

The Contradictory Potential of Institutions

The Rise and Decline of Land Documentation in Kenya

Ato Kwamena Onoma

I wanted a [land] document because it is like a marriage certificate for a woman. It gives you [the husband] confidence that no one will ever bother you.

An old farmer in Taita Taveta, Kenya, in a 2005 interview with author

[Land titles] are mere pieces of paper.

William ole Ntimama, minister of local government, Kenya, “The Indigenous and the Natives,” *Weekly Review* (Nairobi), July 9, 1993.

Introduction

The gradual decline of institutions that secure property rights presents us with an interesting puzzle. These institutions have a number of features that should display positive-feedback effects and ensure their continued strength. Land documentation systems, which constitute key components of these institutions, can aid informed and well-connected members of society in acquiring swathes of land, giving these actors an incentive to perpetuate such documentation systems (Scott 1998, 48).

I thank Peter Hall, James Mahoney, Yaba Ndiaye, Abbey Steele, Kathleen Thelen, Elisabeth Wood, and the participants in the Workshop on Historical Institutionalism held at Northwestern University (October 26–27, 2007), as well as members of the Yale Comparative Politics Workshop, for comments on this paper. Research for this paper was partly funded by an International Dissertation Research Fellowship from the Social Science Research Council.

Further, because titles and other forms of land documents and records can help them hold onto their property, we can expect landowners to invest in ensuring the efficacious operation of these systems. Beyond helping resolve issues of ownership, record systems create incentives for their perpetuation by facilitating the productive use of land and the transformation of land rights into capital (de Soto 2000). People involved in these modes of using land thus have an interest in upholding effective record systems. Also, by rendering such exploitation of land more profitable, these institutional arrangements draw new actors to these land uses and so increase the pool of those dedicated to institutional stability. For these reasons, the development of land documentation systems should foster changes that reinforce rather than undermine property rights.

Against this background, the history of the documentation of land rights in Kenya presents a real conundrum. Introduced by the colonial administration in the early 1900s to aid the commercial activities of European settlers, land documentation was later extended to the African population and was warmly embraced and reinforced by the postcolonial government after independence in 1963. But instead of demonstrating the expected trajectory of increasing the stability of institutions that have positive-feedback effects, the practice of title registration gradually eroded and, by 2004, had fallen into disrepute (Kenya 2004, 189). Many have been quick to blame the exogenous shock of multiparty democratization in 1991 for this decline (Klopp 2000, 2002; Kenya 2004, 82).¹ This focus on exogenous shocks is consistent with much of the literature on change in institutions that display positive-feedback effects (Mahoney 2000; Katznelson 2003). If such institutions operate to increase support for their own continued existence, then their decline must be due to factors external to their workings.

Yet this focus on the exogenous shock of redemocratization in Kenya is a mistake. In May 1991, months before the announcement of multiparty democracy in Kenya, the exploitation of documentation

¹ Many policymakers that I interviewed similarly attributed this decline wholly to the redemocratization process of the 1990s. Interviews with an official of the Ministry of Lands in Nairobi (Ken 1), February 14, 2005, and a land control board member in Nyeri District (Ken 18), March 3, 2005.

systems and subsequent cancellation of hundreds of title deeds by Kenya's High Court had led one contributor to the reputable Nairobi newspaper *Weekly Review* to wonder whether the assumption that a title gives one indefeasible rights to property was still true.² Even more important, much of the fraudulent exploitation of land documents and property rights that followed redemocratization mirrored (and maybe even copied) similar activities in the 1970s. So why did this institution, which should display strong positive-feedback effects, change over time?

To answer this question, I highlight the contradictory potential of institutions in explaining gradual change. By the "contradictory potential of institutions" I mean the ability of institutions to simultaneously cultivate and sustain dominant coalitions that support perpetuation of these institutions and to engender marginal groups that thrive on subverting these institutions. These marginal groups take advantage of institutional rules by covertly violating the rules' intended purpose – they are precisely the parasitic variety of "symbionts" to which Mahoney and Thelen refer in the introduction to this volume. In the struggles between institutional backers and parasitic actors, exogenous shocks can play a role, but not always as the sole or even the main causes of institutional change. Exogenous shocks often only exacerbate the existing advantage of one group or trend over others.

The first part of this chapter details the state's attempt to introduce and expand land documentation in Kenya and the positive-feedback effects these efforts had over time. The aggressive efforts of colonial and postcolonial state officials popularized land documents in Kenya (Meek 1949, 93–94; Kenya 2004). But by the late 1990s, following a long process of erosion and drift, the efficacy of land documents had dramatically declined (Kenya 2004, 189). The second part of this empirical section thus details how the system of land documentation contributed over time to its own decline. I locate a significant cause of the decline in the efficacy of land documents in Kenya in the gradual activities of parasitic forces nurtured and sustained by the very system of land documentation that these forces were undermining. The promotion of land documentation in the Kenyan environment produced and empowered a dominant constituency of white settlers

² "What Value a Title Deed?" *Weekly Review* (Nairobi), May 31, 1991.

and new black landed elites who supported land documentation and forcefully advocated the “sanctity of land titles” (Kenya 2004, 16). Vigorous efforts by the colonial and postcolonial state to encourage land documentation created the popular expectation that possession of a particular piece of paper could confer certain rights to a specific land parcel (Kenya 2004, 16). But, at the same time, land documentation fostered the rise of marginal con men dedicated to its exploitation. By cleverly manipulating beliefs about land documentation and the legal instruments that underpinned them, con men, working from the relative safety of their offices, were able to exchange fake land documents for money and thereby defraud people across the country.³

By the 1970s, well-connected politicians, copying the con men, brought the subversive exploitation of land documents closer to the mainstream of Kenya’s political economy. They used land documents to amass and deploy political support. Issuing and selling fake documents became an excellent way of raising cash for electoral campaigns, for buying the support of various individuals and groups, and for dissuading would-be opponents. Supplying land documents to people without actually giving them the land turned out to be an excellent way to get them to attend political rallies. Moreover, by promising land to document holders in various areas of the country, the politicians could change the makeup of electoral constituencies.⁴

This embrace of the fraudulent exploitation of land documentation by politicians compromised the *willingness* of the state to crack down on this activity. Thus the problem was not just one of weak state capacity. Nor was it that the system of land documentation was not well-established in the first place. The problem was that as people close to the state adopted the con men’s techniques, state agencies became increasingly less willing to use their powers to stop the fraudulent exploitation of land documentation by these people. The activities

³ Letter from the district commissioner, Kwale, to the district officer of the Coast Division, Kwale, April 4, 1968, Kenya National Archives (hereafter KNA) CC/12/47; letter from J. M. Masesi of Garissa to the minister for lands and settlement, June 25, 1968, KNA CC/12/47; and letter from the managing director of the Kenya Express Land and Estate Agent to Mr. James Crispus, April 5, 1968, KNA CC/12/47.

⁴ “Vanity Shares,” *Weekly Review* (Nairobi), June 20, 1980; “Bogus Companies,” *Weekly Review* (Nairobi), May 23, 1980; and “Ngwataniro at Crossroads as Internal Problems Surface,” *Weekly Review* (Nairobi), December 12, 1977.

of politically well-connected land-buying company executives underpinned a process of gradual institutional drift. State leaders failed to adequately shore up the institutions threatened by the widespread parasitic activity. When senior state leaders embraced similar activities after the exogenous shock of redemocratization in the 1990s, it only furthered a process that was already undermining the efficacy of the land document system in Kenya.

The conclusion of this chapter examines the implications of the contradictory potential of institutions for the literature on the political economy of Kenya, as well as on institutional change and stability more generally. As is clear from the analysis here, the extreme emphasis on exogenous shocks such as redemocratization to explain change in institutions that display positive-feedback effects is mistaken and overlooks endogenous processes that drive change over time. Given the constant possibilities for change that the contradictory potential of institutions allows, the excessive focus on so-called critical junctures in the study of institutional change also needs further appraisal. There are more openings for and processes of change than such accounts, steeped in the punctuated equilibrium model of change, permit.

The Contradictory Potential of Institutions

Streeck and Thelen (2005, 1–2) point out that a dominant strain of research on change in institutions that display positive-feedback effects emphasizes the consequences of sudden discontinuous changes sparked by exogenous shocks. Such institutions are said to be characterized by strong periods of stability produced by their positive-feedback effects (Mahoney 2000; Pierson 2000). These periods of stability are punctuated by disruptive moments of change – critical junctures – when exogenous shocks break down the institutions, creating episodes of contingency that allow agents to choose between alternatives (Pierson 2004, 144). This emphasis on exogenous sources of institutional change is grounded in an understanding of institutions as unambiguous entities that structure behavior in coherent and uniform ways (Arthur 1994; North 1990, 94; Pierson 2000, 76–77). They are said to exert what Schneiberg (2005, 103), in critical mode, has called “isomorphic pressures” on agents through incentives and distributional consequences that create and reinforce constituencies dedicated

to the survival of these institutions, and that shrink and raise the costs to those who might be interested in institutional change.⁵

A small but growing body of work has raised the possibility of gradual instead of abrupt change, and has suggested that endogenous factors might play a significant role in generating change in institutions with positive-feedback effects (DiMaggio 1988, 13; Greif and Laitin 2004, 634; Thelen 2004; Schneiberg 2005, 128; Streeck and Thelen 2005; Schneiberg and Clemens 2006, 218). Such analyses are partly grounded in an understanding of institutions as ambiguous entities (see Comaroff 1980, 107; Thelen 2000, 105; Ngugi 2004, 472; Jackson 2005, 229). One dimension of the ambiguity of institutions is that institutional forms do not necessarily dictate specific functions and render all other functions impossible (Thelen 2000, 105). As Thelen (2000, 105) has pointed out, an institution's role can change over time as new interests come into power or as the environment facing old interests is altered.

I take this line of argumentation a step further by pointing out that self-reinforcing institutions can contain internal contradictions that offer the potential for change. Institutions can engender and sustain dominant constituencies who support their continued existence and *simultaneously* foster parasitic groups that thrive on exploiting them in ways that may ultimately contribute to the institutions' decline. This view draws insights from but also shifts away from the idea of "temporal segregation"⁶ found in works that subscribe to what DiMaggio (1988, 13) calls the "internal logic of contradiction" in the process of institutionalization (Barley and Kunda 1992, 386; Schneiberg 2005, 106). According to this idea, the factors that are responsible for an institution's rise at time 1 then contribute to its decline at time 2. Here, however, I show that some of the very things about institutions that produce dominant coalitions invested in their perpetuation also concurrently create and sustain subordinate parasitic groups whose activities subvert the institutions. The coexistence of these forces makes an institution, even at the height of its influence, subject to contention and exploitation by subversive groups.

⁵ Leblebici et al. (1991, 336) and Thelen (1999, 392–396) point out this same portrayal of how institutions work.

⁶ I am using a term that Stephen Barley and Gideon Kunda (1992, 386) borrow from David Maybury-Lewis (1989).

Institutions with positive-feedback effects create stable expectations and material conditions that, ironically, can engender their own subversion by groups that exploit these beliefs. These groups rely on others to play by rules that they themselves ignore. Many institutions, including property rights systems, work by creating certain expectations in the minds of agents about the meanings and implications of specific acts and symbols. Thus the success of an institution depends on and can be measured by how tenaciously people hold onto the expectations that the institution engenders. For instance, a system of land title registration succeeds to the extent that it leads parties to believe that various documents represent rights to pieces of land. These beliefs and expectations enable titling systems to facilitate market transactions involving land. However, some of these same expectations can also make it easier for parasitic agents to feed on institutions in ways that undermine their overall efficacy and strength. In Brazil, for example, con men exploited the trust of American and European environmentalists and sold the foreigners worthless “titles” to state-owned land in the Amazon. One particularly successful con man was able to sell “titles” to an area the size of Ireland.⁷

The workings of a self-reinforcing institution can also create material conditions whose exploitation by parasitic actors causes the institution to drift from its intended purpose. Institutions may, for example, restrict the supply of a good or suppress competition for certain goods. When this occurs, opportunities for parasitic activity may result. For instance, by suppressing suppliers of alcohol, Prohibition in the United States created highly profitable opportunities for bootleggers. Whereas the bootleggers embraced Prohibition because of the high profit margins it gave them, their activities subverted the effort to prevent the consumption of alcohol – the main point of Prohibition.⁸

This perspective calls on us to move beyond the prevalent view that institutional failure occurs only because some actors who are disadvantaged by or who detest particular institutions set out to destroy them (Thelen 2000, 107; Schneiberg 2005, 120–121; Schneiberg and

⁷ “Brazil Hunts Amazon Land Thief,” *BBC News*, January 9, 2001, <http://news.bbc.co.uk/2/hi/americas/1107272.stm> (accessed June 12, 2007).

⁸ Yandle (1983) sheds light on these situations where “bootleggers” and “Baptists” coincide in their support for institutions even though their attitudes toward the ultimate goals of those institutions are opposed to each other.

Clemens 2006, 218). For instance, in noting how institutions can contribute to their own demise, Clemens (1993, 757) points to the way in which self-reinforcing institutions with distributional consequences create grievances through the same exclusionary features that attract “winners” invested in perpetuating these institutions. But I make the point here that change can also be unwittingly brought about by symbionts of the parasitic variety. These are agents who harbor no grievances toward the institutions they are involved with. In fact, they depend on these institutions for their survival and so embrace them. Yet despite their need for these institutions, their parasitic activities can, over time and cumulatively, end up ruining the health of their hosts. The efforts of some con men to prevent others from engaging in similar con games can be understood in this light. Although themselves engaged in rackets that exploit certain institutions, they seek to maintain the health of those institutions by keeping others from similarly feeding on them.

Recognizing the contradictory potential of institutions allows us to explore ways in which such endogenous processes highlighted above and exogenous factors collaborate to engender and shape institutional change (Streeck and Thelen 2005, 22). While self-reinforcing institutions may simultaneously foster parasitic groups that gradually undermine them, these groups may have only a limited capacity to inflict damage. These agents may be only marginal actors innovating with institutional forms and operational logics on the periphery. Exogenous changes that impact the distribution of preferences and power in favor of these agents, however, can aid in bringing formerly marginal forms and logics from the periphery to the center (Streeck and Thelen 2005, 22). Such exogenous shocks could be shifts in the political environment that encourage members of dominant groups to adjust their preferences in ways that bring them in line with those of parasitic groups. These more powerful actors can then bring their power to bear against the institutional system.

Alternatively, shocks such as defeats in major elections could erode the power of dominant groups, allowing parasitic forces to take over and fundamentally undermine institutions. As can happen in cases of parasitic behavior, the very success of the parasitic agents can lead to a total institutional collapse that eliminates the agents’ own host institutions. For instance, where con men gain unhindered freedom to

exploit land documentation, popular belief in the efficacy of land documents will drastically decline over time, eventually making it almost impossible for the con men to profit from the fraudulent deployment of these documents and resulting in a sort of “tragedy of the con men,” as Dan Slater has termed it.⁹

The Establishment of Land Documentation in Kenya

By land documentation, I refer to a system by which information about the locations, dimensions, and various rights to parcels of land are noted in record systems in documents issued to relevant parties. Land documents in Kenya encompass titles, letters of allotment, and letters of offer issued by the Ministry of Lands (Kenya 2004, 13), as well as share certificates issued by private land-buying companies.¹⁰ I adopt this broad definition, which goes beyond land title deeds, in part because people employ many forms of documents as indicators of their right to land (Kenya 2004, 12–13).

In Kenya, land documentation started as a primary means through which the British colonial administration sought to attract European settlers to the country.¹¹ To facilitate the subjugation of Kenya following the declaration of the Protectorate of East Africa in 1895, the British East Africa Company and colonial administrators moved aggressively to encourage European settlement and agriculture (Arnold 1974, 54; Hazlewood 1979, 1; Berman and Lonsdale 1992, 335). The resulting expropriation of land from Africans caused massive landlessness and land hunger among Africans.

The reasons given for documenting the land rights of Europeans in Kenya resembled contemporary arguments supporting title registration and property rights security. European farmers had to have secure property rights to persuade them to invest in agriculture and to facilitate their use of their land rights as collateral for loans (Kenya 1941, 1–3). As a result, settlers’ organizations like the Settlement Committee, the Convention of Associations, and the Nairobi Chamber of

⁹ Comments by Dan Slater on an earlier draft of this paper at the Workshop on Historical Institutionalism at Northwestern University, October 26–27, 2007.

¹⁰ “Vanity Shares,” *Weekly Review* (Nairobi), June 20, 1980.

¹¹ This was in addition to the subsidization of European settlers with heavy taxes levied on Africans. See Leys (1931).

Commerce all lobbied the authorities for a land documentation system (Kenya 1941, 1–13).

Ultimately, the East African (Lands) Order in Council (1901), the Crown Lands Ordinance (1902 and 1915), and the Land Titles Ordinance (1908) were passed to provide for the registration of documents for lands seized from Africans for exclusive European use (Kenya 2002, 21–23). In addition, the colonial administration created survey departments, registries, and assorted boards to govern land transactions. By 1919 the colonial government was recording land titles and granting them to Europeans on a large scale (Meek 1949, 93–94).

Africans were initially excluded from these efforts at documentation. However, at the height of the Mau Mau liberation war (1952–1960), the Swynnerton Plan of 1954 extended land documentation to the Native Reserves, where Africans were allowed to possess land (Atieno-Odhiambo 2002, 238). An honest and perceptive colonial official portrayed the Swynnerton Plan as a counterinsurgency weapon aimed at creating a new Kenyan, who will “become the anchor of the tribe, the solid yeoman farmer, the land owner who knows that he has too much to lose if he flirts, however lightly, with the passions of his nationalistic friends” (quoted in Branch 2006, 28).

At independence in 1963, Jomo Kenyatta’s postcolonial government (1963–1978) warmly embraced and promoted land documentation (Kenya 1966). Laws such as the Land Adjudication Act (Cap 284), the Land Consolidation Act (Cap 283), the Land (Group Representatives) Act (Cap 287), and the Registered Land Act (Cap 300) ensured the continuation of documentation. The Land Adjudication and Settlement Department continued to register titles for land parcels in trust land areas.¹² Records were strictly kept for plots in the state’s settlement schemes, including the Million Acre, Z-Scheme, Shirika, and Haraka schemes, which settled more than two hundred thousand families on approximately three million acres by 2005.¹³ In many

¹² Interview with an official of the Ministry of Lands and Settlement, Nairobi (Ken 5), February 18, 2005; and “Recent Land Reforms in Kenya” (paper given by the Kenya delegate at the Seminar on Land Law Reforms in East Africa, June 4, 1968, p. 10), Kenya National Archives (KNA), BN/81/87.

¹³ Interview with an official of the Ministry of Lands and Housing, Nairobi, (Ken 29), March 15, 2005.

districts, land registries were created to facilitate the registration of land rights.

By the late 1960s, land documents had become a common part of Kenyan life (Kenya 1966). A total of 3.1 million titles had been issued by 1999,¹⁴ and the use of land documents in financial transactions was pervasive (Kenya 2004, 65). Banks that granted loans for the acquisition and operation of agricultural, real estate, and tourism concerns accepted titles to properties as collateral (Wanjohi 1985, 13; Kenya 2004, 65).¹⁵

The Positive-Feedback Effects of Land Documentation

Land documentation systems often have positive-feedback effects by virtue of their ability to distribute land in certain ways and make certain modes of using land easier and more profitable (de Soto 2000, 6–7; World Bank 2002, 4–8; Ngugi 2004, 477). Beneficiaries can transform some of their economic benefits into political instruments to reinforce the structure and integrity of land documentation. Land documentation within the context of land hunger and landlessness in Kenya had such positive-feedback effects. It gained the support of many Kenyans with large landholdings by reducing threats to their new holdings posed by rival claimants (Ngugi 2004, 502). This protection was critical.

¹⁴ “How To Get Out of the Quagmire,” *East African Standard* (Nairobi), March 11, 2002.

¹⁵ This urge to use titles to get loans from the Agricultural Finance Corporation (AFC) and other financial institutions was a big part of what motivated many community leaders to ask the state to carry out land documentation in their area. See letter from Chief Zephaniah Malit of East Karachuonyo to the assistant land adjudication officer of South Nyanza, September 8, 1968. The chief was asking for adjudication and documentation in the area to allow people to use their title deeds to get AFC loans. See KNA BV/156/2. Also, interview with a farmer and member of a group ranch in Taita Taveta, (Ken 62), May 12, 2005; and “Back to Square 1,” *Weekly Review* (Nairobi), May 20, 1981. Also see “Kenyan Ministers” Row Over ‘Grabbed’ Forest Land Deepens Divisions in Narc,” *The East African* (Nairobi), April 4, 2005; and “Kenya Starts Process To Cancel 12,000 Title Deeds,” *The East African* (Nairobi), February 28, 2005. These stories reported the concern of the Kenya Bankers’ Association over threats by the government to cancel titles because of the monies they had lent out on titles. Also see comments by Joseph Wanyela, chairperson of the Kenya Bankers’ Association, in “How Should the Ndung’u Report Recommendations Be Implemented? What Kenyans Say,” *Land Update* 3(4) October–December 2004. Nakuru: Kenya Land Alliance. http://www.oxfam.org.uk/resources/learning/landrights/downloads/kla_land_update3_4.pdf (accessed May 8, 2009).

Many large estates, such as the Taveta Sisal Estate of Basil Criticos and the Ziwani Estate of the Kenyatta family, existed side by side with large populations of squatters. As they sought to keep out squatters, who often had strong historical claims to the land parcels (Ngugi 2004, 502), the owners of these estates quickly adopted the “sanctity of land titles” language first used by European settlers.

Land registration in Kenya, like that in many other places, also acted as a cover beneath which the well-connected and knowledgeable could redistribute land in their own favor. Their education and their positions within the state machinery gave them a deep understanding of land administration procedures, as well as the ability to take advantage of these procedures.¹⁶ Many bureaucrats and politicians registered titles to pieces of land that the state had procured for settling poor Kenyans, using the guarantee of the security offered by the titles to shield themselves from challenges.¹⁷ They also exploited land documentation to acquire huge commercial concerns. The family of Kenya’s first president, Jomo Kenyatta, acquired, among other properties, the Gicheha Farms in Kiambu District¹⁸ and the Ziwani Estate in Taita Taveta District,¹⁹ properties that covered tens of thousands of acres. Kenya’s second president, Daniel arap Moi, acquired, among others, Kabarak Farm in Nakuru District²⁰ and Ziwa Farm in Uasin Gishu District.²¹

The ease with which land titles could be procured throughout the country meant that many Kenyans could use their land as collateral for loans from the Agricultural Finance Corporation (AFC), the Settlement

¹⁶ “Moi Suspends Land Allocations, Raises Hopes About Land Reform,” *Weekly Review* (Nairobi), September 22, 1978.

¹⁷ “No Cheer,” *Weekly Review* (Nairobi), August 7, 1981; and letter from J. H. Angaine, minister for lands and settlement, to the director of settlement, January 7, 1975, KNA BN/81/135.

¹⁸ “Land: Who Owns Kenya?” *East African Standard* (Nairobi), October 1, 2004.

¹⁹ “Land: Who Owns Kenya?” *East African Standard* (Nairobi), October 1, 2004; and interview with an official of one of the land administration agencies in Taita-Taveta District (Ken 63), May 13, 2005.

²⁰ “Land: Who Owns Kenya?” *East African Standard* (Nairobi), October 1, 2004; “A Choice of Seven Grand Homes: Which Will Moi Opt For?” *Daily Nation* (Nairobi), January 28, 2002; and “Six Cows Stolen from Moi’s Farm,” *East African Standard* (Nairobi), June 4, 2005.

²¹ Interview with a divisional officer in Uasin Gishu District (Ken 35), April 21, 2005; and “A Choice of Seven Grand Homes: Which Will Moi Opt For?” *Daily Nation* (Nairobi), January 28, 2002.

Fund Trustees (SFT), and various private institutions (Wanjohi 1985, 13).²² The banks and financial institutions involved in such borrowing also became big supporters of land documentation.²³

Land documentation produced and empowered significant constituencies that were dedicated to its continuance (Ngugi 2004, 502). Defending the sanctity of land titles spread from its initial base within the European settler community to the black Kenyan community (Kenya 2004, 16; Ngugi 2004, 502; Branch 2006, 28). The African delegates to the Lancaster House Conferences, where independence was negotiated, accepted the “sanctity of private property,” and Kenyatta himself went to the European redoubt of Nakuru to assure the settlers there that the state would respect land titles and would not expropriate property (Arnold 1974, 65). These moves were unsurprising. Representatives from the crucial Central Province who had been elected in 1957 and 1958 had depended on electoral support from African yeomen advocates of private property who had just received “newly issued land titles” (Branch 2006, 43). Over time, these supporters would try to stamp “an imprimatur of legal invincibility” on land title deeds (Kenya 2004, 16). Yet the development of this dominant constituency of black and white elites and commoners in support of efficacious land documentation went hand in hand with the development of a marginal constituency that thrived on the subversion of land documentation.

The Parasitic Exploitation of Land Documentation:

Peripheral Innovators

Land documentation, while displaying positive-feedback effects, also created opportunities for its own subversion by parasitic elements. Kenya’s colonial and postcolonial governments succeeded in creating exploitable expectations through their introduction and promotion of land documentation. Parasitic elements whose activities ultimately

²² “Fifteen Years of Land Settlement,” *Weekly Review* (Nairobi), October 20, 1978; and “No Hanging On, Moi Tells Land Companies,” *Weekly Review* (Nairobi), April 4, 1985. In fact, this urge to use titles to get loans from the AFC and other financial institutions was a big part of what motivated many community leaders to ask the state to carry out land documentation in their area. See note 15.

²³ “How Should the Ndung’u Report Recommendations Be Implemented? What Kenyans Say,” *Land Update*, Nakuru (Kenya): Kenya Land Alliance. October–December 2004 (p. 13). Also see (Kenya 2004, 66).

undermined the system of land documentation embraced these opportunities with zest and inventiveness.²⁴ As often occurs with innovation in the face of dominant institutions (see Leblebici et al. 1991, 345),²⁵ marginal actors operating at the periphery took the lead in introducing an alternative logic into the structure of land documentation. Already by 1968, we find state authorities in communication about the activities of petty fraudsters who, taking advantage of widespread belief in the efficacy of land titles, were selling worthless pieces of paper to land-hungry Kenyans.²⁶ These minor con men, lacking political clout, were bent on accessing some of the benefits of the dynamic land market of the 1960s and 1970s. In one example, in 1970, a con man fooled a certain Kariuki into buying “title” to two hundred acres of land in Lunga Lunga Location; the land, however, turned out to be Crown Land to which the seller had had no right.²⁷ The District Commissioner of Kwale was to tell Kinuthia later that “the legality of the written agreement between you and the seller is very questionable.”²⁸ In another example, three men sold some Kamba people land that turned out to be Trust Land belonging to Shimba North Location.²⁹ The proliferation of fraudulent sales in Kwale led the district commissioner to request assistance from local chiefs in combatting the practice.³⁰

²⁴ Ngugi (2004, 472) also argues that land registration in Kenya faced significant opposition. But his argument concerns how various social actors sought to blunt some of the implications of land registration that posed major challenges to existing social arrangements. As he points out, “These social sectors refused to accept all the implications of registration, such as near-absolute powers of the individually registered owner. They organized, invented and mobilized customary norms to frustrate complete operation of the new formal regime of tenure arrangements.”

²⁵ See the interesting work of Leblebici et al. (1991, 345) on how alternative logics and structures are first innovated at the periphery and gradually seep into the center.

²⁶ Letter from the chief of Chimba North Location to the district commissioner of Kwale discussing the illegal sale of state land by con men in Msulwa, October 18, 1968, p. 277, KNA CC/12/47; letter from J. C. Kariuki to the district commissioner of Kwale concerning 200 acres of land, May 29, 1970, KNA CC/12/47; and letter from the district commissioner of Kwale to the district officer of the Coast Division, Kwale, April 4, 1968, KNA CC/12/47.

²⁷ Letter from J. C. Kariuki to the Ministry of Lands and Settlement, May 15, 1970, KNA CC/12/47.

²⁸ Letter from the District Commissioner of Kwale to Mr. Kariuki if Mariakani, May 29, 1970, KNA CC/12/47.

²⁹ “Msulwa Report,” by the Shimba North Location chief to the district commissioner, Kwale, October 18, 1968, KNA CC/12/47.

³⁰ Letter from the district commissioner, Kwale, to the district officer of the Coast Division, Kwale, April 4, 1968, KNA CC/12/47.

Eventually, these institutional entrepreneurs began to invent more complex schemes to exploit the credulity created by land documentation. The “company” that called itself the Kenya Express Land and Estate Agent was a sophisticated example of this trend. With an eye-catching name and a postal address in Nairobi it set about its business of harvesting the fruits of Kenyans’ belief in the validity of land documents. It placed at least two advertisements in the influential *Taifa Leo* newspaper (March 23 and April 5, 1968) offering to sell fifty-acre parcels of land in Kwale District.³¹ The ads invited people to bring or send in the 1,170 shillings for the land, a 20-shilling registration fee, a 2-shilling stamp fee, and a 200-shilling agent fee “in one lump sum – no installment.”³² Their letter of April 5, 1968, to one customer prominently noted that buyers will be issued with “Title-deed[s].”³³ When a would-be buyer in Garissa inquired about visiting Kwale to see the plots he was informed that “owing to unforeseen circumstances the land in question is not yet available and therefore it will be a waste of time for you to come to Nairobi. We will inform you in the future if it will be necessary for you to come.”³⁴ At other times company employees passed themselves off as the agents of the “Local government of Kwale.”³⁵ At least a few victims and would-be victims wrote to officials, including the district commissioner of Kwale and the Kenyan minister of lands and settlement, inquiring or complaining about this company. In response to all inquiries, the district commissioner’s representative wrote: “There are no 50 acre plots being sold in Kwale at all. Watch out for rogues who go around deceiving people that they have lands to sell.”³⁶

These subversive institutional innovations by shady “land merchants” on the periphery would gradually move closer to the

³¹ Letter from J. M. Masesi of Garissa to the minister for lands and settlement, June 25, 1968, KNA CC/12/47.

³² Letter from J. M. Masesi of Garissa to the minister for lands and settlement, June 25, 1968, KNA CC/12/47.

³³ Letter from the managing director of the Kenya Express Land and Estate Agent to Mr. James Crispus, April 5, 1968, KNA CC/12/47.

³⁴ Letter from J. M. Masesi of Garissa to the minister for lands and settlement, June 25, 1968, KNA CC/12/47.

³⁵ Letter from Kinuthia Njoroge to the district commissioner of Kwale, May 4, 1968, KNA CC/12/47.

³⁶ Letter from the district commissioner of Kwale to J. K. Ithagu, May 4, 1968, KNA CC/12/47.

mainstream of institutional practice after they were adopted by wily and politically ambitious land-buying company executives in the 1970s.

Refining and Exporting Technologies

Institutional innovations by marginal actors do not necessarily become dominant. How did the institutional logics and forms invented by uninfluential crooks move from the margins, where they were deliberately hidden from the glare of the law, to the mainstream of Kenya's political economy? An important step in the migration of institutional innovations from the periphery to the mainstream is often the adaptation of these institutional forms by actors with more clout who are trying to solve new problems. These actors, who have the power to avoid punishment by state authorities, can shield new institutional logics and forms from attack in a way that marginal actors cannot. The aura of impunity that surrounds the behavior of these influential actors then encourages imitation by others. In the 1970s in Kenya, powerful, politically ambitious land-buying company (LBC) executives in Central and Rift Valley provinces played this critical role.

The leading LBC executives had little to do with small-time crooks even as they adapted the crooks' fraudulent logics. Because of the executives' political ambitions they found the economic exploitation of land documents useful, but they needed to maximize its political effectiveness. To this end, once they had gotten Kenyans to purchase land documents, they impressed on the buyers that the documents' worth depended on the new owners' "correct" political behavior. In effect, the LBC executives removed the guarantee of rights inherent in various land documents and the administrative institutions that supported them, and transferred it to themselves. This gave the executives the benefit of monies and support that people had already tendered for the papers. It also had the advantage for politicians of transforming people who held land documents into captive populations who had to obey the politicians over the long term so that the rights promised by the land documents could be actualized and protected.

The evolution of LBCs in Kenya represents an interesting case of what Hacker (2005) and Streeck and Thelen (2005) have called institutional "drift." LBCs are registered under the Companies Act (Cap 486). Departing white settlers often sought to sell their farms in large

chunks, and poor peasants, many of whom had been rendered landless by massive seizures of land for exclusive European use, could not afford to enter the land market as individuals. Land-buying companies were devised as a way for people to pool their resources by buying shares in a company. Revenues from the sale of shares could then be used by the company to purchase farms that would be subdivided among shareholders according to the number of shares they held (Wanjohi 1985, 13; Kenya 2002, 38). LBCs had tremendous success in enabling many poor Kenyans to pool their money and acquire land in the 1960s.³⁷ It is this success that explains why people were subsequently willing to buy into the schemes of crooked executives.

This institutional structure of the land-buying company was in the 1970s taken over by fraudsters and politicians and used for political ends through the systematic subversion of land documentation. In Kenya, many parliamentarians and aspiring parliamentarians formed LBCs. Thus, Ngengi Muigai, MP for Gatundu, formed the Gatundu Development Company³⁸ John Michuki, who wished to be the MP for Kangema, formed the Kangema Farlands Company.³⁹ George Mwicigi, the assistant minister for agriculture and livestock development, formed the Kandara Investment Company.⁴⁰ Waruru Kanja, Nyeri MP and assistant minister for local government and urban development, formed Burguret Arimi Limited.⁴¹ Kihika Kimani, who aspired to be MP for Nakuru, formed the notorious Ngwataniro Land Buying Company. There were some 320 and 700 LBCs in the provinces of the Central Valley and the Rift Valley, respectively, by the late 1970s.⁴² Kihika Kimani's Ngwataniro LBC alone was estimated to have as many as 30,000 members in 1979;⁴³ the Uiguano wa Mumbi

³⁷ "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980, and "Ultimatum: Directors Told To End Land Problems," *Weekly Review* (Nairobi), August 29, 1980.

³⁸ "Land Issue," *Weekly Review* (Nairobi), May 9, 1980, and "Opting Out," *Weekly Review* (Nairobi), March 26, 1980.

³⁹ "Michuki Takes the Plunge," *Weekly Review* (Nairobi), May 4, 1979.

⁴⁰ "Mwicigi Resigns," *Weekly Review* (Nairobi), January 25, 1985.

⁴¹ "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

⁴² "No Hanging On, Moi Tells Land Companies," *Weekly Review* (Nairobi), April 4, 1986; "Act Two: Nyeri Land Squabbles Continue," *Weekly Review* (Nairobi), September 5, 1980; "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

⁴³ "Shocking Revelations: Company Allegedly Lost Millions Of Shillings," *Weekly Review* (Nairobi), March 30, 1979.

Company was thought to have 3,604 members;⁴⁴ and Ngengi Muigai's Gatundu Development Company had around 23,000 members.⁴⁵

Land-buying company executives sold "vanity shares" to amass money for political campaigns.⁴⁶ They used the money to influence attendance at political rallies and how and where people voted.⁴⁷ "Vanity shares" were share certificates that were supposed to but that did not actually give people access to land. Shareholders sometimes found that their access to land depended not on their owning share certificates, but on their performance of services, such as rendering political support to LBC executives. The existence of "vanity shares" led to widespread doubts about the legitimacy of LBC share certificates. In 1980, 30,032 people registered with the district commissioner of Nyeri alone, claiming that they had been defrauded by LBC executives.⁴⁸ Of seventy-three known LBCs in Nyeri District in 1980, the directors of forty-one were under investigation for fraudulent activities. The heads of the other thirty-two had simply disappeared, leaving little evidence of their companies' activities beyond the irate peasants they had defrauded.⁴⁹

LBCs were transformed into excellent instruments for raising money for political action. Share certificates were issued for which there were no corresponding land parcels, providing company executives with money for their political activities but leaving purchasers with worthless documents. In 1980, 1,370 shareholders in Burguret Arimi, the LBC headed by Waruru Kanja, complained to the Nyeri district commissioner. They had purchased shares in the company but had received no lands for their shares.⁵⁰ The mammoth Gatarakwa Farming Company, headed by the powerful Ndungu Gicheru, a freedom

⁴⁴ "Land Ultimatum: Directors Told To End Land Problems," *Weekly Review* (Nairobi), August 29, 1980.

⁴⁵ "Land Issue: Shareholders' Patience Running Out," *Weekly Review* (Nairobi), May 9, 1980.

⁴⁶ "Vanity Shares" was the title of a story in the *Weekly Review* (Nairobi), June 20, 1980.

⁴⁷ "Campaign Against JM Rumors," *Weekly Review* (Nairobi), May 5, 1975, and "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

⁴⁸ "Vanity Shares," *Weekly Review* (Nairobi), June 20, 1980.

⁴⁹ "Act Two: Nyeri Land Squabbles Continue," *Weekly Review* (Nairobi), September 5, 1980.

⁵⁰ "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

fighter during the Mau Mau liberation war, produced even more landless shareholders. Only a third of the company's 6,000 members had received their plots by May 1980. The rest crowded the office of the Nyeri district commissioner to complain about their worthless share certificates. More than a thousand shareholders in Weru-ini Land Limited, a company headed by the governor of the Central Bank of Kenya, Duncan Ndegwa, similarly trooped to the district commissioner's office to complain about not receiving the land presumably guaranteed by their share certificates.⁵¹ Some LBC executives put the same plot number on multiple ballots, which led to more than one person's drawing "rights" to the same piece of land.⁵² About 300 members of the Githunguri Constituency Ranching Company actually got land title deeds from their executives but found no corresponding lands. Another 3,250 company members received neither titles nor land parcels.⁵³ Most shareholders in LBCs in the 1970s eventually came to the same painful conclusion pithily expressed by Mzee Mathenge, a victim of the Ngwataniro LBC: "The land just was not there."⁵⁴

The fortunate few shareholders and titleholders who actually got land often soon realized that their troubles were not over. In many cases, avaricious company directors, eager to profit one more time before they relinquished actual land, used the titles to shareholders' land as collateral for massive loans that they made no efforts to repay. As a result, the few lucky people who had gotten those parcels discovered that they had to repay those loans to avoid foreclosure by the bank. In essence, they had to pay for the land twice to avoid losing it. Members of the Ngwataniro LBC, however, did not lose their newly acquired plots to the banks that held the titles as collateral, thanks to President Moi's intervention on their behalf.⁵⁵

Allegations that some of the proceeds from these fraudulent activities had been used "in the last two parliamentary and civic elections"

⁵¹ "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

⁵² Interview with three land control board members and former shareholders in LBCs in Nyeri District (Ken 26), March 9, 2005.

⁵³ "No Hanging On, Moi Tells Land Buying Companies," *Weekly Review* (Nairobi), April 4, 1986.

⁵⁴ "Vanity Shares," *Weekly Review* (Nairobi), June 20, 1980.

⁵⁵ "No Hanging On, Moi Tells Land Buying Companies," *Weekly Review* (Nairobi), April 4, 1986.

were widespread.⁵⁶ Given the involvement of many LBC executives in local and national politics these allegations were not surprising. LBCs had become cash cows for politicians seeking to acquire or maintain positions in the ruling Kenya African National Union's (KANU) competitive one-party system.

But the political uses of LBCs went beyond the companies' serving as a reliable source of cash for aspiring politicians. LBCs became instruments for holding shareholders as political captives who could be manipulated in various ways. The idea was to collect payment from shareholders but delay the distribution of share certificates or titles or both, as well as the land parcels that were supposedly guaranteed by these documents. Politicians could then use the undistributed certificates, titles, and parcels as bait to get people to attend rallies and to vote in certain ways. The case of John Michuki is particularly instructive here. When the former head of the Kenya Commercial Bank decided to contest the Kangema parliamentary seat in 1979, he called a meeting of his Kangema Farlands Company to discuss share certificates. But when members of the six thousand-member-strong LBC gathered at Michuki's home, they had to endure a well-choreographed performance at which share certificates never came up for discussion. Instead, after refreshments were served, a series of speakers mounted the podium to beseech Michuki to run for the parliamentary seat. Michuki finally agreed to do so and announced his intention to unseat the incumbent MP, J. J. Kamotho.⁵⁷

The use of LBCs to gerrymander electoral constituencies was one of the contributions of the man who would become the poster child for the ills of LBCs in the 1970s. Kihika Kimani was the founder and chief executive of what the *Weekly Review* called the "all-pervading business cum political organization" Ngwataniro LBC.⁵⁸ Kimani manipulated the character of voting constituencies in Nakuru District by moving members of his LBC around the company's vast properties during revision of the voters' roll in 1977. Promising land to those who cooperated and threatening the rights of those who refused, Kimani allegedly transported voters from other constituencies to his

⁵⁶ "Bogus Companies," *Weekly Review* (Nairobi), May 23, 1980.

⁵⁷ "Michuki Takes the Plunge," *Weekly Review* (Nairobi), May 4, 1979.

⁵⁸ "Kihika Kimani To Face Uphill Battle," *Weekly Review* (Nairobi), April 27, 1979.

own in Nakuru North, where they registered to vote and boosted his support.⁵⁹

Kihika Kimani used his LBC to rise from obscurity to the heights of Nakuruan and national politics. He created the Ngwataniro LBC after losing his initial bid to unseat the influential Nakuru East MP Fred Kubai in the 1969 parliamentary elections. To raise money for his political activities, he oversubscribed his company's shares, leaving many members with no land. He also threatened to evict company members who opposed his political ambitions and gave company land to many people who were not shareholders but who supported him politically. Using these techniques he expertly executed his plan to replace three of the four incumbent Nakuru District MPs with Ngwataniro members in the 1974 parliamentary elections.⁶⁰ By the middle of the 1970s he was the most influential politician in Nakuru and had set his sights on national politics. He was elected organizing secretary of the powerful Gikuyu, Embu and Meru Association (GEMA), which was very influential during the reign of President Kenyatta. Formed in 1971 to further the social welfare of the Gikuyu, Embu and Meru ethnic groups, GEMA became a powerful and feared political association with an active investment arm, GEMA Holdings.⁶¹ When the prominent Nyandarua North MP J. M. Kariuki was murdered, Kimani launched a series of meetings in the Rift Valley to quell widespread rumors that senior state officials were involved in his assassination. Ngwataniro funds and vehicles were thought to have been used in organizing those meetings.⁶² Kihika Kimani's most significant foray into national politics was his founding of the Change the Constitution Movement in 1977, which hoped to prevent Vice President Moi from automatically succeeding President Kenyatta in the event of the president's death.⁶³

⁵⁹ "Ngwataniro at Crossroads as Internal Problems Surface," *Weekly Review* (Nairobi), December 12, 1977.

⁶⁰ "Campaign Against JM Rumors," *Weekly Review* (Nairobi), May 5, 1975, and "Mr. 100 per cent," *Weekly Review* (Nairobi), January 12, 1979.

⁶¹ "GEMA speaks out on politics," *Weekly Review* (Nairobi), May 19, 1975; "What Went Wrong at GEMA Holdings," *Weekly Review* (Nairobi), February 2, 1979.

⁶² "Ngwataniro at Crossroads as Internal Problems Surface," *Weekly Review* (Nairobi), December 12, 1977.

⁶³ "1977 Limping to the Finish in Kenya," *Weekly Review* (Nairobi), December 26, 1977.

Moi was well aware of the political significance of these LBCs and of their fraudulent manipulation of land documentation and property rights in the struggle for control of the Kenyan state. One of his first actions on succeeding Kenyatta as president was to launch a sustained attack on the LBCs that had enabled his opponents to form the Change the Constitution Movement. Moi knew that the power of these LBC executives came from their frauds involving share certificates, titles, and land parcels. By going after the manipulators he set out to liberate the captive shareholders on whose backs the LBC executives stood (Wanjohi 1985, 14). He thus worked diligently on property institutions in areas influenced by LBC executives, seeking to hinder their efforts to exploit land to garner political support.

Moi repeatedly criticized LBCs and their fraudulent activities, going so far as to compare the LBC executives to Kenya's former colonial masters.⁶⁴ He compelled the companies to register everyone who bought shares from them as shareholders, not just the executives. In its 1977 returns, for instance, GEMA had listed only seven shareholders, all of whom were executive members. The 6,980 others who also held shares were left off the list. By not registering the vast majority of their shareholders, LBC executives kept these "sleeping partners" in legal limbo, denying them the legal standing to challenge the executives.⁶⁵ Moi also forced LBC executives to issue titles to their members and immediately parcel out farms to the rightful shareholders (Wanjohi 1985, 14).⁶⁶ He even deployed state officials to aid the subdivision of parcels and registration of titles wherever executives seemed unwilling or unable to undertake these tasks. Such was the case with the Gatarakwa Farming Company in Nyeri District. Moi went there himself in 1986 to distribute titles to members but refrained from doing so because of problems with the documentation. He then sent state officials to give out land to shareholders and register

⁶⁴ "Beware Conmen," *Weekly Review* (Nairobi), October 5, 1979.

⁶⁵ "Company Rules Tightened: Sleeping Partners To Get Protection," *Weekly Review* (Nairobi), February 23, 1979.

⁶⁶ "Company Rules Tightened: Sleeping Partners To Get Protection," *Weekly Review* (Nairobi), February 23, 1979; "Beware Conmen! President Warns Kenyans," *Weekly Review* (Nairobi), October 5, 1979; "Ultimatum: Directors Told To End Land Problems," *Weekly Review* (Nairobi), August 29, 1980; and "Progress," *Weekly Review* (Nairobi), April 22, 1983.

their rights.⁶⁷ Earlier, in April 1983, Moi had traveled to Bahati in Nakuru to distribute share certificates to members of the Ngwataniro LBC.⁶⁸ In addition, he ordered the deregistration and dissolution of LBCs once they had completed issuing land and titles to their shareholders.⁶⁹ Moi thus tried to free tens of thousands of people from the control of LBC executives. However, given his own similar ruthless manipulation of property rights in the years to come, one can only assume that his effort to save LBC shareholders was motivated more by an interest in undermining his LBC opponents than by any genuine interest in empowering land-hungry Kenyans.

Moi's efforts paid off for him handsomely. As some of the most notable LBC executives lost their ability to manipulate shares and titles, they experienced a rapid decline in their political fortunes. Kihika Kimani's dramatic downfall exemplifies this. On April 21, 1979, his long reign as director of Ngwataniro LBC ended when he refrained from contesting the directorship under pressure from his opponents.⁷⁰ In addition, after Moi had nullified KANU Nakuru Branch elections in 1979, Kimani declined to contest his long-held seat, thus allowing Moi's favored candidate, Kariuki Chotora, to run unopposed.⁷¹ That same year, Kimani lost his Nakuru North parliamentary seat to Koigi wa Wamwere, who received thrice as many votes as he had.⁷² Finally, in 1985, Kimani was convicted of mismanaging Ngwataniro funds and imprisoned.⁷³

It is important to note that state-issued land title deeds did not escape the disrepute into which land documents had fallen. The country's High Court nullified hundreds of title deeds issued after an adjudication exercise in Mosiro, Kajiado District, in 1991 because Ministry

⁶⁷ Interview with an official of a land control board in Nyeri District, (Ken 26), March 9, 2005; "Action for Gatarakwa," *Weekly Review* (Nairobi), June 13, 1986; and "Progress," *Weekly Review* (Nairobi), April 22, 1983.

⁶⁸ "Progress: Ngwataniro Members Finally Get Share Certificates," *Weekly Review* (Nairobi), April 22, 1983.

⁶⁹ "No Hanging On, Moi Tells Land Companies," *Weekly Review* (Nairobi), April 4, 1986.

⁷⁰ "Kihika Kimani To Face Uphill Battle," *Weekly Review* (Nairobi), April 27, 1979.

⁷¹ "Kihika Steps Down," *Weekly Review* (Nairobi), June 8, 1979.

⁷² "Dixon Kihika Kimani Bids for Come-back," *Weekly Review* (Nairobi), November 19, 1982.

⁷³ "Kihika Appeals," *Weekly Review* (Nairobi), January 31, 1985.

of Lands officials had handed out titles to relatives and friends with no right to land in the area.⁷⁴ The cancellations prompted the reputable *Weekly Review* magazine to ponder the validity of the popular expectation that “a title deed gives the holder irrevocable ownership of a piece of land.”⁷⁵

This parasitic exploitation brought land documentation in Kenya under tremendous stress by 1992, following redemocratization. Widespread belief in the efficacy of land documents had played a significant role in facilitating this subversion.

Arriving at the Heart of the Mainstream

The exogenous shock of redemocratization in 1991 did not suddenly cause the subversion of land documentation in Kenya, as some have argued (Klopp 2000, 8–9).⁷⁶ It contributed to an ongoing process by giving even more senior KANU leaders an incentive to embrace, as they struggled to shore up their political dominance, practices similar to those of LBC executives (Klopp 2000, 8). This similarity supports the significance that some scholars give to imitation as an explanation for how peripheral institutional forms and logics move to the mainstream.

The 1992 and 1997 elections pitted KANU politicians against opponents from new parties like the Democratic Party (DP) and the Forum for the Restoration of Democracy (FORD). KANU officials at the highest levels of government resorted to issuing worthless or encumbered land titles and letters of allotment in exchange for money and political support, threatening and evicting title-bearing opponents, and using land documents to influence voting patterns in various constituencies (Kenya 2004, 37–40, 75).⁷⁷ They filled their campaign chests and

⁷⁴ “Land Questions,” *Weekly Review* (Nairobi), May 24, 1991.

⁷⁵ “What Value a Title Deed?” *Weekly Review* (Nairobi), May 31, 1991.

⁷⁶ Internal Displacement Monitoring Center (IDMC), “‘I Am a Refugee in My Own Country’: Conflict-induced Internal Displacement in Kenya” (Geneva Switzerland, December 19, 2006), [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/AF919E45D789BD0BC125724900350687/\\$file/Kenya%20Special%20Report%20Dec06.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/AF919E45D789BD0BC125724900350687/$file/Kenya%20Special%20Report%20Dec06.pdf) (accessed June 4, 2007), pp. 13–20. There is also a popular discourse ascribing the subversion of land documents and other forms of corruption in the land market to redemocratization in the 1990s. Various interviewees held this view. These included a staff member of an NGO involved in advocacy on land issues (Kenya 2), February 15, 2005; and an official of the Department of Lands (Kenya 1), February 14, 2005.

⁷⁷ IDMC, “‘I Am a Refugee in My Own Country,’” pp. 13–20.

sought political support by issuing more than one title or allocation note for the same piece of land (Kenya 2004, 9–14, 80).⁷⁸ To facilitate this fraud, the Ministry of Lands included a disclaimer in letters of allotment in 1993 absolving itself of its responsibility to give people alternative plots of land when the parcels indicated in the allotment letters were already occupied.⁷⁹ Officials also took to changing entries in title registers to benefit their supporters (Kenya 2004, 37–40, 75).

To better tie people to KANU, leading party officials let it be known that the efficacy of a holder's land documents depended on his or her political leanings. In this vein, the minister of local government and influential KANU Narok MP William ole Ntimama threatened many of the title-bearing Gikuyu residents of Narok who were seen as anti-KANU with eviction when he told them to "lie low like an envelop or face grave consequences."⁸⁰ Lying low meant "proper" political behavior. As Ntimama pointed out, "These people are doing lucrative business in all sectors, but recently they have been wanting to control the politics of the area."⁸¹ To those who harbored the vain hope that a title would protect them from victimization if they supported opposition candidates or parties, Ntimama boldly proclaimed that land titles were "mere pieces of paper" in 1993.⁸² This public belittling of supposedly indefeasible titles provoked panic and led the opposition Masai politician John Keen to comment that devaluing land title deeds was "like opening a Pandora's box and ultimately means that no one has a right to own anything in Kenya."⁸³ Ntimama, however, was not trying to deny the existence of property in Kenya. In line with methods first invented by LBC executives like Kihika Kimani, he was attempting to influence title bearers by sapping their documents of the guarantee of security and making such guarantees dependent on "proper" (pro-KANU) political behavior.

⁷⁸ Interestingly, the state simultaneously bought lands at highly inflated prices from allies of leading politicians who had acquired these parcels from the state at very low prices.

⁷⁹ Interview with an official of the Department of Lands (Ken 1), February, 14, 2005.

⁸⁰ "The Narok Saga and Its Implications for Land Policy," *Weekly Review* (Nairobi), March 1, 1991.

⁸¹ "Narok: Background to Ethnic Conflict," *Weekly Review* (Nairobi), March 1, 1991.

⁸² "The Indigenous and the Natives," *Weekly Review* (Nairobi), July 9, 1993, and "The End of Tribal Talks," *Weekly Review* (Nairobi), July 9, 1993.

⁸³ "The Indigenous and the Natives," *Weekly Review* (Nairobi), July 9, 1993.

Title-bearing Gikuyu who refused to heed Ntimama's calls for compliance were violently evicted from Enoosupukia in Narok District.⁸⁴ Similar evictions and clashes preceded the 1992 and 1997 elections and spread across the country, driving home the point that only titles held by those involved in pro-KANU political activities would be respected (Ajulu 2002, 264–265; Klopp 2002, 274–275).⁸⁵ By 1993 clashes in areas such as Nakuru, Turkana, Nandi, Kericho, Uasin Gishu, and Taita Taveta are thought to have led to fifteen hundred deaths and three hundred thousand displacements.⁸⁶ The deliberate depreciation of the worth of land titles was further revealed when KANU elites, including Ntimama and Kipkalya Kones, vowed not to allow title-bearing Gikuyu clash victims to return to their farms until political questions between the communities were settled.⁸⁷

The land clashes that punctuated the elections of 1992 and 1997 led to massive displacement and violence but did not mark the beginning of the subversion of land titles and other land documents. They merely continued a process that had been long underway, one that had proceeded hand in hand with, and had been facilitated by, the promotion and development of land documentation in Kenya.

Conclusion

This chapter builds on an understanding of the contradictory potential of institutions to demonstrate how the success of land documentation in Kenya contributed to its own gradual demise. I argue that the institution of land documentation in Kenya produced and sustained dominant agricultural, real estate, and tourism interests that were dedicated to the “sanctity of land titles” in Kenya. But the success of land documentation created a belief in the efficacy of land documents that was easily exploited by fraudsters and politicians intent on exchanging worthless or encumbered land documents for economic and political gain. The abuse of land documentation by these groups was only exacerbated by the reintroduction of democratization.

⁸⁴ “Resettlement for Victims,” *Weekly Review* (Nairobi), November 19, 1993.

⁸⁵ IDMC, “I Am a Refugee in My Own Country,” pp. 13–20.

⁸⁶ IDMC, “I Am a Refugee in My Own Country,” p. 13.

⁸⁷ “End of Tribal Talks,” *Weekly Review* (Nairobi), September 15, 1995, and “New Fears and Suspicions,” *Weekly Review* (Nairobi), September 1, 1995.

This reflection on the contradictory potential of institutional structures gives us a good way to reflect on the endogenous contributions to change in institutions with positive-feedback effects. It allows us to understand how institutions demonstrating strong positive-feedback effects also contribute to their own downfall. This does not totally rule out the impact of exogenous factors, but shows that, sometimes, these exogenous factors speed along or exacerbate processes that are underway because of endogenous causes.

Recognition of the contradictory potential of institutions has both a theoretical and a methodological implication. On the theoretical front, it forces us to reexamine the conceptualization of critical junctures. Critical junctures are defined as moments of great historical significance during which change occurs and actors chose between various alternatives, unlike normal periods that are marked by the structural reproduction of paths (Mahoney 2000, 513; Thelen 2004, 30). The contradictory potential of institutions reduces the historical significance of “critical” junctures. It infuses the periods of supposed stability with greater significance by showing that agency often operates outside of critical junctures in instances where the process of change unfolds gradually (see also Thelen 2004, 32; Streeck and Thelen 2005, 4; Mahoney and Thelen, this volume). On the methodological front, the story told here about the contradictory potential of institutions forces us to rethink the historical periods in which we concentrate research on institutional change. If change is an ever-present possibility because of the very nature of institutions, and can occur gradually over time, then concentrating research on critical junctures marked by big exogenous shocks and obvious drastic changes might produce misleading conclusions about the sources of change.

Focusing on periods outside of those thought of as critical junctures is important because institutions that display contradictory potential inherently contain the germs of conflict that generates change. By simultaneously fostering parasitic agents and those dedicated to the proper functioning of institutions, institutions create the constant possibility of conflict and contestation. This view of institutions opens up opportunities for conflict and change in even more ways than do accounts that portray institutions as unambiguous structures and that influence behavior in uniform ways. Here the contradictory forces nurtured by institutions do constant battle, and the stable persistence of

institutions even at the height of their acceptance by societal actors is not a foregone conclusion. As shown with Kenya's LBC executives, where such "friends" of institutions happen to be subversive parasites, their warm embrace and exploitation of prevailing institutions may well contribute to drift and gradual institutional decline.

At the heart of the examination in this chapter of the abuse of property rights institutions by con men and LBC executives is recognition of some of the ends to which actors may put the subversion of titles and other forms of land documents. The literature on property rights is replete with works emphasizing the beneficial effects of property institutions like titles. They portray titles as instruments that facilitate productive activities and allow the transformation of real property into capital through its use as collateral (de Soto 2000; World Bank 2002; Joireman 2007). Little attention has been paid to the question of how these same institutions can be manipulated to serve ends that systematically disempower and rob people, undermine markets, and create social disorder. A key dividend of recognizing the contradictory potential of institutions is that we can understand how these institutional structures may be used for different purposes with diverse practical effects and dissimilar ethical valences.

References

- Ajulu, Rok. 2002. "Politicised Ethnicity, Competitive Politics and Conflict in Kenya: A Historical Perspective." *African Studies* 61 (December): 251–268.
- Arnold, Guy. 1974. *Kenyatta and the Politics of Kenya*. London: Dent.
- Arthur, Brian. 1994. *Increasing Returns and Path Dependence in the Economy*. Ann Arbor: University of Michigan Press.
- Atieno-Odhiambo, Elisha. 2002. "Hegemonic Enterprises and Instrumentalities of Survival: Ethnicity and Democracy in Kenya." *African Studies* 61 (November): 223–249.
- Barley, Stephen, and Gideon Kunda. 1992. "Design and Devotion: Surges of Rational and Normative Ideologies of Control in Managerial Discourse." *Administrative Science Quarterly* 37 (September): 363–399.
- Berman, Bruce, and John Lonsdale. 1992. *Unhappy Valley: Conflict in Kenya and Africa*. Eastern African Studies. London: J. Currey.
- Branch, Daniel. 2006. "Loyalists, Mau Mau, and Elections in Kenya: The First Triumph of the System, 1957–1958." *Africa Today* 53 (Winter): 27–50.

- Clemens, Elisabeth. 1993. "Organizational Repertoires and Institutional Change: Women's Groups and the Transformation of U.S. Politics, 1890–1920." *American Journal of Sociology* 98 (January): 755–798.
- Comaroff, John. 1980. "Class and Culture in a Peasant Economy: The Transformation of Land Tenure in Barolong." *Journal of African Law* 1 (Spring): 85–113.
- de Soto, Hernando. 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. London: Bantam.
- DiMaggio, Paul. 1988. "Interest and Agency in Institutional Theory." In *Institutional Patterns and Organizations: Culture and Environment*, ed. Lynne Zucker, 3–21. Cambridge, MA: Ballinger Publishing Company.
- Greif, Avner, and David Laitin. 2004. "A Theory of Endogenous Institutional Change." *American Political Science Review* 98 (November): 633–652.
- Hacker, Jacob. 2005. "Policy Drift: The Hidden Politics of US Welfare State Retrenchment." In *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen, 40–82. Oxford: Oxford University Press.
- Hayanga, C. A. 1975. "Loans to Agriculture in Kenya." *Journal of African Law* 19 (Spring-Autumn): 105–111.
- Hazlewood, Arthur. 1979. *The Economy of Kenya: The Kenyatta Era*. Oxford: Oxford University Press.
- Jackson, Gregory. 2005. "Contested Boundaries: Ambiguity and Creativity in the Evolution of German Codetermination," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen, 226–254. Oxford: Oxford University Press.
- Joireman, Sandra. 2007. "Enforcing New Property Rights in Sub-Saharan Africa: The Ugandan Constitution and the 1998 Land Act." *Comparative Politics* 39 (July): 463–480.
- Katznelson, Ira. 2003. "Periodization and Preferences: Reflections on Purposive Action in Comparative Historical Social Science." In *Comparative Historical Analysis in the Social Sciences*, ed. James Mahoney and Dietrich Rueschemeyer, 270–301. Cambridge: Cambridge University Press.
- Kenya. 1941. *Land Tenure Committee Report*. Nairobi: Government Printer.
- Kenya. 1966. *Report of the Mission on Land Consolidation in Kenya, 1965–1966*. Nairobi: Printing and Packaging Corporation.
- Kenya. 2002. *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration*. Nairobi: Government Printer.
- Kenya. 2004. *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land*. Nairobi: Government Printer.
- Klopp, Jacqueline. 2000. "Pilfering the Public: The Problem of Land Grabbing in Contemporary Kenya." *Africa Today* 47 (Winter): 7–26.

- Klopp, Jacqueline. 2002. "Can Moral Ethnicity Trump Political Tribalism? The Struggle for Land and Nation in Kenya." *African Studies* 61 (December): 269-294.
- Leblebici, Huseyin, et al. 1991. "Institutional Change and the Transformation of Interorganizational Fields: An Organizational History of the US Radio Broadcasting Industry." *Administrative Science Quarterly* 36 (September): 333-363.
- Leyes, Norman. 1931. *A Last Chance in Kenya*. London: L. and Virginia Woolf at the Hogarth Press.
- Mahoney, James. 2000. "Path Dependence in Historical Sociology." *Theory and Society* 29 (August): 507-548.
- Maybury-Lewis, David. 1989. "The Quest for Harmony." In *The Attraction of Opposites: Thought and Society in the Dualistic Mode*, ed. David Maybury-Lewis and Uri Almagor, 1-17. Ann Arbor: University of Michigan Press.
- Meek, Charles. 1949. *Land, Law and Custom in the Colonies*. London: Oxford University Press, 1949.
- Ngugi, Joel. 2004. "Reexamining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration." *Michigan Journal of International Law* 25 (Winter): 467-527.
- North, Douglass C. 1990. *Institutions, Institutional Change, and Economic Performance: The Political Economy of Institutions and Decisions*. Cambridge: Cambridge University Press.
- Pierson, Paul. 2000. "Not Just What, but When: Timing and Sequence in Political Processes." *Studies in American Political Development* 14 (Spring): 72-92.
- Pierson, Paul. 2004. *Politics in Time: History, Institutions, and Political Analysis*. Princeton: Princeton University Press.
- Schneiberg, Marc. 2005. "Combining New Institutionalisms: Explaining Institutional Change in American Property Insurance." *Sociological Forum* 20 (March): 93-137.
- Schneiberg, Marc, and Elisabeth Clemens. 2006. "The Typical Tools for the Job: Research Strategies in Institutional Analysis." *Sociological Theory* 24 (September): 195-227.
- Scott, James. 1998. *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven: Yale University Press.
- Streeck, Wolfgang, and Kathleen Thelen. 2005. "Introduction: Institutional Change in Advanced Political Economies." In *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen, 1-39. Oxford: Oxford University Press.
- Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science* 2 (June): 369-404.
- Thelen, Kathleen. 2000. "Timing and Temporality in the Analysis of Institutional Evolution and Change." *Studies in American Political Development* 14 (Spring): 101-108.

- Thelen, Kathleen. 2004. *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan*. New York: Cambridge University Press.
- Wanjohi, Nick Gatheru. 1985. *The Politics of Land, Elections, and Democratic Performance in Kenya: A Case Study of Nakuru District*. Vol. 412, *Working Paper*. Nairobi: Institute for Development Studies, University of Nairobi.
- World Bank. 2002. *Building Institutions for Markets: World Development Report, 2002*. New York: Oxford University Press.
- Yandle, Bruce. 1983. "Bootleggers and Baptists – the Education of a Regulatory Economist." *Regulation* (May/June): 12–20.