Dilemmas of development
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Conflicts of interest and their resolutions in modernizing Africa

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(Editors)
Introduction

People’s relationships to land are in Kenya inherently contradictory, conflictive and confusing at the same time. Confusion and conflict is part of everyday life. Local people, state agencies and the elite alike position themselves differently in such conflicts. Whereas in the policy arena much emphasis is given to governance issues (The Constitution of the Republic of Kenya, Constitution of Kenya Review Commission 2002), social movements such as the Kenya Land Alliance (KLA) push for the enactment of relevant legislations to address the ambiguities of agrarian policies such as land-grabbing, land quarrels and land related ethnic clashes.\(^2\) KLA’s main focus is to curtail the practices of political elites that alienated public land for private purposes. The current land tenure policy debate in Kenya, however, stresses the solution of problems associated with its political system of patronage, rivalry and corruption. It tends to neglect the rather complex everyday life of land rights practices at the local level and the kind of conflicts that emerge from conflicting interpretations of land arrangements.

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Considering and addressing land conflicts and disputes are not easy and demand a social analysis that unpacks legal repertoires and goes beyond the view that relationships to land are property rights. Conflicts over land are often understood as emerging out of the overlapping of laws upheld by the state and customary land arrangements of, in this case, the Luo of the Siaya area in Western Kenya that mediate people’s relationships and attributes regarding land. Both are normative, institutional arrangements that are constructed by actors involved in land issues and these repertoires sometimes overlap and sometimes do not. Customarily land is the inalienable property of the clan given in usufruct to a lineage member and inherited according to lineage membership. Such land tenure arrangements have been reshaped over the years by the introduction of private land ownership, which dates back to the colonial period, and more specifically to the Swynnerton Plan implemented in the 1950s. Rights to access land are since then formally registered, the land being adjudicated and title deeds issued according to modern state land laws. This certainly has opened doors for the sale and the acquisition of land outside the realm of customary arrangements. But if the “owner” wishes to sell his land, the consent of the council of village elders is still required. These elders cannot be ignored as they are the custodians of customary land law. Whereas modern, private land tenure arrangements are codified, customary law is not and as this paper argues, rather presents itself as a repertoire of land rights and embedded social relationships that are open for competing interpretations.

Von Benda-Beckmann (2002: 39) conceptualizes this social phenomenon as the “co-existence of law or legal orders” within a given society. Von Benda-Beckmann (Ibid: 69) draws attention to the fact that “people are aware of alternative normative repertoires and/or procedures in which these can be used. But generally the condition of legal pluralism challenges the exclusiveness and self-evidence of any single normative system. … [I]n the context of legal pluralism, different participants and decision-makers may refer to the same law. But they often mobilize different legal repertoires against each other”. In other words, co-existence of legal repertoires thus implies different types of interactions or encounters between actors and social practices constituting an arena³ where normative repertoires are contested and used as “weapons” in the struggle with others over land.

Custom or the reference to what is supposed to be representing custom, plays a key role in the way the conflicts are played out. An interesting observation is the

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³ Von Benda-Beckmann (2002: 35) stipulates that there are many possibilities where legal pluralism can be studied. Depending on one’s interest it could be a politico-administrative space, structural places like households, analytically conceived functional domains, semi-autonomous fields or arenas. The notion of “arena” fits the purpose of this paper the best. The notion of arena and processes of contestation is also derived from the work of Long (2001) and Arce & Long (2000).
one by Channock (1991: 97) about custom. “Custom” he maintains, operates as “a weapon in the battle against” others, for instance in the settling of conflicts over land. He points out that in this battle “accentuated and narrower version(s) of ‘custom’ became a weapon in the hands” of others. This paper will show how the repertoire by which people identify their relationship(s) to others is indeed used as a weapon to defend their specific interests and claims on their rights to land. We thus need to explore these repertoires in great detail if only to show how such repertoires are constructed and used in the negotiations about land.

Conflicts over land rights, however, can only partly be explained by customary rights to land being reshaped and reconstructed by the introduction of individualized and privatized property rights to land. Property rights in fact are social relationships. Anthropologists have (always) argued that African land tenure is not about ownership per se, but instead rights and social obligations (Shipton 1994; Chanock 1991; Lund 2002). Rights to land are rather embedded rights; embedded in complex social relationships and shaped by obligations, reciprocity and shifting alliances between family members. Rights are not fixed, but often temporal and subject to negotiation (Odegaard 2002). While mapping these conflicts in Luoland, tensions at the level of kinship relations come to the fore. These kin quarrels often become part of or are played out during a conflict over land. Rights to land, whether embedded in customary or state law, then, do not represent one shared and accepted notion, but rather one that is subject to various and often conflicting interpretations that hinge on actors’ interests, social relationships, gender, status within the community and to which age group one belongs.

The first part of the paper depicts the Luo kinship relationships with reference to land allocation and inheritance by drawing upon local people’s accounts of kinship and customary rights to land gathered during fieldwork that was carried out between 1998 and 2002 in Siaya District in West Kenya. These accounts are supplemented by existing ethnographies of scholars (Southall 1952, Wilson 1961, Ochola-Ayayo 1976, Cohen & Atieno-Odhiambo 1989). Such an account as argued earlier, needs to be treated with caution as it suggests a shared notion of customary law. This article shows indeed that differently placed Luo have been construing and reconstructing, using and abusing, the various distinctions between tradition, custom, customary law and national legal frameworks. The second part takes this further by introducing case material to explore contemporary practices in relation to the complexities of inheritance and acquisition of land. Because of the embeddedness of land relations in wider social relations, genealogies are ideal to present and order the case material. The case material

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4 Ref. Chanock (1991: 67) where he narrates the role of “custom” in the complex process of the transformation of labour power into a commodity form eroding the basis of customary kinship.
underpins that land laws, whether customary or private, are often conflicting narratives or normative repertoires and that land conflicts take place in arenas of contestation. What custom is, and who is in a position to frame custom, emerges as crucial for understanding land conflicts as much as reciprocity of social obligations is.

Settlement and kinship relations

Charles Obudho\(^5\) and other old and well-respected men like him in Muhanda village in Siaya district insisted that if we wished to capture land rights we needed to investigate kinship and the way the Luo have settled over the years. Inheritance, he says, “may become confusing if one does not understand kinship relationships and the terminology used to describe the relationships of the persons involved”. Together they constructed in a few meetings an almost ideal typical version of customary rights to land. They began to explain that a (typical) Luo homestead (\textit{dala}) consists of a site where the monogamous or polygamous domestic groups build their houses, in the surroundings of which they have their fields. The smallest social unit in the homestead is the “household”. A homestead consists of at least two generations, that of the father and the mother(s), and their offspring. Occasionally, households of brothers of the homestead’s owner also reside in the \textit{dala}, as well as servants and “strangers” (see Figure 3.1). Several homesteads make up a \textit{gweng} and resemble what we now recognize as villages or settlements. Residence in a village, as Southall (1952: 27) also noted, is based upon kinship – or more specifically people that descend from the same grandfather (\textit{Jokakwaro}) – but also upon alliances developed out of strategic considerations (Cohen & Atieno-Odhiambo 1989: 14).

The elementary social relationship is patrifocal, which cements the relationships between father, mother and their children. People refer to this as \textit{jokawuoro} (“people of the same father”) who operate as one corporate group sharing and distributing most of the domestic activities. Marriage and inheritance of resources are intertwined and shaped by the normative respect of age (i.e. seniority). Seniority works out such that the eldest son has to marry first, then the second eldest, and so on in order of seniority; the same is true of the daughters.\(^6\)

\(^5\) C. Obudho is one of the twelve old men that were selected in the entire district to sit on the District Land’s Board chaired by the District Commissioner. He has been on the Siaya District Land’s Board for the past thirteen years. We had many and long discussions about his views on Luo customary (land) law and social relationships.

\(^6\) Custom dictating social behaviour is of course subject to changes and deviations. During our fieldwork we came across a “case” in which a junior son has left his father’s compound before his older brothers married. Our informants who brought this to our attention referred to this situation as “jumping the seniority principle”. To make things even more complicated, the junior son married several wives and had build several but separate houses for them. The elderly informants uttered clear expressions of disagreement with such behaviour.
When the senior son marries and has children, he is the first to build a new and independent homestead. When the father dies, the eldest son takes over the responsibilities of leadership of the family. An implication of the responsibility and prestige of genealogical seniority is that it puts the holder into the primary position of first harvesting (dwoko cham), first sowing (golo kodhi), as well as of eating specified parts of an animal killed, which are usually the best parts. The inheritance rights of daughters are limited to before their marriage. When married they leave the dala and lose the right to any wealth realized.

If Luo society were composed only of this line of groupings, the study would have been much easier. The complication arises when one considers a polygamous homestead, which is composed of a plurality of matrifocal units (jokamiyo). Polygamy shapes the mothers’ marital relationships with a common husband. The Luo commonly refer to the relationship between such matrifocal units as nyiego. Nyiego means “jealousy” when it refers to the relationship between the co-wives, and means “rivalry” when it involves all in a matrifocal unit as a group against another, opposing group. Nyiego relationship often generates the various kinds of conflicts, competitions, envy, confrontations and even divisions that are so characteristics at various levels of Luo social organization. The polygamous setting explained above accounts only for the first three wives in a polygamous homestead. A further complication occurs if there are more than three wives in a homestead. In the basic Luo polygamous homestead, (see Figure 3.1) the house of the senior wife (mikayi) is at the centre back. The second wife’s house is at the right-hand side of mikayi to which people refer to as nyachira. The third wife (reru) has her house on the left-hand side of mikayi. Women married after the first three wives are called nyi-udi, which means the daughters of the house to which they are attached. They also stand in juxtaposition and compete with one another.

Beyond the grandmother and grandfather line, at the third and up to the fifth generation, the keyo appears as a next organizational form. People descending from the same great-grandfather constitute a keyo. The elders of the keyo act as representatives in disputes between various opposing keyo. They are also intermediaries between younger members and the ancestors and therefore act as foster father guardians. They form the first organized council to arbitrate land and

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7 The Luo call this “liberation”. They distinguish, however, between two different forms. The first liberation is when a woman starts cooking in her own house in the compound of her father-in-law. The second liberation is when a man establishes his own homestead.

8 For the Luo living along the shore of Lake Victoria, it is the senior brother who can first own a fishing boat. Since it is he who communicates with the ancestors, he also conducts or leads the sacrifices of religiosity regarding the boat.

9 According to Wilson (1961: 7), a keyo constitutes extended polygamous families tracing descent from a common great-grandfather. The point of division is descent from the hut of one of his wives. The members of each of them thus constitute sub-groups sharing a common grandfather and are rightly called jokakwaro, “people of the same grandfather” (Ochola-Ayayo 1976: 122).
boundary disputes between members of their *keyo*. Social control of the community is here exercised partly through the authority of these elders and in the past partly and certainly through their control over the means of accumulation. The migration of their sons and daughters to towns has changed the role of the elders considerably, but when it comes to land the elders still maintain a large degree of authority.

![Spatial ecology of a Luo homestead](Image)

*Figure 3.1  Spatial ecology of a Luo homestead  
Source: Sennyonga (1997)*

A next level in the lineage is the *libamba*, which involves descendants of a common ancestor, usually from four to seven generations back. It is a maximal lineage of landholding co-operating agnates and generally considered by anthropologists as the backbone for settlement, household and family formation, and social reproduction (see for instance Evans-Pritchard 1965, Southall 1952, Parkin 1978). Its members characteristically meet often at the *keyo* level to discuss the distribution of land titles, land conflicts and other property disputes. The study of Luo economic structure is most conveniently in terms of the operation of the *libamba* units, because these units define maximal frameworks for economic, social and political competition. According to Ochola-Ayayo (1976: 121) “the Luo sum up in the *libamba* all those forces of friction and competition, which weaken the solidarity of a lineage segment and lead to its further subdivision”. Thereafter, the next level is the clan (*dhoot*).
Luo customary land tenure arrangements

The Luo acquire land rights in several ways. Charles Obudho explains that rights to land derive from being a member of the clan. Secondly, the clan also used to grant access to land to strangers and also slaves and servants were in the past given rights to access land. Finally, roughly since the late 1940s, land can also be purchased. Given that the land conflict cases this article explores in detail all deal with land that is accessed through customary inheritance arrangements, the buying and selling of land is not documented.

Land allocated to clansmen

The basic right to access land stems from being a member of a tribe in a given territory for which lineage or clan members and their ancestors fought, and that is “once acquired by conquest” (Wilson 1961: 18). This represents the strongest claim to land in Luo territory: Every member of a clan has an inalienable right to cultivate a garden within the territory of his grandfather. This right is normative because it is associated with lineage membership.12 This is important socially, because it provides a sense of security, which springs from living among kinsfolk. It is economically important as well, because a clan member is entitled to occupy such land on terms of correct usage without payment, except customary dues to land-controlling elders.

Natural boundaries well define the land that belongs to the clan, and the natural landscape of ridges and valleys aids this demarcation. One clan usually occupies a ridge or part of a ridge. This now is the area in which a man from that clan may expect to obtain a right to cultivate and to raise stock.

Formally, the land belongs to the head of the homestead. He in his turn allocates land to his wife or wives and keeps that part of the field closest to the gate for himself. Father’s field is commonly known as the mondo. Before they establish their own compounds, sons work on their mothers’ field(s). Below we will discuss how sons inherit land.

Land allocated to strangers

A jadak13 (stranger) is the person who comes to the area of a clan other than his own and asks for land. According to Luo tradition, it is difficult to refuse a stranger the land he requests to provide for his subsistence. It is this tradition that allows people to live among tribes or clans other than their own. Friendship, or maternal or affinal connections, qualify one to ask for land which is given in usufruct. In any case, the council of elders must approve such a transaction.

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12 According to Luo beliefs, land that was found unoccupied was left as a trap, or smallpox had killed the owners. Advance parties of warriors and diviners tested such land.

13 In Dholuo Jadak is singular, and jodak is the plural form.
lands given to a stranger are usually within the territory of the clan. In return, the stranger must show solidarity and allegiance to the clan members. The stranger and his descendants have no right of inheritance; his children can only renew the usufruct right. The length of usufruct is indefinite, and this has led to many misunderstandings by the colonial and current government administration, and still complicates many land cases today.

The *jodak* tradition dates back to the time when a rich man counted his security and prestige by the number of followers he could attract to his holding. It is fair to say that the Luo encouraged *jodak* to settle among them and, until recently, a *jadak* was not normally turned out of the land “given” to him, except in certain serious situations. According to some informants, the expression *chiem gi wadu* (“eat what you have with your neighbour”) is strongly associated with the Luo concept of *jadak*. If, on the other hand, the clan in which a *jadak* was a squatter was at war with another clan, and he had shown bravery on the battlefield, upgraded his position to that of landowner. He, after all, had fought for the land and had been prepared to sacrifice his life in the same way, as did the ancestor of the present member.

The allocation of land to a *jadak* was not intended as an economic enterprise in a direct way, but as a means to achieve a higher status. The land was being valued as a source of wealth and as a means of subsistence, which may raise a person into an honorific, higher position. Land distribution was a vehicle for prestige and a means of protection.

*Land allocated to slaves*

*Misumba* is the word used to describe a servant or a foundling brought up as a foster child, or a slave in the proper sense of the word (Ochola-Ayayo 1976: 131). Under the first meaning of *misumba*, the homestead head assigns a child, or an adult man, to the house of a *migumba* as if he were her son. A woman is regarded a *migumba* if she has not had a male child. People expect a *misumba* to fill the social position of a male child in the house of the *migumba*, as if he were that woman’s actual son. In any case, a *misumba* inherits his foster mother’s gardens and livestock, but his position with regard to the inheritance of his foster father’s field (*mondo*) is like that of an illegitimate child. If the foster mother gives her *misumba* cattle to marry a wife, then he is expected to become a member of the clan, and his children will be members of this clan. If, however, he should one day decide to return to his original clan land, then not only does he lose the land, but so do his children and their mother. The children are regarded as the legal descendants of the social father, or as an informant put it: “*their mother’s bride-wealth was clan wealth*.”
The inheritance of land: Customary rights

The way a father while still alive allocates land to his sons resembles the approach to land inheritance. The division of land between brothers or sons in a monogamous family is rather simple and straightforward. Land conflicts usually arise between nyiego groups. In the case of two or three sons of the same mother, the senior son takes the centre portion of the land in the homestead up to and beyond the gate or to the buffer zone; the other sons then have the remainder of the land to divide among themselves. If the land is divided among the elder sons after they are married, and they take to living on their lands, it often happens that the youngest son remains in the father’s compound to care for him in his old age. His inheritance is the mondo and the remaining gardens of his mother (Wilson 1961: 13, Ochola-Ayayo 1976: 129, Francis 2000).

In the event of a father’s death, then whoever remarries his wife (indicated as jater) is the legal guardian of his fields and his children. A jater may take the widow to his village or may live in the village of the deceased. The widow will continue to cultivate her deceased husband’s land. The jater may also cultivate these lands on a usufruct basis but must vacate them if ordered to do so when the sons of the deceased have married and established their own homesteads. In most cases, a jater is a classificatory father to the children, and he will fulfil his obligations to the latter according to custom. Should a jater be a stranger, then it is the duty of the clan elders of the dead man’s lineage to watch him closely and see to it that the sons get the land of the deceased. The jater, whether relative or stranger, has no permanent right whatsoever to any of the dead man’s property; nor have the leviratic children (children born of the jater), unless there is no male heir. Once the eldest son has built his homestead, it becomes his duty to set up homesteads for his junior brothers. He should divide the land equally; or else the junior brothers may seek redress from the council of elders.

The right of inheritance also depends on the presence of ancestral graves on the land (Shipton 1992: 377). Furthermore, if the ancestors conquered the land, a descendant can lay extra strong claims to it (Ogot 1967: 222). Land is inherited only through patrilineal relationships. A sole survivor of the grandfathers would then inherit all the grandfathers’ land. A brother only inherits land belonging to a full brother if the latter does not have a male descendant. The eldest of the group of brothers is the temporary owner of the father’s entire land, and acts as arbitrator in disputes between the younger brothers. Younger brothers can appeal to the council of elders. A man can only inherit land belonging to a paternal uncle if the uncle does not leave a son, or full or half-brothers. The unwritten rule of inheritance by the nearest agnatic kinsman operates throughout the clan, that is, if no

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14 A buffer zone is open land between family lands. Nowadays, because of population pressure, buffer zones no longer exist. They have been allocated to homesteads for use.
heirs can be found from the father, grandfathers or great-grandfathers, then the nearest male relative to the deceased within his clan inherits. The sons, when they marry, share their mother’s land. A mother usually gives her sons part of her garden at that time, but unmarried sons inherit those fields remaining at their mother’s death.

In the event that a man dies without a male heir, then his land reverts to his father or nearest agnatic kinsman, except that portion allocated to his wife or wives provided they remain within the lineage of the deceased. In the case of a man dying without a son and his wife having been unable to provide a male child through another relationship, she may “remarry” a girl, usually from her own clan, with the cattle of her dead husband or with her own cattle. She then calls a close agnatic kinsman of her deceased husband to cohabit with this girl to serve as genitor. Children of this union are the legal sons of the deceased husband, and they will inherit his remaining wealth: Land, cattle and other personal properties. This form of marriage is what anthropologists call “ghost marriage” (Ocholla-Ayayo 1976: 131).

Inheritance of land in a polygamous setting

In polygamous settings, the land is divided along the same lines, except that, within the village, the sons claim the area contiguous to the houses of their mothers. Each wife and her sons constitute a group with similar rights as a son of a sole wife: Children of the senior wife are given that portion of the total area that would have been given to the senior son in a monogamous family. The sons of the second and third wives lay claim to those portions that would have fallen to the second and third sons, respectively, in a monogamous situation.

There is, however, a further complicating factor and that concerns situations where there are more than three co-wives (perceived as attached daughters). These co-wives are attached to the first three sets. The sons of the senior wife inherit as a group with the sons of daughters attached to the senior wife; sons of daughters attached to the second wife and the sons of daughters attached to the third wife will also inherit as groups with the sons of the second and third wives respectively.

Kinship and land inheritance in practice

Let us now examine how kinship and land inheritance work out in the practice of everyday life in the Siaya region of Luoland. Issues of land allocation and inheritance have become much more conflictual and complex as land became scarce due to increased population. Land use has intensified over the years leaving little opportunities to fallow land to restore soil fertility. The room for

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15 See for a detailed account of land use changes, Mango (2002), Chapter 2.
manoeuvre for allocating and dividing land according to Luo customs among clan members, or for allocating land in usufruct to strangers and slaves, has been substantially limited over the years and is virtually absent nowadays. Moreover, the implementation of the Swynnerton Plan from the mid 1950s onwards partly restyled Luo land tenure arrangements. This Swynnerton Plan laid the political groundwork for a state policy to privatize land tenure in Kenya (Hebinck 1990: 59 ff.). Practically all the land is now adjudicated and registered, and subsequently title deeds have been issued. This opened doors for the buying and selling of land. However, private land tenure has continued to operate concurrently with Luo customary law, whereby Luo elders still have to quell land disputes among their people. Where there is no conflict over land, people have been able to buy and sell land on an individual basis. Jodak and misumba have been able in this way to get land as long as they could afford to buy it from a willing seller. As we shall see in the cases presented below, the legal and written evidence that a piece of land belongs to a certain person stirred intra-lineage and intra-household conflicts. Privatization of land implies a breakaway from the situation where land is collectively owned by the lineage under the authority of its leaders. While in the recent past, Luo elders would act as judges in the case of land disputes and settle them, their role is now minimized and increasingly been taken over by the government’s magistrates’ courts and district land tribunals.

The cases presented below aim to elaborate on such conflicts. They were chosen in such a way that the different ways by which land customarily may be inherited and allocated are represented. The cases show local legal pluralism at work: Customary and private land tenure systems interface and are embedded in day-to-day quarrels about social obligations.

Case 1
The situation of Oketch Bundmawi and Oduor Lomo with regard to land illuminates the complex nature of land quarrels. They are brothers and have the same father, Ogonji, and are married with children. Despite Luo customary land arrangements, neither has yet managed to inherit land from their father. Their elder brother, Abednego, currently holds all the title deeds of the land of their grandfather, Olum (see Figure 3.2). Oketch for the moment cultivates the land of his deceased uncle, Agina, where he has also established his own homestead. Lomo, as the youngest son, according to the custom should have inherited the mondo and the homestead of his father, Ogonji. However, Abednego cultivates the largest portion of his father’s land and he has established his homestead on his father’s mondo, thus dashing Lomo’s hopes of inheriting the mondo. Their mother retains another portion of the land. According to Luo customary law, his mothers’ field should go to Lomo after her death. Lomo currently works on
another part of his mother’s field and a small portion of the land of his paternal uncle, Odongo.

To fully explore the many dimensions of this particular conflict we need to go back to the brothers’ grandfather, Olum. The origin of the conflict can partly be traced back to him and his eighth wife, Adungairo, who was a seer and a witch doctor. Olum had three sons from his seventh wife: Ogonji, Agina and Odongo. His only remaining son, Odongo, has a hearing problem due to his old age and does not say much about his father. When asked about Olum, his grandson, Abednego, mentioned that he was a well-known farmer who had come to Muhanda at more or less the same time as the British arrived in Luo land. He had six other wives in his original village some ten kilometres from Muhanda. Olum’s family also belongs to a lineage of the real landowners, the Gem people who conquered Muhanda village (from the Abaluhya) before the establishment of colonial rule.

Olum came to Muhanda with his seventh wife who died in 1934, after which he married Adungairo. This marriage did not produce any children. People believe that she was possessed with evil spirits who did not allow her to have children, but because she had healing powers, she made Olum rich, as people brought her many cattle and goats. At the time of his death, he was a famous and
a wealthy person. People also believed that Adungairo bewitched Olum’s sons, as they experienced marriage problems.

To escape the witchcraft, they went to the Rift Valley to find work on white settler farms. Odongo did not stay for long and came back home almost immediately after his father’s death to settle into farming. He got married and had a daughter. His wife died soon after that and he never remarried. Agina married in town and did not return to the village. He died in town and his wife did not live long afterwards. Their son, Okumu, is now a high-ranking railway functionary in Nairobi. He married in Nairobi and never visited his father’s village.

Ogonji was Olum’s first-born son. When Olum died, Ogonji worked in Kitale as a mechanic for the Hughes Company. He married and had three sons and a daughter. These sons are Abednego Ochieng, Oketch Bundmawi and Oduor Lomo. The daughter is married and lives in Seme. Since Ogonji married rather late, he fathered his children when he was at an advanced age. He retired in 1970, returned home, and died in 1979.

The land tenure and inheritance arrangement in the Ogonji family is that of people descended from the same grandfather (*jokakwaro*). When Olum died, he had allocated land to his three sons. The records of the District Land Register in Siaya indeed specify that the title of plot no. MN 426 (7.5 acres; 3.0 hectare) is vested in Ogonji, that of plot no. MN 423 (6.5 acres; 2.6 hectare) is on Agina’s name, and plot no. MN 424 (5.5 acres; 2.2 hectare) is registered in Odongo’s name.

Abednego, being Ogonji’s eldest son, customarily holds the title deeds for all three plots. This is because his uncle Odongo is now old, has no heirs and is depending on Abednego and his wife for his daily subsistence. Odongo officially has a say over all the title deeds, but has given them to Abednego for safekeeping. To complicate things even further, Abednego is also cultivating his father’s plot (*mondo*). Oketch and Lomo are not happy with this situation at all. They feel that they should get their share. One day when the issue came up, Odongo made clear to them that “you can subdivide your father’s plot among yourselves. I will retain Agina’s plot because he was my brother and I will also retain mine. Furthermore I can still marry and get a boy child who can be heir to my plot”. This scared Ogonji’s sons. Their mother advised them to suspend their quarrel for the time being. They fear they will lose these plots – the more so, because Odongo has the right to sell his own and Agina’s plots. So they do not want to annoy him or else they will lose the land.

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16 After Olum’s death, Adungairo left and remarried somewhere else. Her wealth followed her. In Luoland it is believed that when a rich person dies or leaves an area, whatever wealth he or she leaves behind disintegrates.
The reason why Abednego is holding on to the title deeds and not allocating them to his younger brothers is a combination of how authority is exercised and of not complying with expected patterns of behaviour, such as mutual help in return for assistance later. When Ogonji died, Abednego shouldered his responsibility as senior brother and paid for his younger brothers’ education up to secondary school level. Furthermore, he says, “I paid bride-wealth for my brother Oketch when he married”. When they later got jobs, he demanded assistance from them to help him pay school fees for his children. Both refused to help him out. Abednego is not happy with them, given that he expended resources on them that he could have used to improve himself.

On the other hand, Lomo and Oketch argue that they do not like the way Abednego exercised his authority as the senior brother. When they returned home from working in town, neither had yet established own homesteads. Abednego made them eat in his house, while their wives had to eat in their mother-in-law’s house. Abednego’s objective clearly was to draw labour from his younger brothers and to make them work in his fields; but, when the harvest was brought in, he barely shared it with his brothers. Abednego defends himself by arguing that he was using his position as eldest brother to unite the family. Lomo was not happy with the situation and liberated himself unofficially by 1994, when he ordered his wife to start cooking in her own house. Lomo thus violated the Luo custom of seniority. Being the last born, he should have been the last one to be liberated. Oketch also followed with his wife. Lomo then requested to be given his own plot so that he could engage in serious farming without being controlled by Abednego, but his mother refused. She told him outright that Abednego is everything in their family. Lomo is only allowed to farm part of his father’s land and his uncle Odongo’s land temporarily.

The conflict, as it now stands, partly involves people of the same father (jokawuoro) but has the potential of also involving people of the same grandfather (jokakwaro). Okumu, who can claim the land of his father, Agina, will not be a serious contender however. Oketch, who now lives and works on Agina’s land, is convinced of this:

My cousin is a very irresponsible man. When my uncle Agina grew very old, he did not take care of him. When he died, he did not even come home to bury him. When his own mother died, he never came back home. This means he delinked himself from us. We can only give him a small portion of this plot.

The situation will become more complex if descendants of Olum who are still in his original village show up and claim the land. This is because Olum’s fourth wife and seventh wife are daughters attached to the first wife’s house (Nyiudi) and their sons inherit as one group with the sons of the first wife. Customarily,
they are entitled to claim the land of Agina and Odongo, as it is part of the land belonging to Olum, their father.

Case 2
This case is about Martin and his struggle for land. It involves genealogically the Ogonda (I) family (see Figure 3.3) who are descendants from a jadak. The case is further compounded by the fact that the son of Ogonda (I), Obudho, had several wives, and this stirred rivalry when it came to land allocation. As a result, one of Obudho’s sons, who at that time worked in Uganda, missed land. He remained landless until he died. The problem now is that his remaining three sons, among whom Martin, are landless. Martin only has access to the land he is working on by virtue of being “people of the same grandfather”. His other two brothers have migrated to town to seek casual employment. Martin and his brothers are seen as squatters and not entitled to title deeds. Their future will be based on their ability to acquire land through purchase.

The Ogonda (I) family lives in Luero village. Ogonda (I) founded this village a long time after the region had been conquered by the Luo, who, however, had left the place unoccupied until then. Before Ogonda (I)’s arrival, it was used as grazing land for livestock. This pastureland was allocated to Ogonda (I) in the jadak relationship by his brother in-law who was married to his sister. His
brother-in-law belonged to the Kalanyo clan and Ogonda (I) belonged to the Kathomo clan. Luero was then still grazing land. One of Ogonda’s sons was Obudho who married nine wives. He had two sons with his sixth wife, Abigail. The first son to Abigail is Jeconia Ogonda (II) and the other, John Ambajo. Ogonda (II) had two wives. The first wife gave birth to two sons of whom Martin is the eldest. The second wife also had two sons.

Martin lost his mother in 1965 when he was eight years old. When his father completed his primary education, he found work in Mulago National Hospital in Uganda. He came back to Kenya in 1971 on a transfer to work in Kenyatta National Hospital in Nairobi. While in Uganda, he married a second wife who is now a tailor in Kakamega. Martin does not have land himself. He has only access to his uncle’s (John Ambajo) land. When the land was subdivided, his father was in Uganda. Since his grandfather had many wives, there was stiff competition for land because of the nyiego (rivalry) relationships between the co-wives. As a result, his father was not given land simply because, when he was summoned to come back for the land allocation, he never turned up. His step uncle, Adero (son to Obudho’s first wife, Okwatch, Abigail’s sister), allocated the land to his paternal uncle, John Ambajo. This is the land on which Martin is now living and which contains Obudho’s second homestead. Most of Martin’s step-grandmothers’ graves are in that homestead, as well as that of his father and mother. John Ambajo, whose name is registered on that land (plot no. L723 at the District Land Registrar’s office in Siaya), lives in Nairobi and rarely visits the village. He is separated from his wife, and his two sons still live with their mother. Martin lives in his grandfather’s homestead. His father, however, never managed to establish a homestead of his own. Martin still lives with his grandmother, who is about 100 years old, in Obudho’s homestead. Martin built his hut behind his grandmother’s house in accordance with the Luo customs. Martin is married and has one son, Ogonda (III).

Martin has only usufruct rights to the land in Luero village because he is a member of jokakwaro. Most likely, after the death of his grandmother, his uncle may ask him to look for land to purchase somewhere else. He does not know his fate as far as land allocation is concerned,

I hope my cousins will understand and give me a place to put up a homestead. The field where I planted maize belongs to my paternal uncle, John Ambajo. If I fail to get land here, I will have to look for land in another village and buy. However, this will only happen after the death of my grandmother.

The complexity is heightened by the fact that, customarily, Martin has the right to use the land of his grandfather because his grandmother is still alive and he has the right to use her gardens. Moreover, the homestead where they are living contains the graves of his mother and father. The migration of Ambajo to
town with his sons has enabled him to cultivate part of Ambajo’s land, but only under the conditions of usufruct rights.

Case 3
This case also involves a jadak who came to live in Muhoho village among his maternal uncles. The man who came to this village was Opiyo Naki. The conflict we will discuss involves brothers from the same mother. The appellant is the biological son and the defendant is a social son.

Opiyo belonged to the Isuha clan and came to Muhoho as jadak. He had two wives. The first wife had two sons: Okelo Naki and Otieno Naki (see Figure 3.4). The second wife had two sons and two daughters. Opiyo lived from 1890 to 1939. Before his death, he had allocated both his wives parcels of land. According to Luo land tenure arrangements, the sons were to inherit their mother’s land. However, after Opiyo’s death, his eldest wife was married by one of his relatives (jater) called Agulu. Agulu shares the same grandfather as Opiyo, but they have different fathers. He only came to Muhoho to inherit Opiyo’s wife and went back to his village some 60 kilometres from Muhoho. Opiyo’s eldest wife produced a son with this man. According to Luo custom, the son, Oluoch Agulu, is a bona fide son of Opiyo, rather than of the man who remarried his mother (jater).

![Figure 3.4](image)

Figure 3.4 The descendants of Opiyo Naki

Oluoch Agulu, born in 1945, does not have land of his own. In this village they are strangers and were not allocated a large piece of land. His brothers, Okelo Naki and Otieno Naki, tried their best and assisted in his education up to college level. He graduated as a primary school teacher in 1966. Oluoch Agulu married two wives. He had three sons and two daughters with the first wife.
However, they were not happily married and so they divorced. He then married the second wife, Pamela, with whom he has two sons and one daughter. Oluoch is a retired primary school teacher.

When we visited Otieno for the first time, we wandered over the plots he was farming. This did not please Otieno. One day, Otieno met one of us alone and started quarrelling about why we were trespassing on his field without his knowledge. When we checked the land register in Siaya town, only the names of Oluoch’s two brothers and his stepmother are registered as owners. Plot no. MH 734 is in the name of Okelo (Opiyo Naki’s eldest son) and plot no. MH 736 is in the name of Otieno Naki. The plot covers Oluoch’s homestead and the fields he cultivates. Plot no. MH 735 is registered in the name of their stepmother. Earlier on, another informant mentioned to us, however, that Oluoch is not a real son to Opiyo, even though he had established his homestead on Opiyo’s mondo. We were told that he did this on his mother’s instructions. Throughout our conversations with Oluoch and his wife Pamela, they did not at all mention the biological father. In any case, Oluoch now calls himself Charles Oluoch Agulu Naki, which is in fact a combination of the names of his biological and social father.

In 1995, Otieno took this case to the council of elders of Muhoho village and some elders from their original village. The case was decided in favour of Oluoch. Based on Luo customary law, he is the son of the deceased. The ruling did not convince Otieno, and he decided to take the case to the High Court of Kenya in Kisumu. The case underwent several hearings and was still pending in court by the end of the research, following the death of the magistrate who was handling it. A new magistrate now has to take it up. Most villagers who know of the case argue that Otieno cannot win because Oluoch is his brother.

This case shows the complications that arise out of confrontations between jadak-based land allocations and private land tenure arrangements. Oluoch Agulu refers to customary law to lodge his “rightful” claim on the land because he is a son to his father. Otieno, for his part, is resorting to private land tenure arrangements to secure his case and hopes that the court will rule in his favour. Meanwhile, because of this land issue and some other family-related problems, Oluoch Agulu and Pamela became active members of the Anglican Church and claim to live according to Christian norms and values. Pamela one day made the following remark: “somehow I get peace in salvation. Christianity is my strength”.

Conclusion

This article has shown that land appears to mean more than property as often is assumed. Land has different meanings and is not just a resource that is required for productive purposes. A whole complex and dynamic set of social relationships is built around land, tying people together and defining their relations vis-à-
vis each other. Over the years, and largely still, the key normative principle has been that one can gain and maintain access to land by membership of a clan. Rights of individuals are not thought sacrosanct; rather, they interlock with the rights of others, and overlap with those of families, their members and wider groups. A place on the landscape implies a place in a kin group, and vice versa. Patrilineality, virilocal residence and the subdivision of holdings devolving from one generation to the next remain the socially defined norms in Luo country. The multiple meaning of land and the intrinsic complexities and conflictive nature of Luo land tenure arrangements are often misunderstood.

Having said this, one cannot escape the lessons of the cases presented. The first case shows that land inheritance is clouded by relationships between members of the same kin group or family. This particular conflict is not necessarily about customary land law and rights, but about actors using and constructing elements of that law strategically to position them in the conflict. The second case of Martin is quite clear, as each party understands its obligations. The two operating land tenure arrangements do not interfere with each other. Customarily, Martin has the right to be on his uncle’s land where he resides at the moment, but his identity as a stranger confines him to just that and he will never be able to acquire more land. His dreams of becoming a farmer through investing in perennial crops and soil fertility management will only materialize if he is able to acquire land privately. Martin, like Lomo from the first case, represents the numerous members of the younger generation who have developed a more individualistic attitude, and who are eager to get their own title deeds, since this would enable them to make their own plans, without having to accept the authority of an elder, a father or an older brother. However, in conflict situations, the owner of the homestead, in most cases the one holding the title deeds, tends to hold on to these deeds as long as possible to maintain his authority. In many cases, this hampers the construction of a proper inheritance arrangement, which could mean the continuation of the quarrel between sons after the death of the father. In the “old” days, the eldest son succeeded his father as the head of the homestead. In more recent times however, younger brothers often question and challenge his seniority position. The absence of title deeds is felt as impeding one from acquiring a loan that would enable investment in agricultural production, in other economic activities, or in marrying other women. Obtaining title deeds, either through the private property or the customary route, offers new opportunities.

The third case shows the role played by customary and private land tenure arrangements. Each party in the conflict reverts to the tenure arrangement that fits their particular interest, and engages in strategic positioning. Such cases generate the kind of conflicts and confusions about land and inheritance with
which Kenya as a nation, with its recent politically and ethnically induced land conflicts, is grappling. In the absence of an integrated land policy, the unresolved issue of land tenure persists.

The paper has also shown \textit{inter alia} that women do not normally inherit cultivation rights but acquire them mainly through marriage. Women’s rights are only ancillary, depending on allocations from their husbands. Their position regarding land can also be seen from the angle of matrilineal relationships in a patrilineal society. Women are the ones who work the land most of the time, and obtain rights in their post-marital homesteads by devolution from their mothers-in-law.

The argument developed in this paper is that it is too simple to explain land conflicts only with reference to situations as evolving around overlapping customary and private land tenure arrangements shaping the way the Luo deal with land, understand land issues and resolve conflicts over land. In more theoretical terms this paper has underlined the usefulness of legal pluralism as an approach to research situations constituted by co-existing normative legal repertoires. Claims on land are subject to various, competing interpretations of customary and state law that often result from and lead to embroiled relationships between family and/or clan members. But as this article has shown, there is a need to go beyond legal pluralism and emphasize the wider set of social relationships people are embedded in. Rights to land have to be seen in relation to other social relationships (seniority, kinship) with their associated rights and obligations. Land conflicts thus take place in \textit{arenas of contestation} wherein people position and reposition themselves continuously in their understanding and (re)construction of the existing customary and modern, private laws with regard to land. The metaphor of “forum shopping” as a social practice, borrowed from von Benda-Beckmann (1981), seems to do justice to an attempt to characterize the land rights arena. People literally shop between the various kinship and legal repertoires and actively (re)construct them in situations of conflict. In contemporary Luoland, legal shopping manifests itself in the socially constructed tension between collective/customary versus individual/modern. Differently placed Luo, both in terms of membership of social categories and in terms of their immediate social circumstances, have been construing and reconstructing, using and abusing, the various distinctions between tradition, custom, customary law, and national legal frameworks for as long as these have been around. The challenge for any advocacy group and government to address seriously local level land conflicts is the question to adhere to which legal repertoire of (customary and private) law and find ways for relating to conflicts at the level of social relationships.

Meanwhile, people tend to organize their daily lives by doing their own thing. Kinship principles and customary arrangements and obligations are not dead but
subject to reinterpretation and negotiation. Despite the fact that nobody talks about them, kinship-defined social relations and customs still act as a go-between the tensions of contemporary, everyday Luo life.

References


