

SECURING TENURE FOR CUSTOMARY LAND RIGHTS HOLDERS IN SOUTHERN AFRICA

POLICY BRIEF 61

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This policy brief reports findings from a study undertaken by researchers at the Institute for Poverty, Land and Agrarian Studies (PLAAS) with Livangingo, Platform for Youth and Community Development (PYCD), Zambia Land Alliance (ZLA) and Nkuzi Development Association. The researchers investigated the formalisation of customary land and its implications for women's tenure security in Mozambique, Zimbabwe, South Africa, and Zambia from 2020 to 2022. The researchers conducted fieldwork in Siluvo and Metuchira villages in Nhamatanda district, Sofala province in Mozambique; Munyokoweri, Mahachi, and Kondo villages as well as the Checheche growth point in Chipinge district, Manicaland province in Zimbabwe; Kaliwe and Vuzimumba villages in Nyimba district, Eastern province in Zambia; and Kwena Moloto and Ceres villages located in Capricorn West district, Limpopo province in South Africa. The study reached 335 respondents through in-depth interviews and focus group discussions. In addition, the researchers conducted a survey of 443 households across the four countries.

KEY MESSAGES

1. Decision-making and authority over customary land are largely vested in the executive and customary authorities rather than in women and men who are the real land rights holders and users.
2. Customary land access, use, and ownership for most women are still largely dictated by entrenched traditional authorities and patriarchal norms that perpetually place women under the authority of men and fail to protect their land rights.
3. Married women, divorcees, single women without children, and young women have lower tenure security over the land that they use compared to single women with children, whereas widows enjoy rights conditioned to patriarchal norms.
4. Across our study sites, almost one in every three households (30.3%) said that conflicts have increased in the past 10 years revealing deepening social and gendered divisions.
5. Across our study sites, 27.5 % of respondents feel insecure on their land and 45.6 % of the insecure fear that they may lose their land to government in the next five years.
6. Formalisation is accelerating the commodification of customary land leading to the rise of informal 'land markets' characterised by corrupt exchanges and are out of reach for the poor and vulnerable, especially women.
7. There are increased state and non-state interventions to individualise property rights in customary land leading to exclusive rather than inclusive tenure systems.
8. The majority of female respondents (81.4%) across the four countries prefer to live under customary tenure systems but with more democratic, transparent, gender-equal, and gender responsive land governance institutions.
9. The southern African states are reluctant to domesticate the international principle of free, prior and informed consent (FPIC).
10. Rural development initiatives and tenure reforms in the region seem to be informed by an ideological belief that the customary African relationship to the land is backward and unready for modern rural development.

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CONTEXT

One of the most dramatic post-colonial developments in southern Africa today is the drive towards formalisation of property rights in land, for people who live under customary tenure. Estimates show that 78% of land in Africa is held under customary tenure (Chimhowu 2019, 897). Customary tenure often refers to a set of unwritten, traditional, and socially acceptable rules about how to use and allocate land and natural resources (Cousins 2021). Formalisation takes different dimensions in different countries depending on local circumstances and the different interests of stakeholders. However, the formalisation programmes seem to be embedded in Western evolutionary models of land tenure rights that draw from a narrow construction of legality, which presumes that individual ownership is ultimately inevitable for all social contexts (Platteau 1996). Our study investigated four different forms of formalisation in four countries. The first is formalisation from above by legally mandated state institutions in Mozambique where the 1997 Land Law provides mechanisms through which individuals, communities, and investors could register land-use rights, including

a *Direito de Uso e Aproveitamento da Terra* (DUAT), which comprises a right to use and benefit from land that may be held individually or jointly. The second is formalisation from below through non-state institutions in Zambia. This process is neither recognised by the 1995 Lands Act nor the Zambia National Lands Policy of 2021. It involves the surveying of boundaries, registration and issuance of documents called customary landholding certificates (CLHCs) to individuals by the traditional leaders working with civil society organisations (CSOs) and Western donors. The third involves the conversion of customary land to state land for the government's various rural development projects in Zimbabwe buoyed by a resurgent modernisation belief. The fourth dimension is exemplified by South Africa where there is an increase in urban domestic elites acquiring huge tracts of customary land in alliance with traditional leaders, especially for residential purposes. Consequently, this policy brief outlines the impact of these four processes of formalisation on how women and men who live under traditional authorities relate to land and the wider implications for land policy.

CUSTOMARY LAND RIGHTS HOLDERS LACK LEGAL AND SOCIAL POWER OVER LAND

Across the four countries, decision-making and authority over customary land are largely vested in the executive and customary authorities rather than in women and men who are the real land rights holders and users. This stems from distorted versions of African customary law as part of the apartheid and colonial legacy. A declaration by the government in any of the four countries automatically renders the land the private property of the state. The context is complicated because most traditional leaders in southern Africa are powerful because they administer customary land. In South Africa, land laws and bills such as the Traditional Leadership and Governance Framework Act, Traditional and Khoi-San Leadership Act, the Traditional Courts Bill, and the Communal Land Rights Bill vest too much decision-making power and authority over land in the traditional leaders. South Africa's progressive Interim

Protection of Informal Land Rights Act (IPILRA) which seeks to protect informal land rights users is hardly enforced. In Zimbabwe, Section 26 (4), Section 5 (19) and section 9 (19) of the Traditional Leaders Act [Chapter 29:17] of 1998 provide for Chiefs and headmen to have a role in land allocation. In Zambia, Chiefs have legal power to administer customary land with a strong say over what happens on the land, as enshrined in Sections 8(2) and 3 of the 1995 Lands Act. In Mozambique, the government has always tried to sideline *régulos* (traditional leaders) because they were appointed by the Portuguese colonial state. However, the Council of Ministers' Decree 15/2000, made customary authorities – sometimes led by an elected secretary of neighbourhood and other times *régulos* – to represent the state at the village level. Evidence from Nhamatanda shows that these customary authorities dominated by

men and ironically called the “rooster” in local lexicon often make decisions over land. The ruling parties in Zimbabwe, Zambia, and South Africa and more recently Mozambique seem to understand the Chief as the bastion of rural power, as practiced in the apartheid and colonial eras. Within the trusted customary authorities, women are largely excluded from decision-making processes over land rights and when ‘included’, patriarchal practices dominate. However, as Alexander

(2018) argues, traditional leaders are never homogeneous in the way they manage land. In our study sites in South Africa, the Chiefs epitomise “decentralised despotism” (Mamdani 1996). Interestingly, in Nyimba, Zambia they were seen as relatively gender-responsive and in Zimbabwe most respondents preferred Chiefs to elected local councillors, whom they deemed corrupt, whereas in Mozambique’s study sites, régulos were considered to be deeply patriarchal.

INCREASED INTERVENTIONS TO INDIVIDUALISE PROPERTY RIGHTS IN CUSTOMARY LAND

There are increased interventions meant to individualise property rights in customary land across our study sites. In particular, the tenure reforms tend to exclude the registration of common property resources, either in policy or in implementation. For example, in Nyimba, Zambia, the CLHC does not provide for registration of rights to common property resources, such as gaining access to natural resources like firewood, medicinal plants, charcoal, grass for thatching, water sources, and grazing lands. In Mozambique, the law allows for registration of common property resources but our evidence from Nhamatanda district shows that state officials in Nhamatanda were issuing DUATs for residential land, not for arable land or common resources such as forests, which may prevent communities from

accessing such resources in the future. In our study sites in Zimbabwe, the conversion of customary land to state land is also leading to changes in tenure from more collective social forms of tenure to statutory forms of private property. In South Africa’s Capricorn West district, the movement of urban domestic elites on customary land is associated with a significant degree of individualisation as urban elites fence their properties, including common lands. The urban elites are therefore redefining customary property rights as exclusive rather than inclusive. This individualisation trajectory may be beneficial to elite and middle-class groups but is causing further descent into tenure insecurity and poverty for the majority of the poor women and men living on customary land.

COMMODIFICATION OF CUSTOMARY LAND

In all four countries, formalisation is accelerating the commodification of customary land, leading to the rise of informal ‘land markets’ characterised by corrupt exchanges and is out of reach for the poor and vulnerable, especially women. This is despite the fact that land laws in all four countries do not permit the selling of customary land. The processes of commodification are starker in our study sites in South Africa where over three quarters (75.25%) of our respondents who acquired residential plots or arable land in the past ten years paid for it in cash to the traditional authority or individuals. This is followed by Zimbabwe where 59% of our respondents had bought land in the past five years. In our study sites in Mozambique and Zambia

informal land markets are also established. Traditional leaders are primarily the ones selling land in South Africa, Zambia, and Zimbabwe outside the law, while in Mozambique it is mainly individuals and domestic elites. Land prices are also increasing, to the disadvantage of many vulnerable women. Some urban elites, salaried local workers, migrants, and the local big shots – mainly men – acquire land for speculative and not production purposes. This is resulting in a new land question of elite concentration in southern Africa. The emerging new land rights property system is becoming a mechanism to redistribute land from the poor to the rich and from farmers to speculators.

WHO WINS AND WHO LOSES WITHIN DIFFERENT CATEGORIES OF WOMEN

Customary land access, use, and ownership for most women are still largely dictated by entrenched traditional authorities and patriarchal norms that perpetually place women under the authority of men and fail to protect their land rights. Within this matrix, married women, divorcees, single women without children, and young women have lower tenure security over the land that they use compared to single women with children, whereas widows enjoy rights conditioned to patriarchal norms. For example, in Nhamatanda district, our evidence shows that only 26.6% of DUATs were registered in a woman's name. This is consistent with Mozambique's National Directorate of Land's 2015 data that showed that only 20% of DUATs were registered to women. Customary authorities expected women to benefit in their dependent position as the wives of landowners. In South Africa and Zimbabwe, most married women also still gain access to land through their husbands. However, in South Africa, the traditional councils even expect newly married women to re-register land they might have acquired before marriage in the husband's name. The Nyimba case in Zambia might seem to be an exception because 53% of issued CLHCs were in a woman's name partly because the tenure programme was designed to primarily target women. Yet our qualitative evidence shows that even when a married woman's name is on the certificate it does not always transform gendered power relations over who controls the land. In marriages, power relations and decision-making over land continue to favour men, as entrenched by patriarchy. In the event of divorce, most members of society and traditional leaders expect women to move out of the homestead, making the divorced the most vulnerable. Staying married even under abusive husbands seem to provide some sense of 'security' for women because they retain access to matrimonial property.

The biggest losers from our study were single women without children, who were mainly allowed to gain access to land through their families, especially male members of a household, such as a father or an uncle. Young women in general remained excluded as only

8.45% of our respondents who acquired land in the past five years were aged between 18 and 35 years. Most have secondary user rights that are insecure. There is no active review, harmonisation, and updating of land laws and policies in order to promote equitable access to land for youth, as reflected in the 2009 African Declaration of Land Issues and Challenges in Africa.

In many cases, the poor women could not afford the costs involved, putting land rights beyond the reach of many, especially in a region where close to 88 million people – translating to 45.5% of the population in rural areas – live in extreme poverty with the highest number among female-headed households (see Porter 2017). This shows that Aspiration 6 of the African Union Agenda 2063 to ensure that 90% of rural women have access to productive assets, including land, by 2025 remains a pie in the sky. This also spells doom to the implementation of the 2015 African Union's Special Technical Committee on Agriculture, Water and Environment recommendation that requires states to allocate at least 30% of land to women. The few women who acquired land had at least formal primary education, access to information, strong social networks, and had decent financial income.

Customary authorities demonstrated the adaptability of living customary law through accommodating and allocating independent residential sites to the growing number of single women with children in the region and protecting widows from eviction by family members upon the death of the husband. Single women with children did not face many restrictions concerning the acquisition of customary land. Traditional leaders considered single women with children to be more 'stable', hence their ability to access land is much more effortless than single women without children or married women. However, like any other customary land holders there is still lack of clarity about their real rights. Even though fewer widows are being evicted, there are a litany of rules that perpetuate discrimination against them. In many cases, if a widow decides to remarry,

most customary authorities require her to leave her matrimonial property, including land and houses. Most widows across the study sites feel that the traditional courts discriminated against them because they did not have the protection of a male partner. There is still

lack of clarity in society about the real rights of the widows living on customary land even though custom and inheritance-related laws seem to be adapting to curtail their discrimination and eviction.

CONFLICT OVER LAND AND PERCEPTIONS OF TENURE INSECURITY

There are intensifying conflicts over land across the region, revealing deepening social and gendered divisions. Almost one in every three households (30.3%) said that land conflicts have increased over the past 10 years. The distribution within countries is as follows: Zimbabwe (59%), South Africa (49.8%), Zambia (10%) and Mozambique (2.3%). Our evidence suggests that land conflicts are a driver and consequence of widening land tenure insecurity. The most prevalent of these conflicts relate to: double allocations of the same parcel; access to common property resources; boundary conflicts; inheritance conflicts; divorce disputes; disputes with new settlers and returnees; eviction by the state and private investors, and gender-based conflicts.

Across our study sites, 27.5% of respondents feel insecure on their land and fear that they may lose the land in the next five years. Out of those who feel insecure,

almost one in every two households (45.6%) feel that they may lose their land to the government in the next five years. The distribution of respondents who fear losing their land to government per country is as follows: Zimbabwe (84%), Mozambique (58.3%), South Africa (20%), and Zambia (20%). On the other hand, 40% of the respondents who feel insecure, fear that they may lose their land to private investors in the next five years. The distribution of respondents per country who fear losing their land to private investors is as follows: Zambia (53.3%), South Africa (40%), Mozambique (16.7%), and Zimbabwe (10%). Owing to the existential threats, most households said that common property resources such as forest land, rangelands, community grave sites, and rivers are the most insecure and the most likely to be grabbed by government and private investors.

WOMEN'S PREFERRED TENURE SYSTEM

Across the four countries, the majority of female respondents (81.4%) preferred to live under customary tenure compared to statutory leaseholds. The distribution per country is as follows: Mozambique (68.2%), South Africa (90.5%), Zambia (75%) and Zimbabwe (92%). They prefer to live under customary tenure because most female respondents considered it as: cheaper because they did not have to pay council rates; part of their heritage; dynamic to support a diverse range of land-based livelihoods for the poor and vulnerable; adaptable and flexible, which worked well for the poor and future generations; and capable of

providing cheap and easy access to alternative dispute mechanisms. However, women still wanted an overhaul of patriarchal norms and practices and land governance institutions within customary tenure systems to be more democratic, gender equal, and accountable. Few female respondents preferred formal titling because to them it is less open to patriarchal and state abuse once rights are agreed. Women disgruntled with the customary tenure systems are mainly widows without children, single women without children, and divorcees who are usually treated unfairly by traditional leaders and community members.

RECOMMENDATIONS

Southern African states should:

1. Provide for more explicit legal and social recognition and respect for customary land rights holders – both women and men – and their rights to use, access, control, own, and transfer land and other natural resources. This requires changing the mindset and amending land laws and policies to shift the balance of power and authority over land to women and men, families, and members of the community living on customary land from traditional leaders and the executive.
2. Legally recognise existing traditional and good faith occupation by individuals (women and men), families, and local communities who have been using the land for at least 10 years.
3. Ensure that where there are other family members with rights, residential and arable land rights should be vested in families to avoid possible exclusion of other users – especially women and children – by one individual. On the other hand, common property resources should be vested in members of the community.
4. Establish a property rights framework with secure land rights for different categories of women legally equivalent to those of men and provide clarity on the shared land rights between women and men – that is, not undermined by other laws such as marital, family, succession and inheritance, and patriarchal practices.
5. Pilot cheap and context-specific geospatial digital technologies that can record multiple, nested, and layered property rights in land and flexible customary land boundaries to reflect realities of social tenure and the continuum of rights on the ground. However, this should not lead to the invalidation of social tenure systems that are impossible to register.
6. Enshrine the principle of free, prior and informed consent (FPIC) in domestic land laws and policies. FPIC is an international principle that gives people (women and men) the right to agree or disagree (consent) to developmental projects, therefore upholding the universal right to self-determination.
7. Undertake comprehensive needs assessments to inform the development of context-specific dispute resolution frameworks that are gender sensitive, effective, affordable, impartial, and accessible to all in order to find sustainable long-term solutions to resolving land conflicts.
8. Promote equitable and secure access to and ownership of land for youth (especially young women) and women in general, as reflected in the 2009 African Declaration of Land Issues and Challenges in Africa and Aspiration 6 of the African Union Agenda 2063, intended to ensure 90% of rural women have productive assets, including land.
9. Support the development or implementation of social and legal mechanisms that ensure that at least 50% of members from local to national land administration institutions are women of different status.
10. Partner researchers, CSOs, communities, and development partners should develop context-specific land administration systems and gender-equal institutions that are cost-effective, transparent, and responsive to the needs of citizens in a participatory, gender-sensitive and democratic manner. Crucially, communities must be allowed the right to choose the tenure system appropriate to their circumstances.
11. Capacitate state institutions that formulate and implement land laws and policies and independent institutions that promote women's land rights and promote gender-equal 'ownership' and governance of land.
12. Stop embracing narrow developmental policies premised on expelling women and men living and eking their livelihoods on customary land. An alternative path is to direct public investments to rural dwellers through: (a) investments in the upstream (inputs), midstream (production), and downstream

(processing); (b) provision of public goods; (c) facilitation of access to markets, largely through state parastatals; (d) provision of extension services; (e)

support for institutional innovations to help rural farmers achieve economies of scale against monopolistic markets; and (f) financial incentives.

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