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**Inheriting Community: Social Identity and Common Property
among the Digo of Kenya**

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The rains were particularly good this year (1993) leaving the grass lush and tall and the forest deep green. We walk down the hundreds of paths and roads in the country side that cut across compounds and turn by the side of houses, to attend a wedding or a funeral. I am stunned by the enormous view of grass patches and gardens, twisted cashews and gigantic Baobabs and houses and compounds softened by the hushed light of coconut plantations. At no time is my view or my path interrupted by fences. Among the Digo of the southern coast of Kenya, tenure to land is recognized and established not by boundaries marked by fences, but through the ownership of trees, specifically coconut trees. A person's tenure of land is understood through a relation to the person who planted the trees that mark the boundaries of tenure. When in Tiwi, a small town in Kwale, I asked in passing why don't people fence their property. I was asked in return;

why would anybody fence property? It is too exclusionary, too individual and since the neighbors are family why would I want to shut them out.¹

Inclusion and exclusion, the grounds for and the limits to unity, can be read through the physical grid of land holdings. Why are fences considered to be too exclusionary and too individual? Why is individualness considered a problem? Who is being excluded? What does she mean by family? Why is kinship important? This paper argues that how one is a member of a group is of fundamental importance to the way land is used, allocated and understood to be owned. Understandings of relatedness and belonging and therefore difference set criteria for distribution of properties and property. How property relations are understood through the competing ascriptions of personhood, by what is characterized as Islamic, Western and Digo is especially important to the Digo in conceptualizing kinship and constituting group identity in Kwale District. How are competing and contradictory systems of classification negotiated and mobilized to retain

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certain practices regarding landholdings? In what ways are these landholdings related to political authority and forms of power? Who wins and loses in the process?

This paper will focus on the expression of identity and social continuity through retention of common land among the Digo of the southern Kenyan coast. Common property lies at the center of Digo disputes and practices concerning land which emphasize clan identity and membership more than individual ownership. The paper looks at how the Digo negotiate overlapping and conflicting classificatory social orders that set differing criteria for the distribution of property. Constructions of family belonging importantly affect the manner in which property is transferred intergenerationally. Specifically, this paper looks at how Digo people negotiate legal systems in order to hold land in common, through the registration of land, variations on Islamic inheritance and *inter vivos* distribution of property.

In an endeavor to institute power through categories of meaning regarding land and social relations, colonial and independent governments and Islamic institutions disrupted Digo notions of kinship, law and identity with gendered implications. These categories of meaning are precisely what is at stake for the distribution of property and power in post-colonial Islamic Digo society. I look at how differing inheritance practices, reflecting political, economic and religious authority and power determine the manner in which women own, and gain access to land. In this paper I argue that rather than just negotiating various land laws that exist simultaneously in Kenya - statutory, Islamic and customary law, - conflicts in inheritance and practice must be read as fights within and without a community over defining community and belonging.

I explore the relation between common property and government, notions of production and value, that hinge on constructions of persons. Grossi argues that although the debate over common and private property in Europe of the nineteenth and twentieth centuries can't be removed from the debate about communism and capitalism it is not

limited to this.² The distinction between common and private property has been thought of throughout this century and last century in a variety of ways.

Locke, whose influence we still feel strongly today, thought that the existence of private property was made possible by the application of labor to ~~common property~~ ^{unowned common} property.³ To Locke labor removes what is common from ^{to all} a state of nature and begins property. The common has no meaning to him without the possibility of fixing property as private property through labor. Because a person first owns himself, his labor is "naturally" seen to be his as well. Through this labor that belongs to the individual, he can remove resources from the commons and fix his property in them. This idea that private property rises out of common property can be contrasted to Maine who believed that common and individual property were in opposition to each other, in separate states of evolution.⁴

In The Gender of the Gift Marilyn Strathern argues that the way we conceptualize persons determines how we understand the relationships between person and things.⁵ If we take her concern for how persons are understood, imagined, related and bounded as part of, or against other persons or things, then we must first understand how difference between persons and things come into being in society. We can not assume a unitary, radical individual as the unit of analysis to study African land tenure systems.

In the same vein, Collier, Maurer and Navaz⁶ argue that Western legal practices play a role in the breakup of old orders and identities founded on them, in the process of globalization. These legal practices provide a particular form for soliciting and negotiating expressions of identities. Tracing the individualism to Hobbes, they agree that Western legal practices identifies "the primary creator and beneficiary of law as an individual who

²Grossi, Paolo 1981 *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*. University of Chicago Press. Chicago 106

³Locke, John 1964 "Second Treatise" in Two Treatises on Government, Hafner.

⁴Maine, Henry Sumner 1986 Ancient Law. Arizona

⁵Strathern, Marilyn 1988 The Gender of the Gift: Problems with women and problems with society in Melanesia. University of California Press, Berkeley.

⁶Collier, J., B. Maurer and L. S. Navaz 1995 "Sanctioned Identities: Legal Constructions of Modern Personhood" in *Identities Global Studies in Culture and Power* (2) 1-2:1-28.

'owns' property, even if only in 'his' person".⁷ Strathern's argument stresses that Western concepts of property depends upon a notion of the singular proprietor of one's own person [demonstrated in Locke or in law] which allows for the possibility of an individual relationship between persons and things that is taken to be natural.

Grossi argues that European culture of the nineteenth century was dominated by extremely rigid cannons of possessive individualism.⁸ He argues that this was fortified by the political rise of the bourgeoisie, and the revival of Roman and Romanistic techniques of law establishing a secular society on the basis of *having*. Property took on a moral character that defined persons as individuals and as subjects of the emerging European nation-states. This moral character included viewing private property as having positive values and unowned? shared? *individual* common property as a negative values. The state was viewed as the guarantor of wealth of whoever held it legitimately and the proprietor was seen as the ideal citizen.⁹ However, Grossi points out that debate raged throughout the nineteenth century over the origin of individual landed property and the limit of undivided rule of private property. The proponent of common property were, however, to lose the debate at the end of the nineteenth century where private property emerges all the more strong for the debate? existence.

These debates take place during the expansion of European imperialism and colonialism in Africa and Asia and must be seen as contributing to the form *not* property law took in countries such as Kenya. The formation of a colonial state intensified the colonial government's adherence to and investment in the outcomes of the debate. Raising a point common to British colonies, Scott Atran argues that registration of land was tied to the British efforts to create a free labor market.¹⁰ In Kenya the creation of free labor, for

⁷ Collier, J., B. Maurer and L. S. Navaz 1995 "Sanctioned Identities: Legal Constructions of Modern Personhood" in *Identities Global Studies in Culture and Power* (2) 1-2:2.

⁸ Grossi, Paolo 1981 *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*. University of Chicago Press. Chicago pg. 235

⁹ Grossi, Paolo 1981 *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*. University of Chicago Press. Chicago pg. 3

¹⁰ Atran, Scott 1989, "The Surrogate Colonization of Palestine, 1917-1939", *American Ethnologist*,

plantations and especially the two war efforts at the coast, included a "war on property" in the form of taxes, destruction of animals and houses, and the fight against trade in ivory and palm wine.¹¹ As in other parts of the world, British land policies regarding tenure in Kenya were instigated under the interest of improved agricultural production. As a result, between 1910 and 1920 the colonial government "set out to establish the *legal* structure for capitalist development".¹² The post-colonial government inherited the concern for the transformation of agricultural production and has based its development policy on a specific type of land holding (private property) and land subject relations (citizen) ever since independence.

Strathern point out the ideology lying behind Western concepts of personhood that are implicated in notions of property. In post-colonial regions Western concepts of possessive individualism are reinforced through inherited colonial codified or common legal systems. Although these legal systems have developed and changed, the efforts to create independent nation-states have increased rather than decreased the authority of this Western law through nationalism. The Kenya government essentially continued colonial policy towards agrarian change by considering private registration of title to land essential to improving agricultural output. Okoth-Ogendo points out that "the continuity of agrarian law was simply an aspect of the wider process of the continuity of the political economy of colonialism as a whole".¹³ The Registered Land Act of 1963, which provided a single code of property law for the whole country, reinforced by the Succession Act of 1981, removed government sanctions on claims to customary law in nationalist attempts to secure

16(4):719-744

¹¹ Brantley, Cynthia 1981, *The Giriama and Colonial Resistance in Kenya 1800-1920*. Berkeley, University of California Press: and Mambo, Robert M. 1987, "Nascent Political Activities Among the Mijikenda of Kenya's Coast During the Colonial Era", *Transafrican Journal of History*, 16:92-119.

¹² Cooper, Frederick 1992, "Colonizing Time: Work Rhythms and Labor Conflict in Colonial Mombasa" in *Colonialism and Culture* Dirks, N. B.(ed), Ann Arbor, The University of Michigan Press.pg. 217

¹³ Okoth-Ogendo, H. W. O. 1991, *Tenants of the Crown*. Nairobi, ACTS press pg. 164

tenure and regularize succession. As this paper argues, and as others have argued for other parts of Kenya¹⁴ these attempts were largely unsuccessful .

The Digo are one of nine peoples who make up the Mijikenda, the name itself meaning "the nine *kaya*". In the late 1940s, when forming the cooperative political organization the Mijikenda Union, they chose to be called Mijikenda.¹⁵ The *kaya* were fortified forest hilltop villages established by different Mijikenda peoples along the low plateau running north-south some twelve miles inland of the Kenya coastline. Today, the *kaya* are considered to be sacred forests, and the seats of the highest courts and ceremonies. Among the Digo the word "*kaya*" is synonymous with "home" such that, when people say they are going home they say "*akavia kaya*". *Kayas* are set aside for prayers, mainly traditional prayers for rain, harvest and against illness. ¹⁶

Unlike other Mijikenda peoples, the Digo are Muslim, and have expressed and express social continuity through concepts of matrilineal kinship and the continuation over time of matrilineal clans. The Digo have a single set of named matrilineal clans known as *fuko*. ¹⁷ The *fuko* "plays an important role in giving individuals their identity and supplying the idiom by which membership in Digo society is claimed or demonstrated".¹⁸ Although maternal clan ties are the most important kinship ties, Digo people consider paternal lineage ties to be important as well. The Digo differentiate between the mother's

¹⁴See MacKenzie, Fiona 1993, "A Piece of Land Never Shrinks": Reconceptualizing Land Tenure in a Smallholding District, Kenya" in *Land in African Agrarian Systems* Thomas J. Bassett and Donald E. Crummy eds. The University of Wisconsin Press. Madison and Shipton, Parker 1992, "Debts and Trespasses: Land, Mortgages, and the Ancestors in Western Kenya", *Africa*, 62(3):357-386.

¹⁵The other eight Mijikenda peoples are the Giriama, Kauma, Ribe, Kambe, Jibana, Rabai, Chonyi and Duruma. The Duruma also mainly live in Kwale District while most others live north of Mombasa. Brantley notes that "the Giriama's own term, *Makayachenda* , the nine *makaya*, was changed by them to *Midzichenda* but the Swahili term Mijikenda is best known and has now been accepted by the Mijikenda themselves" (1981:6). *Miji* in Swahili means town, city, or village while *chenda* is the old Bantu word of nine replaced in Swahili by the Arabic *tisa'a*.

¹⁶HM

¹⁷Spear, Thomas T. 1978, *A History of the Mijikenda Peoples of the Kenya Coast to 1900*. Nairobi, Kenya Literature Bureau and Wamahiu, Sheila Parvyn 1988, "Continuity and Change in Adigo Women's Roles, Status and Education: An Exploratory Anthropological Study." Kenyatta University, Ph.D.

¹⁸Oendo, Ayuko, 1987 "Marriage Instability and Domestic Continuity in Digo Society" *Cambridge Anthropology* vol. 12(2):47

clan, the *fuko*, and the father's lineage, the *mbari*. *Fuko* and *mbari* were described to me by a couple in Mombasa:

Mbari is whose family one belongs to and goes back probably no further than grandfathers. It is a shorter unit than *fuko* which ranges all the way back to all ancestors and the founder of the *fuko*. However, *mbari* is also mainly patrilineal and your grandfather's family, while *fuko* is all your mother's mothers back to the beginning.¹⁹

Fuko and *mbari* provide two different ways of belongings that set out rights, duties and obligations to members. These may include the obligation of your *shangazi* (father's sister) who is part of your *mbari*, to replace objects that you damaged, or the obligation of fathers to provide land to divorced daughters, or the rights to produce from *fuko* or *mbari* farms, or the rights to inheritance of *fuko* land. *Fuko* belonging is considered to be a relationship that ranges back to the founder of the *fuko* while *mbari* is a relation to a specific person of the not very distant past.

The relationship between *fuko* and *mbari* determines in what manner land should be distributed. Kinship relations to land differed both by gender (defined by membership in clan), and over time (defined by the relative distance of relations from the clan). Although sons belong to the *fuko* of their mother, their children do not, and have no rights to clan land (*mashamba ya mafuko*). Common land connected to social kin relations such as *fuko* land, materially reproduces these social ties when it remains in the hands of women or passes maternally from mother's brother to sister's children or from mother to child.

In relation to time, lineage land extended and apparently changed the gendered nature of land relations, over a terminal duration. At times in the past, *fuko* land could be inherited by sons and became known as *mashamba ya mbari*. However, this form of inheritance was not a continuous inheritance but rather lasted about three generations. The grandfather would have gotten the land from the *fuko* originally. The great-grandchild is said to be very far from the *fuko* of the grandfather, as s/he has no immediate relatives who

¹⁹December 1993 BK and HK.

belong to that *fuko*. The grandchild's connection to the *fuko* is his father, but the great-grandchild belongs to a still further removed *fuko*. When the intersection of two different idioms of relatedness, *mbari* and *fuko*, cease to function or hold meaning, a tension is created between who the land is associated with, and who might be holding it at the time. *Mashamba ya mbari* then returns to the *fuko* instead of going to the great-grandchildren. On returning to the *fuko* it goes to the nearest relative of the grandfather's sister.²⁰

Ownership is understood by the Digo as relations between persons in regard to things. Gluckman argues that legal relations exist only between persons, and we should not speak of "ownership" so much as speak of "rights".²¹ However, Strathern critiques this theory of property saying that Western property assumptions lie in the manner in which "agents and their actions are assumed to be structured".²² That is, they contain an assumption about the "natural" proprietorship of persons. I contend that aside from the material importance, inheritance of property becomes the chosen expression of this social continuity when ownership of *fuko* land becomes contested. Although the land is common property in that its "ownership" resides with the *fuko*, the *fuko* is not a corporate entity that acts as an individual, neatly and concretely bounded. *Fuko* land is land where various clan interest inhere, and rights and duties of clan members exist. These rights are not the same as individual claims, or something owned by a proprietor of rights, rather they are a guarantee of relational existence. As Gluckman noted for the Barotse, if the "right" is removed the relationship that brought it into being has to change.

The *mashamba ya mafuko*, *mashamba ya mbari* and *kayas* are forms of common land that are dependent on Digo notions of belonging and clan membership. Metaphors of stealing are used to refer to the process under which these properties turn individual, which are linked to the imbrication of Islamic and Western forms of law, legal systems and

²⁰December 1993, HM.

²¹Gluckman, Max 1965 The Ideas in Barotse Jurisprudence. Yale University Press. New Haven.

²²Strathern, Marilyn 1988 The Gender of the Gift: Problems with women and problems with society in Melanesia. University of California Press, Berkeley. pg. 137

conceptualizations of persons, community and belonging. Women from Kinondo lamented to me that "there is no longer a sense of community. Now people live very separate from each other; one family here, another there, with no sharing".²³ They were particularly concerned that brothers were able to register land under their own names. Because the sisters' names did not appear on the title the brothers were able to sell land or the produce from land without consulting or paying the sisters. They considered the registration of land in a brother's name stealing land and produce ^{the} sisters "have a right to".

Brothers are able to "steal" land through a joint appeal to two competing systems of classification of belonging. Today, it is taken for granted that a Digo person is Muslim, although not all are. Through claims to Islamic laws of inheritance and understandings of family, as sons, brothers have a greater right than daughters to control and ownership of land.²⁴ Sisters in fact have no claim over their brother's property. Twenty percent of the Digo land claims that come to the Attorney General's office (which deals with administration of estates for those who have died intestate) are claims to land through customary law. I use customary law not to refer to a static, ahistorical product of a self contained particularity as legal structures often perceive it, nor to a colonial construct as Chanock's analysis of the construction of customary law and Ranger's of the invention of tradition,²⁵ would suggest. Rather as a fluid element in a system of legal pluralism customary law becomes "one of the legal spheres to which disputants have recourse".²⁶

²³CWG women's group October 1993

²⁴I refer to Islamic law as an entity only so much as it exists as part of the national legal system through the Kadhi's courts, recognizing that in calling it law, I am doing an injustice to a system which has moral and legal features to it, but is not limited to law. Family refers to networks of extending relations, that can not necessarily be thought of as an entity that is bounded and can act.

²⁵Chanock, Martin 1991, "Paradigms, Policies and Property: A Review of Customary Law of Land Tenure" in Law in Colonial Africa Portsmouth, Heinemann and Ranger, Terence 1983, "The Invention of Tradition in Colonial Africa" in The Invention of Tradition Eric Hobsbawn and Terence Ranger, Cambridge, Cambridge University Press, 211-262.

²⁶MacKenzie, Fiona 1993 "A Piece of Land Never Shrinks': Reconceptualizing Land Tenure in a Smallholding District, Kenya" in Land in African Agrarian Systems Thomas J. Bassett and Donald E. Crummy eds. The University of Wisconsin Press. Madison p. 201

These claims mainly take the form of brothers and sisters or nieces and nephews claiming a deceased's land.²⁷ They reflect discordance produced by a single civic identity separate from clan or ethnicity. Although change in laws would seem to indicate change in practice, actual practice can often be contradictory as the following case shows. This case is a dispute about the division of land in accordance with general aspects of Islamic and customary law. The struggle is about what this means, to be Muslim *and* Digo.

The case started in 1983 when Ali's father tried to plant trees on a portion of his deceased father's land. Ali's grandfather, the original land owner, had died prior to land adjudication and registration of title in 1974-75²⁸. He left behind three wives. One with nine children, one with two children and one with one child - Ali's father. At the time of land adjudication, the land was registered in five names which is the maximum number of names allowed to be registered on one piece of land in Kenya. These names were three children out of the nine siblings, one out of the pair of siblings and Ali's father.

Ali's father tried to plant trees on his land, but the nine siblings refused to allow him to do so. He ignored them and began to plant. The siblings complained to the sub-chief. The sub-chief sided with the nine siblings and ordered Ali's father to up root his trees. Again he refused and went to the chief to ask assistance. The chief sided with Ali's father in favor of a division of the land by "house", that is, land is divided between the families of each wife, rather than between all the children. Thus, he was advocating a three-way division of the property rather than a twelve-way division. At this point, the nine siblings invoked Islamic law by arguing that the land should be divided by children, although they did not want the specific divisions of fractions of land that Islamic law prescribes. The father was invoking Digo customary law by arguing for division by

²⁷Attorney General's Office Mombasa October 1993

²⁸In this paper adjudication or registration refer to the process of adjudication and registration that turned native reserves into private or communal (trust) property just before and after independence. The process allowed the freehold of property by individuals and has been government policy since independence.

house.²⁹ The dispute was not settled there and went first to the District Officer and then to the courts.

At the court level the dispute left the hands and discussion of the elders, and was instead argued by lawyers. As the court at that time³⁰ had no mandate to enforce or uphold either Islamic law or customary law, the lawyers argued for the division of land by the five registered names. The court, however, ruled for a three-way division by house. A surveyor then divided the land into four and the father had to take it to court again, where the surveyor was threatened with contempt of court, if he did not divide it by three. The land dispute caused terrible family strife. The families involved stopped talking to each other and even threatened each other with weapons. The case was finally concluded in 1985 with the ruling that the land was to be divided into three parts representing the three houses involved.³¹

This case brings forth the many ambiguities of legal structure and the contradictions of government administration. Firstly, not all people with interests in the land could register the land in their name. There were thirteen siblings but only five could legally register their names. Secondly, different parts of the local administration supported differing sides in the argument. The terms of debate were influenced by the level of government authority being engaged. Lastly, the court did not necessarily follow its mandate regarding customary law. After the Law of Succession Act (1981) customary law was not supposed to apply to succession cases.

Intergenerational transfer of land remains crucial in Digo society as a site for struggles over land and identity both materially and symbolically. Due to restrictions on settlement, the economic marginality of Kwale district, the poverty of the rural areas in comparison to urban ones, and resulting lack of substantial monetary income,

²⁹No distinction is made between order of wives or children as an elder child does not inherit more than another child. Throughout the area property seemed to be evenly distributed among those who qualified to inherit.

³⁰After the 1981 Succession Act and before the 1991 amendment to the Act.

³¹ December 1993 AH.

intergenerational transfer remains the only way of obtaining land for the majority of the population. For those who do not, and cannot, fully participate in a capitalist land market yet rely on land for survival, inheritance is fundamental. Inseparable from kinship patterns and social relations to land, intergenerational transfer of land also provides a space where the struggle over meanings, and authority to define meanings, is enacted.

The Digo desire and ability to retain both a Mijikenda and Islamic identity, was unique among the Mijikenda, arising most probably from patterns of residence which integrated Islam in most aspects of Digo life. Willis points to the importance of this combined identity stating that; "only among the Digo did a non-Swahili Muslim identity really develop, which may explain why some Mijikenda Muslims on the coast north of Mombasa, anxious to assert both their identity as Mijikenda and their religion as Islam, have adopted Digo identities".³² For the Digo the systems of being Muslim and Digo overlap and are interconnected.

Being Muslim means confronting how differing notions of relations and kin belonging lead to differing distribution of resources. Digo "customary" classification of belonging comes into conflict with alternative classifications of sameness and difference, through the administrative and legal processes that support concepts of Islamic and statutory or nationalist law. Digo common ownership differs from Islamic inheritance as stipulated by the Kadhi in Kenya or in the Koran, which urges the specific division of property in specified amounts to a number of heirs. Some people expressed concern to me that too many people have rights to property under Islamic law. Regarding a case disputed between sisters and brothers I was told that:

Islamic law greatly increases the number of people who then have a right to the land. For instance, if my aunt dies her land could go to her husband and the children. ³³

³² Willis, Justin 1993, Mombasa, the Swahili and the Making of the Mijikenda. Oxford, Clarendon Press:197.

³³ November 1993, AV, Mombasa

The concern is expressed mainly in regard to non-clan members gaining access to clan land and thereby removing it from circulation. The rights of individual holding is considered divisionary both of land and of the clan. However, this is not a uniquely Digo concern as there is a long tradition in Islamic law of circumventing the diversionary effect of laws of inheritance through public or family endowments or *waqf*. These *inter vivos* distributions of property often take the form of collective holdings and can inhere in individuals, collectivities and institutions. Some Digo people opt to distribute their land while still alive. Omar's grandfather had land from which he gave plots to all his children, male and female and his two wives while he was alive. He retained a plot as his own, which he declared would go to all his family / descendants to use communally after his death.³⁴ *Inter vivos* land distribution is customary under both Digo and Islamic law and the Digo use either system to justify intergenerational distribution of land. However, the high incidence of inheritance disputes among the Digo would indicate that *inter vivos* land distribution is not standard practice, and inheritance remains the major mode of intergenerational land transfer.

Beyond transforming authority within the family, the more individual conceptualization of land and person under Islamic moral and legal structures is at odds with Digo notions of clan land. As a result many Digo make provisions for a separate pattern of inheritance involving self acquired land and clan land. Self-acquired property (acquired by clearance or purchase but not inheritance) began to take on the more individual form of Islamic property holdings which included the possibility of patrilineal inheritance.

Common property is retained within an Islamic tradition of inheritance not only through the registration of common title. The Digo argue that brothers and sisters should, and most often do, inherit equally from their parents as opposed to the lesser percentage (1/2) stipulated for women. Digo expressed that in the past land went to the nieces and

³⁴7 December 1993 KR, Mombasa.

nephews but today it goes to the children of the deceased equally. Oendo argues that men accept this distribution because it allows some property to go to their sister's children. He argues that "while formally meeting the demands of Islam for female inheritance, brothers use it to circumvent Islamic injunctions which permit only parent-child inheritance".³⁵ This practice partially returns *fuko* land to the *fuko*, although now the criteria for distribution is a mixture between membership inclusion and individual rights to women.

The resistance to private ownership of land in Kwale is part of a continued contestation of land registration which has taken place since the beginning of adjudication in 1974/1975. Unlike their neighbors to the west, the Duruma, who voted to hold land as group ranches (basically a communal form of ownership where land is held in trust and which is now being privatized), the Digo voted for private property and individual tenure.³⁶ However, Digo women and men did not vote the same way on this issue. Adjudication records indicate that women were against the titling of private property and men were for it. This remains a contested areas where registration is transformed to enable common landholdings and specific modes of inheritance. Registration makes possible a certain kind of "stealing" which is both gendered and individualizing.

The extension of the logic of increased agricultural production through adjudication, registration and consolidation of land is explained by three reasons. The first reason was that adjudication would provide a secure tenure by establishing title and thus, bringing an end to land disputes and enabling "progressive" use of the land. The second is that it will enable capital accumulation and development because the title can act as a mortgage in raising credit. Lastly, it will regularize inheritance. This is expressed in the 1994-96 Development plan as:

³⁵Oendo, Ayuko, 1987 "Marriage Instability and Domestic Continuity in Digo Society" *Cambridge Anthropology* vol. 12(2):61.

³⁶Gray, Nancy 1972, "Acceptance of Land Adjudication Among the Digo". Institute of African Studies, University of Nairobi.

The Government's strategies towards this need is to ensure that all land is planned, surveyed, adjudicated (where applicable) and registered with a view to issuing title deeds. This in turn provides security of tenure and encourages the people to invest in and develop their land. This leads to higher incomes, increased productivity, general rise in economic growth and improved standards of living³⁷

The government argued that the land adjudication concept paralleled farmer's own "urges". This farmer had become a possessive individual defined through having. As expressed by the Central Bank of Kenya:

the rationale behind the concept of land adjudication is the natural urge and wish of all farmers to own their land. Such ownership has proved vital spur to development. Once land is owned by an individual or group of individuals, a title deed is issued to the holder who can then use the document as a means of securing funds for development.³⁸

Similar to what MacKenzie³⁹ argues for the highland Kenya, contrary to the goals of adjudication, the amount of land disputes in Kwale did not decrease after adjudication. In fact, registration provided another area for land disputes within the community. Security of tenure was not improved after adjudication either. The insecurity of tenure exemplified by the circumstances of Ali's father's case indicate the tenuous relation of title deeds to increased productivity. Ali's father's land became less secure and less productive with registration as registration provided a third method of distribution and contestation. Currently the claims to land by clan is less easy to uphold, especially in court. When the land is registered it ceases to be clan land in the gaze of the government. Adjudication policy was conceptualized around a notion of a radically individualized farmer, a space that the *fuko* and *mbari* could barely fit. Privatization of clan land causes conflict because it questions and challenges Digo kinship structures and basis of social relations.

Although land adjudication in Tiwi in 1974 -75 resulted in the registration of land to private title, out of the 2,426 plots registered, thirty-four percent of the land was registered by common equal undivided share. The land registration records indicate that

³⁷ 1994, *Development Plan 1994-96*. Nairobi, Government of Kenya. pg 187

³⁸ 1991, *Kenya Land of Opportunity*. Nairobi, Central Bank of Kenya. pg 119

³⁹ MacKenzie, Fiona "A piece of Land Never Shrinks": Reconceptualizing Land Tenure in a Smallholding District, Kenya" in p. 201

this proportion has not decreased in recent years. Rather, most plots where the proprietor has passed away since adjudication, have been registered in common to the heirs or are undergoing arbitration. The majority of the land held in common share is held by siblings or in the case of inheritance since adjudication by the children (and often wives) of the deceased. A large proportion of women with registered land hold it in common.

This adherence to common property ownership has disrupted efforts to establish a private property regime as envisioned by adjudication policy. It also causes problems in the mortgaging of land. Once there is more than a single name on a title deed banks do not accept the title for mortgaging. Unwilling and unable to mortgage land to secure credit, Digo people for the most part rely on a system referred to as *rahani* which was thus described to me:

Outside the system of banks credit is raised by mortgaging trees or land by verbal agreement. Until the debt is paid the creditor is able to use the trees or land and take the produce. If a creditor dies before the debt is paid his family inherits the debt, or rights to use of land and so on down the line. Thus, two groups of people can hold rights in land at the same time. This is the usual form of credit.⁴⁰

In conjunction with *inter vivos* distribution of property the *rahani* system has produced buildings and houses without land increasing the complexity of rights associated with property. *Rahani* acts as a critique of the system of registration of land that foregrounds mortgaging of land as essential for increased productivity. Common ownership remains one of the biggest challenges to the rationale of land adjudication.

Common registration can be thought of as an effort to introduce dynamism to a system that is concerned with fixity. Different people are benefited from the fixity or dynamism of categories at certain moments. As in Ali's case rather than securing land holdings, registration further caused dissension in society and fueled disputes. In his critique of Zionist land policies in Israel, Atran analyses problems that became evident

⁴⁰ November 1993, AV.

when "peasants were suddenly forced to live with the results of their last redistribution as if caught in an arbitrary moment of 'musical chairs'".⁴¹ Registration of *fuko* land had a similar effect of making permanent the last redistribution of land within the clan, thus stopping the dynamism. *Kaya* elders and fishermen at the Port of Chale felt that the registration of *mashamba ya mafuko* was robbery. To express the ultimate in stealing through registration, the registration of *kayas* were compared to the registration of mother's or grandmother's land. "Stealing" then, is not gender neutral but is always perceived as containing a gendered moral component.

In Tiwi sub location of Kwale district twenty-eight percent of the names that land was registered to during adjudication in 1974-75 were women.⁴² This percentage (on record) has not changed significantly today in spite of some sale and sub-division of land in Tiwi. However, in most of Kenya, women are subordinate rights holders in land. As Shipton points out, well over ninety percent of land titles in Western Kenya are issued to men at registration of title.⁴³ Kwale district has the highest percentage of land registered to women in the country.⁴⁴ How is gender implicated in debates between individuals and collectivities? How are women located and relocated in a negotiation of kin relations? In short, how are social relations of land gender specific?

Both adjudication records and interviews indicate that most land inherited matrilineally had at one time belonged to a woman.⁴⁵ Ownership through matrilineal inheritance no longer constitutes a large proportion of the plots in Tiwi, as patrilineal inheritance is more often practiced today? Yet *inter vivos* matrilineal transfer of clan property is still done as the following case indicates. Omar's grandmother had inherited

⁴¹ Atran, Scott 1989, "The Surrogate Colonization of Palestine, 1917-1939", *American Ethnologist*, 16(4):727

⁴² This is not the same as the percentage of plots of land registered to women since 35% of the plots of land in Tiwi sub-location of Kwale district are held in common. The statistics were compiled from land adjudication records for Tiwi sub-location 1974-1975.

⁴³ Shipton, Parker 1992, "Debts and Trespasses: Land, Mortgages, and the Ancestors in Western Kenya", *Africa*, 62(3): 370

⁴⁴ Personal communications with Okoth-Ogendo.

⁴⁵ Lands Office, Kwale District

land from her *mjomba* that is her mother's brother, although her *mjomba* had had five sons. She then left her land to her daughter's daughters although she herself had two sons as well as one daughter. Omar's grandmother's land first passed maternally from mother's brother to sister's child, and then remained in the hands of the women of the *fuko*. Thus, the land passed through the women of the family only.⁴⁶

Traditionally women owned and gained access to resources because as women they were the central units through which clan properties and property were transferred. This land was, however, considered common property as clan land. Conceptualization of family under Islam changes the manner in which women gain access to resources. They are able to own land and have access to land as spouses, as individuals and as daughters. The land they then hold is their personal property.

What is at stake in the loss of common property for women? As Muslims and as Digo clan members women have access to land through relationships. However the type of access and the form of the person who holds land is radically different. As Oendo argues Digo insistence that sons and daughters inherit equally both verbally and in practice, is a way of joining matrilineal and patrilineal inheritance by providing for the sisters children. Thus, it is also a way of keeping part of the property within the clan from which it originates. If we consider this practice in relation to the registration of clan land which is seen as stealing, it is less free from dispute than it first implies. The involvement of registration in negotiating Digo Muslim categorizations indicates that none of these systems are working in isolation from one another, but rather are imbricated in a complex manner. Digo land practices challenge individual title to private property as envisioned by the state and development communities. In addition, they challenge Islamic inheritance stipulations while it reinforces family ties and relations whether matrilineal or patrilineal.

⁴⁶December 1993 KR

Conclusion

In this paper we have seen a situation where land is highly contested, where people come to property through different and often competing criteria, where the categorization of people is what is at stake, where multiple people have claims to the same property, where the state is too distant, unable and politically reluctant to enforce a specific method of transfer of property and where security of tenure is a major problem. In the development policy of Kenya and as a principle of neo-liberal economics common property is seen as less secure, and less productive than private property. The argument is that with private property a person has a stake in the property, thus they will look after it more and invest in it. I argue rather that the stake in property is produced through the stake in the grounds for unity, in the relations of belonging. Fiona MacKenzie argues that in a system of legal pluralism such as Kenya, insecurity arises from the contest of rights over land by individuals drawing on different sets of legal rights, which interact with each other⁴⁷. Taking into account Strathern's critique of assuming individuals or rights, and my own interest in ideology and power behind legal process, I want to extend this argument to refer to the social ordering of reproductive units for the continuation of groups.

In Kwale there are competing grounds for unity and limits to unity such that sameness can be understood in multiple ways. I argue that it is *this* state of conflict between categorization of persons and criteria for distribution of property, (clan membership, religious brotherhood, citizen) rather than a mode of ownership (common or private) that produces the insecurity of tenure resulting in decreased productivity. In Kwale district the average land holding is 7.3 acres and the mean cropping acreage is only 3.6.⁴⁸ At the same time, however, 22.5 % of Kwale households are landless, accounting for

⁴⁷MacKenzie, Fiona, 1993 "A Piece of Land Never Shrinks': Reconceptualizing Land Tenure in a Smallholding District, Kenya" in Land in African Agrarian Systems Thomas J. Bassett and Donald E. Crummy eds. The University of Wisconsin Press. Madison pg. 200

⁴⁸1990, "Socio-Economic Profiles". Government of Kenya, Ministry of Planning and National Development and UNICEF

12,600 people with no land.⁴⁹ Where are these landless people? Are they like two brothers in Shimba who were only informed of the previous sale of their property some twenty years earlier, when they went to do the paperwork to sell the land themselves? They had been unaware the land had already been sold, as no new owner came to use it. What would it mean for these people to have been removed from their property? How has the rest of the tenure system managed to support 12,600 landless people? The flexible boundaries, borders, networks of kin, relationships of belonging and sameness, allow people to remain on land, to be productive, and to survive that a system of private property would displace to such an extent as to destabilize much more than just the person's relation to land.

Production is thus, related to how secure the categorization of personhood, of sameness and difference, is in a society. This is secured through deployment of power and authority. Thus, there is no "natural" stability or increased production with private property. In Kwale the unsureness of tenure and the flexibilities of rights duties and boundaries allows for an increased stability rather than the reverse. The Digo property relations can be seen as the constant tension between fluidity and fixity. Fluidity in belonging, and the imprecise and multiple ways of categorizing persons allows for a moment between categorical systems that enables access to resources. Individuals and collectivities try to fix specific categories that benefit them. Rather than looking at land as a private or common property we need to look at the classificatory order (the grounds for and limits to unity) that sets criteria for the distribution of properties and property. These categories of meaning and social relations are what is at stake in restructuring and define community through common property. In this paper I argue that conflicts between different forms of holding and transferring land must be read as fights within and without a community over defining community and belonging.

⁴⁹1990, "Socio-Economic Profiles". Government of Kenya, Ministry of Planning and National Development and UNICEF.