WORKING PAPER 272

Breathing Life into Dead Theories about Property Rights: de Soto and Land Relations in Rural Africa

Celestine Nyamu-Musembi
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Abstract

Presumption of a direct causal link between formalisation of property rights and economic productivity is back on the international development agenda. Belief in such a direct causal relationship had been abandoned in the early 1990s, following four decades of land tenure reform experiments that failed to produce the anticipated efficiency results. The work of Hernando de Soto has provided the springboard for this revival. De Soto argues that formal property rights hold the key to poverty reduction by unlocking the capital potential of assets held informally by poor people.

De Soto's justifications of formal title do not differ much from justifications that were advanced for ambitious land tenure reforms in various sub-Saharan African countries, starting with Kenya in the 1950s. Introduction of formal title in the African areas was seen as the key to solving problems of land degradation and improving agriculture by providing farmers with security of tenure that would create incentives for further investment in the land.

This paper argues that there are five shortcomings in both the old and contemporary arguments for formalisation of land title. First, legality is constructed narrowly to mean only formal legality. Therefore legal pluralism is equated with extra-legality. Second, there is an underlying social evolutionist bias that presumes inevitability of the transition to private (conflated with individual) ownership as the destiny of all societies. Third, the presumed link between formal title and access to credit facilities has not been borne out by empirical evidence. Fourth, markets in land are understood narrowly to refer only to 'formal markets'. Fifth, the arguments in favour of formulisation of title as the means to secure tenure ignore the fact that formal title could also generate insecurity.

Keywords: property rights; land relations; agriculture; poverty reduction; land tenure; Africa.

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Contents

1 Introduction

Presumption of a direct causal link between formalisation of property rights and economic productivity is back on the international development agenda. Belief in such a direct causal relationship had been abandoned in the early 1990s, following four decades of land tenure reform experiments that failed to produce the anticipated efficiency results (World Bank 2003; Bruce and Migot-Adholla 1994). The work of Hernando de Soto has provided the springboard for this revival (de Soto 2000). De Soto argues that formal property rights hold the key to poverty reduction by unlocking the capital potential of assets held informally by poor people: most assets in developing countries and former socialist states are held informally. Instead of a national rationalised formal system of law and information on property, property relations are governed through webs of informal norms based on trust, which do not extend beyond narrow local circles (de Soto 2000: 6). The West, by contrast, was able to develop into a functioning capitalist system by overcoming this legal pluralism, assembling all these micro-rules into one coordinated system of formal property rights (de Soto 2000: 52). Property systems in the Third World and in post-socialist states are a snapshot of pre-nineteenth century Western property systems. Unless the Third World can do what the West did a large majority of its people will continue to be 'trapped in the grubby basement of the pre-capitalist world', holding dead assets that cannot be translated into capital (de Soto 2000: 55). Formal title breaths life into dead assets and transforms them into capital.

De Soto's argument has found favour with development agencies across the political spectrum: from neoliberal USAID and World Bank, to social democrat Nordic governments spearheading a property rights reform agenda in the UN Economic Commission for Europe. For the left the notion of 'property rights for poor people' or 'pro-poor property rights' wraps a social justice mantle around an issue that is otherwise more closely associated with a conservative agenda. It keeps the intractable question of substantive redistribution off the agenda. For the right, the idea of unlocking poor people's own assets to alleviate poverty is consistent with a lean state that merely facilitates market interaction by putting in place the necessary legal and institutional framework, rather than engaging in redistribution. Little wonder then, that a *High Level Commission for the Legal Empowerment of the Poor* co-chaired by Hernando de Soto and hosted jointly by the UN Economic Commission for Europe and the United Nations Development Programme (UNDP) has the support of several governments rich and poor alike, and has taken off notwithstanding protests from NGOs about lack of representation of poor people's movements.[1]

De Soto's work – and the publicity accorded to it internationally through forums such as the High Level Commission – has breathed life into previously discredited theories on land rights, land tenure reform and efficiency, and

1 See http://legalempowerment.undp.org/; www.desotowatch.net/.

enabled the current debate to proceed as though the negative lessons learned from African experiments of the last four decades never happened. Concern is heightened by the fact that while at times it is clear that de Soto is writing within the context of urban slums, at other times he writes as if making a general argument for formalisation of property rights as the route to economic empowerment of poor people. Those who have seized upon his work and popularised it in influential media are even less careful to make this contextual distinction.[2] It is therefore necessary to pause and examine the implications of his prescriptions for formalisation of property rights in the context of rural land in Africa.[3]

De Soto's justifications of formal title do not differ much from justifications that were advanced for ambitious land tenure reforms in Kenya in the 1950s. Introduction of formal title in the African areas was seen as the key to solving problems of land degradation and improving agriculture by providing farmers with security of tenure that would create incentives for further investment in the land, transforming the African into 'economic man':

> He [the African] must be provided with such security of tenure through an *indefeasible title* as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security against such financial credits as he may wish to secure from such sources as may be open to him …
>
> (Swynnerton 1954)

Such thinking exhibits five shortcomings which also manifest themselves in de Soto's argument:

1 Narrow construction of legality to mean only formal legality. Legal pluralism is equated with extra-legality. This narrow construction of legality, combined with a social evolutionist bias results in a normative assumption that formal legal title must replace informal social norms in order for property systems to function efficiently;

2 There is an underlying social evolutionist bias that presumes inevitability of the transition to private (conflated with individual) ownership as the destiny of all societies.

3 The presumed link between formal title and access to credit facilities has not been borne out by empirical evidence.

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2 See for example 'Breathing Life into Dead Capital: Why Secure Property Rights Matter', *The Economist*, 17 January 2004: 6–8; Peter Schaefer, 'Poor Need Resurrection of their Dead Capital', *Wall Street Journal*, 14 June 2005: A15; Robert Robb, 'Poor Africans Need Land Rights', *Arizona Republic*, 15 July 2005; Kerry Dolan, 'A New Kind of Entitlement', *Forbes Magazine*, 23 December 2002.

3 For critiques of de Soto's work from other perspectives see Manders (2004); Rakodi and Leduka (2003); Hunt (2004); Rawson (2001); Kinsella (2002); Hendrix (1995); Winn (1992).

4 Markets in land are understood narrowly to refer only to 'formal markets'.

5 The argument ignores the fact that title spells both security and insecurity.

This chapter will explore each of these shortcomings, relating them to both past and contemporary arguments for formalisation of property systems, substantiating the discussion with empirical findings from research by the author in Eastern Kenya, and secondary literature based on experiences elsewhere. The empirical research was conducted in Makueni district between June 1998 and January 1999. The data comprises a village level survey with 111 respondents (49 women and 62 men) by means of in-depth semi-structured interviews, interviews with local administrators and district-level land officials, clan leaders and women's groups' leaders, as well as observation of dispute proceedings and review of land records. The research is discussed in more detail elsewhere (Nyamu 2000).

2 Narrow construction of legality

> The only real choice for the governments of these nations is whether they are going to integrate those resources into an orderly and coherent legal framework or continue to live in anarchy.
>
> (De Soto 2000: 27)

According to this view, the absence of formal legality means anarchy. The existence of plural informal legal orders (legal pluralism) is equated with extra-legality, meaning being outside of the law. De Soto therefore uses 'legality' when he really means formal legality. By posing the choice as one between a formal property system and anarchy de Soto discounts the ordering force of the vast territory of informal legality that governs property relations. Informal legality is a feature of property relations everywhere including the West which, according to de Soto, has successfully replaced these multiple informal orders with one orderly and coherent legal framework where neighbourhood relationships or local arrangements no longer play a role in property relations (De Soto 2000: 53).[4] The messiness of informality continues to intrude even in the US to render land titles much more ambiguous than de Soto admits, making costly title insurance a mandatory feature of land sales (Hendrix 1995).

Kenya's Registered Land Act embodies the legal-centric myth when it states that:

4 On the co-existence of formal and informal legality in Western property relations see Ellickson (1991), Merry (1990), Ruffini (1978).

> Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act (section 4).

The social reality, however, is different. Although the official idea of ownership anchored on formal title does exist in some form, it is not the defining feature of property relations. It co-exists with, and is constantly in tension with broader and dynamic social processes and institutions that shape property relations by constantly balancing between various competing claims and values, rights and obligations.

Justifications of private title over-valorise the role of formal state institutions as the anchor for property rights. Much as the legal-centric view would like to present property rights as simply 'juridical constructs enforced by the centralized state' (Firmin-Sellers and Sellers 1999: 1116), the legitimacy of property rights ultimately rests on social recognition and acceptance. Social institutions such as family networks and locally based dispute resolution processes play a much more central and immediate role in day-to-day interaction. When formal title is introduced it does not drop into a regulatory vacuum; it finds itself in a dynamic social setting where local practices are continually adapting to accommodate competing and changing relations around property. In these day to day local practices, the meaning of formal title gets transformed through the informal rules that people develop in their land relations. These informal rules and the concomitant expectations they produce become the immediate points of reference in people's land relations, more often than not relegating the formal laws and institutions to a marginal role, or modifying them to suit the reality of their lives.

Experience in Eastern Kenya illustrates this. The area in which I conducted research has sections that were titled in 1969/70, and sections that were titled in the mid-1980s. Formal title has therefore been in this area for periods ranging from 10 to 30 years. One statement that kept recurring both among land officials and local administrators, as well as among people I interviewed was that one advantage that formal title had brought about was a reduction in boundary disputes, as these had become easier to solve. On further inquiry it emerged that a set procedure had emerged for dealing with boundary disputes: on an agreed date each of the disputing parties would bring two witnesses (often other neighbours), and the chief or assistant chief would attend.[5] Each of the disputing parties would then be required to identify the spot he/she claims to be the boundary. A centre-point between the two disputed spots would then be identified. From this centre-point a distance of three paces in the direction of each party's piece of land is measured and marked out, resulting in a strip six paces wide. This strip is marked off as a buffer zone between the two pieces of land. Each party agrees to fence off his/her land leaving this buffer in

5 Chiefs and assistant chiefs are government-appointed local administrators who have a broad mandate to maintain law and order. Roughly half of their time is spent solving local disputes.

between to avoid further disputes. They sign an agreement to this effect, which is witnessed by their respective selected witnesses, and stamped by the chief or assistant chief.

The procedure stipulated in section 21 of the Registered Land Act is far from this local arrangement. The Registered Land Act requires that in the event of a boundary dispute, the parties shall make a request to the Registrar of Lands to make a site visit, bringing along the official map showing the boundaries demarcated at registration. Among the people I interviewed not a single person had used this statutory procedure, or knew of anyone who had. Apart from the obvious reasons of cost and avoidance of lengthy bureaucratic procedures, the reality of unregistered sub-divisions and transfers that have taken place since the initial official demarcation of boundaries in 1969/70 or the mid-1980s have rendered the registrar's official information obsolete. Similarly in dealing with succession or inheritance it is family and clan procedures that apply, backed up when necessary by local administrators (Nyamu 2000; Nyamu-Musembi 2002a).

Therefore even though people reflexively associated orderly resolution of property disputes with formal title, the formal property system cannot take credit for this order. The only official 'rubber stamp' present is that of the chiefs or assistant chiefs who apply a mixture of the community norms in which they are embedded and their own understanding of what would be viewed as officially acceptable by their superiors. A property system is a social system and it takes shape according to the cultural context in which it is rooted. The content and shape of formal title varies with local context, and can be very different from what the officials and proponents of formalisation have in mind. Thus, given the reality of legal pluralism, to argue that formalisation of title yields an efficiently functioning property system is to make a hollow claim.

3 The social evolutionist bias

De Soto's work brings a nineteenth century idea back into popular discourse: that formal private ownership of property carries with it the mark of civilised progress ('efficiency' in present-day terminology). He digs into the history of property relations in pre-industrial revolution England and pre-nineteenth century United States and suggests that this historical reality is a snapshot of present-day property relations in the Third World. In order for the Third World to make the progress that the West has made, it has much to learn from the West's experience of consolidation of a formal property system (de Soto 2000: 158, 159). Although de Soto is careful to mention that he is not calling for slavish imitation of the US transition, he leaves no doubt as to a shared destination. De Soto presumes the inevitability of transition to formal private ownership as the universal route to efficiently functioning property systems.

Whether wittingly or unwittingly, the simple dichotomisation between capitalist and *pre*-capitalist property relations, and de Soto's juxtaposition of *contemporary* Third World realities with *historical* realities in the West allies him with nine-

teenth and early twentieth century social evolution theories. These theories placed all societies on an evolutionary ladder on the basis of criteria such as mode of political organisation, the degree of rationality in their legal systems, and degree of complexity in division of labour (Weber 1954; Durkheim 1964; Maine 1986). These theories were imported wholesale into analysis of land tenure systems in Africa and have been deeply implicated in justifications for expropriation of land in colonial times, as well as land tenure reform experiments in the decades that followed. The evolutionist justification for formalising and privatising ownership of land was taken for granted and spoken of explicitly, as this quote from Sir Frederick Lugard, one of the chief architects of British colonial rule illustrates:

> Speaking generally, it may, I think, be said that conceptions as to the tenure of land are subject to a steady evolution, side by side with the evolution of social progress, from the most primitive stages to the organization of the modern state.(…) These *processes of natural evolution, leading up to individual ownership*, may, I believe, be traced in every civilization known to history.
>
> (Lugard 1922: 280)

This evolutionary view eventually provided the impetus for the introduction of formalisation programmes in British colonies in East and Central Africa in the late 1950s.[6]

One key difference between these colonial-era views and de Soto's is that de Soto affirms that informally held property rights are quite well defined and upheld within each narrow setting, and only need to be represented in a form that outsiders (such as the state and financial institutions) recognise. The colonial-era views, in contrast, view customary property relations as unable to give rise to defined rights. Chanock (1991) and Klug (1995) have hypothesised that this portrayal of African customary tenure was necessary in giving the impression that no defined rights were implicated in the expropriation of African lands for European settlement.

But the notion that movement towards private individual ownership is inherently progressive is an influential one. It even makes a subliminal appearance in an article that is otherwise strongly opposed to the presentation of indigenous tenure systems as 'static polar contrasts' in relation to Western ones. The authors defend the dynamic nature of indigenous tenure systems by arguing that such tenure systems embody

> spontaneous individualization of land rights over time, whereby farm households acquire a broader more powerful set of transfer and exclusion rights

6 Report of the Conference on African Land Tenure in East and Central Africa, Arusha, Tanzania, October, 1956. [Special Supplement to the *Journal of African Administration*] at p 2.

> over their land as population pressure and agricultural commercialization proceed.
>
> (Migot-Adholla *et al.* 1991: 155)

Such arguments are influenced by abstract contrasting images between communal and individual tenure, which gloss over the immense variety of relations over property that can exist within any given system. Property relations in any society are dynamic and adaptable and allow several types of property-holding arrangements to co-exist depending on the type of property in question, the types of uses, and even the types of social relationships between the people using and managing the property.

As the following example from Akamba[7] customary land tenure illustrates, different senses of 'ownership'(control and use) exist for different types of land.[8] Broadly people speak of five types of land: *Weu, Kisesi, Kitheka, Muunda,* and *Ng'undu*. Weu refers to unsettled land, often used as common grazing and hunting areas accessible for use by anyone within a given locality. These hardly exist anymore.[9] *Kisesi* also refers to grazing areas, but it differs from *weu* in the sense that individual families, or groups of families that are not necessarily biologically related could fence off an area and claim it for themselves. *Isesi* (plural) were seasonal pasture usually relatively far away from homes, which served mostly as temporary grazing areas in drought emergencies. They would usually be abandoned when conditions improved in grazing areas closer to home.[10] Interests in *isesi* are regarded as temporary. They are not heritable, and cannot be reclaimed once they are abandoned. When a particular family's use of a *kisesi* ceased, the land reverted to *weu* and could be used by anyone else.

Kitheka refers to uncultivated land usually close to the home, which could be used for grazing, gathering firewood, bee-keeping and growing of timber. The boundaries between various people's *itheka* (plural) are usually clearly marked or known to the families involved, even though the state presumes that until demarcation has been carried out there are no clear or 'official' boundaries. *Muunda* refers to cultivated land. This belongs to a distinct family, and within the family, particularly if it is polygamous, to a distinct household identified by reference to the particular wife. Finally, *Ng'undu* also refers to cultivated land, but land that has been farmed by the same family for several years, spanning at least

---

7 Akamba are the predominant ethnic group in four districts of Eastern Kenya, including Makueni district, the site of the empirical research referred to here.

8 This account is based on conversations I have had with various people prior to and during my field research. In particular, I draw from my interviews with clan elders and Land Adjudication Officers. I also rely on Penwill (1951).

9 Now references to 'weu' exist almost exclusively in folk lore. See e.g, Mbiti (1966).

10 Since there is hardly any land available for *isesi* now, a similar practice in the case of drought emergencies is the leasing of land in a different area where herds are temporarily located for the duration of a drought.

three or four generations. Thus, a piece of land that may have started off as an unsettled *Kisesi* could end up as *ng'undu* as a result of subequent settlement and cultivation.

The strength of the claims of individuals and distinct households increases as we move towards *ng'undu*, the importance of individual or family claims being determined by the type of use. Where the land is being used (or was, at some point in the past used) to produce food for the basic survival of the family, the claims are given stronger recognition. Unlike *kisesi, ng'undu* is regarded as heritable (can be passed down patrilineally). In the event that there are no heirs, the land does not revert to *weu*. Instead, it passes to the clan (*mbai*), which has the power to allocate it to a member of the clan and to exclude non-clan members.

The point of referring to this is to show that contrary to evolutionist assumptions of a linear progression from communal to individual control, the reality is one of 'multi-tenure systems with different land uses calling for different tenures' (Platteau 1996: 33). Variety in property holding arrangements is a reality in Western societies as well, as writings on property and social relations in the US illustrate (Singer 2000a; 2000b; Alexander 1997).

It is important to expose evolutionist biases in contemporary arguments for formalisation of property rights for two reasons: first, because the simplistic dichotomisation into capitalist and *pre*-capitalist brushes aside the vast differences among and within Third World countries and charts only one direction in which change ought to proceed for all. Second, the evolutionist impulse dictates a weeding out of any vestiges of communalism and its parochial norms on property relations, in favour of according legal validity only to those interests that most closely resemble individual or absolute ownership. This concern is already a reality in Kenya's fifty-year experience of formalisation. During my field work I observed that although the Land Adjudication Act[11] mandates the registration of all existing interests, not merely interests amounting to ownership,[12] the exercise proceeds as though only interests amounting to 'ownership' in the absolute exclusionary sense matter. Neither in the land adjudication cases that I examined nor in the finalised registers that I perused did I find registered

11 The statute that outlines the procedure to be followed in determining registrable interests in land prior to their formal registration.

12 Section 23 (2) (e) of the Land Adjudication Act lists such interests to include 'any lease, right of occupation, charge or other encumbrance, whether by virtue of recognized customary law or otherwise …' The statute requires the Recording Officer to deter mine the nature and extent of such interest in order to enable it to be registered in the name of the person or persons claiming it. In theory, a wife or other member of the family claiming a customary law right of occupation could invoke this section to have that interest officially registered. I have not come across any such use of this pro vision nor any legal argument on its possible use.

any other types of interests, other than interests amounting to ownership. The training manuals used by the Land Adjudication Officials do not guide them in this direction either.[13]

I must note that although this narrow appproach has been the dominant trend, there are a handful of African governments who, since the late 1990s, have been experimenting with more inclusive land registration policies. Examples include Ethiopia, Mozambique and Tanzania (Kanji *et al.* 2005; Adenew and Abdi 2005; Teklu 2005; Haile *et al.* 2005; Chilundo *et al.* 2005; Tsikata 2003).

4 Where is the credit?

> In the United States, for example, up to 70 per cent of the credit new businesses receive comes from using formal titles as collateral for mortgages. Extralegality also means that incentives for investment provided by legal security are missing.
>
> (De Soto 2000: 86)

That formal title enables access to credit and therefore increases economic productivity is one the reigning myths of formalisation. The security that formal title brings with it, so the argument goes, gives landowners an incentive to invest, using their land as collateral. A World Bank report on sub-Saharan Africa in the 1980s placed a lot of emphasis on the centrality of land tenure security in improvement and transformation of agriculture:

> Accordingly, farmers must be given incentives to change their ways ... Secure land rights also help rural credit markets to develop, because land is good collateral.
>
> (World Bank 1989: 104)

De Soto reiterates the argument linking formalisation of land ownership to access to credit and productivity despite the fact that such arguments have long since been discredited by empirical evidence, including in de Soto's native Peru (Hendrix 1995; Winn 1992). Empirical studies in Africa failed to establish the link between formal title and access to credit for smallholder farmers. A study of a sub-location of South Nyanza district in Western Kenya found that only 3 per cent of the 896 titles had been used to secure loans, seven years after completion of the formalisation exercise in the sub-location. A similar study in a sub-location of Embu district in Eastern Kenya found that only 15 per cent of the

13 The officers in the Makueni land adjudication office rely on two handbooks, none of which refers to the registration of claims other than ownership claims (Government of Kenya 1970, 1991).

titles had been mortgaged to secure loans, 25 years after the formalisation exercise (Shipton 1989). A comparative study of two coffee-growing areas, one in a formally titled area in Kenya, and the other in a non-titled area in Tanzania found that only two out of the 115 households in the Kenya site had land-secured loans, not that different from the Tanzania site (Pinckney and Kimuyu 1994: 9). A recent study in Ethiopia's Amhara region suggests that farmers do not necessarily relate land titling with facilitation of access to credit: only 2 per cent had such an expectation (Adenew and Abdi 2005: 22).

My own fieldwork findings in Makueni district, Eastern Kenya are consistent with these studies. Out of the 111 people interviewed, only 2 had ever taken out commercial loans. Several of the interviewees spoke of two families that had taken out loans, and then defaulted, leading to foreclosure and loss of land in one, and near loss in the other.[14]

Reasons why smallholders' access to credit has not improved significantly with formal titling may be summed up as follows.

First, the attitudes and lending practices of commercial banks tend to shun small scale (particularly rural or agriculture-dependent) landholders. Title does little to change these institutionalised biases (Government of Tanzania 1994). The second reason is the existence of a vibrant informal micro-lending network. The credit obtained from informal networks is not secured on land and is therefore more attractive in a context where people fear losing their family land. There is a strong attitude against risking family land for credit. My field research established this, as have studies in other parts of the country (Shipton 1992). Third, I found that many registered landowners have not gone to pick up their official documents of title from the land registries, several years after the formalisation exercise. Most people only have the parcel number and sketch map issued to them following demarcation, the first step in the formalisation process. Without the certificate of title they cannot transact with formal financial institutions, and since they do not get to transact with these institutions anyway, they have not bothered to pick up the documents and pay the requisite collection fee. Out of the 111 people interviewed in my study, 33 had picked up documents of title (about 30 per cent). Studies in other parts of the country also show a low incidence of collection of title documents. A study carried out at the Kisumu District land registry showed that in Lower Nyakach, out of 109,545 titles that had been processed, only 24,893 (23 per cent) had been picked up. In upper Nyakach only 28 per cent had been picked up since completion of the registration exercise in the 1960s (Okoth-Ogendo and Oluoch-Kosura 1995).

Finally, the overall link between formal ownership and productivity has similarly been discredited by empirical data that shows that holders of unregistered land have made equally productive investments. The comparative study of two coffee growing regions in Kenya and Tanzania discussed above concluded that land

14 Interviews in Kathulumbi Location, Makueni District, October 1998.

titling had little or no impact on agricultural investments or credit markets, contrary to conventional and official justifications – an observation that brought the authors of the study to the conclusion that titling is simply unimportant (Pinckney and Kimuyu 1994). Another study conducted in the Njoro area in Kenya concluded that it is difficult to identify and measure the impact of tenure reform on productivity. The results were inconclusive because the richer ('more productive') farmers, who are most likely to benefit from the titling programmes, are also the ones more likely to seek title and loans. The poorer ('less productive') farmers are less able to acquire title and leverage loans. Thus, making a simple comparison of productivity in such a context tends to overstate the supposed benefits of title (Carter *et al.* 1994).

5 Which market, which land?

> Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market.
>
> (De Soto 2000: 45)

Proponents of formalisation make two assumptions that are refuted by empirical evidence: that 'market' refers only to 'formal market' and that 'commodity' or 'asset' captures all the dimensions of meaning that people attach to their possessions. These views could not be further from the reality when it comes to rural land in sub-Saharan Africa. The presumption that markets in land can only operate when there is formal private ownership is strong in arguments for formalisation. On this point, however, de Soto makes a less ambitious claim. He at least acknowledges that there are vibrant markets in the informal economy, and that the contribution that formal title could make is to scale up people's ability to transact beyond narrow informal circles (de Soto 2000: 6). In its conventional form the argument linking formal title to markets in land is expressed in economic terms as follows: a formalised private property regime is the only way that individuals are enabled to take advantage of increases in land values brought about by factors such as market integration, land scarcity, or technological innovation. Informal communally-based systems do not enable this capturing of economic rents because there is no institutional mechanism allowing assignment of valuable economic rents to any specific person or group. Individuals therefore capture these rents by demanding a shift toward private property rights that will enable them to take advantage of the new benefits. Formalisation and individualisation of ownership is therefore the state's appropriate response to this demand. A market in land is thus encouraged to develop since formalisation lowers transaction costs in land transfers due to reduced ambiguities in property rights, a view that has been much criticised (Platteau 1996; Firmin-Sellers and Sellers 1999).

Contrary to this view, a market in land does exist *in the absence of formal title*, and informal transactions in land do take place *in spite of formal title*. This market in land is regulated primarily by informal social structures and only marginally, if at all, by formal official structures that are supposed to regulate land transactions. There is evidence of a thriving market in land, mostly in the form of sales of portions of a family's holding, land exchanges and leasing of farm land and grazing land (Mair 1948; Shipton 1989; Moore 1991; Okoth-Ogendo and Oluoch-Kosura 1995; Nyamu 2000). In a sale transaction, it is common practice for the intending buyer and seller to simply call witnesses and draw up and sign an agreement of sale of land. Often a local administrator such as the chief, assistant chief or village headman is called in to witness the agreement, to give the transaction an appearance of official backing. One of the assistant chiefs in my area of study showed me a standard form agreement that he had developed for people transacting before him.[15] Thus, formal title and its institutional apparatus are only marginally relevant or useful in the rural land market.

A further presumption often made is that people everywhere regard land as a commodity and view the freedom to dispose of it as central to their right to land. The 1996 *World Development Report* carried the following definition of property rights:

> Property rights include the right to use an asset, to permit or exclude its use by others, to collect the income generated by the asset, and to sell or otherwise dispose of the asset.
>
> (World Bank 1996: 49)

Formal legal definitions similarly emphasise the owner's absolute ownership, including the freedom to dispose of the property.[16]

Holders of property rights are presented as abstract autonomous individuals exercising their formally recognised rights of ownership. The reality is different. As Platteau observes, in a rural smallholding setting, land is much more than simply one more input in an agricultural enterprise (Platteau 1996: 50). It is impossible, for most people, to abstract land from the social and cultural meanings associated with it. Besides being the main source of livelihood for the majority of families, land also supports a wide network of kin relationships, and functions as a status symbol. To sell land – particularly ancestral land – is a monumental decision. Thus, the sale of land takes place mostly in emergency situations, such as meeting unexpected medical expenses, to pay for children's education when there is no other source of income. Usually it will involve sale of only a portion of the land, sometimes in an agreement expressed as a redeemable sale, and almost always on an informal basis, with no official transfer registered.

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15 Interview with Mr Justus Mwanzia, Assistant chief, Mutembuku sub-location, 18 January 1999.

16 Section 27(a) Registered Land Act, Chapter 300, Laws of Kenya.

Social institutions such as the clan play a major role in instilling a level of restraint in transacting in land. In the location where I conducted research, 17 clans are represented, of which 10 have written rules. All ten had a clause concerning land transactions. Even the clans without written rules had widely cited oral rules concerning land transactions. An example from the *Atwii* clan captures the spirit of clan rules on land transactions:

> It is not permitted for a member of our clan to sell land without the knowledge and consent of the clan committee. Land belonging to a *Muutwii* [member of the *Atwii* clan] must first be offered for sale to the family, and then to other clan members, before it can be offered to outsiders.[17]

A clan member who intends to sell land must satisfy the clan committee that he is in agreement with his family members and that he has valid reasons for selling the land, and most important, that he will still have sufficient land left for his family's needs. Even in other communities where this rule may not be formally spelled out, there is general expectation of consultation of family members before any sale of land. This is an illustration of the fact that the commodity view of land promoted by officials and proponents of formalisation competes with a different social vision of property as primarily a means through which social responsibilities are met and even though individual rights and entitlements do matter, these are conceived of broadly in order to enable the fulfilment of those social responsibilities. Individual entitlements are conceived of broadly so as to include rather than exclude. An argument that links formal title to the emergence of land markets on the expectation that individuals are always motivated by the desire to capture economic rents ignores the fact that the social context of which they are a part plays a role in shaping their preferences (Firmin-Sellers and Sellers 1999).

6 Security for whom? The distributional consequences of title

> When we ask ourselves whether a social or legal practice works, we must ask ourselves 'works *for whom*?' Who benefits and who loses from existing political, economic and legal structures?
>
> (Singer 1990: 1841)

If we take the relational nature of property rights seriously, the argument that formal title ensures security of tenure must necessarily be met with the

17 *Miao ya Mbai ya Atwii-Athunzu* [Rules of the Atwii Athunzu Clan] [Passed on 10 July 1948, revised August 1993], Rule No.29. [Author's translation].

question 'security for whom?' De Soto celebrates the promise of 'lifting the bell jar' to enable inclusion of poor people into formal property systems so much that he fails to acknowledge that there are negative distributional consequences involved. Any redefinition of property rights produces winners and losers (Hunt 2004: 188; Manders 2004). Title holders can both gain and lose, as in the case of formalisation in urban slum contexts where the land does gain value, but this has often meant that poor beneficiaries of land titling programmes come under pressure to sell off their holdings to developers and slum-lords, forcing them into further marginality and widening inequality (Manders 2004).

In the context of sub-Saharan Africa the negative distributional consequences of formalising rights to land, with an emphasis on absolute individual ownership in rural areas governed by customary tenure, have been well documented (Shipton 1988; Lastarria-Cornhiel 1997; Meizen-Dick *et al.* 1997; Whitehead and Tsikata 2003; Okoth-Ogendo 1979; Pala 1983). Entitlements based on customary rights to land have been rendered vulnerable when title holders assert their absolute rights of ownership against unregistered family members. Courts in Kenya have overwhelmingly ruled in favour of title holders, ignoring the reality that the vast majority of people regulate their property relations based on custom even in the case of registered land.

Prevailing judicial attitudes against unregistered interests translate into systemic gender bias in interpreting property rights within the family, given the low incidence of registration of women whether as individual or joint owners.[18] The remainder of this section focuses on the displacement of women's claims to family land to illustrate the distributional nature of title and to refute the simplistic equation of formal title with security.

6.1 Displacing women's claims to family property

Low incidence of joint registration, coupled with the established practice of registering land in the name of the 'head of household' has meant that formalisation weakens women's claims to family property. This insecurity has been spoken of in some writings as if it were unique to women (Karanja 1991; Butegwa 1991; Tibatemwa 1995). However, it needs to be understood within the general context of the systemic narrowing of existing social criteria for recognising entitlement. Framed this way, we are able to see that the problem is with the narrow and limited understanding of registrable interests employed in the individual titling programmes, which inevitably results in exclusion.

18 Estimates place the national figure at 5 per cent (Davison 1987). In Makueni district my own calculation based on a sample of the land registers for the entire district yielded 8 per cent. The incidence of joint registration in general is very low, let alone joint registration of spouses. In the sample, out of a total of 3,183 registered parcels of land, only 69 (2 per cent) are registered as jointly owned. Of those 69 only 45 had a woman as one of the joint owners.

This exclusion does have gender-differentiated consequences that translate into particular expressions of insecurity for women. For the vast majority of married women, interests in family land are held on account of the marriage relationship, which for most women is based on customary law. The precariousness of customary land rights in the eyes of a legal system that pretends to be blind to the reality of plural and overlapping rights to land is obvious. Unmarried daughters living on land registered in their fathers' or brothers' names are in a similarly precarious position. In the absence of legal recognition of customary interests in registered land, the entitlements of women in these situations have no independent legal existence. They derive from the title-holder's interests, and their security depends primarily on the stability of their relationship with the title holder. The Kenyan Court of Appeal ruled in 1988 that a wife's interests under customary law cease to exist once her husband becomes the formally registered owner. Therefore as a widow she could not rely on her customary law entitlements in the face of third parties with competing registered claims, in this case, a financial institution to which the land had been mortgaged.[19]

But it is not just exclusion from formal title that renders women's interests in family land insecure. The formalisation process reinforces existing relative insecurity of women's customary land rights. By relative insecurity I mean relatively weaker capacity to mobilise social support for one's claim to property. It refers specifically to a person's position in the property-holding entity – a family or kinship network. Relative insecurity does not have to be based on comparison between men and women only. It could be between people born into a family versus those who have married in; or between women at different stages of the life cycle; or between those with children and those without; those with a regular source of income and those without. A husband or eldest brother occupies a position of authority within the family. He enjoys economic power that derives from exercising control over valued resources, as well as social power to allocate resources, which implicates others' loyalty, dependency and obligations.

Against this background, formalisation of title has become synonymous with transformation and increased visibility of men's control rights over land, and the simultaneous disappearance or invisibility of women's established usage rights. The formalisation programme relies on one understanding of ownership, namely ownership as absolute authority. Even in countries where recent reforms have required special attention to the property interests of wives and ex-wives, there is still evidence of practrices that circumvent the law and result in dispossession (Kanji *et al.* 2005; Teklu 2005). Empirical work conducted by Achola Pala in the Luo community in Western Kenya illustrates the gendered effects of formalisation (Pala 1983). She shows that in the Luo language, the term for 'owner of land' (*wuon lowo*) is understood at two levels. First, it refers to the person (often

19 Elizabeth Wangari Wanjohi and Elizabeth Wambui Wanjohi –v- Official Receiver and Interim Liquidator (Continental Credit Finance Ltd.), Civil Application NAI No. 140 of 1988. Reproduced in *The Nairobi Law Monthly* 14, February 1989 at 42.

male, generally in the position of a grandfather) who has the power or right to allocate land to others. At the second level, it refers to a person (female or male) who has a recognised right to use a particular piece of land over a long period of time. This right exists by virtue of his or her relationship to the person who has authority to allocate the land. She argues that the process of formalisation of title has focused on the first level only (which is exclusively male), and ignored the second sense of land ownership (which would allow for more gender inclusiveness). Thus, only men end up registered as owners of land.

By equating ownership of land to only the first sense of *wuon lowo*, the process transforms men's allocative authority into an absolute right of ownership, which includes the right to alienate the land, without any safeguards for the rights exercised by women and other family members as owners and users of land in the second sense. Parker Shipton, writing on the same community, concludes that registration has effected 'a hardening of men's land rights into absolute legal ownership to the exclusion of women and children' (Shipton 1989: 119).

Fiona Mackenzie (1990) writing on central Kenya makes a similar argument regarding the absence of protection for 'lesser rights', and the rendering of men's interests in land into rights of outright ownership. She argues that the precarious position of these 'lesser rights' is made even less secure in light of the weakening of social institutions that would otherwise have played a supervisory role in the way men exercise those interests.

Finally, weakening of women's claims to family property is illustrated by the manner in which courts have decided cases concerning marital property in Kenya (Nyamu-Musembi 2002b). Since there is no Act of Parliament specifying the rights of spouses to family property following marital breakdown, courts apply an English statute, the Married Women's Property Act of 1882. This statute follows the common law doctrine of separate property, which means that each spouse retains as personal property whatever he or she owned before marriage, as well as what he or she acquired during marriage. The property holding unit is the individual, not the family unit. Marriage alone does not confer a proprietary interest on the other spouse. The starting point in any dispute therefore is to establish legal ownership. In the case of land this would be evidenced by title. The court then enquires into any claim of beneficial ownership made by the non-title holding spouse. The most common claim made is significant contribution in form of money or labour, which must be proved strictly. Thus, wives pursuing marital property claims with no formal title documents to show are forced into an uphill battle of proving significant contribution. Regardless of the duration of a marriage, a wife must strictly prove her contribution to the assets acquired during the marriage.

In a context where formalisation of property rights in land has resulted in individual registration of men as heads of households, application of a strict separate property regime produces a gendered pattern of exclusion. Any discussion of formalisation of property systems that engages seriously with this gendered pattern of exclusion, as well as the broader negative consequences of disregarding customary rights to land cannot credibly make the claim that formalisation of title brings security.

7 Conclusion

By disregarding discussions of the failure of tenure reform experiments of the last four decades, de Soto's work re-popularises previously discredited theories of property rights and reproduces their shortcomings. This chapter has discussed five such shortcomings with reference to the context of rural land in Africa: First, narrow construction of legality to mean only formal law results in over-valorisation of formal title and downplaying of the central role played by informal norms and practices. Second, dichotomisation of property systems into capitalist and *pre*-capitalist glosses over the dynamic and multi-tenure nature of land-holding arrangements and echoes nineteenth century notions of the inevitability of social evolution toward private individual ownership. Third, the assertion of a causal link between formal title and access to credit is repeated without any acknowledgement of the overwhelming evidence discrediting it. Fourth, in arguing that formal title scales up markets in land de Soto does acknowledge that markets in land do exist in the absence of formal title. However, he overlooks the fact that informal transactions do persist in spite of formal title, and fails to take account of the multiple dimensions of meanings that people attach to land and other valued possessions besides 'commodity' or 'asset'. The fifth shortcoming- failure to engage with the insecurity that formal title often brings with it – casts doubt on the 'pro-poor' credentials of the property rights reform agenda.

In conclusion, promising inclusion into the formal legal framework as the solution to poverty and marginality keeps substantive discussion of inequality off the agenda. The solution is deceptively simple, hence its appeal in international aid circles. Such contemporary arguments linking formal title to productivity and poverty reduction need to be questioned in light of historical evidence, and their relevance for the African context examined in light of empirical evidence, as this paper does.

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