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# **Pastoralism and Land-Tenure Change in Kenya: The Failure of Customary Institutions**

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## **ABSTRACT**

Until recently, the Pokot in the highlands of the Baringo area in Kenya have practised semi-nomadic pastoralism. Today they are rapidly sedentarizing and in many areas suitable for farming, they are adopting rain-fed agriculture. As a result of these dynamics, claims to individual property on *de facto* communal rangelands have arisen, and to such an extent that they seriously threaten the peace of the community. This article explores the conflicts that emerge in the transition from common property to private tenure. Using locally prominent land disputes as exemplary cases, it focuses on the role of traditional gerontocratic authorities in the attempt to resolve a growing number of land disputes; on the emerging power of patrilineal clans and local elites in the enforcement of access to land; and on the incompetence of government agencies to intervene. The failure of customary institutions to ensure land tenure security leads to a situation in which women and marginalized actors in particular are threatened with displacement, and in which most local actors want the state to intervene and establish formal property rights.

## **INTRODUCTION**

On a hot morning in November 2010, I was sitting under a large acacia tree, the habitual meeting place of the elders in highland East Pokot, waiting with about a dozen village seniors for the group of claimants to come and attend the hearing of the land dispute they had scheduled for the late morning. At around noon, the situation became tense. Samuel, the current resident of the disputed piece of land, came with a dozen clansmen he had rallied for support. Rumour had it that the claimants, members of the large Kasait clan, had rallied a much larger number of clan members. While Samuel anxiously told the elders that the Kasait had threatened to burn down his house if he did not leave the land, a large crowd suddenly appeared on the

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dusty main road. They quickly approached the meeting place, yelling and chanting aggressively, swinging clubs and fighting sticks. Alarmed by the sheer number of opponents, Samuel's small bunch of followers escaped to the nearby headquarters of the district officer (DO) where they asked the local administration police (AP) unit for protection. Meanwhile, some of the elders rushed to stop the enraged crowd on the main road. They convinced them to hand their clubs and sticks to the police officers and to move to the DO's headquarters and install themselves peacefully in the shade of the surrounding trees. Shortly thereafter, the trial of Kasait versus Samuel began, supervised by armed police officers.

Quarrels about land ownership in the East Pokot highlands started in the mid-2000s. Until the 1980s, the area had been used predominantly as common rangeland; since then, many of the hitherto semi-nomadic Pokot had started to settle permanently. Immigration of lowland Pokot into the fertile highland areas, steep demographic growth rates, and the rapid transition to rain-fed crop cultivation had contributed to an increasing shortage of arable land. Although land in East Pokot is communal, and private tenure is officially not recognized,<sup>1</sup> many of the highland areas, particularly those close to settlements and roads, are nowadays demarcated, fenced and privately claimed.

The concomitant conflicts bring to the fore the substantial and highly controversial body of literature on land and land tenure in Africa and beyond. These debates mostly revolve around formal versus informal and private versus communal tenure, and customary versus statutory law (Chimhowu and Woodhouse, 2006). Anthropologists, as Pauline Peters (2009: 1317) observes, 'have contributed both to the formation of these dichotomies and to criticism of them'. The case of East Pokot awkwardly falls in a gap between these divisions: in de-jure terms, land is strictly communal, while de facto large chunks are claimed as private property. Mounting conflicts over tenure, therefore, are beyond the jurisdiction of statutory law.

Customary institutions for conflict resolution, however, as I will demonstrate in this contribution, are neither designed to deal nor capable of dealing with the increasing demand for individual tenure. In this vacuum, an ongoing scramble to secure the best plots of land has emerged, in which mostly the strong benefit: local elites and large, powerful clans. As a result, tenure insecurity is growing and people not only emulate official practices to formalize property but also call for state intervention and demand title deeds. Expectations of pending formalization are nourished by the constitutional changes in Kenya, which promise devolution and new legal frameworks for

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1. At the time of writing the article, this was indeed the case. However, as the manuscript is being prepared for publication, the situation is changing. The way these changes currently impact the situation in East Pokot underlines the enormous demand for individual land tenure in the area. However, how circumstances on the ground will change in the long run remains to be seen. Please also see footnote 8.

land tenure. The dispute introduced at the outset of this section is just the tip of an iceberg of land-related property conflicts that are erupting in the area. Yet, this specific dispute, which will be referred to as the Kasait vs Samuel case hereafter, caught the public imagination in East Pokot during my period of fieldwork.

In this article, I focus on the formation of property in the context of rapid socio-economic change and in the absence of canonical rules, and on the role of customary law. While there is a substantial body of literature that deals with the motivations and outcomes of changes in landed property rights, relatively little is known about how property rights actually change (Mwangi, 2009). This contribution, therefore, concentrates on the dynamics of change and describes the formation and interpretation of informal rules, the emulation of official procedures, and the difficulties faced by those responsible for restoring civil order. It focuses particularly on the role of clan bonds, which are revived in these times of change and contribute to an expansion of conflicts. In an almost Gluckmanian fashion, the Kasait vs Samuel case condenses the crucial features of land-related conflicts in East Pokot. However, this work is not intended to be a study in legal anthropology; I use it rather as an extended case to highlight the underlying ‘matrix of social process’ (Gluckman, 1973: 622).

## **LANDED PROPERTY: THEORETICAL BACKGROUND**

In standard neo-classical economics, explicit and formal tenure rights and their protection and enforcement by statutory law were long depicted as preconditions for economic prosperity, societal well-being and environmental protection. Across the globe, the World Bank, the IMF and other major development agencies have urged aid-dependent governments to rigorously promote privatization and title formalization. The often dismal outcomes of this policy in sub-Saharan Africa, post-socialist Eurasia and elsewhere have been documented widely, and there is a similarly long-standing history of challenging the assumed universality of this liberal paradigm of property rights (Hann, 1998). In the past decades, however, institutions that previously promoted the top-down implementation of privatization programmes have increasingly started to promote common property alongside customary management as a cost-effective, adaptive local solution (Fitzpatrick, 2005; Li, 2010), often with the underlying assumption that property relations will evolve autonomously towards more exclusive forms of tenure (Platteau, 1996). It is now widely recognized that formalization of titles can be highly inefficient and that well-established local systems may be more effective (Sjaastad and Cousins, 2009). This is in line with what has been described as the worldwide ‘revitalization of political authorities and legal frameworks based on neo-traditional, religious, ethnic or local legitimizations’ (von Benda-Beckmann et al., 2009: 5–6).

The shift towards an official recognition of customary tenure was supported by the work of Ostrom (1990) and others, who convincingly demonstrate the robustness of customary management of common property resources, provided that a certain set of rules are observed. Two main caveats exist: first, land under customary tenure may be vulnerable to interventions and even re-allocations by predatory states, for example, in the event that land is sold to investors (Peters, 2013a). This dynamic is currently less relevant to East Pokot. More important in the case at hand is a second observation, namely that on the ground, traditional rules are often vaguely defined, and therefore leave ‘much scope for interpretation and manipulation’ (Hann, 1998: 7). As Sara Berry (1993) has convincingly demonstrated for sub-Saharan Africa, power relations, cultural meaning and negotiation rather than rules determine access and tenure in customary settings. Not surprisingly, therefore, observers of customary land management come to different, sometimes contradictory conclusions: while some see rather harmonious and equitable outcomes, others point to division, inequality and conflict (Peters, 2013b: 544). One point of entry for many critiques is the presupposed notion of tightly knit, cohesive and homogenous communities. This problematic notion of community cohesion tends to ignore that any collectivity contains individualized and at times conflicting interests (Agrawal and Gibson, 1999; Li, 1996). The situation in East Pokot clearly highlights this point, and will be touched upon later in this contribution.

As some observers have pointed out, political and economic changes place additional stress on property relations (Ho and Spoor, 2006) and may reveal how closely tenure regimes are connected with questions about the nature of authority (Lund and Boone, 2013). Thomas Sikor and Christian Lund aptly describe the link between property and authority: ‘The process of recognition of claims as property simultaneously works to imbue the institution that provides such recognition with the recognition of its authority to do so’ (Sikor and Lund, 2009: 1). Another body of theory that is illustrative in this context is the bargaining theory of institutional change (Knight, 1992). As Knight and Ensminger, for example, show, in conflicts parties with greater bargaining power are likely to change and enforce social norms and institutions so as to alter distributional outcomes in their favour (Knight and Ensminger, 1998). In the Pokot case, clan size, money and the threat of violence constitute such bargaining advantages, and thus impact on the outcome of land-related conflicts.

As has been outlined elsewhere, pastoralist systems in Eastern Africa are undergoing a process of rapid change (Galvin, 2009; Korf et al., 2015). This is certainly also true for the Pokot in the Baringo area. Elsewhere, we have outlined some of the pertinent causes and consequences of these changes with regard to public spaces (Bollig et al., 2014), wildlife conservation (Greiner, 2012), intensification of agriculture (Greiner and Mwaka, 2016; Greiner et al., 2013) and interethnic conflict (Greiner, 2013).

Finally, changes in tenure systems under conditions of increasing competition for land also often go along with changes in social structure (Peters, 2002). A pertinent example of this relationship is provided by Parker Shipton (Shipton, 1984a, 1984b). In the fuzzy region between common property and clan-controlled land, he identifies two basic agrarian systems in late colonial East Africa which he calls locality-based and descent-based systems. In both systems, grazing rights are public, and rights to land for cultivation are assigned on an individual or family basis. A rough summary of the differences between the two systems reveals that in the former, exemplified by the Bantu-speaking Sukuma and Nyamwezi, households move from one location to the other more frequently, land is allocated to individual households by the traditional authorities, and only labour (i.e. cultivating the land) earned and maintained one's right to a specific parcel of land. In the latter system, exemplified by the Nilotic Luo, moves are less frequent, and claims to land are based on lineage and ancestral traces. The occurrence of these systems, Shipton (1984a) argues, mainly depends on population pressure and land scarcity. While the locality-based system usually correlates with the presence of abundant farmland, the descent-based system occurs predominantly in areas with high population densities. Moreover, with increasing population pressure, increasing scarcity of land and restricted residential mobility, the former system might gradually transform into the latter. Shipton (1984b) refers to the Tanzanian Nyakyusa among others to illustrate such dramatic shifts.

Before returning to the Kasait vs Samuel case and disentangling the dynamics of land-tenure change in East Pokot, I will provide a general overview of the research area and of my methodological approaches.

## **STUDY AREA AND METHODOLOGY**

Research was conducted in the semi-arid savannah region of East Pokot, which is located in Baringo County in the Kenyan Rift Valley Province. The research area covers a transect that stretches approximately 50 km from the shores of Lake Baringo on the Rift Valley floor (about 900 masl) to the highlands, where East Pokot merges with the Laikipia plateau (about 1,800 masl). East Pokot is almost exclusively inhabited by the Pokot people, who moved into the Baringo area during the 19th century. During that process, the Pokot, who are linguistically related to Western Kenyan agro-pastoralists, adopted a fully pastoral nomadic lifestyle. Culturally they are therefore more closely related to their pastoralist neighbours, such as the Karimojong and the Turkana (Bollig, 2006). The patterns of transition from pastoralism to rain-fed crop cultivation in relation to the bio-geophysical attributes of the area have been published elsewhere (Greiner et al., 2013). Suffice it to say here that in some areas, particularly in the highlands, soils and climatic conditions are suitable for crop cultivation.

In contrast to most neighbouring areas, land in East Pokot is strictly communal, and placed under the trusteeship of Baringo County Council. In the Tugen Hills at the western end of the Baringo basin, for example, land privatization started as early as the 1960s (Little, 1992). In neighbouring Samburu, towards the northeast, group ranches were established in the early 1970s (Lesorogol, 2008b) and in West Pokot, towards the northwest of the Baringo area, private land titling and leasehold started in the 1970s (Nangulu, 2009). In East Pokot, however, neither NGOs nor government institutions intervened to promote a change towards individual titles. Quite in contrast, still in 2011 the highest government representative, the district commissioner (DC), revealed himself to be an outspoken opponent of private titles, and the sitting member of parliament (MP) of East Pokot, when confronted with the issue at public meetings, avoided any clearly stated position.

Most Pokot in the Baringo area have until recently lived a semi-nomadic pastoral life, and in most parts of the lowlands this lifestyle continues to dominate. In what follows, I will refer to this part of Pokot society as the pastoral Pokot. Among pastoral Pokot, people are associated with their place of origin, but in contrast to the Maasai, the Pokot did not develop a sectional territoriality. Access to resources was defined along tribal lines, 'linking resource access to ethnicity and de-linking it from kinship' (Bollig and Österle, 2008: 306). Yet the often reiterated observation that pastoralists have 'well-developed systems of communal land management' (Lesorogol, 2008b: 309) no longer holds true for East Pokot. From the 1980s onward, Michael Bollig and Matthias Österle observe an increasing demise of common-pool management. They identify a lack of institutional adaptability as the root cause of this demise, noting that the Pokot operate with an institutional set-up that has worked for sparsely populated areas but is 'doomed to fail when applied to a population which has increased tenfold over the last 80 years' (Bollig and Österle, 2008: 314).

As in many other areas of north-eastern Africa (Anderson, 1988; Smith, 2005), aid agencies established small-scale agricultural schemes in East Pokot during the droughts of the 1980s to help destitute pastoralist to cover their drought losses. With the exception of some highland areas, permanent settlement did not occur in East Pokot, but people re-established themselves as pastoralists, leaving only the poor behind. Since the 1990s, however, this has changed. Crop cultivation occurs more frequently, even in less suitable areas, and a growing number of Pokot settle in areas suitable for rain-fed agriculture, often building their houses on the land they cultivate. Several factors increasingly prevent extensive forms of livestock keeping and favour alternative forms of sedentary livelihoods, and thus contribute to the rapid transition towards crop cultivation and agro-pastoralism. The tremendous speed of population growth in the area is undoubtedly a prime driver of land-use change. According to National Census figures, the population in East Pokot has more than doubled, from about 63,000 to 133,000 in the decade

between 1999 and 2009.<sup>2</sup> Loss of livestock due to droughts, diseases and raids by neighbouring groups forces people to seek alternative incomes. Increasing violence and livestock raiding along all district borders has severely limited herd mobility, and the recent implementation of wildlife conservation areas has led to progressively increasing levels of rangeland fragmentation. Additionally, the pervasive bush encroachment has contributed to a dwindling carrying capacity (Bollig and Österle, 2008). Fundamentalist Christian churches, which have gained tremendous influence in some areas, preach a complete break with traditional pastoral values, and the increasing desire to send children to school forces households to settle down more permanently.

While a more elaborate discussion of the various factors falls beyond the scope of this article, it is important to emphasize that combined they contribute to a growing pressure on the land, and, along with this, to its increasing commodification. This trend is amplified by promises of land reforms, as promulgated in the constitutional reforms of Kenya since 2010, and by expectations of coming infrastructures, such as the Lamu-Port and Lamu-Southern Sudan-Ethiopia Transport Corridor (LAPSSET). Although it is illegal under current law, land is traded among individuals, sometimes even speculated with. During the time of my fieldwork, land conflicts, sometimes resulting in the eviction of long-established households from their land, were the order of the day.

Data for this article were collected in a year-long ethnographic field study in East Pokot from October 2010 to September 2011, and during three shorter trips to the area, one of these a recent follow-up study in early 2016. Data collection methods included ethnographic observations, qualitative and quantitative interviews — which were undertaken with the help of a local interpreter and fieldwork assistant — and questionnaire-based surveys on household parameters (N = 271) and on attributes of local agricultural production systems and plot sizes (N = 48). I was able to participate in the negotiations of three land cases. Together with my research assistants, I observed the negotiations and recorded them, later transcribing them step-by-step. I interviewed chiefs, community elders and members of the parties involved. Furthermore, I documented additional cases in which I could not participate based on interviews, and, in some cases, on the notes taken by chiefs and DOs. My work also benefits tremendously from the availability of ethnographic long-term data recorded by Michael Bollig, who has worked in the area since the late 1980s.

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2. Demographic data are based on National Census figures. Intra-decadal growth rates from 1979 to 1989 and from 1989 to 1999 are 4.1 per cent and 4.5 per cent respectively. Such growth rates are high but may be natural. The census figures, however, are probably based on extrapolations and not on empirical data. Annual growth rates from 1999 to 2009 are given as 7.4 per cent, which does not reflect a natural growth rate. I do not have a solid explanation for the 2009 growth rates, except for failures in the methodological procedures, as there is no significant in-migration into East Pokot. However, it remains uncontested that the demographic growth in the area is tremendously high.

**AN EXEMPLARY PRECEDENT**

Here, I return to the Kasait vs Samuel case, which condenses some of the crucial features of land-related conflicts and reveals some of the underlying complexities. In a nutshell, the story is as follows. Samuel, a widely respected community elder, was asked by members of the Kasait clan to abandon the piece of land in the highlands on which he lives with his family and which he has cultivated since the mid-1970s. The claim by the Kasait was made on the grounds that their father, Lochilit, had lived there for some years during the 1960s. The Kasait clan is one of the largest clans in East Pokot, and they are known for having been very rich in livestock in the past. The claimants' families had also lived in the highlands for some time, on other pieces of land, until they moved towards the lowlands in the early 1980s. Other people moved into their former lands, built houses, and began cultivating maize. In 2010, however, several members of the Kasait clan had decided to claim back land in the highlands, which they considered to be theirs. By then many members of the clan had lost their animals in subsequent droughts. They successfully evicted two people from the area where they had lived before they moved to the lowlands — one by sheer threat of violence, the other by lodging a successful claim to his land in a local court case. Now they were expanding their claims, and approached Samuel, urging him to leave his land. Samuel refused and started raising awareness in public meetings: what if more people began claiming land where their nomadic forefathers had once temporarily settled?

This very point set the Kasait vs Samuel case as a precedent. It should be mentioned here that in the 1960s and 1970s the highland areas were sparsely populated, and if people farmed at all, they cultivated wherever they found suitable soils. The highland areas around the market town of Churo constitute a transitional zone between the Rift Valley escarpment and the Laikipia high plateau consisting of long hillsides and large valleys that provide good conditions for rain-fed cultivation. From the 1980s onwards, when more and more Pokot started to settle down permanently and began cultivation, people chose a piece of land and approached the chiefs or the elders to get permission to occupy the area. What evolved was a locality-based system of land tenure (Shipton, 1984a), where settlement patterns emerged irrespective of any clan affiliations. Towards the early 2000s, however, more and more Pokot had moved from the lowlands into the highlands. Arable land became scarce, often only available by inheritance or purchase, and conflicts over ownership arose. Increasingly people started claiming back land, which had once been occupied by their families.

In such cases, the elders usually ruled on the basis of what by then was established as rule, namely that land can only be claimed back on the basis that the claimants can prove that they or their families had cultivated crops there before. Land that only served as temporary residence could not be claimed. What is now established as a rule is said to go back to the statement of a



late Chumo-generation elder who, towards the end of the 1970s, suggested that one had a right to the place where one had first started crop farming. Other rules regarding land allocation do not exist, and issues, for example, of inheritance, boundaries or trespassing are decided case by case. The question that emerged in the Kasait vs Samuel case was: what constitutes the beginning of cultivation? Common sense in East Pokot has it that cultivation starts with the tilling of the land with a *jembe* (Kiswahili: hoe), but it is also acknowledged that in the early days of cultivation, people also used a *panga* (Kiswahili: broad-bladed knife) to dig holes for the seeds. Many families in the area hoped that the elders would establish clarity regarding this point once and for all, because they were afraid of becoming victims of further claims.

In Churo the case was also perceived and discussed as a confrontation between traditional pastoral and modern Pokot values. The Kasait have always been the clan of ritual prophets, who in the past were highly respected and feared for their magical powers. In the highland areas, however, where Christian churches and formal education have gained increasing influence in the past decades, the clan has lost much of its power and prestige. In contrast, Samuel, who is in his late 50s, epitomizes the modern Pokot. He has attended secondary school and teachers' college, and joined a private Christian University where he graduated in Theology. He was director of a local school until he resigned a couple of years ago to fully dedicate himself to his role as a pastor of the African Inland Church.

In the trial, Samuel argued that the Kasait clan had no right to claim his land, because it had only served as a temporary residence for their late clan members, and not as a *shamba* (Kiswahili: agricultural plot) where they had cultivated field crops. He pointed out that during the 1940s and 1950s many other people had subsequently lived on the ground, including his father. Yet, he argued, this fact alone would not establish his ownership of the area; only the fact that in the 1970s he had tilled, fenced and cultivated the area would justify his claim. The Kasait people on the other hand claimed that a late daughter of Lochilit had, in a time of food shortage, planted maize near the homestead, and this fact would very much substantiate their claim to the land. If they had cultivated maize at all, Samuel countered, they had done so by digging the ground with a *panga*. However, for want of witnesses, the assertion that maize was actually cultivated was hard to prove, let alone to refute.

After five hours of tense negotiations, the old men who were assigned by the community to arbitrate brought up a verdict in favour of Samuel. Mbira, one of the elders, summarized: 'Let us not claim where our forefathers have stayed or lived in the past, because everyone might be evicted from where he stays currently'. A landmark decision regarding the question of what constitutes the beginning of farming, however, was not made. The verdict that Samuel should stay on his land was immediately refuted by the representatives of the Kasait clan. They accused the Churo elders of being

biased, announced that if necessary they would take the land by force, and cursed Samuel and his family.

As with virtually all land-claim cases I have participated in or heard of, the conflict didn't end with the verdict. About two months after this event, another trial took place. It turned out that none of the Churo elders who had participated as arbitrators in the first trial attended this event, and neither did Samuel, who claimed that he had to guard his *shamba* on that specific day because a bunch of Kasait people were hanging around threatening to burn down his house. Apparently the meeting ended with the verdict that Samuel should immediately leave the land in question. Some days later, Samuel showed me a letter signed by a dozen attendants of the second trial, stating that he (Samuel) agreed to leave the land within a period of one month. Samuel never signed, but sent the unsigned document to the DO, the DC and a police station along with a statement that he and his family felt threatened by members of the Kasait clan. A week later, the council of elders in Churo also sent a letter to the DC, stating that in their view only the first verdict, favouring Samuel, was valid. Shortly thereafter, the DC placed an order to all chiefs to stop all land-claim cases until further notice, because they were threatening social peace in the area. Apart from freezing the Kasait vs Samuel case for the remainder of my time spent on fieldwork, the order had little effect. The scramble for farmland continued, as did the often helpless attempts by the elders to arbitrate the ensuing conflicts in their communities, a subject upon which I will dwell in more detail in the following section.

### **THE FAILURE OF TRADITIONAL GOVERNANCE**

Customarily, disputes among Pokot were settled by what Sally Falk Moore (2000) refers to as self-help. People met in neighbourhood councils and discussed the matter until a solution to the conflict was found which was acceptable for all parties. Chiefs and other state representatives were not involved (Bollig, 1992). In the recent land-based conflicts, the dispute is also submitted for arbitration by an informal tribunal of elders, who act as representatives of their respective neighbourhoods. They are, however, usually assisted by one or more area chiefs, who often wear their uniforms as insignia of their official status. Additionally, many of the elders nowadays are retired chiefs or councillors themselves, who simultaneously act as peace committee members. They are all male. In principle, disputes under arbitration by elders can only be resolved if both parties accept the verdict, because formally it is not legally binding.

According to Moore, societies with such legal principles usually have 'well-established conciliation procedures and well-established ideological frameworks which support both conciliation and fighting' (2000: 99). While this was the case with the pastoral Pokot (Bollig, 1993), this is no longer given in those areas where land-tenure and land-use changes are most advanced.

Here, the demise of nomadic pastoralism has led to a partial erosion of the traditional gerontocratic governance structures (Bollig et al., 2014). The problem, however, is that according to the Kenyan Trust Land Act (2010) it is exactly these structures that are in charge of administering communal trust land: land rights shall be enjoyed ‘by virtue of existing African customary [sic] law’ (National Council of Law Reporting, 1970/2010: 69/18).<sup>3</sup>

The massive and conflict-laden processes of land privatization, fuelled by the anticipation of changing institutional frameworks, however, bring about unexpected challenges to customary law, which in East Pokot is largely based on pastoralist experience. Many younger Pokot, therefore, complain that the background of the elders who are the custodians of customary law doesn’t extend much beyond circumstances directly related to issues of livestock and rangelands.

Members of the local elite, particularly labour migrants, who have been exposed to realities outside East Pokot are particularly successful in taking advantage of this awkward situation, and demarcate land not only for agriculture but also for speculative purposes. Given the fact that local elites usually have considerably more material funds with which to sustain their claims this is not surprising, and has been reported from other settings as well (Lesorogol, 2008a). District Commissioner (DC) Amos Mariba summarized this trend as follows: ‘We have seen a situation where some of the people who are bringing the disputes are elites, people who are educated, and they don’t even recognize the authority of the elders who normally have been solving these disputes at that level, and always they have been solving it amicably’.<sup>4</sup> He is particularly worried about the growing number of evictions from land. For such evictions one usually needs an official court order, yet official courts are not responsible for solving disputes over trust land.

Another powerful player that has emerged in the current processes of land reallocation is the patrilineal clan. In the pastoral nomadic setting, clans rarely acted as cooperative groups, and access to resources was not linked to clan membership (Bollig and Österle, 2008; for a similar observation in West Pokot, see Dietz, 1987). In the scramble for individual land ownership, this has changed, as the Pokot increasingly deploy the power of clans to assert new claims to land. Competing claims to land are thus no longer conceived of as conflicts between individuals, but more often as conflicts between clans. For customary trials, the opponents often gather as many male clan members as possible for their support, and in the negotiations, the contestants are addressed as members of their respective clans. Chiefs and elders largely agree that usually either a large clan with which to impress the jury or sufficient funds with which to bribe them are required in order to enforce a claim to land. Poor Pokot who have moved from the lowlands

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3. Until the new Community Land Bill is enacted, which at the time of research and writing, was still pending in Parliament.

4. Interview with author, 29 June 2011.

into the highlands to start cultivation are the main victims of this situation. Lacking sufficient numbers of clan members to lend them support in land conflicts, they are increasingly also branded strangers by the highland Pokot.

Such situations, in which disputes between individuals expand into group confrontations, have been described as exemplifying ‘the principle of expanding dispute’ by Moore (2000: 99). Among the pastoral Pokot, the involvement of descent groups in conflicts is rare, and only known in cases of homicide (for details, see Bollig, 1993). In the highland areas, however, access to land is often enforced by clan affiliation. This relates to Shipton’s observation that under conditions of agricultural intensification, demographic pressure, and growing scarcity of land, the acquisition of plots is easier in clan-based systems. ‘Staying on and inheriting part of a paternal holding is an easier way of obtaining land than asking the headman of a crowded village or neighbourhood’ (1984b: 620).

Moore points out that in societies that have a principle of expanding dispute, legal disputes are likely to ‘figure significantly in the continuous process of definition and redefinition of major structural relationships’ (Moore, 2000: 130). The increasing significance of clans in claiming and enforcing property rights to land in East Pokot might well serve as a case in point. Whether this could lead in the long run to what Shipton (1984b) has described as the transition from a locality-based to a descent-based tenure system might well be doubted, as clans are currently only used as vehicles to assert claims. For the latter system, however, the densely settled highlands of the agricultural neighbours of the Pokot, particularly the Marakwet (Widgren, 2006) and residents of West Pokot (Davies, 2012) are classical examples. This, however, falls beyond the scope of the time frame of my data. I would rather like to point out that not only do patterns of ‘expanding dispute’ threaten tenure security in the area, but so also do conflicts along gender lines. Esther’s story is a case in point. It highlights how the current legal situation in East Pokot threatens women’s access to land, and also demonstrates the impotent position of state officials *vis-à-vis* the mounting conflicts. Esther’s case introduces the final part of this article, in which I also sketch out why many Pokot demand formal property rights.

#### **DEMAND FOR INDIVIDUAL PROPERTY RIGHTS**

Esther’s story takes place in Chepkalacha, a location in the hot, undulating plateaus close to the road that stretches towards the highlands. Despite the area not being particularly suitable for crop cultivation, several pockets of cultivation have been established since the 1980s. In 2001 Esther, a single woman who is now in her forties, asked the council of elders for a piece of land. She was given a considerable piece of about 20 acres, which she

started to clear and cultivate bit by bit. In 2005, a group of young men from various local families teamed up, approached her, and demanded that she leave the largest part of the land to them. They based their claim on the notion that in their view, according to Pokot customs, a single woman had no right to own land. Although this stood in clear contrast to the judgement of the elders, who had agreed to give the land to Esther a few years previously, the local area chief backed up the young men. Esther did not give in, however, and approached the village elders, who intervened on her behalf and managed to stop the men. A year later, however, the quarrels resurfaced. This time, the number of young men had increased, and they just began dividing the land among themselves and cleared the remaining bush from the divided land. When she approached them and complained, some of the men beat her severely. After she was released from hospital, she approached the DO, who came two months later and publicly confirmed that the land belonged to her. When he left, the chief and the young men, however, argued that the DO had no right to interfere in land matters. Esther reported this back to the DO, who forwarded the case to the DC. One month later, the DC came to Chepkalacha and called a meeting, which ended with the same conclusion as had the DO's visit: it was confirmed that the land rightly belonged to Esther. Apparently the DC had given instructions to the chief to inform the young men to leave the land, but for one year nothing happened, and the men did not leave the land. Towards the end of 2008, Esther went to the District Headquarters in Chemolingot to talk with the DC about the case. He referred her to the DO, who was just about to be transferred, so she had to wait for his replacement. In March 2009, the chief publicly encouraged the young men to take over all of Esther's land. She reported this to the new DO. About a year later, he called a village meeting and announced that the piece of land rightfully belonged to Esther. During the time of my fieldwork, the struggle resurfaced anew. The old chief had died, but the then-newly appointed area chief of Chepkalacha told me that he sympathized with the claims of the young men to the land Esther owned.

Like the Kasait vs Samuel case, Esther's story highlights some of the fundamental problems of customary land law in East Pokot: it is very open to interpretation and it is difficult to enforce. The 'principle of expanding conflict', the waning authority of the elders as custodians of traditional law, and the incompetence of public authorities leave a power vacuum, which favours powerful actors, enables thuggery and speculation, and leads to high tenure insecurity. About 67 per cent of all household heads surveyed throughout my research transect spoke out in favour of private land titles. In the highland area around Churo this figure stands at 85 per cent. Overwhelmingly, enhanced tenure security was given as the reason for this choice.

Henry, a Churo elder who was involved in the early NGO attempts to establish crop cultivation in East Pokot summarized: 'Yes, agriculture

spreads out. This is closely linked with the idea that land should be demarcated and privately used'. Referring to the ongoing struggles for land he added that 'the sense of ownership is coming'.<sup>5</sup> The local Churo development committee, of which he is a member, has appealed to the DC that land should be demarcated and individual titles should be given to the people. Other communities in the area have started similar initiatives. Particularly in the highland areas, where formal education, experiences gained through labour migration, and the influence of Churches and NGOs increasingly displace traditional pastoral values and provide alternative epistemologies (Bollig et al., 2014), people associate formal land titles with modernity, citizenship and development. They point to the fact that farmers in neighbouring districts enjoy such privileges, and demand equal treatment. Similar dynamics have been observed by Carolyn Lesorogol in Samburu, who notes that 'for those individuals who sought private land ownership, the values of modern Kenyan society played a formative role in defining the reference group from which they sought approval' (2003: 540).

The chiefs in the affected areas also want titles. Speaking out in a group conversation with four area chiefs from the highlands, assistant Chief Julius Loremoi, referring to the conflict dynamics outlined above, explains why the chiefs are in favour of titles:

people now come claiming that their forefathers have lived on this and that piece of land and that it therefore rightfully belongs to them, even if the occupant of that land is a fellow Pokot. Generally speaking, the more people you are in a family, the stronger your clan is, the better are the chances of successfully claiming land. Sometimes, these conflicts turn violent, very violent, and we have to separate families from one another in the process of arbitration. This is why we want the titles to be demarcated officially by the surveyor. It will help to establish peace in the community.<sup>6</sup>

And yet, up to the end of my year-long fieldwork in 2011, the proposal of the Churo development committee, which had been forwarded by the DC to the Ministry of Lands in Nairobi, had not been assessed, and local government officials were reluctant to give in to demands for private titling. DC Amos Mariba explained this dilemma.<sup>7</sup> He acknowledged that there has been a shift towards agro-pastoralism in some areas and he was well aware of the conflicts that have emerged in this process. But personally, he did not recommend the implementation of individual land titles, and his arguments were almost textbook-like phrases from advocacy work for pastoralism: 'I think that pastoralism is still a viable economic activity, because the meat industry in Kenya is generally dominated by these arid and semi-arid areas. And therefore, a subdivision of these lands into small parcels can make these lands uneconomical'. Justifiably, he was worried that the demand for private

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5. Interview with author, 21 October 2010.

6. Group interview with highland area chiefs, 10 November 2010.

7. Interview with author, 29 June 2011.

land would spread rapidly beyond those areas suitable for agriculture and lead to uncontrollable processes of rangeland fragmentation, a process that has been observed throughout dryland East Africa (Fratkin, 1994; Galaty, 2013).

When I returned to East Pokot in January 2016, the legal situation had changed. With the New Constitution of Kenya (2010), enacted after the general elections in 2013, the politico-administrative framework of land management had been transformed. The County Councils — hitherto custodians of trust land — became defunct, giving way to the new County Governments. Public and trust land were transferred to the County Governments. The National Land Commission (NLC) acted as trustee, represented at the County level by the County Land Management Board (CLMB). Trust land was renamed community land under the New Constitution, but the Community Land Bill (2015), which shall provide management and administration for community land, was still pending in parliament when this manuscript was completed.<sup>8</sup> Initially, the new Baringo County Government decided to classify all wards in what now is East Pokot Sub-County as group ranches. When these plans trickled down to the highland population in East Pokot, they resulted in a series of meetings in which the representatives of the County Government were persuaded to demarcate Churo-Amaya and parts of Tangelbei-Korossi wards for land adjudication, a process which in early 2016 had not yet started.

Meanwhile, people in the most densely settled highland areas make do with informal endogenous solutions, which could be referred to as ‘informal formalization’ (Peters, 2009: 1320) — solutions that ‘do not conform to the legislation but are tolerated and at times legitimated by government institutions’ (Lund, 2001: 151). Since 2000, the buying and selling of land in Churo is documented and witnessed by elders, relatives of the buyer and seller, and by an area chief who acts as government official, if the trading parties so wish. Figures from informal land sales documents (N = 51) that I managed to collect show that in the highlands, the price per acre has increased by almost 60 per cent in the period from 2006 to 2011. Similar dynamics of informal land markets have been documented elsewhere, in West Africa (Mathieu et al., 2002) and in Indonesia (Timmer, 2010) for example. While a more thorough discussion of these dynamics falls beyond the scope of this article, I would like to point out that, although such contracts are largely respected in the area, they only provide the illusion of legal certainty. As DC Mariba put it in one interview: ‘Whatever happens up there in Churo, it is not legal and people can lose the informal titles once a surveyor comes’.<sup>9</sup>

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8. On 31 August 2016, President Uhuru Kenyatta signed the Community Land Bill into law (Migiro, 2016). Please also see footnote 1.

9. Interview with author, 2 November 2010.

**CONCLUDING DISCUSSION**

To sum up, the transition from pastoralism to agro-pastoralism and rain-fed crop cultivation has led to a rapidly growing desire for individual land ownership. Customary institutions responsible for the arbitration of communal trust land, however, have an increasingly hard time adequately tackling the massive conflicts that are brought about by the emerging inequalities and exclusions with regard to differential access to land. The dynamics in East Pokot are particularly driven by expectations of land adjudication, rising property prices, infrastructure and an increasing involvement of patrilineal clans on the one hand, and local elites on the other, which use the emerging power vacuum to enforce their own access to land. This has led to a situation in which tenure is highly insecure, particularly for women and marginalized actors, and many Pokot would support state intervention.

The expectation by many Pokot that state intervention and subsequent official demarcation and titling of the land would be a solution to the current dismal situation is evident from the fact that people emulate state-like practices to substantiate claims to land and to create illusions of tenure security. Also, often in sheer desperation, actors who see their claims threatened approach state authorities for assistance in quarrels over land, although they are aware of the latter's inability to actually intervene with lasting effects. The issue here is similar to the dynamics described by Jaap Timmer (2010) in his work on customary institutions in East Kalimantan, Indonesia. Timmer writes that locally endorsed state law increasingly gains superiority over other kinds of arrangements, because 'people tend to attribute to the state a superior position, as they feel the need to legalize tenure arrangements' (ibid.: 710). This is reminiscent of an observation by Jean and John Comaroff, who write that the fetishism of law (represented by the state) has the power to 'carve concrete realities out of fragile fictions' (Comaroff and Comaroff, 2004: 192).

While the situation in East Pokot generally substantiates well-established theories of intensification under growing demographic pressure (Boserup, 1965; Desta and Coppock, 2004), it does not support the evolutionary theory of land rights (Platteau, 1996), which claims that tenure institutions will evolve autonomously to adjust to changing demands for individual ownership. On the contrary, the case of East Pokot demonstrates how customary institutions of conflict resolution are unable to provide sufficient tenure security under conditions of rapid socio-economic changes, demographic pressure, profound cultural transformations, and increasing endogenous commodification of land. The institutional weakness, which has already been noted by Bollig and Österle (2008) with respect to range management, is seriously aggravated in the context of land demarcation, where the fact that resources are finite becomes evident so rapidly.

In East Pokot, the challenges of land-use and land-tenure change in combination with rapid socio-cultural transformations have created a situation



in which customary institutions are no longer able to prevent arbitrary displacements of weak actors, let alone to settle the ever-growing number of land-based conflicts. In such situations, that is, ‘when informal institutions and practices no longer provide reliable methods of adjudicating land rights and ensuring land tenure security’, Jean-Philippe Platteau (1996: 76) suggests in his critical review of the evolutionary theory of land rights in Africa that ‘African governments should consider undertaking a formal registration procedure’. While the way in which state intervention in formalization, such as in titling programmes, leads to conflicts and other dismal outcomes among pastoralists, such as the Maasai, has often been deplored (Galaty, 1980; Mwangi, 2007), it is important to point out that customary tenure systems have undesirable outcomes too. Women, for example, are often systematically discriminated against regarding their rights to land (Khadiagala, 2001; Whitehead and Tsikata, 2003) and in Ghana, for instance, the arbitrariness of chiefly authority persists in customary land management (Boone and Duku, 2012; Ubink and Quan, 2008). Critics of formalization have further pointed out that titling may lead to distress-prompted land sales by the poor, and be primarily beneficial to the elites (Kingwill et al., 2006). Yet the case of East Pokot demonstrates that communal tenure doesn’t prevent land from being commodified, and that it is mainly powerful actors who benefit from the current situation. As Admos Chimhowu and Phil Woodhouse (2006: 348) point out, ‘processes of *de facto* commoditization of land sit uncomfortably with land policy informed by stereotyped non-market ideals of customary tenure’.

In the literature on pastoralism and land, much effort has recently been made to safeguard pastoralist mobility by promoting communal land rights (Abbink et al., 2014) and by securing rights to livestock mobility and key resources (Turner, 2011). Given the wide array of ecological variation and socio-economic heterogeneity in African rangelands, it is out of the question to give general recommendations pertaining to the privatization of such pastureland, given the complexity of formalization processes (Benjaminsen et al., 2009). It is necessary, however, to remain sensitive to those cases in which an endogenous need for privatization is expressed by local land users. As important as it is to enable mobility, endogenous demands for privatization are ‘a reality and need to be addressed’ (Lesorogol, 2003: 329). The key challenge for policy makers and administrators will be to find the delicate balance between these seemingly contrary entitlements.

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