The perils of land tenure reform: the case of Kenya

H.W.O. Okoth-Ogendo
Department of Public Law, Faculty of Law, University of Nairobi, Nairobi, Kenya

Introduction

An important theme in this workshop is the assumption that for agricultural development programmes to succeed, they need to be founded on land policies which inter alla emphasize the reform of tenure rather than of the agrarian structures and conditions under which production relations operate. The theory of the case is that by changing tenure, that is, the manner and conditions under which land is held, it is possible to generate efficient land use practices. This assumption is in turn founded on the argument that ownership per se, especially if it is individualized and is secure against State intervention (or interference), is the foundation of economic initiative.

This argument has been pushed by free enterprise economists and planners in Africa on two complementary fronts. First, it has been offered as the explanation for the alleged inability of indigenous tenure institutions to stimulate agricultural development; it being contended that because of their "communal" nature these institutions are inherently incapable of accommodating "modern" production methods, techniques, and practices. Second, it has been offered as the panacea for the morass of underdevelopment which continues to plague rural Africa; the implication being, therefore, that salvation lies along the path of the privatization of land ownership rather than of the public control of land use.

Although a number of countries in Africa have accepted this argument and in consequence have invested staggering resources in tenure reform programmes, there is evidence that its wider political economic consequences have not always been assessed or fully appreciated. In particular, the impact of tenure reform on the economic, political, and social organization of rural society has never been fully weighed against its alleged contribution to rapid growth in the agricultural sector. The concern of this paper will be to investigate some of the perils that have befallen rural societies in Kenya as a result of this omissiom It is argued that whatever contribution tenure reform may have made to growth in that country has been completely offset by the emergence of economic disparities, redistribution of political power, and the disequilibration of socio-cultural institutions that have occurred in rural society as a consequence of reform.

The Kenya programme is particularly instructive, since it remains the most comprehensive in eastern Africa. Its history, justification, and expectations were first set out in a report prepared in 1954 by R.J.M. Swynnerton. A Plan to Intensify African Agriculture represents official government policy to this day. The essence of the Swynnerton formula was the privatization of land through the displacement of indigenous property systems, relations, and modes of production and their replacement with a new legal order modelled after 1925 English land law. Although the programme is by no means complete, and at the present rate may not be until the year 2050, it is estimated that over 70 per cent of all land outside the arid parts of the Coast, Eastern, North-eastern, and Rift Valley provinces has now been privatized (Okoth-Ogendo 1976). It is the impact of this new regime on the allocation of economic and political resources to, and resolution of normative conflicts within rural society that this paper examines.

The data presented here are drawn from research conducted in four areas in Kisii and South Nyanza districts of western Kenya between 1972 and 1974. Although these data are some eight years old, the trends that emerge from them appear to have been exacerbated rather than to have abated during that period. Indeed, the current Development Plan 11979-1983) clearly anticipated this when it called for the establishment of a land reform commission during the plan period to investigate inter alia the rationalization of existing land laws and tenure systems, speculative dealing in land, illegal subdivisions of registered land, absentee landlordism, and land mining (Kenya 1979). Most of these, as we shall see below, are in one way or another linked to the tenure reform programme. As nothing has been done

towards the establishment of such a body, there is even greater need to expose some of these issues and to examine their consequences.

Land Tenure Reform and Public Resource Allocation

The first relationship we examined in the 1 972-1974 research was between tenure reform and public resources allocation, for an important claim that was made about reform was that it would facilitate the delivery of important production factors such as credit and farm-planning services.

The Distribution of Farm Credit

It will be recalled that policymakers, even in the postcolonial period, had insisted that it was impossible for the small-farm sector to generate credit from any source except on the basis of individual tenure. Indeed, there were times in the early days of tenure reform when commercial banks were eager to lend to small-scale farmers on the security of title alone. This line of propaganda was remarkably successful in inducing farmers in certain parts of the country, such as the Nyanza Province and parts of Eastern and Coast provinces, to accept reform. Thus, by 1973, all of our four sample areas had been registered. As an embodiment of farm-credit policy, however, that position has led to important de facto consequences not altogether palatable to the small-farm sector.

Credit guidelines issued from time to time by the Ministry of Agriculture to the Agricultural Finance Corporation (AFC) and all field personnel processing small-farm loans emphasized that a farmer was entitled to a loan only if:

a. he or she had a title deed;
b. was 21 years old or over;
c. had a farm large enough to provide for subsistence and loan repayment; and
d. was a progressive farmer (Ministry of Agriculture 1 974).

These guidelines, coupled with the fact that the AFC is required by legislation to function strictly on commercial lines, have raised special problems in relation to the administration of a variety of credit schemes in the small-farm sector. In the first instance, the original theory that title deeds were sufficient for the acquisition of loans gave way to a formula that insisted on the issuance of credit only after the most exhaustive scrutiny of the "creditworthiness" of the farmer. Under this formula, the possession of title deeds became little more than a prerequisite for a loan application, never a sufficient condition for obtaining one. In order to receive a loan, the applicant had to offer substantial collateral, such as urban or other forms of realty or valuable personally, or be in a position to repay the loan from off-farm income. The effect of condition (d) of the guidelines was to further narrow the availability of credit to a very select group of rural elites, namely, those chosen by extension workers to "spearhead" agricultural innovations. In the second instance, the guidelines, especially condition (d), tended to perpetuate a longstanding bias under the Agriculture Act (Cap. 318), namely, that unsecured credit could only be given to farmers whose scale of operations exceeded 15 acres (6.1 ha), or whose gross annual income was at least K. Shs.10,000/-. But, as tables 1 and 2 indicate, the median land sizes in study areas were so low that only 12 per cent of the farmers qualified against this criterion. In both

TABLE 1. Size and distribution of holdings in Bogetenga and Boochi registration sections of Kisii District (1974)

	Number of holdings in each category	
Size in hectares	Bogetenga	Boochi
0 - 1.0	282	139

1.1 - 2.0	554	273
2.1 - 3.0	233	319
3.1- 4.0	122	215
4.1- 5.0	50	184
5.1 - 6.0	25	97
6.1 - 7.0	15	89
7.1- 8.0	12	64
8.1- 9.0	8	60
9.1-10.0	9	28
10.1-11.0	5	21
11.1-12.0	3	23
12.1 - 13.0	2	23
13.1 - 14.0	0	15
14.1 - 15.0	1	9
Over 15.0	2	63
Total	1,323*	1,622*

Source: Land Registry Files, Kisii District Registry

* These totals represent approximate figures as of 1 January 1974. As subdivision continues. variations will occur in the cumulative totals as well as in the distribution of holdings. Inevitably holdings will become much smaller. thus making credit flows based on holding size even more difficult.

TABLE 2. Size and distribution of holdings in Kabuoro and Kajulu registration sections of South Nyanza District (1974)

	Number of holdings in each category	
Size in hectares	**Kabuoro**	**Kajulu**
0- 1.0	144	312
1.1 - 2.0	234	304
2.1 - 3.0	497	186
3.1 - 4.0	125	85
4.1 - 5.0	73	37
5.1- 6.0	39	15
6.1- 7.0	28	14
7.1 - 8.0	18	7
8.1 - 9.0	14	5
9.1 - 10.0	11	6
10.1-11.0	4	2

11.1 - 12.0	3	0
12.1 - 13.0	2	1
13.1 - 14.0	1	0
14.1-15.0	1	0
Over 15.0	7	0
Total	901 *	974*

Source: Land Registry Files, South Nyanza District Registry

* These totals represent approximate figures as of 1 January 1974. As subdivision continues, variations will occur in the cumulative totals as well as in the distribution of holdings. Inevitably holdings will become much smaller, thus making credit flows based on holding size even more difficult.

Kisii and South Nyanza districts, little more than 2 per cent of registered smallholders were able to obtain secured or unsecured credit in any single year between 1 970- 1 973 (tables 3 and 4). The reason seems to be that loan institutions regarded the social status of an applicant as far more important than the technical description of title. In the case of the AFC, it was also clear that the legislative principles upon which it was mandated to operate per se had become the greatest impediment to its effectiveness as an instrument for the development of small-scale agriculture.

But while individual tenure did not appear to have accelerated credit flows for small-farm development, a situation seems to have arisen in which agricultural land was increasingly being used to secure loans for commercial and other non-farm enterprises. Most commercial banks which were lending money on the security of agricultural land were in fact engaged in this type of enterprise. Table 5 sets out the tote) amount of loans that were secured on land in Kisii and South Nyanza districts for the period 1 970- 1 973. By subtracting from this the AFC component other than GMRs, as set out in tables 3 and 4, we estimated that approximately 82 per cent of all loans that were secured on rural farmland in Kisii District and 77 per cent in South Nyanza District went into nonagricultural enterprises each year during that period. This estimate was based on the assumption that the non-AFC loans which were generally in the amounts of K. Shs. 15,000/and above were predominantly for commercial purposes. That assumption was derived from the fact that the main institutions that were dealing in this kind of loan, such as the Industrial and Commercial Development Corporation (ICDC), the Barclays Bank, Standard Bank, National Bank of Kenya, and the Kenya Commercial Bank, were not at the time involved in agricultural lending to any significant extent.

TABLE 3. Disbursement of loans by the Agricultural Finance Corporation to smallholders in Kisii District for 1970 - 1973a

Period	Type of loan	No. of farmers	Amount in K. Shs.
1970	AFC S.S.[b]	105	298,300
	GMR	45	126,900
	KFWc	150	347,000
1971	AFC S.S. (discontinued)		
	GMR	90	292,220
	KFW	275	707,700
1972	GMR	282	902,440

	KFW	413	1,060,420
1973	GMR	215	722,520
	KFW	181	649,000
Total		1,756	5,106,500

Source: AFC Branch Office, Kisii District; personal communication from the acting manager, 26 February 1974.
a. These figures represent returns for the whole district and not just the study areas. When worked out as a percentage of the total number of households in the area, the number of loanees each year was less than 2 per cent.
b. AFC small-scale loans.
c. KFW was a German scheme applicable to Kisii only.

Morris and Somerset 11971). in their analysis of the African businessman, bemoaned the fact that attachment to land was the graveyard of many a business established by Africans. They observed that there was a strong tendency to apply profits made in non-farm enterprises to the purchase of agricultural land. Part of the explanation for this, we found, was also that those businessmen who sank some or all of their profits in the purchase of agricultural land did so to raise their aggregate holdings so as to be able to qualify for higher loans. This was in response to the practice followed by certain commercial institutions, such as the ICDC, of computing the maximum amount of loans a qualified applicant could receive as a function of the aggregate quantity of securities, including land, that he could offer. According to the then branch manager of the ICDC, Western and Nyanza provinces, (F. Ndungu, personal communication, 1974), the ICDC gave loans at the rate of K. Shs. 1,500/- per acre. Since most ICDC loans began at K. Shs. 10,000/-, it meant that an applicant needed to have almost three hectares to qualify for one allocation. The implication of all this for credit flows in the small-farm sector was fairly clear. African participation in business, especially after the Trade Licensing Act of 1967, which opened up areas of trade previously dominated by migrant communities, had set in motion a strong intersectoral drain that was unlikely to benefit small-farm agriculture. There was no indication, for example, that those enterprises that were being financed in this way were complementary to agriculture or capable of offering a real cushion to mounting population pressure in the rural areas. As much information as was able to be gathered pointed to the fact that much of the money was invested in the purchase of urban houses and the establishment of shops, hotels, and catering establishments. For example, of the K.Shs. 7,924,500/- that were approved for South Nyanza between 1964 and 1973, 36 per cent went into commercial ventures, 50 per cent into property, and only 14 per cent into industrial development. Figures for Kisii during the same period were K. Shs. 16,891,000/-, of which 60 per cent was commercial, 27 per cent property, and only 13 per cent industrial.

TABLE 4. Disbursement of loans by the Agricultural Finance Corporation to smallholders in South Nyanza District for 1970-1973a

Period	Type of loan	No. of farmers	Amount in K. Shs.
1970	AFC S.S.	55	173,700
	IDA b	27	89,500
	GMR	53	172,700
1971	AFC S.S. (discontinued)		
	IDA 20	85,090	

	GMR 47	144,000	
1972	IDA	6	59,040
	GMR	446	15,408
1973	IDA	24	83,970
	GMR	143	428,400
Total		821	2,151,798

Source: AFC Branch Office, South Nyanza District; personal communication from loans officer, 4 July 1974.
a. These figures represent returns for the whole district.
b. IDA loans were provided by the International Development Association and were applicable only to South Nyanza District

The Quality of Farm Planning

The claim that individual tenure would facilitate planning was based on an even more euphoric argument. Agronomists had expected that tenure reform would lead to neatly fenced and consolidated units which would create a tabula rasa for field personnel eager to pursue the Swynnerton formula to its logical conclusion. To some extent this was achieved, particularly in Central Province, parts of upper Embu and Meru districts, Taita Hills, and Kisii District. Indeed, agricultural personnel assigned to the African areas did increase, at least during the last decade of colonialism. Attempts were even made after independence to systematize planning. For example, the Ministry of Agriculture's credit guidelines mentioned earlier went on to prescribe in elaborate detail procedures for joint planning between the land and farm management instructors and individual farmers, although in practice the instructors never solicited the farmer's opinion.

TABLE 5. Cumulative total of all loans secured on title in Kisii and South Nyanza districts for 1970-1973

Year	Amount in K. Shs.		AFC loans as percentage of total	
	Kisii	S. Nyanza	Kisii	S. Nyanza
1970	2,133,200	430,000	30.25	61.20
1971	5,420,300	460,540	13.05	18.47
1972	3,664,480	423,203	28.93	13.94
1973	6,053,200	905,340	10.72	9.27
Total	17,271,180	2,219,083	17.73	22.14

Source: Monthly Returns, Kisii and South Nyanza District Land Registries

In reality, however, this service remained available only to those few who were either "progressive" or were recipients of AFC loans. But even in these cases it is doubtful whether individualization of tenure per se made it any easier for farm planners to devise more suitable plans, formulate more realistic targets, and design better implementation machinery than was possible in the pre-reform period. An analysis of Kenya's field bureaucracy, which has been done elsewhere, suggests that the new tenure law remained largely inaccessible to the peasantry and imperfectly understood by the bureaucrats themselves (Okoth-Ogendo 1977). Besides, compulsory consolidation was in fact abandoned in 1968 and hence a large part

of the country was not expected to fit into the picture that Swynnerton had drawn as an ideal model for farm planning.

Land Tenure Reform and Farmer Decision-making

The second relationship we examined was between tenure reform and the decision-making processes of individual farmers. For it was claimed on the basis of classical laissezfaire economics that individual ownership, unlike customary tenure, was alone capable of generating entrepreneurship. This, agronomists agreed, was because all externalities allegedly associated with multiple ownership or access having been removed, the individual owner was then left free to make rational choices about the use of his land. Our investigations revealed, however, that beyond the physical reality of a surveyed holding, farmer perception of the nature of land rights and the power derived from them did not significantly change. This was particularly evident in the small farmer's perception of the powers of disposition implied in individual title and the way in which it related to the realities of his land-use environment.

Perception of the Power of Disposition

The much expected growth of a viable land market in the small-farm sector was based on the rather simplistic notion that farmers would respond to individual ownership by breaking loose from the supposedly static and retrogressive confines of "communal" living into a world of laissez-faire individualism. Thus, the Registered Land Act (Cap. 300, Sections 27, 28, 30) was carefully drafted to make it clear inter alia that the rights of an individual proprietor were not liable to be defeated by anything not shown in the register. Indeed, the act went so far as to convert all "customary rights of occupation" into tenancies from year to year, thus giving the registered owner the power, upon giving one year's notice, to terminate such occupation.

In an attempt to understand the manner in which farmers in our study areas had responded to that situation, we ran a series of questions directed at the relationship between registered owners, occupiers, and the land upon which they were resident. In particular, we sought to find out the nature of their attachment to the land. Using concepts of value and lineage ties as indicators of attachment, the following pattern emerged. Primarily, a few small-scale farmers interviewed were prepared to put a monetary value on their land. When pressed to state in purely hypothetical terms what they would ask for it if they had to sell, most farmers gave such unrealistic ceilings as to suggest either that the question was improper or that even in those circumstances they would still be inclined to price their land out of the market. The concept of value they were using here clearly included a complex network of cultural symbolism as well as simple economic indicators. To them, the land was still regarded basically as a "family investment" and one that could not be parted with except perhaps in exceptional circumstances.

Much the same attitude could be traced among those occupying land registered in other people's names. In over 95 per cent of the responses received from all the study areas, such occupiers said they were on the land by virtue of the fact that it belonged to the lineage or family of which they were members. They pointed out, for example, that since the registered proprietors themselves had received the land more often by inheritance or family partition than by purchase or gift, they had no moral right to exclude other members of the family from it. Instead, they expected such land to be governed by the same principle of control, allocation, and use as was the case before tenure reform.

Table 6 outlines what their reaction was to the suggestion that under the new law the registered proprietor could ask them to leave. The difference in perspective between the farmers in the two districts was probably due to the fact that Kisii had had a much longer experience with individual tenure than had South Nyanza. The possibility that people could be thrown out by registered proprietors was, therefore, not as hypothetical to the Gusii as it certainly was to the Luo.

TABLE 6. Reaction of lineage members to the possibility of expulsion by registered proprietors

	Percentage of respondents	
Reaction	**Kisii**	**South Nyanza**
Possibility inconceivable	28	87
Would demand his share	55	5
Would move willingly	12	4
Would go to court	3	4
Would buy land elsewhere	2	0
Total	100	100

Note: Figures were drawn from a sample of 64 unregistered occupiers in Kisii and 23 in South Nyanza.

Nonetheless, the view that the registered proprietor had no exclusive rights to the land remained strong in both areas.

The general finding that indigenous rights of access to land continued to define the extent of the farmer's "freedom" of disposition under individual tenure was also traced more concretely in the manner in which land control boards dealt with those who had attempted to exercise that statutory right. The theory of land control in the small-farm areas, it may be explained, was initially social, namely, that the state had a duty to prevent the improvident from exercising their rights to their own detriment (Okoth-Ogendo 1976). In the post-colonial era, especially under the unitary system set up by the Land Control Act 1967, the basic rationale of control throughout the whole country became more political and economic than social. It was, therefore, all the more remarkable that although very few farmers ordinarily applied for consent to charge, sell, lease, or otherwise dispose of their land, almost without exception land control boards in the small-farm areas regarded family consent as fundamental to the exercise of discretion under the act.

Before examining the data, it might be useful to explain how the control structure of land control boards made this development possible. Primarily, the control structure of the boards as set up in 1967 was a reproduction of a model first developed in 1959 exclusively for the African areas. It was now provided, however, that the majority of the members of the boards should inter alia be persons resident or owning land in the area in which the relevant land control board had jurisdiction. This meant that in most cases the boards were dominated by local residents. But even in those cases where the boards were dominated by public servants sitting ex officio or as residents of the area, little difference in outlook resulted. This was because the officers who sat on these boards (other than the district officers who were chairmen ex officio) were so low in the field hierarchy that their outlook was dominated by the local rather than national milieu. The two land control boards having jurisdiction over our study areas were dominated by officials of this cadre.

Subject to what we shall say about land distribution below, our study of these boards, as well as the available literature (Bosire 1975; Wilson n.d.) on the operation of land control boards in other parts of Kenya, support the general argument of this paper to the following extent, that the boards:

a. were not willing to approve complete transfers or subdivisions and transfers unless family members approved;
b. were generally against approvals even if family consent was given, unless satisfactory alternative means of subsistence, usually ownership of land elsewhere, was shown; and
c. were for reasons given below, willing to approve charge and mortgage transactions and leasehold grants as a matter of course.

The first of these was the most-often-cited ground for deferrals or refusal of consent. There were numerous occasions recorded in board minutes when the Rongo Land Control Board would instruct applicants "to bring wife and brothers" or, as happened on one occasion, sale would be refused: because the father of the seller presented himself before the board rejecting subdivisions and sale of the land in question. Also it was learns that though the father of the seller was not registered, he was staying on the same piece of land (Rongo Land Control Board, Minute No. 41/1973 of meeting held 8 August 1973 [emphasis added]).

Most applicants were usually able to obtain the necessary consent and so have their transactions approved. The second attitude, apart from being a variant of the benevolent paternalism which had always dominated administrative approaches to small-farm development in Kenya, had its own particular logic. It was invoked strictly in protection of parties other than the vendors. On one occasion, for example, the Rongo board refused consent on the grounds inter alia that "the transferor was selling the sole parcel that he had leaving his mother and children stranded" (Minute No. 81/1972 of meeting held 13 December 1972). On another occasion the board deferred an application "for the seller to go and bring justification that he has another land somewhere [sic]" (Minute No. 53/1973 of meeting held 10 October 1973). The corollary to both of these positions was, of course, that partitions to members of the family were always approved irrespective of whatever objections agricultural officers had. Indeed, whenever there was conflict between social justice and economic reality, it was always resolved in favour of the former.

The attitude with regard to charges and mortgages represented a different set of values. First, many board members remained faithful to the general thrust of state propaganda on the issue, namely, that credit flows to agriculture or commercial enterprises are per se a good thing and should be encouraged. In fact, only on one occasion during the 1968-1974 period did the Rongo Land Control Board ever refuse consent to a charge. This was a case involving a large partnership which was seeking a loan on security offered by one partner alone. Said the board:

> The applicant [is] investing money in [sic] a company which is not his own and he [has] no method of repayment.... The Board [fears]...that the applicant would lose his land (Rongo Land Control Board, Minute No. 12/1973, meeting of 14 March 1973).

What emerges from this discussion is that the concerns of society in the post-reform era remained the same as they were before. Clearly, comprehensive reforms in other sectors of the agricultural economy and its complementary legal institutions were necessary before the social processes associated with decision-making could change.

The Realities of the Land-Use Environment

But the small farmer's attachment to land was rooted in something more rational than just the trappings of culture and tradition. Starting from the premise that the small-scale farmer's economic behaviour is conditioned by the fact that the land is his or her basic means of sustenance, we asked farmers in our sample why most of them had not availed themselves of the opportunities offered by tenure reform to improve the productive capacity of their holdings. Their responses suggested, however, that even with loan assistance, the kind of programmes the Department of Agriculture was pushing were far too expensive for them to afford. The expense was being calculated not simply in terms of money and labour, but also in terms of what, in their view, would constitute a reasonable return for that outlay.

What these farmers were perhaps responding to was the fact that in most cases the technical prescriptions contained in post-tenure reform development packages assumed the existence of certain social and economic facts that simply did not exist in the small-farm sector. One of these was that the sector had reached a level of capital accumulation that would enable it to absorb the costs of change. In fact, because

of claims arising from both social and civic duty, for example, basic subsistence, education, taxes, and self-help projects, capital accumulation in the small-farm sector remained low and re-investment in agriculture even lower.

Further, although the average small-scale farmer saw education and the possibility of employment in urban centres as a viable alternative to agriculture, especially for the younger generation, he or she was generally unwilling to let that perception influence his view of land as a transgenerational investment. Only in some places in Central Province were we able to trace cases in which parents had assessed the value of education against the land rights of various children. But even there, available evidence indicated that this attitude grew partly in response to the frontier which the land settlement programme had opened up for Kibuyu country, particularly Kiambu District (Karuga 1972).

Land Tenure Reform and the Pattern of Land Distribution

The third relationship we examined was between tenure reform and land distribution. Although, in theory, it was not expected that tenure reform per se would radically affect the pattern of land distribution in the small-farm sector, in practice, a significant amount of accumulation did occur, and this to the detriment of the bottom quartile of rural society. Some of this resulted from lack of clarity within the legal structure of reform, and some from the manner in which the reform process was administered.

The Distribution Effects of Tenure Reform Law

For successful execution of Kenya's tenure reform programme, an understanding of two totally different legal regimes was always necessary. One was the existing customary land law of a given area, and the other, the statutory framework relating to the administration of reform and the definition of the question of property rights that was being conferred by that process. It was essential that administrators should understand the former, since this was the framework within which adjudication, that is, identification of existing rights, was being conducted. This would then enable them to enter into the adjudication register rights that were equivalent to those known to the latter regime, failing which, to protect such right as was best possible. In most cases, lack of complementarity of the field staff of the Department of Land Adjudication made it impossible to achieve many of these results.

The major problem was that the original tenure reform statutes contemplated only two categories of land rights, both premised on the notion that the power of allocation in customary law was equivalent to exclusive ownerhip in English law. These categories were cultivation and residential occupation rights. Hence, the adjudication of land rights came to mean little more than the identification of homesteads plus the area of land to which household heads had cultivation rights. These categories were unable to describe land rights in those parts of the country where no permanent settlements existed. For example, pastoral communities knew of no cultivation rights and of residential occupation only in a temporary sense. Only later was legislation dealing with this particular problem passed. The Land (Group Representatives) Act Cap. 287 of 1968 introduced a third category of general territorial rights, which, upon identification, were then vested in group representatives. The "group" was defined in such a way as to include anything from a "tribe" to a nuclear family.

The very narrow view initially taken of land rights in the statutes made it virtually impossible to bring to the register all the multiple rights that were claimable or capable of protection under customary law. In almost all communities, public grazing lands disappeared as people moved in to claim every bit of land under the rubric of past cultivation. The primary impact of this was that it altered the structure of access to land in the family economy by vesting the attributes of ownership in adult male heads of households without at the same time giving adequate protection to the de facto or potential rights of women and children or others who had general access rights not accompanied by the power of ultimate control. It is striking that, except for parts of Central Province and the matrilineal descent groups of Coast Province, women accounted for less than 5 per cent of the total registered proprietors, and children, that is, those

under 18, for even less. The position of women was particularly precarious in those pastoral or semi-pastoral societies in which adjudication was being done on individual rather than group bases. In those areas what was being done was to adjudicate clan claims and then let clans assign individual rights to their own members. In doing so, the clans normally followed the lineage principle in customary succession, a procedure which would almost invariably exclude women who were not regarded as permanent members of patrilocal societies (Okoth-Ogendo 1975, 5).

The Distribution Effects of the Process of Reform

Failure to appreciate the nature of customary land rights was merely one element in the redistribution of land during tenure reform. The manner in which the reform itself was administered was another important factor, particularly in those areas which underwent consolidation. Except for Central Province, parts of Meru and Embu districts which were consolidated under emergency conditions, and the pastoral or "group" areas, the process of consolidation created a very interesting situation from the point of view of distribution. Because people were not always willing to consolidate their various parcels and thereby lose the benefits of risk distribution that was inherent in the structure of fragmentation and the location of parcels, the adjudication personnel were often constrained in many areas to apply "gentle pressure" to achieve this result.

The effect of this was that a clandestine land market emerged in which parcels that could not be physically exchanged were simply sold to other people, usually to people within the adjudication area but sometimes to strangers and other immigrants. The most significant characteristic of this market was that land prices were extremely depressed, sometimes so low that within a year of being registered the land could be sold at a price as high as over 1,000 per cent of its original purchase price. This was particularly the case with beach land bought from the Wadigo of Kwale District, Coast Province. The growing importance of the tourist industry has led to an extremely inflated market during the post-1972 period. The main losers and beneficiaries in this development tended to vary from area to area. In general, our data drawn from interviews with land adjudication personnel in Homa Bay, South Nyanza, indicated the following. First, it suggested that sellers tended to be those who for one reason or another were unable to register such parcels, either in their own names or the names of potential heirs or wives. This category included monogamously married peasants or those whose families were not large enough to spread around. Second, the general land market thus precipitated was often seen as an additional source of ready cash for poor people with more land than they could develop. Much of this money went into taxes, school fees, or just plain subsistence requirements. Third, the buyers were almost invariably well-to-do neighbours who were able to command the necessary funds from government employment, business enterprises, or salaried relatives and friends. The point to be stressed is that the tenure reform process led to a certain amount of land accumulation by some sections of the rural society. Since land control boards only had jurisdiction over registered areas, this market remained unregulated and at times rather volatile.

In a land-based economy, the pattern of land distribution is always an important indicator of political power. The suggestion that the ability to command capital was an important element in the expansion of land holdings during tenure reform remained valid for the post-registration period, even though the land market that was evolving was not as vigorous as most agronomists had expected.

The link between this phenomenon and political power in rural society was not obvious by any means. One particular trend was, however, worth noting.

This was that those who were accumulating land in the small-farm sector were clearly predominantly state obligees. Many of them had come up as "progressive" farmers, civil service personnel, and, to the extent that the benefits of Africanization of business enterprises had trickled down to the rural areas, as owners of shops, hotels, and catering establishments in rural centres (see also Stockton 1971). Consequently,

there was a level at which this group of people could be seen essentially as the rural end of the system of elite control that dominated and continues to dominate Kenya's political culture.

But the rural elite remained basically a dependent elite, depending on continuous patronage by those at the centre for survival, and wielding influence in the rural sector mainly because of its relationship with the centre. This association often paid handsomely in terms of further advancements in the entrepreneurial and political fields. For example, analysis of parliamentary election turnover in 1 974 as compared with the 1 967 elections already made clear that the character of political representation made both at the local and national levels was beginning to reflect the changing economic as opposed to simply educational or traditional positions of the elites in the rural areas. This transformation was part of a much wider shift in status differentiation in Kenya, namely, that property rather than educational attainments or traditional status per se was increasingly becoming the most accurate index of effective political power.

Land Tenure Reform and Rural Social Structure

The fourth relationship we examined was between tenure reform and rural social structures. Our concern in this respect was to assess the degree of response of rural structures, especially those concerning ownership and use of land, to the political and economic consequences of reform. This was particularly important since the colonial process had already weakened these structures by destroying the economic base upon which they were founded. Our investigations indicated that tenure reform further weakened these structures by transferring many of their functions to the State, and by shifting the basis of accountability of power from indigenous norms and principles to new and totally alien ones. Two specific cases will suffice to illustrate this finding.

The Structure for the Devolution of Land Rights

Tenure reform did not include, as it might have done, any provisions for the streamlining of procedures regarding the devolution of registered land. It left this important area to the customary law domain, subject to the qualification that the Registered Land Act limited the number of co-heirs that might succeed to any parcel of registered land to five (see Section 120 - 121; read with Section 101 [4] Registered Land Act).

The administration of this qualification, however, was turned over to local chiefs and courts rather than to the indigenous institutions or in consultation with them. As a result, the system turned out to be patently absurd, for inter alla its implementation depended very heavily on the active cooperation of potential heirs, particularly in the transmission of all relevant information relating to property left by intestate owners. For example, they were expected to report to their local chief the death of persons from whom they expected to inherit land. The chief was then required to transmit that information to the local court for the issuance of a certificate of succession. In that certificate, the court was required to indicate who the heirs and their respective shares were and, where the number exceeded five, to determine who among them would be allowed to succeed and how the rights of those excluded would be dealt with.

To the extent that no provision was made for the participation of indigenous institutions, for example, family councils, clan elders, etc., in this procedure both at its reporting and allocative stages, it remained to all intents and purposes a dead letter. Besides, to the extent that the procedure was patently inequitable, it became the cause of a great deal of de facto subdivision that was not reflected in the register. It is not surprising, therefore, that so very few applications for certificates of succession ever came up to the local courts.

The Structure of Land Administration in the Pastoral Areas

The new structure for the administration of group registration areas presented far greater problems of role conflict and accountability than policymakers ever expected, for group registration did not simply alter the indigenous system of land administration; it altered the pattern of land use as well. The system of

administration was altered by introducing a completely new medium through which authority over land was henceforth to be exercised, namely the group representatives. Although the Land (Group Representatives) Act is fairly general about who may hold office as a group representative, the emerging practice appeared to be that those elected to office were people who were at least able to read and write. Ordinarily, this would have raised no problems, had it not been for the fact that in those parts of the country where group ranches were set up, for example, the Maasai and Pokomo countries, the level of literacy was, for historical reasons, very low. Those assuming office as representatives tended, therefore, to be the younger, less influential members of indigenous society. This tended to slow down decision-making in many areas, since most decisions taken by the representatives still carried very little weight unless they were also channelled through indigenous levels of authority.

The pattern of land use was altered by severely restricting the nomadic character of pastoral communities without first improving their ability to adapt to semi-sedentary living. In particular, adequate steps were not taken to reduce the people's dependence on seasonal availability of water and stock feed. One consequence of this was that in order to minimize drought risks, clans and families often found it necessary to split herds and join different ranching schemes, a course of action that was apt to put great strain on the social institutions of pastoral society.

Implications for Land Relations in Peasant Society

An attempt has been made in this paper to explain the manner in which land tenure reform has affected various aspects of peasant organization in Kenya. We wish to conclude with a brief resume of what the implications of that explanation are for land relations in that sector. From the point of view of property jurisprudence, it seems clear that most farmers did not see the new tenure system as conferring exclusive power in the manner that Swynnerton expected it to do. Ownership remained something essentially heterogeneous and divisible. In a sense, the registered owner remained a custodian, not an expropriator, of a lineage asset and therefore was subject to all the obligations that flow from that position. (Contrast this with the attitude of the Kenya High Court analysed in OkothOgendo 1979.) From a purely agrarian standpoint, however, the implication of the impact of the new land law was a lot more complex. What is worth noting here is that the much expected land market did not really materialize in quite the same way as agronomic experts expected. The market that arose was essentially one dealing in subdivisions and transfers, rather than in whole transfers. This was particularly true of Kisii, where tenure reform was accompanied by compulsory consolidation in most registration sections.

The observation that people were reluctant to transfer whole parcels suggests that the market was responding more to non-agricultural cash demands and, in the case of family subdivisions, perceived landlessness in society than to commercialized farming. As such it was likely to stabilize as soon as a level of parcelation was reached that threatened the socio-economic conception of the place of land in smallfarm agriculture. Although we are unable to determine what that critical level would be, it was likely to fall very much below what agronomists considered to be "minimum economic sizes" for these areas. The effect of that eventuality would be inter alla that the market would revive only if a land frontier outside the various districts emerged or if opportunities alternative to agriculture both in terms of employment and income-generation emerged in the small-farm sector.

From a wider political economic perspective, it is clear that the expectations of the protagonists of the new legal order for the small-farm sector were not being realized. That conclusion is based on the following observations:

a. that the particular regime that was recommended was intrinsically inappropriate for that sector;
b. that perhaps what was necessary was comprehensive changes in other aspects of rural life before tenure reform was attempted; and
c. that emerging trends indicated that that situation was unlikely to improve.

Indeed, it is our view that agricultural processes under the new order were not simply perpetuating inequalities between the large- and small-farm sectors of the economy. They were, in fact, creating new forms of stratification and status differentials within the latter.

References

Bosire, E.A. 1975. "Control of Transactions Involving Agricultural Land in Bogetutu Division of Kisii District." LL.B. thesis, University of Nairobi, Nairobi.

Karuga, J.E. 1972. "Land Transactions in Kiambu District." IDS Working Paper No. 58, University of Nairobi, Nairobi.

Kenya. 1979. Development Plan 1979-83. Part 1, p. 282. Nairobi.

Ministry of Agriculture. 1974. Credit Guidelines. Department of Agriculture Office, Kisii.

Morris, P., and T. Somerset. 1971. The African Businessman. EAPH, Nairobi.

Okoth-Ogendo, H.W.O. 1975. "Land Tenure and the Transformation of Peasant Economies in Kenya." Address to the International Women's Year Tribune's Panel on the Family, Mexico City, 27 June.

_____ 1976. "African Land Tenure Reform." In J. Heyer et al., eds., Agricultural Development in Kenya: An Economic Perspective. OUP, Nairobi.

_____. 1977. "Development and the Legal Process: An Approach to the Analysis of Law and Rural Development Administration." Paper presented at a seminar on Law and Rural Development, Kisumu, Kenya.

_____. 1979. "Imposition of Property Law in Kenya." In B. Harrell-Bond and S. Burman, eds., The Imposition of Law. Academic Press, New York.

Stockton, R. 1971. "Aspects of Leadership in Nyeri." IDS Staff Paper No. 107, University of Nairobi, Nairobi.

Swynnerton, R.J.M. 1954. A Plan to Intensify African Agriculture. N . p.

Wilson, R. N.d. "Land Control in Kenya's Smallholder Farming Areas." IDS Staff Paper No. 89, University of Nairobi, Nairobi.

_____. "The Economic Implication of Land Registration in Kenya's Smallholder Areas." IDS Staff Paper No. 91, University of Nairobi, Nairobi.