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Analysis of Dispute resolution systems as a means of fighting Land Corruption and promoting Access to Justice: The case of Kenya and Ghana

...We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace. We must take a comprehensive approach to Justice and the Rule of Law. It should encompass the entire criminal justice chain, not only police, but lawyers, prosecutors, judges, prison officers[...] a “one-size-fits-all” does not work. Local actors must be involved from the start...” - Kofi Annan, the (then) UN Secretary-General

1.0 INTRODUCTION

The right to free legal aid for citizens who cannot afford legal representation is an essential component of the right to a fair trial. Legal aid provides a foundation for a fair and effective justice system based on the rule of law. In line with the International Covenant on Civil and Political Rights (ICCPR)¹ and the UN Principles and Guidelines², many countries, have enacted laws that provide for and guarantee the right to free legal representation for indigent and vulnerable persons. The Constitution of Kenya 2010 recognises access to justice for all as a fundamental right for all and obliges the State to not only respect and protect, but also promote its realization in the fullest sense. Notably, the law identifies access to justice as a core element of achieving social justice in the country. To enhance access to justice, the Kenyan government enacted the Legal Aid Act 2016 to facilitate the provision of legal aid to the poor. Besides the Act, there also exists the National Action Plan on Legal Aid (2017-2022) whose underlying spirit is ‘Towards access to justice for all in Kenya.’

The Sustainable Development Goals give particular emphasis to land rights, urban land and corruption, particularly Goal 16 which provides for *Peace, justice and strong institutions Promote peaceful and inclusive societies... provide access to justice for all. Targets include substantially reducing corruption and bribery and developing effective, accountable and transparent institutions, among others.*

However, the challenge in many countries lies in the implementation of the right to legal aid. The status quo on access to justice in many African countries, Kenya and Ghana included, has been characterised by limited resource allocation for legal aid services and insufficient number of legal aid providers, who more often lack the necessary capacity to discharge their mandate effectively.

In their quest to access justice on land cases, it has been observed that most vulnerable communities (marginalised groups including women, persons with disability and the indigent) in Kenya and Ghana encounter immense challenges. The justice sector is characterised by legal, institutional, structural, procedural, economic, political and socio-cultural challenges. Suffice it to say, land cases in their very nature are quite technical and

¹ Ratified by Kenya on 1st May, 1972

² UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems Available at https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf (Last accessed 18th June 2019)

complex hence require legal expertise that can only be availed through legal representation or through adequate capacity building. However, challenges such as technical land laws, overlapping or conflicting customary and statutory legal frameworks compound matters for vulnerable groups. Similarly, institutional weaknesses due to poor accountability mechanisms are a precursor that allows corruption to thrive at the expense of justice for all.

2.0 LAND CORRUPTION

Corruption in the land sector is the abuse of power and authority by those in charge of land administration for their own gain or benefit.³

Transparency International, through its empirical and desk-based baseline survey (2015-2016) on land corruption in Cameroon, Ghana, Kenya, Madagascar, Sierra Leone, Uganda, Zambia, and Zimbabwe, identified a number of issues that would have to be tackled to increase a nation's capacity to counteract land corruption:

- Inadequate access to information, which allows citizens to knowing their rights and how to make use of them;
- Complex laws and procedures regulating land ownership and insufficient access to justice (multiple laws, gaps in legislation, traditional versus formal laws and institutions, uncertain law-enforcement);
- Deficient citizen participation in decision making and monitoring on land transactions, so that there is free, prior, informed consent;
- Absence of efficient anti-corruption oversight and restriction mechanisms, with grievance mechanisms, in the land sector;
- Insufficient capacity in local administration and traditional institutions to support good land governance;

One of the key issues that emanated from the baseline survey is that of grievance mechanisms. The biggest challenge concerns the lack of awareness on dispute resolution mechanisms on land issues. Grievance mechanisms and cycles of judiciary appeal exist in almost all countries but are largely inefficient because they are too costly or too specialized. The low accountability of traditional leaders pose a challenge as customary laws have different complaint mechanisms and grievance provisions from state legislation. These and many other factors compromise access to justice in land cases.

3.0 ACCESS TO JUSTICE

Over the years, there has been increased focus to improve the justice systems of various countries, with a view of fighting corruption, attracting investments or improving security. With the increase in effort and interventions in the sector, this has necessitated the need to create tools to assess justice systems. With this focus, the ability of citizens to access justice institutions to address their grievances and resolve conflicts has thus come

³ Transparency International (TI) (2009b): The Anti-Corruption Plain Language Guide. URL: http://www.transparency.org/whatwedo/publication/the_anti_corruption_plain_language_guide

to be seen as an essential element of development, human rights, democracy, and the rule of law.

Despite the much focus, there is no one definition of access to justice. UNDP broadly defines it as “[t]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards”.⁴ Access to justice may refer to a situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.⁵

Access to justice is fundamental to the establishment and maintenance of the rule of law, because it enables people to have their voices heard and to exercise their legal rights. It is an indispensable factor in promoting empowerment and securing access to equal human dignity.

3.1 ACCESS TO JUSTICE IN LAND MATTERS

National Constitutions in Kenya and Ghana entrench and provide the yardstick on access to justice. There also exist regional and international treaties that oblige these two countries to ensure access to justice for all.

The sustained implementation of Constitutions in Kenya and Ghana is indeed critical to ensuring the necessary raft of land reforms required to achieve sustainable peace, development and prosperity. Despite the enactment of many laws to safeguard access to justice, the law in action paints a different picture from what is well espoused in books and legislation. It thus follows that much more remains to be done to address the long existing challenges experienced by average citizens in accessing justice over land cases. More of this particularly relates to a strict implementation of laws on access to justice to the latter. Implementation remains a challenge due to lack of political will as the main perpetrators of land injustices, are at times, in themselves, the well-connected people who wield a lot of power in society, and more so, control the means of production. As such, the injustices continue being perpetuated in society, with the under privileged groups bearing the brunt of it all.

The case of Kenya having previously been the subject of complaints to the African Commission on Human and Peoples’ Rights (ACHPR) for violating its obligations under the African Charter is an illustration of how implementation of court decisions can be a daunting task. A more recent example is the Endorois case⁶, which concerned violations

⁴ See UNDP (2005).

⁵ M.T. Ladan, “Access To Justice As A Human Right Under The Ecowas Community Law,” available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07->, (accessed on 19th July 2019)

⁶ Ctr. for Minority Rights Dev. (KENYA) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Comm. 276/2003, 27th ACHPR AAR Annex (Jun 2009 - Nov 2009) Available at

resulting from displacement of the Endorois, an indigenous community, from their ancestral lands without adequate compensation. In its decision, the African Court found the government guilty of violating the rights to freedom of religion, property, health, culture and natural resources under the African Charter on Human and Peoples' Rights. The court further recommended restitution of Endorois ancestral land, recognition of their right to ownership as well as compensation for the loss suffered. Sadly, the government is yet to comply with this ruling. How then do we secure compliance of orders? Is it just sufficient to have it in legislation?

3.2 ACCESS TO JUSTICE: THE GENDER DIMENSION

According to the United Nations Food and Agriculture Organisation (FAO) 2011⁷, women own less than two per cent of the world's land. They make up 43 per cent of the agricultural labour force in developing countries and are responsible for between 60 and 80 per cent of food production, yet on average, only five to 20 per cent of agricultural land is owned by women in those countries.

Women's subordinate position in society is reflected in many national legal systems.⁸ Women and girls often face discrimination with regard to property and inheritance rights. This can be attributed to poverty, as women are more likely than men to have limited access to resources and thus face higher levels of poverty, which subsequently hinders them from accessing justice. In a study by the Ghana Integrity Initiative (carried out by the TI National Chapter in Ghana) on Women and Corruption, almost 40% of women specified that corruption hindered their access to, and control over, land resources and therefore fundamentally impacted their livelihoods. This data shows the extent to which land corruption is an impediment to women's access and ownership of land.

Secondly, few women are represented in male-dominated judicial and security institutions. As such, staff, including police officers and judges, can deter women from reporting land cases. Sensitive issues such as disinheritance of land are thus likely to go unreported due to fear of shame and stigma.

Third, officials involved in the administration of justice, namely prosecutors, police, lawyers and judges, may lack understanding on the sensitivities surrounding certain violations of women's land rights or even of their justiciability. As such, access to justice can be hindered by weaknesses in the operations of the police, prosecutors and entities first encountered by those seeking justice, leading to poor investigation and evidence collection of cases.

http://www.worldcourts.com/achpr/eng/decisions/2009.11_CM RD_v_Kenya.htm (Last accessed 20th June 2019)

⁷ Available at <http://www.fao.org/3/am307e/am307e00.pdf>

⁸ Kangas, A., Haider, H., and Fraser, E. (2014). Gender: Topic Guide. Revised edition with E. Browne. Birmingham: GSDRC, University of Birmingham, UK <https://gsdrc.org/wp-content/uploads/2015/07/gender.pdf>

Fourth, women are also under-represented, and sometimes excluded, in informal justice systems as decision makers are normally men, which may cause additional impediments for women using these means to access justice. Women are thus more likely to be discriminated against due to the imbalance of power and the absence of judicial safeguards, especially in land, where women often cannot obtain reparation when using mediation channels.

Fifth, the implementation of decisions on violations of rights often presents significant difficulties, for instance due to lack of enforcement mechanisms or complex and lengthy procedures for enforcement. At times, the difficulty arises when women fail to enforce their favourable judgements (especially if against a man) as in land cases, due to the stigma associated with it.

4.0 ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) refers to all decision-making processes other than litigation, including but not limited to negotiation, enquiry, mediation, conciliation, expert determination and arbitration. Article 33 of the UN Charter outlines the various conflict management mechanisms that parties to any dispute may resort to.⁹ Some of the processes include: negotiation, enquiry, mediation, conciliation or arbitration.

It is argued that ADR is a simple, quick, flexible and accessible dispute resolution system compared to litigation.¹⁰ It emphasises win-win situations for both parties, increases access to justice, and improves efficiency and it is expeditious. Unlike litigation, it is also a cost-effective means for dispute resolution that fosters parties' relationships in disputes including commercial, land, family, succession disputes. ADR and traditional justice systems strengthen the Rule of Law and contribute to development.¹¹ This is because they enhance access to justice which is an essential component of the Rule of Law. The Rule of Law is the foundation for both justice and security.¹²

In Kenya, ADR mechanisms are anchored in the law. Article 159 of the Constitution stipulates that in exercise of judicial authority, courts and tribunals are to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.¹³ ADR mechanisms including negotiation, mediation and arbitration are also available in the settlement of intergovernmental disputes.¹⁴ In land conflicts, the National Land Commission is required to encourage the

⁹ Article 1.1, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹⁰ Z. Xie, "The Facilitative, Evaluative and Determinative Processes in ADR," 2011-10-12, available at <http://www.xwqlaw.com/info/c47f5ff15b464882ad5c9a7f97338652>

¹¹ J. Michel, "Alternative Dispute Resolution and the Rule of Law in International Development Cooperation," J&D Justice & Development Working Paper Series, (2011), p.2.

¹² UNDP, "Access to Justice and Rule of Law," available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/

¹³ Article 159(2) (c), Constitution of Kenya, 2010.

¹⁴ Article 189(4) Constitution of Kenya, 2010

application of traditional dispute resolution mechanisms.¹⁵ Recognition of ADR and TDRM processes in the Constitution is meant to enhance access to justice as guaranteed in Article 48 of the Constitution.

5.0 CASE STUDIES

• THE CASE OF KENYA

Kenya has an area of approximately 582,646 sq. Km. Nearly 80% of the land is arid or semi-arid. This means that agricultural potential is limited to about 20% of the land. The population density in these areas with high agricultural potential is estimated to be 2000 persons per sq. Km. Recent statistics have put absolute poverty in rural areas at 54% of the population and 53% in the urban areas. With high unemployment rates, this means that a huge majority of Kenyans are wholly dependent on land for sustenance and their livelihoods. This has led to unprecedented competition for dwindling resources tied to land. In fact, the National Land Policy (2009) itemized the issues facing the country as deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict. In the recent past, the country has suffered from alienation of large swathes of indigenous peoples' land for mining,¹⁶ large scale farming¹⁷ and land intensive capital projects.¹⁸

Land is a key driver of socio-economic development in the society and the country at large. Individuals, communities and organizations have over the years embarked on investing in land. With the increased levels of investments, the state of affairs has not only encouraged land grabbing, but also led to various malpractices that amount to corruption in the land sector. As a result, conflicts have been increasingly acknowledged, a critical factor to the attainment of secure land tenure rights, development, peace-keeping and peacebuilding. In addition, cases emanating from these conflicts have been dragging in courts for years. People are now tired of going to courts to seek redress and justice.

If the right of every person to access justice is to be realised, then these hurdles must be addressed. The sustained implementation of the Constitution is critical to ensuring the necessary raft of reforms required to achieve sustainable peace, development and prosperity for Kenya are implemented. Central to the Constitutional reforms was the clear mandate for judicial reform and the significant premium on equitable access to justice in Kenya. The Constitution further entrenches a robust and more independent Judiciary under Chapter Ten to oversee the protection of these rights and liberties. With more than 8 years since the promulgation of the Constitution of Kenya, 2010, and in light of the gains made since then, much more remains to be done to address the challenges experienced by average citizens in accessing justice in Kenya.

¹⁵ Article 67(2) (f). Constitution of Kenya, 2010

¹⁶ Mining projects include Titanium mining in Kwale, coast region and coal mining in Kitui, eastern region.

¹⁷ One of the projects includes the Galana-Kulalu Ranch which has about 1000 Ha under irrigation.

¹⁸ This includes projects such as the standard gauge railway and the Lamu Port project.

The 2017 East African Bribery Index¹⁹ released by Transparency International Kenya brought to light a scenario where justice is on sale, with the Kenyan judiciary being one of the judiciaries that receive the biggest share of bribes paid by citizens to either influence the outcome of law suits or fast-track decision-making. The rampant corruption has led to delays in delivery of judgements due to disappearance of files at the registry, among other tactics, which judicial officers employ to block justice. This revelation is therefore a clear depiction that more still needs to be done in the fight against corruption, particularly in the Judiciary, where resolution of various injustices takes place. There is thus need to strengthen the capacity of various institutions of governance to deal with the pervasive problem of corruption, to enhance public confidence in their ability to play their part in combating the vice.

That notwithstanding, it is instructive to note that the Constitution now recognises and promotes the use of Alternative Dispute Resolution in settling disputes. However, such ADR mechanisms and traditional justice systems (TJS) ought to be guided by the law and the national values and principles of governance as stipulated under Article 10 of the Constitution. Principles such as the respect for the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, transparency and accountability are key.

There is need to take stock of the legal, institutional reforms and progress made towards making access to justice for all a reality in the country. Respecting land and tenure rights – whether traditional, customary or modern – is thus the basis for good land governance in Africa. Land governance brings together men and women as users and producers on land, and the state; as a service provider to its citizens and the enabler and protector of their prosperity. If the state is corrupt, and laws to protect citizens’ rights do not exist or are not enforced, land governance and land rights fail. In that case, the livelihoods of men and women whose prosperity is based on secure access to land are severely undermined.²⁰

- **THE CASE OF GHANA**

Ghana is an agrarian economy with a total land mass of about 238,540 sq. km and an estimated population of 24million people. Agriculture contributes about 36% of Gross Domestic Product (GDP) and is the main source of livelihood for most Ghanaians, especially in the rural areas. To them, land is also of critical social, cultural and religious significance. It is widely regarded as a deity and a heritage won for the living by their ancestors in the various ethnic communities. The centrality of land to national development efforts in Ghana cannot be overemphasized. Ghana has attracted

¹⁹ Available at <https://tikenya.org/wp-content/uploads/2017/09/East-African-Bribery-Index-EABI-2017-.pdf> (last accessed 10th July 2019)

²⁰ Promises, Power, and Poverty“. 170 Oxfam Briefing Paper, April 2013

considerable attention from both multinationals and local companies in the area of agricultural investments.²¹

Ghana is characterized by a varied legal system where customary and statutory systems overlap. Almost 80% of its land is held under customary tenure, and is controlled by lineage or clan-based land-owning groups and allocated to individuals or households on a usufructuary basis. Most of the land is vested in chiefs, earth priests (who hold spiritual authority over land matters because of their role as the descendants of the first village settlers) or other customary authorities. Land is mainly owned communally along ethnotribal and family lines, with designated traditional authorities responsible for its management in their capacity as trustees.

The land priest, called Tindana, holds control over land ownership in most rural communities. The land priest is traditionally the community's spiritual leader. He is mandated to distribute land to members of the group, mediate land disputes and act as a link between the community and the spirits of their ancestors, who are believed to dwell in ancestral groves controlled by them.

In most parts of the country, particularly in the northern regions, women are challenged in accessing land except where there is a male guarantor, or where there is group ownership. Traditional leadership exercises strong influence over land allocation. This is a breeding ground for land corruption and serves to disenfranchise women.

Access to Justice in Ghana

In Ghana, access to justice is enshrined in various provisions of the 1992 Constitution. Article 12 demands from all absolute respect to uphold the fundamental human rights and freedoms as enshrined in the supreme law of the land, except in accordance with the procedure permitted by law.”²²

A major obstacle in accessing justice in Ghana is the lack of an efficient and fully-functional court system, with few poorly resourced courts to provide efficient services to all. Moreover, there are too many protracted land cases in courts where it takes between three to five years (at the minimum) and between eight to fifteen years (maximum), to successfully resolve land disputes in court. The situation has also been characterized by high risks of corruption, abuse of human rights and justice. Consequently, most Ghanaians prefer using other alternative means of dispute resolution mechanisms rather than the formal court systems.

Chiefs and other custodians of customary lands are continuously altering existing land-use plans by leasing land for uses which are often inconsistent with the proposals of the prevailing planning policy. In some cases chiefs prepare makeshift 'plans' for fast

²¹ Over 20 companies from countries like Brazil, Italy, Norway, Israel, China, Germany, the Netherlands, Belgium and India are engaged in investments, mainly for the cultivation of jatropha, on vast acres of lands in the Volta, Brong Ahafo, Ashanti, Eastern and Northern Regions of Ghana.

²² Article 14(1) of the Ghana Constitution

urbanising areas without the knowledge or endorsement of the designated planning authorities.

While traditional dispute resolution systems would have been ideal in resolving land conflicts at the community level, those entrusted with land frustrate the process. Access to justice must therefore create avenues for accessing justice that are targeted to support the disadvantaged through the establishment of systems, processes and social agencies to facilitate the provision of justice services.

There has been continuous debate with respect to traditional and informal justice systems in resolving land disputes. The main question has been whether justice can be made more accessible by encouraging such systems, or by facilitating a more collaborative approach between such systems and formal justice systems. Indeed, there have been proposals that some elements of informal justice should be incorporated into formal state processes.

Others have criticized the arrangement, with institutions asserting their position as follows:

*"[T]hose who have criticized [informal traditional justice forums] as being too traditional to promote development are often too simplistic in their arguments. They are bound up in the traditional-modern dichotomy in which 'traditional' is equated with 'backward' and 'modern' with 'advanced'. Development can thus only occur within a 'modern' framework. The main problem with this equation is that it is based on a very static view of tradition. It ignores the fact that traditions are often 'invented' and hence, very 'modern' in content."*²³

Recommendations to promote ADR address the Challenges to Access to Justice

- The government should encourage and institutionalise alternative dispute resolution to ease the backlog in courts and ensure expedient resolution of justice. There have been very least efforts to formalise these courts. There should be clearly defined structures to recognise and affect customary systems of justice, as a beneficial way to increase access to justice for all citizens.
- The government should collaborate with civil society and the private sector, to educate citizens on their land rights and assisting them in accessing justice.

²³ Keulder, C. 1998 "Traditional leaders and rural development", in D'EnglebronnerKolff, Hinz and Sidano (eds), Traditional Authority and Democracy in Southern Africa, Proceedings from the workshop, Traditional Authorities in the Nineties - Democratic Aspects of Traditional Government in Southern Africa, 15-16 November 1995, CASS, University of Namibia, New Namibia Books, Windhoek, pp. 289-323.

- There should be establishment of legislative and administrative frameworks for compliance with the objectives of human rights treaties and implementing the rulings of regional courts.
- A functioning justice chain that is gender responsive should be encouraged, so as to take cognisance of the gender issues at play in access to justice.
- There is need to sensitize chiefs and their communities about the impact of their actions in land transfers and illegal land dealings; to promote transparency of land transactions; and improving access to dispute resolution mechanisms.
- There is need for the civil society and parliament to engage in oversight to strengthen overall accountability in the justice system.
- While ADR cannot efficiently handle disputes between parties with greatly differing levels of power, they can be designed to mitigate class differences and overcome discriminatory norms among disputants.
- ADR can also be replicated and expanded to the national level while maintaining adequate human and financial resources.

6.0 CONCLUSION

Although ADR programs are effective in resolution of land disputes, they cannot replace formal judicial systems which are necessary to establish redress fundamental social injustice, provide governmental sanction, or provide a court of last resort for disputes that cannot be resolved by voluntary, informal systems. There is need for a comprehensive approach to Justice and the Rule of Law. It should encompass all persons affected by land corruption. A “one-size-fits-all” does not work.

If the right of every person to access justice in the land sector is to be realised, then these hurdles must be addressed.

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