In Kenya, when a husband or father of the family passes away, his widow and children are often unable to inherit the land and property. In 2010, the new Constitution of Kenya was promulgated, followed by laws in the land sector to be put into effect from 2012. As the land laws were being developed, ELCI successfully pushed for the incorporation of clauses that increased recognition and support for widows, orphans and people with disabilities in property inheritance.

**PRINCIPAL ORGANISATIONS INVOLVED**
Environment Liaison Centre International (ELCI), Council of Luo Elders, Council of Kisii Elders, National Council for People with Disabilities, International Federation of Women Lawyers (FIDA)

**LOCATION**
Nyamira, Migori, Homa-bay and Kisii Counties, Kenya

**TIMELINE**
2011–2012

**TARGET AUDIENCE**
Civil society, policy makers

**KEYWORDS**
Legal reforms, social marginalisation, orphans
GOOD PRACTICES
towards making land governance more people-centred

This case study is part of the ILC’s Database of Good Practices, an initiative that documents and systematises ILC members and partners’ experience in promoting people-centred land governance, as defined in the Antigua Declaration of the ILC Assembly of Members. Further information at www.landcoalition.org/what-we-do

This case study supports people-centred land governance as it contributes to:

Commitment 1  Respect, protect and strengthen the land rights of women and men living in poverty
Commitment 4  Ensure gender justice in relation to land
Commitment 7  Ensure that processes of decision-making over land are inclusive

Case description

Background issues

This case centres around a traditional practice in the inheritance of land and property in Kenya and its punishing effects on women, children and people with disabilities. In Kenya, some communities essentially deny widows, orphans and people with disabilities the right to inherit land. Weak national laws, corruption and the fact that the legal practitioners themselves are often in favour of these traditions, mean that this practice is entrenched in the political and social fabric of society and benefits from widespread consensus. This makes it difficult for solutions to emerge within the formal justice system.

In the Kisii community in Kisii and Nyamira Counties, and among the Luo community of Migori and Homabay Counties in Kenya it is the norm for land to be owned by men. As it is not common for wills to be written by family members, it is often the case that when men pass away, their land and property is automatically reclaimed by the nearest male relatives rather than their wives or children. These relatives, mainly brothers, but also uncles and others, inherit the land to the exclusion of the widow and orphaned children.

For different reasons, but with similar results, people with disabilities, who might be entitled to the inheritance of land are often not able to claim it, as they are deemed incapable by their communities of administering and taking care of it. This similarly results in the land being taken over by the kin next in line, mainly again the male relatives.

In these areas, there have been many instances where following a man’s death, the property was ransacked and land taken over by the man’s wife’s in-laws. There have also been cases where - when men passed away - the neighbours living in the land adjacent
to the land of the deceased encroached onto the land where his children and wife would still be living.

Solution

With the approval of Kenya’s new constitution in 2010, the opportunity presented itself for an important change to be made to the old laws on land administration and inheritance. ELCI decided to push for laws that are more inclusive of women, children and people with disabilities, by intervening at the creation stage of the new laws. It undertook this effort for three main laws: the Land Registration Act of 2012 (which consolidates the registration of titles to land), the Land Act No. 6 of 2012, and the National Land Commission Act No. 5 of 2012. Together, these acts are responsible for the management of land and everything that falls under the remit of land in Kenya. They give effect to provisions and provide a framework and structure for aspects such as land registration, transfer, leasing, ownership, and all administration functions.

In addition to an effort on a legal level, ELCI recognised the importance of an effort on a social level as well, specifically one making use of the crucial role played by the elders in conflict resolution among families in the Luo and Kisii communities. ELCI facilitated a number of awareness raising and capacity building sessions with the elders. A Council of Elders came together and presented a petition to the Parliamentary Committee on Land and Environment in Homabay on 20 March 2012. Due to the fact that at that point the elders were embedded in the process, it was highly beneficial that they took the lead in the presentation of the petition, as this gave the cause an extra dimension of legitimacy. They were able to participate in the public hearings of the Parliamentary Committee on Land and Environment, addressing the 3 laws ELCI was trying to target for reforms. At least 70% of the recommendations made by ELCI and the Council of Elders were included in the different legal reforms. These laws are now robust enough to ensure adequate protection for the vulnerable groups who were the most affected by traditional practices in these communities.

Activities

ELCI involved community elders with the purpose to build the capacity of the elders in order for them to understand and apply constitutional and legal provisions in their conflict resolution processes. In consultation with them, ELCI prepared a petition that included a raft of recommendations to achieve the following:

- Ensure automatic transfer of ownership of land to a legitimate widow upon the death of her husband
- Ensure involvement of wives in cases where land is used as collateral for loans and other transactions
- Ensure equal recognition of all wives in land transactions in cases of polygamous men
- Increase penalties for encroachment (crossing boundaries) especially onto land belonging to orphans
- Strengthen the vetting process of those purporting to be representing people with disabilities in land transactions by ensuring firstly, that the nature of the disability is
considered, and secondly that the disabled person actually needs that representation, and finally that powers of such representatives are limited to ensure people with disabilities do not lose land on that one account.

- Enhance huddles for those who wish to use land belonging to orphans or to dispossess orphans of their land.
- Ensure devolution of structures for land administration to local levels through the recognition of the councils of elders to reduce the cost of justice, and through capacity building.

**Education on human rights and legal standards**

ELCI worked with legal experts that included a lawyer who facilitated discussions on the Bill of Rights as contained in the Kenya National Constitution, 2010. Article 19(2) of the Constitution provides that “the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings”. Other provisions focused on, include provision 27 regarding equality between men and women, and forbidding discrimination on any grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. Other discussions were on Chapter 5 of the Constitution that regards land and environment, and the equitable access to land and security of land rights.

**Raising elders’ awareness**

This was a critical step because the elders are the custodians of the oppressive traditions that deny women, children and people with disabilities equal access to land rights. ELCI engaged a renown elder, Professor Gilbert Ogutu, who was also the Secretary General to the Luo Council of Elders. He became a co-facilitator to ELCI in all the awareness raising events and meetings that ELCI implemented. The importance of engaging Prof. Ogutu was in relation to understanding the “language” of the elders. The elders are some sort of a “clique” in terms of their deeply rooted perceptions that have been handed down through generations. They ascribe to traditional justice systems and values and are responsible for protecting and transferring these to new generations. Prof. Ogutu, being a scholar, was a fitting facilitator, with a clear understanding of values and the formal justice system of Kenya, yet capable of juxtaposing that against traditional systems and engaging the elders with a form of diplomacy that met their expectations, while gradually moving them to accept new realities.

ELCI also facilitated radio talks, with Prof. Ogutu as the expert speaker. These covered the same issues discussed above but in vernacular languages. Those that fall victim to the oppressive traditional systems are often the poor and uninformed rural people. Like some urban dwellers they mainly listen to the local radio stations that broadcast in their languages. The show consisted of an approximately 20 minute talk by Prof. Ogutu with the remaining 40 minutes dedicated to phone calls. It is estimated that there were more than one million listeners. On one occasion, the show went on for over an hour due to the high number of callers, indicating the high demand for such programmes.
Using Information, Education and Communication Materials
ELCI sponsored a poster competition on land-related themes and key matters among the youth in the counties. The message about the competition was communicated through the same elders. ELCI evaluated entries to the competition and settled for one poster that ELCI enhanced and printed. Copies were distributed to the elders and posted in strategic public locations such as the market places.

Advocacy activities at the national level
The elders who participated in the awareness raising meetings facilitated the organisation of informal meetings with fellow elders and other relevant audiences in their villages to highlight the need to strengthen the protection of rights, particularly with reference to widows, orphans and people with disabilities. The purpose was to make it easier for people to use the formal justice system and for the elders to preside over land and property dispute cases drawing from both the formal and the traditional justice contexts.

In October 2011 the first two bills were released by the Parliament, the Land Bill and the Land Registration Bill. In line with the constitutional requirement of popular participation in legal reforms, parliamentary committees were formed to gather views from Kenyans. These committees travelled to various parts of the country.

ELCI worked with the elders to prepare a petition to the parliamentary committees. The process included drawing from the lessons and messages gathered during the awareness raising sessions and converting these into recommendations for inclusion in the bills. These recommendations were reviewed by a legal expert for conformity with the Constitution of Kenya of 2010.

On 5th March 2012, ELCI wrote a letter to the Clerk of the National Assembly requesting an opportunity to present the petition that was a combination of views held jointly by ELCI and the Council of Elders. The Clerk guided that ELCI present the petition during a public meeting held in Homabay County on the 19th March 2012. In order to present the petition, ELCI mobilised three representatives of the elders from each of the counties of Homabay, Migori, Nyamira and Kisii to participate in the public hearing and take responsibility for the actual presentation of the petition. Throughout the public meeting, the elders were very active, drawing from the positions they had established during the awareness sessions earlier. They generally had wide support from the public that participated in the hearings and eventually presented the petition.

Importance of the case for people-centred land governance
The work of ELCI achieved a change in perceptions on an issue rooted in the traditions of a community. Through the involvement of the elders, and the activation of change from within the community, the protection of property inheritance rights of widows, children and people with disabilities gained validity and legitimacy in the eyes of the community. This was a major advancement for people centred land governance, as the new acceptance of land rights for widows, orphans and people with disabilities became embedded in the wider vision of the community for itself. This was in itself a step...
forward in the recognition of the dignity of all human beings and the furthering of human rights within rural communities.

Changes

Baseline

Until 2010, land administration was based on old laws (rooted in Indian laws) such as the Registered Land Act CAP 300 (RLA). Such laws, borrowed heavily from Kenya’s colonial administration, which empowered men in land ownership, limiting opportunities for land ownership by women. In addition, they did not make any reference to people with disabilities or provide any measures of protection for their land. They offered a certain level of protection for the interests of children, but did not ascertain clear roles regarding the power of trustees of the land belonging to them.

As a result of the efforts undertaken by ELCI, the situation on the ground for many of the communities changed remarkably. They went from being communities where the practice of land-grabbing by male relatives of the land of widows, children and people with disabilities was a widely spread and commonly accepted practice, to ones where there was a common acceptance of the injustice and hindrance that this practice posed to all community members (not just the victims).

Achievements

The mandate of ELCI in this project covered supporting the reform process. The indicator of success is therefore the number of legal frameworks that contain recommendations forwarded by ELCI. The fact that nearly 70% of ELCI recommendations were carried on with some amendments, points to successful advocacy by ELCI.

Following the enactment of the bills into law, there has been increased participation of women in land administration. For example, one of the responsibilities of the County Land Boards during the vetting of men who apply for loans using their title deeds as security, is to ascertain the consent of their wives. Forms prepared for application for such consent provide for signing by the wives. This was not the case before, when wives would normally be surprised when land was for example auctioned because of unpaid loans.

These laws were a big step forward in securing the land rights of those normally marginalised people, as a result of the efforts undertaken by ELCI with affected communities. Although sometimes society needs time to get used to and respect the law, at least on a jurisdictional level the rights of widows, children and people with disabilities are now embedded in the laws. It means that there is no longer the preoccupation that legal practitioners will neglect to enforce them.
Another major achievement came in the form of the shift in perception of the community elders with regards to certain practices. The consultative processes with the Councils of Elders left at least 60 elders with enhanced understanding of the plight of vulnerable groups with regard to access to land, and its legal and constitutional implications. These elders became champions for change, being the leaders of the community entrusted with the task of continuously guiding their community towards better wellbeing. They are listened to, and because of their roles of leadership and guidance within the community, their endorsement can signify the change of opinion of an entire community.

Evidence

In line with the objectives of ELCI in this project, two laws were enacted by the Parliament of Kenya: The Land Act 2012 and the National Land Commission Act 2012. Thereafter The Kenya National Land Commission Act 2012 was enacted, and later in 2016, the Community Land Act 2016. All these capture the spirit of ELCI messages carried far back in the campaigns of 2011 and 2012.

Lessons learned

Lessons for civil society

It is crucial to engage important influencers like elders and government officials who can otherwise be the stumbling blocks to success. Their engagement is important because it means they will not stand as obstacles to the achievement and subsequent progress of the project. Their endorsement can galvanise the wider community to support it.

Public awareness is critical. It is important to create the possibility for people to discuss issues that affect the whole community, without having to reveal their identities so they can speak freely. It has been seen that in many cases, widows came across extensive problems for speaking out on land or property being taken over by others such as in-laws, when it was due to them. In communities where it is considered a huge act of disrespect for women to speak out against elders or in-laws, many women refrain from doing so, just so that they and their children are not socially marginalised. These are social and cultural contexts where the community regulates and manages many aspects of public life, and going against certain social norms is not acceptable. The only way that there can be awareness about this problem and impetus to resolve it, is if the subjects being affected by it speak out.

Lessons for policy makers

There are very many families and individuals languishing in poverty after failing to access their rightful shares of family land, and this has to be brought to the attention of the government.
With the process put into place by ELCI, there has been education on human rights and legal standards, and elders became willing to change the cultural and traditional beliefs that have led to injustices in land administration. The government could support with further educational programmes targeted at changing attitudes in communities and in the country more broadly.

As we have seen through this case, even though the elders of the community were the ones actually perpetuating traditional practices, once they saw how these were hindering the wellbeing of some individuals, they shifted their positions and became de-facto advocates for change in the land sector reforms, especially with regard to the protection of the family. This shows that elders can be instrumental in changing perceptions and reforming traditional practices from within. They could be built upon by the government for other issues as well and targeted for capacity building.

**Challenges**

The main challenges encountered during the implementation of the legal reforms were related to the fact that the elders are the custodians of traditions for the community. As a result, initially convincing them that some traditional practices were harmful to the community was not an easy task. It was difficult for ELCI to imagine being able to win over the elders, especially those who had not gone through ELCI training on land property rights. As a result ELCI engaged a well-known role model elder – a professor of religion and former Secretary General of Luo Council of Elders, well versed with the traditions of Luos and Kisiis, yet well exposed to the formal justice system and general governance. He carried effective conciliatory messages drawing from tradition, religion, human rights and the formal justice systems to the communities. Through radio talk-shows led by the same professor, ELCI broke the ice on important topics, attracting overwhelming numbers of live callers. Some very senior government officers also participated in some of the talk-show episodes to respond to questions from community members.

ELCI was unable to effectively monitor the work the elders undertook on preventing land grabbing by family members of the land of women, children and people with disabilities, after the funded advocacy season. This is mainly due to the fact that in order to sustain such monitoring effectively, resources - both financial and human - are required. Nevertheless, ELCI maintains telephone contacts with some of the elders and occasionally meets them. On such occasions, ELCI receives positive messages that point to increasing justice for women, orphans and people with disabilities. Because of enhanced awareness, there are fewer affronts by men on women, since the laws provide for the need to protect the rights of these vulnerable groups. There is an increase in recognition of their roles and negotiations with them, showing a growing involvement.
Follow-up

Due to the increased awareness of the problem of land grabbing of the land of women, children, and people with disabilities by family members and male relatives, the widows and disabled persons as well as the elders, remain active advocates for their rights. They are regular participants in the preparation of County Integrated Development Plans, which are the blue print for resource allocation at the county level. Issues remain visible and trained advocates continue to work effectively for the prevention of future land grabbing of the land pertaining to these groups.

Supporting material

References and further reading


The Kenya Land Act n.6 (2012).


The Kenya Community Land Act n.27 (2016).

Photos, videos

*An elders’ consultative session, 2011*

Photo credits: Kennedy Orwa
Mr. Adera Osawa and Mrs. Leonora Agong conferring during an elders’ consultative meeting in Migori County, 2011

Photo credits: Kennedy Orwa

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