26 titles including substantive acts, regulations and amendments to statutes passed between 1989 and 2012 (Department of Land and Registration 2012). One or two statutes have been amended several times in the period, especially the Land Tenure Act. Since the purpose of the list was to compile legislation directly relevant to COLA (Commission of Lands) work, it does not include other legislation related to land administration, e.g. planning, and document registration laws; or legislation guiding the management of the Zanzibar Stone Town (a world heritage site) or property taxation.

Another recent compilation is the dossier prepared to support ongoing physical planning initiatives (Shapira and Hellerman 2014).

A recent Act of Parliament which is also very important is the Valuation and Valuers Registration Act (2016) whose purpose is to regulate the valuation profession. Once operational, this law will be beneficial to the Zanzibar Land Transfer Board.

2.3 Impoverishing vulnerable groups

A few questions will help us understand better the manner in which the aged are deprived of their property.

Who are the people who are most prone to lose their property?

Women are most vulnerable when it comes to the loss of property. Widowed women find themselves in situations where the land acquired by their late husbands was held in trust and therefore becomes the beginning of a feud. Also, customary laws on access to land have disempowered most women on their right to own land. Some cultures provide that the first son inherits all land, therefore disinheriting the women and barring them from owning property.

The elderly as well as orphans are also the most vulnerable people when it comes to the dispossession of property.

How is the theft done and who are usually the culprits?

Land culprits are to be found far and wide. They include individuals, community or organized groups, business people or land buying companies; also clandestine groups, government agencies and administrative officers, and political class members. The current trend involves altering title deeds, forgery of stamps, forcible entry, obtaining registration of land title deed by pretense. Not uncommon is forgery of title deeds, powers of attorney and forging sales agreements and transfer documents.

What are the effects or impact on dispossessed owners and families?

Dispossession has contributed to the loss of lives and property, ethnic animosity, increased fake title deeds and unending court cases. Incidents of land conflicts have been on the rise as land ownership becomes competitive and scarce. After the 2007/2008 post-election violence, Kenya drew international attention when widespread violence resulted in the death of 1,300 people and the displacement of as many as 600,000 individuals. Long-standing disputes led to violence, and, as a result, domestic and foreign economic investment was hurt.

What remedies are available?

The new Kenyan constitution and other legal frameworks have expanded citizen rights to access, own and use land resources. The National Land Commission Act (2012) enacted the Land Registration Act (2012), setting up Land and Environment Court with a similar status and power of ruling as the High Court. The result was disbanding and reconstituting land tribunals at the county level. There are also different commissions to investigate specific crime incidents related to land e.g. Ndungu Commission on corruption and land grabbing (2004) and the Truth, Justice and Reconciliation Commission on historical injustices (2013).

The Zanzibari government has amended the Land Transfer Board Act to mitigate some of the issues that were constantly arising during land transfer, many of which were involved in disenfranchising the vulnerable in the community.

3 DATA SOURCES

3.1 Kenya Data Sources

In Nairobi there is a civil society organization which has been fighting for human rights over the last three decades. We requested Kituo cha Sheria (Legal Advice Centre) to share their experience on this issue, e.g. who comes to Kituo cha Sheria with such problems, and what is the level of success of resolving these problems? Kituo Cha Sheria, through their Legal Aid and Education Department, have gone a long way towards empowering people and letting them know that they have their rights (Legal Advice Centre 2015).

3.2 Zanzibar Data Sources

Data from Zanzibar was obtained largely from the Zanzibar Land Transfer Board which has experienced many cases brought forward to resolve pre-transfer issues relating to land and property. Additional information was obtained from key informant interviews.

4 RESULTS

4.1 Kenya Case Studies

A visit to the Kituo cha Sheria offices yielded good data. The summary given by one of their legal officers about their operations regarding land cases was as follows:

“Daily, here at Kituo Cha Sheria, I can estimate that 70% of land cases are from the elderly. Of the cases received, most involve land grabbing by administrative officers and property dispossession by relatives or children.

When such cases reach our desks, we always advise the Client to get a land search or acquire a green card at the District Land Registry level. The Green Card will enable us to know who holds original records of all transactions relating to the piece of land/plot. In cases where the land's proprietor is deceased, and there is a conflict concerning the property, we start by filing an *ad litem* (a term used in law to refer to the appointment by a court of one party to act in a lawsuit on behalf of another party) for our clients so that a suit may be filed.

In some instances, we recommend that a caveat or temporary restrain be registered when land is at risk of being sold without consent. Kituo has also solved most land cases through mediation since it is cost effective to most of our clients. Regarding the cases that are still in court, we have some few that have reached the stage of judgment that favored our clients, who are mostly the elderly.

She went on to say that “as Kituo Cha Sheria, we are aware that landowners may be approached by land buyers, development agencies, and investors without them understanding their land rights. Therefore through our legal aid and education department we have gone ahead to empower people and let them know that they have land rights”.

4.2 Highland Kenya Case Studies²

Here are a few examples of what often happens on the ground:

1. One Elias Njuguna, who was 65 years of age, came to Kituo Cha Sheria seeking assistance. His younger brother stole the original land share certificate before their mother was deceased and sold the share certificate immediately after their mother died to an innocent buyer. The one Embakasi Ranch issued the share certificate. Elias Njuguna has not filed an ad litem stating that he is his Deceased mother's representative. The property in question is still registered under his late mother, who died a long time ago; therefore any application on injunction in Court regarding the suit property may be struck out since the dead cannot represent themselves in Court. The land is now in the process of being sold. As Kituo cha Sheria and after consultation between senior advocates in the department, a caution was drafted and was implemented thereafter. The caution was implemented on the basis that the land was still under succession. Since Embakasi Ranch has not been compliant with the land transfer policies, caution seemed to be the necessary action to take.
2. Jane Gathoni came to Kituo Cha Sheria intending to file a suit against her mother, Mary Njeri, who was 62 years of age, to pursue land rights. Her father, the late George Mungai, had four wives. He owned land parcel of 15 hectares. Upon his death, the four households succeeded him vide a Succession Cause in court. According to the Letters of Administration, the land was to be subdivided equally between the four wives. Upon successful subdivision, the property was registered in her mother's name in trust to her household. Her mother had started dealing with the said property held in the trust without consulting her since she was a married woman. She felt discriminated against because of her marital status. She was never involved in the proceeds of the sale despite being entitled; the matter underwent mediation, and the agreement was signed in the presence of a witness who was the area chief (local administration officer). The agreement was filed in Court, and the case was closed.
3. George Kirui, a Client from Nakuru, came for legal advice since he had used all his funds to purchase a piece of land that he never set foot on. The property was worth Ksh5.2 million. The funds were acquired through a bank loan, and the title for the land he was residing on was used as security for the loan. He engaged an advocate to represent him for the sole purpose of purchasing the piece of land and signed three copies of the sale agreement. Later on, when he went to the advocate to inquire on the status of the transfer, he was thrown out of the advocate's office and was asked never to return. He went to the lands office to do a land search and found out that the advocate was the new

² The names used in the Kenya and Tanzania case studies are fictional for confidentiality purposes.

registered owner of the land he had bought. It was clear that the agreement was somehow forged. George Kirui is a 50 years old man who only wanted to invest in property. The matter was referred to the National Legal Aid Service (NLAS) where the advocate was subjected to disciplinary action.

4. Alice Wairimu Kinyagia is one of the success stories of Kituo Cha Sheria. She has been living with her family on a piece of land in Dumberi/Tiganga, about an hour's drive north of Nairobi. Her husband passed on, and in the year 2017, she filed a succession suit in Court to transfer the property in her name. She gave that responsibility to his brother in law and gave him money to effect the property's transfer in her name. Her brother-in-law argued that Alice Wairimu's land was a property held in trust during the court proceedings. At some point during the proceedings, the file disappeared from the registry. Her brother in law produced some documents that stated that the late husband to Alice Wairimu had held the said piece of land in trust for him. Due to these documents, there were chances that Alice Wairimu would remain destitute. Therefore the Legal Officers found it right that the case be solved out of Court. The matter was settled through mediation and the agreement filed in Court.
5. Mr Mbae Mungai had occupied a piece of land LR.LOC.7/ICHAGAKI/109 as from the year 1981 after the death of his father, Mr.Paul Njagi, who was buried in that same piece of land. Later on in the year 2003, Mr. Mbae's mother died and was buried in the same land and continued occupying that same piece of land. In 2004, one Mr James Mwangi forcefully took a quarter acre of the land and started tilling. Mr James' defence in Court was that the said piece of land he was cultivating was sold to him by Mr Mbae's father, who is now deceased. He claimed that Mr. Paul Njagi had sold the suit property while they were still residing there. The case reached a judgement, and it was decided that the suit land was occupied based on adverse possession by Mr Mbae Mungai, and the piece of land was restored back to him. In this case, the case file went missing from the court registry and therefore, the case delayed for six months.

4.3 Zanzibar Case Studies

On the two major islands of Zanzibar litigation issues are numerous and the Land Court is overwhelmed. One of the reasons is that large areas of the islands have not been registered, although land adjudication and registration is slowly in process.

By far the most common transaction is transfer by sale (86.6%), followed by gifts (12.2%). Experience with gifts is that they need to be carefully handled since they are susceptible to problems during and after the transfer process (see Case Study1), being driven by sentiment rather than business. There are therefore several instances where objections have been filed by family members long after a gift was registered.

Another threat to the assets of the aged is when they enter a business collaboration with smart young men or women who are attuned to the land market and related laws. There has been

several cases of enthusiastic ladies from say Europe or the Americas coming to East Africa, falling in love with the environment and the people, and building a relationship with a young man or woman. They build a house together or invest in a hotel on the beach. After a few years the relationship gets sour, or the young spouse or friend becomes greedy. He/she finds a way of converting the title deed into his name as sole owner, or to illegally manipulate the immigration documents so that the partner has to leave the country. Fortunately the government is aware of such treachery and takes the necessary care.

1. Gifts and Their Pitfalls

While giving a gift is a praiseworthy act driven by affection and/or piety, getting it recognized and documented in accordance with the law is far from straightforward. There is a thin line between what Shariah (Islamic law) dictates and what secular law says.

For example, there have been instances of:

- Gifts of land and buildings being given to the junior wife without the senior wife knowing about it;
- Gifts to children of the senior wife to the exclusion of the second family;
- Children realizing after their father's death that the deceased had transferred property to his junior wife;
- Gifts to only one child out of several;
- Man attempting to sell property he had already given to his wife as Hiba (the process of endowing a special gift that holds a special quality, making it more than just a mere gift);
- Husband who tried to cancel the gift of a town house when he divorced his wife.

The law allows a gift to be given to anyone, but the ZLTB (Zanzibar land transfer board) prefers to see the family benefitting, including adopted children. The reason is to counter the temptation to take advantage of the low fees for Hiba (gift) transfers.

From time to time discarded families come to ZLTB offices for advice and relief. All this means that a lot of staff time and resources are spent on managing transfers resulting from gifts. Where necessary ZLTB staff insist on interviewing the applicant and both wives. In some cases the applicant withdraws the application after advice from the Board.

2. Sharp District Commissioner preempts fraudulent transaction

Raha Paradise Villas has a 0.19 ha. parcel in Pwani Mchangani held by three persons, i.e. two Europeans each with a 45% stake in the company, and a Zanzibari citizen (Humud Ali Said) with a 10% share.

Humud presented documents to the Transfer Board as sole owner, and on 20/7/2016 Raha Paradise Villas Company Ltd (MPV) complained to the Transfer Board Chair, requesting that Humud's application be cancelled and RPV be shown as the transferor in the certificate when issued.

As it happened, Said held a lease under S46 Land Tenure Act 1992 from 6/6/2015 for a 0.19 ha. parcel for 33 years renewable. The District Commissioner (DC) North

had written on 3/9/2014 to the Ministry dealing with land recommending the survey of a parcel on behalf of Humud Ali Said.

Although Said submitted all the required documents the Board suspended the transfer after the DC wrote on 18/7/2016, that information had been received that Said wanted to transfer the property to a third party; and that “there has been a case of fraud in the relevant property, whereby all documents show that the property belongs to Humud and that is a fact that I know is not true”.

The complainants had also reported the matter to the police. The DC requested that the transfer be suspended immediately until the truth is established. Whether the police will seriously take up the case and follow up with further investigations is yet to be seen, but the matter raises questions about the vulnerability of the system and the extent to which land owners are exposed to fraud.

5. SUMMARY AND CONCLUSION

People aged sixty five and older are only 3.9% and 3.1% of the population in Kenya and Tanzania respectively. The aged are overwhelmed by the youth considering for instance that Europeans of the same age are 17% of the total population. Old age comes with not only poor health but reduced ability to protect one’s wealth. And poor people suffer even more when it comes to protecting the little they have. Threats could come from offspring, other family members, friends or neighbors. Governments have more important (in their perspective) issues to address, the legal system is inaccessible to many people and sympathizers are scarce. Civil society organizations like Kituo cha Sheria (Legal Advice Centre) in Kenya and other similar human rights activists as well-managed land transfer regulation institutions administered by governments like the one in Zanzibar can go a long way towards relieving the difficulties suffered by the old.

It is therefore important to strengthen existing land policies in a manner that will protect the property of aged land owners. While legal services have to be more accessible, training local communities in dispute resolution will also help. Another impediment that needs to be resolved is reducing the amount of unregistered properties. Money lenders need to be more careful on who is the legitimate owner of the collateral property since property developers can be ruthless.

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BIOGRAPHICAL NOTES

Prof. Saad S. Yahya, PhD is a former University of Nairobi Dean of the School of Built Environment. He is also a Fellow of the Royal Institution of Chartered Surveyor, Member of the Institution of Surveyors of Kenya and Member of the Kenya Institute of Planners. He has authored more than a hundred publications on land economics and urban development.

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