

**LAND FOR HOUSING THE POOR IN AFRICAN CITIES.  
ARE NEO-CUSTOMARY PROCESSES  
AN EFFECTIVE ALTERNATIVE TO FORMAL SYSTEMS?**

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*This presentation refers to some of the preliminary findings of an ongoing French-British research project on “Current changes in customary land delivery systems in sub-Saharan African cities”.*

*This project covers 9 countries, namely Benin (Cotonou & Porto Novo), Cameroon (Douala & Yaounde), Ghana (Kumasi), Kenya (Nairobi), Namibia (Windhoek), Senegal (Dakar), South Africa (Gauteng & North West Province, Mpumalanga, Durban Metropolitan Area), Tanzania (Dar es Salaam) and Uganda (Kampala).*

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## - ACCESS TO LAND FOR HOUSING THE POOR IN SUB-SAHARAN AFRICAN CITIES

### *1.1. Regional context and trends*

According to recent UN estimates (Moreno, 2003), Africa has the world's highest rapid urbanisation growth in the world, with an annual average urban growth of 4.0 %.

Over the next two decades, 87 % of the population growth in Africa will take place in urban areas.

High rate of urbanisation combined, in most countries, with consistent economic decline over the last two decades has resulted in drastic increase in the number of the urban poor: in sub-Saharan African countries, it is estimated that more than 40% of urban resident are living in poverty.

In the vast majority of sub-Saharan African cities, the urban poor as well as large segments of low and middle income groups do not have access to land provided by the public and the formal private sectors:

In all countries covered by the research project, excepted in South Africa, ***public provision of serviced land and housing*** is steadily declining. Reasons are many: magnitudes of the problem, lack of resources, lack of political will, widespread corruption and illicit practices, administrative and technical bottlenecks, especially in the identification of land rights and a failure to reach targeted low-income groups.

As for the ***formal private sector***, it does not contribute in the provision of land and housing, unless heavily subsidised. Private sector's investments in low-cost housing development schemes is usually deterred by political risks, chronic weaknesses of housing finance systems, lack of reliable land information and registration systems, and low profit margins.

The failure of governments' urban land and housing policies and the inability of the formal private sector to provide land for housing the poor has strengthened the attractiveness of informal land markets. The African continent has today the largest proportion of the urban population living in ***informal settlements*** with no proper access to basic urban services and less security of tenure than in formal settlements.

Access to land through informal processes covers a wide range of situations. At the periphery of Sub-Saharan African cities, informal land delivery processes are strongly influenced – and occasionally even dominated – by actors that refer to *customary legitimacy*.

### ***1. 2. Emerging forms of customary land delivery in urban areas***

During the past two decades, *customary land management practices* have undergone various adjustments. In most countries, they proved to have a surprising ability/capacity to adapt to the new economic and social context introduced by the globalisation of national economies and to the rapid spatial expansion of urban areas.

*Customary land "ownership"* refers to the communal possession of rights to use and allocate agricultural and grazing land by a group sharing the same cultural identity. A single person usually administers on behalf of the group. Decisions - made on a consensual basis - must comply with the cultural tradition of the concerned community. The extent of the rights to use the land depends on the agreement passed between the customary community and the person receiving the rights. Within the group, social institutions defend or protect these rights against other claims regarding the land.

However, in urban areas, customary land delivery in the strict sense of the term does not operate according to this model. It still survives at the periphery of most cities, but it has been progressively eroded during the colonial and post-colonial period. Recent empirical observations suggest that it is being replaced by what we can call "*neo-customary practices*": a combination of *reinterpreted customary practices with other informal and formal practices*. As underlined in the case of South Africa, the definition of neo-customary tenure includes urban and peri-urban areas where land rights were initially delivered by customary systems, and where practices that have been part of a customary system are currently being used. Current land and housing situation in many African cities cannot be explained without referring to these practices. These terms need to be defined.

*Neo-customary land delivery systems* include all the stakeholders and all the practices, which claim to be rooted directly or indirectly in the custom. It works *through individuals* who sell as market commodities, more rights that they have received through a customary system.

Alternatively, these systems may operate *through groups* that replicate familiar elements of customary systems that inspire confidence among those obtaining land. Group practices derived from customary ones for delivering land rights to their members.

Neo-customary systems are *based on trust* that assures (that others will support will support an individual's claim) This trust arises from a confidence in the customary social relationships that have been embedded in the land delivery process, because the land rights were first obtained directly from a customary delivery system or because they came through a system that used customary practices or both. These systems permit a cheap and fast access to land, and often provide a better security of tenure security of tenure than other informal land delivery systems.

Neo-customary practices *involve social institutions* including central and local government institutions, but the basis of the neo-customary social institutions remains the group. Neo-customary actors play an important political and social role at settlements levels, and are often able to position themselves as necessary intermediaries between the communities and the administration, even in cities and countries (such as Senegal or Cameroon) where they are not officially recognised. In countries where they are formally recognised, such as Ghana, neo-customary actors are tightly associated in the decision making process at the lowest levels of local governance.

All case studies confirm that commodification is the most important factors that transform customary into neo-customary land delivery systems. *Neo-customary sector deals with land rights that have been commodified*. As noted in the case of Senegal, as soon as a customary land is subject to a monetary transaction, it enters within neo-customary logic's.

*Points of difference between neo-customary and other informal land delivery systems* are not always easy to establish. The main distinction between neo-customary and informal land delivery systems is the status – the primary tenure right – of the land. Referring to Cotonou case study, Precht (2003) suggests that the entire land delivery process (from land subdivision and the sale of individual plots by customary owners to the delivery of a housing permit by government institutions following the land readjustment and redevelopment scheme - *opération de lotissement-remembrement*), clearly follow a neo-customary logic. Being recognised by the administration, owners of building plots are incorporated within the sphere of the modern law

(the Civil Code) and they have no more links with the custom. In fact, in the absence of formal title registration, the land remains under the customary regime.

Another approach is put forward by the Kenyan case study. It stresses that the distinction is provided by *a belief* that a group – a social institution – will defend claims to the land.

This belief is probably created by reference to customary social practices, in the form of the claim of the seller that he/she received rights from a customary land delivery system *or* in the form of a practice that imitates a familiar customary practice. This is the case in Nairobi where group ownership of a formal claim (which has not been delivered by a customary system) is managed by the group and informal rights are divided among the members.

### ***1.3. What is the scale of the population in the city area that rely on these practices for having access to land for housing?***

According to all empirical observations, a significant proportion of the urban population rely on neo-customary practices

However, especially in countries where customary practices are not recognised, and accordingly which do make any distinction between various forms of informality, it is difficult to provide accurate figures regarding the number of population that had relied on neo-customary systems to have access to land for housing. In **Ghana** most peri-urban land in the country is held under customary law. In Yaoundé, **Cameroon**, more than 70% of populations of suburban settlements live on customary lands. In **Tanzania**, it is generally officially stated that some 70% of Dar es Salaam's residents live with informal tenure in unplanned areas, with traces of customary or quasi-customary tenure. In Dakar, **Senegal**, between 1982 and 1987, 91% of the housing production was considered as informal. It can be assumed that most of it has taken place on customary lands. In Cotonou and Porto Novo, **Benin**, it can be estimated that about 80% of the last two decades land developments have taken place on land provided by the neo-customary system. Most of the land in Kampala City, in **Uganda**, is managed and delivered according to neo-customary practices by the Buganda Land Board. More than 56% of the population of Nairobi, Kenya, is living in informal settlements

Although it is estimated that only 9% percent of all households in **South Africa** “live under traditional, informal, inferior and/or officially unrecognised forms of tenure, primarily in rural

areas.” (Royston 2002) “the informal allocation of land by traditional authorities is observable” in towns that are in close to former homeland boundaries (Cross 2002, Allanic, 2003). With time urbanisation of urban areas such as Durban, which are surrounded by land under tribal authority, will depend on adjustments to traditional land allocation.

*In my presentation, I shall mainly focus on the two following questions:*

1. What are the current changes and trends regarding neo-customary land delivery practices in urban and suburban areas?
2. Are customary land delivery systems a viable alternatives to formal systems in providing the urban poor access to urban land?

## 2. CURRENT CHANGES AND TRENDS REGARDING NEO-CUSTOMARY LAND DELIVERY PRACTICES IN URBAN AND SUBURBAN AREAS

### *2.1. Depending on countries, three main types of situations regarding customary rights:*

- *Customary land management is formally recognised by governments* (by law and in the Constitutions). However, recognition is usually limited to particular types of lands and/or to particular areas/regions (Uganda, Ghana, South Africa).

- *Legal recognition of customary system is limited to rural areas, but customary land management practices are tolerated in suburban areas* (under certain circumstances and depending on local political context) (Benin, Cameroon, Namibia).

- *Customary land management is not recognised or it is strictly limited to rural areas* (Tanzania, Cameroon, Senegal). This does not mean that customary actors cannot operate. Usually, they can, but at their own risk, given the discretionary power of central government regarding land administration. In former French colonies this situation is clearly linked with conception of freehold as defined in the Code Napoleon, and with the French centralist political model. It is characterised by: (i) State monopoly on land, and state control over land markets and centralised land management system, and (ii) access to land mainly through conditional and revocable administrative permits to occupy and/or housing permits delivered by government administrations.

Over the last decade, trends towards *de facto* recognition of customary rights and practices can be observed in several countries studied including in those countries that used to have repressive attitude regarding neo-customary land management. This shift is linked with land administration reforms: in Senegal in 1970: (administrative recognition of some neo-customary land developments ), in Tanzania in the 1980 and 1990s (where judiciary decisions showed some recognition for customary tenure in urban areas)(), and in administrative practices, such as in Cameroon in the 1990s.

Kenya, where there is no significant customary land management (the customary land is held in trust by the Government and not managed by customary actors at all) does not fit into any of these three categories

## ***2.2. Converging trends in the provision of land for housing in sub-Saharan African cities.***

In all countries studied, excepted in South Africa, converging trends can be identified in the provision of land for housing.

### ***Step 1 (from political independence to the early 1990s)***

- Rapid population increase in all cities of the region
- Newly independent governments take over the land management responsibilities of the colonial powers.
- Limited capacity of the formal private sector to respond the housing needs of middle income groups (weak housing finance mortgage systems, legal dualism regarding tenure, centralised and over-complicated procedures for obtaining administrative approvals, corruption and illicit practices, ....)
- Public provision of land (more rarely of housing) at subsidised prices, using public land reserves, mainly targeted towards emerging low-middle and middle income groups (government/state clientele).
- High pressure of the demand for land for housing from the urban poor.

Depending on cities, the urban poor have a limited number of housing options.

- \* They can settle as squatters, usually on public land.
- \* They can be tenants in formal and informal low income settlements, in the periphery of the cities or in over-crowed areas in city centres,
- \* They can apply for a temporary permit to occupy on public owned land at the periphery of cities (in most Francophone West African cities)
- \* They can settle on of a plot of land bought from customary owners at the periphery of cities. Some of them will be entitled to apply later for a PTO, or a leasehold.

***Step 2 (from the early 1990s onwards)***

- State disengagement from the urban land and housing sector (economic crisis, role of international finance institutions and structural adjustment plans, limited achievement or failure of most public land and housing policies).
- Public urban land reserves are drying out.
- Emergence of urban middle classes and corresponding demand for urban land that the States can hardly provide.
- Demand for urban land is boosted by speculative behaviour of middle and high income groups (limited investment opportunities in the productive sectors).
- Re-emergence of customary claims, in most Francophone West Africa countries (including Cameroon and Senegal) where customary law and practices had been abolished (public land reserves frequently claimed back by customary groups)
- In most countries, greater tolerance regarding customary practices from the part of the States and, accordingly, improved security of tenure for buyers of plots of land
- Better security of tenure results in an increased demand from middle income groups, inducing increases in market price of land and scarcity of customary land in the nearer urban fringe areas.
- Access to neo-customary land delivery system by the urban poor is increasingly difficult in sub-urban areas. The only option for the urban poor is to settle on customary land far from the city boundaries or in suburban areas unsuitable for urbanisation, or to be a tenant in the sub-standard rental sector, or to settle as a squatter, usually on public land..

Although the *situation is different in South Africa*, where tenure systems, land administration and government's attitude regarding customary practices have been strongly influenced by the legacy of apartheid, some similarities with other sub-Saharan African countries can be observed. Recognition of traditional/customary rights and practices, especially in the former "homelands", and increased scarcity of land for housing in the urban fringes have generated a high demand for customary land from low and low-middle income groups.

Neo-customary land delivery systems have emerged in peri-urban settlements incorporated within metropolitan and urban areas where customary control and land administration are being challenged and eroded due to large numbers of people seeking access to residential land predominantly in break away from customary authorities. However they want to retain the advantages of the customary system of land delivery, i.e. cheap and fast access to bigger plots, a grassroots land management body that can mediate and arbitrate land disputes and make requests

for services and development to public authorities. This land delivery is usually followed by a phenomenon of self-initiated and self-funded house construction and upgrade which reveals a feeling of tenure security (Allanic 2003)..

Similarly to other countries in the region, access of the poor through neo-customary land delivery system is progressively declining, especially in rural-urban fringe areas located near densely urbanised areas.

***2.3. In all sub-Saharan African countries, two converging dynamics that narrow the gap between formal practices and informal/neo customary practices can be observed.***

### ***2.3.1. That of government institutions***

Given the limits and failures of public and private formal land delivery systems, the ***contribution of neo-customary actors in the provision of land for housing is progressively acknowledged*** in an increasing number of sub-Saharan African countries. This shift can be linked with emerging role of civil society organisations, democratisation processes, and the acknowledgement by governments of the limits of public land and housing delivery.

Ongoing ***decentralisation processes***, and pressure from municipality on central governments to put an end to the State monopoly on land, facilitate the involvement of local counsellors together with customary actors in the land delivery process (Dakar after 1996). As a result, neo-customary actors are now providing land with rather sound de facto security of tenure.

More flexible government policies regarding existing informal settlements (less forced evictions) and their renewed interest for ***tenure regularisation or upgrading programmes*** generate sense of tenure security in those who have access to land through neo-customary land delivery.

In all countries, the poor people using neo-customary land delivery systems have problems with conventional registration and titling processes. For this reason, many countries have started land law reforms or have initiated pilot projects in order to provide ***new forms of evidence and approaches regarding customary land rights*** (systematic titling is not consider as the only option).

In some countries (Uganda, Ghana, and South Africa, for example...) *new tenure types are being introduced under new land laws codes*: they include occupancy rights, anti-eviction rights and family or group rights.

### ***2.3.2. That of neo-customary actors and communities living on land delivered by neo-customary systems***

They are increasingly accepting to comply with a minimum set of rules and formal procedures, especially regarding registration of land rights and transactions, planning rules and delivery of some basic services. .

- ***Land transaction*** in the neo-customary sector are being progressively formalised: (institutionalising the use of witnesses to land transactions, transaction authenticated by local and sometimes central government administrations, keeping records of land transfers and transactions). This practice helps solving one of the main problems neo-customary land delivery has.: the multiple allocation of the same plot of land to different buyers (common practice, with the collusion of customary and local authorities). It provides also improved security of tenure: to defend their rights, people will refer to both the “paper” (usually a deed of sale countersigned local government officials, or a certificate delivered by administrations in charge) and to customary evidence.

- Neo-customary systems are incorporating elements of planning: new concerns to comply with ***planning rules*** (especially layout plans) are being observed, such as Uganda and Kenya, but especially in Francophone African countries, where professional surveyors involved in neo-customary land delivery play an important role regarding this matter (Cameroon)

### ***2.3.3. However, limits of these converging trends.***

For Government institutions

- Land management as well as planning reference model inherited from colonial period
- Centralist administrative tradition, especially regarding land management and administration, and resistance to decentralisation

- Lack of human and financial resources of local authorities and insufficient administrative capacities.
- Widespread corruption and illicit practices regarding land allocation
- Weak registration of titles and deeds: conventional land registration and titling systems too complicated and too expensive (especially for the poor).
- Lack of appropriate LIS and cadastres.
- Weaknesses of community organisation
- Political problems (competing legitimacy between customary leaders and democratically elected representatives)

Neo-customary system is being eroded

- Although considerable customary land reserves are available in rural areas far from city centres, customary land reserves are drying out in the inner fringes of cities. Access to customary land is now possible only in areas far from city centres.
- Lack of resources, technical culture, skill and know-how from the part of neo-customary developers create planning and environmental problems
- Neo-customary owners are being marginalised by intermediaries and brokers, including by land surveyors. They play a key role between buyers, customary owners and government administrations.

### **3. ARE CUSTOMARY LAND DELIVERY SYSTEMS A VIABLE ALTERNATIVE TO FORMAL SYSTEMS IN PROVIDING ACCESS TO URBAN LAND FOR THE POOR?**

Given the weakness of public and formal private land and housing delivery system, neo-customary systems are strong enough and effective enough in terms of quantity delivered to be an alternative to formal systems. They are less bureaucratic and more flexible than formal systems: time for delivery is short, transaction costs are lower than in the formal system, and they provide enough security of tenure to encourage investment in housing. As suggested by the Kenyan case study neo-customary land delivery systems can thrive even when they do not use land that has been provided by a customary system

However, their effectiveness for reaching the poor as well as their long-term sustainability as well as their accessibility for the poorest segments of the urban population must be questioned, especially in the absence of appropriate public policies.

***3.1. Viability of neo-customary land delivery systems and practices can be questioned on the following:***

***Supply of land***

In the periphery of most cities, the supply of customary land at reasonable commuting distance from cities is drying out.. In the inner part of the urban fringe, it has been already alienated (sale of small plots of land, or of large tracks of customary land to informal developers). However, it should be noted that in cities such as Nairobi, neo-customary land delivery system can operate without using land that was once delivered by a customary system.

In most cities studied, customary lands reserves still available for urban development are now further and further from cities boundaries. Distance from places of employment as well as lack of public transports limits severely the capacity of neo-customary sector to respond to the demand for land for housing.

However, more than often, this situation does not put an end to neo-customary practices. The Kenya illustrates how, even without land reserves, neo-customary leaders can intervene, especially in land disputes resolution, in community organisation, and in mediation between residents and public authorities.

***Provision of basic services***

Policies to plan land development and to install service facilities are made more difficult to implement by all of the neo-customary land delivery systems that we have studied, although there are some that are moving toward more co-operation.

One of the greatest shortcomings of the neo-customary system is its inability to provide land with adequate services. However, official recognition of neo-customary tenure claims and authority improves land management and housing and infrastructure provision, since this increases the confidence that landowners have over their land. Officials can then give these systems, advice, legal powers and technical assistance to proceed. They can also assist them in securing internal or external support (Kombe and Kreibich, 1999).

It seems that neo-customary developments located near cities boundaries and usually targeted towards low-middle and middle income groups are likely to make the necessary land reservations for the future provision of urban services. However, neo-customary actors do not have the required financial resources or guarantees (in terms of security of tenure) for providing basic urban services. Should they have, this would inevitably impact on the selling price of land. Provision of services is usually left to local authorities and residents, and will be provided in a later stage, once the self-initiated house construction is well advanced.

Conversely, in areas far from city centres, and/or in local contexts where neo-customary land developments are not likely to be integrated within the city web in the near future, neo-customary developers will not make the necessary provisions for the delivery of basic urban services, but rather keep the cost of land development as low as possible and proceed as rapidly as possible.

### ***Layout and planning***

Neo-customary actors do impose on public authorities land use and spatial growth patterns that are not necessarily compatible with long term planning objectives. Usually unplanned settlements and inappropriate layout, have created spatial planning and environmental problems in the urban areas and have had serious implications for housing development and infrastructure provision, at settlement as well as at city levels. Urban houses are constructed in areas without adequate infrastructure and are allowed to stand vacant while their owners wait for infrastructure to be provided. Even in case like Kumasi, Ghana), where the customary system operate within a legal framework, the planning authorities are unable to expedite action on planning applications from developers. This leads many people to carry out their developments without permission. However, it is worth to note – as emphasised in the Benin case study – that future recognition and integration of neo-customary land developments will be facilitated if the development conforms to a minimum set of rules regarding road accessibility, charges, layout and land reservations for public spaces and services.

In most cases studied, ***uncontrolled urban sprawling*** is clearly associated with neo-customary land developments. Steady increase in the price of urban land close to cities boundaries, along with the absence of constraining regulations in areas that are not included within municipal boundaries encourage the spatial expansion of cities, especially in countries where neo-customary institutions and community organisation are not in a position to limit land speculation

processes at settlements level. In the long term, the cost of urban sprawling borne by public authorities (provision of infrastructure and services) and by the population concerned (higher costs for basic services and for transports) will be considerable.

In the context of South Africa, current development of neo-customary land delivery in the Gauteng and North West provinces is clearly linked with massive subsidies for providing basic services in these settlements. Ongoing decentralisation process and cost recovery for service delivery is likely to impact of the long-term sustainability of neo-customary settlements.

### ***3.2. Accessibility to the urban poor***

Excepted in Kenya and in Namibia, case studies confirm that neo-customary land delivery systems are responding increasingly to the demand from middle and low-middle income groups, which have no access to public land and housing development projects. They are less and less effective in reaching poor people in urban areas, especially in contexts where neo-customary practices are recognised (Ghana and Uganda) tolerated and streamlined by inclusive administrative practices (Benin) or not recognised (Cameroon, Senegal).

In such contexts, the urban poor have to rely on squatting (in the strict sense of the term) and on the sub-standard rental sector (in squatter settlements, informal land subdivisions, backyard shacks, and dilapidated building in city centres).

Alternatively, the poor will settle in customary claimed land in areas unsuitable for urbanisation near cities, or in neo-customary development located in the outer periphery of cities, thus accelerating urban sprawling.

Current trends observed suggest that accessibility to the poor is decreasing in most cities. However, neo-customary land delivery seems to have a positive impact on the economic situation of low-middle income groups to which it remains accessible (South Africa, Gauteng Province case study).

### ***3.3. Dealing with neo-customary land delivery systems: current shifts in public policies***

The basic contradiction of all policies aiming to improve the performance of neo-customary land delivery systems can be summarised as follows: if neo-customary land delivery practices are formally recognised, not only tolerated they will probably loose their main advantages to low-income people (fast, simple and cheap delivery); if not recognised, public authorities denied

themselves the possibilities to have any influence on neo-customary practices and dynamics, and on some of their major shortcomings.

### ***Land records and registration***

Conventional land registration systems are not adapted to neo-customary land delivery, especially in the absence of land-related information systems such as cadastres. Although de facto security of tenure is usually provided to households who settle in neo-customary developments, lack of formal registration or local records of land transfers may generate series of conflicts (multiple allocation of land). For households living in such settlements, this situation can impact on their access to credit, for public authorities on taxation, and for providers of urban services on cost recovery. However, it can be argued that credit may be given without formal land title, taxes can be charged without formal ownership registers, and even some services may be paid for without them. To a large extent, these limitations may exist mainly because the formal sector views of neo-customary land delivery systems do not provide a basis for overcoming these obstacles.

### ***Inclusive administrative practices are more important than formal legal recognition of neo-customary land delivery practices***

Benin is a good example of such an approach: the law ignores neo-customary transactions but permits them. For example, land readjustment schemes carried out in neo-customary settlements do not have any legal basis: they are mere administrative practices. However, they give to households living in informal settlements a sense of tenure security. In return, households concerned do comply with administrative requirements.

***Ad hoc institutions or administrative procedures must be set up, especially at local/municipal levels***, to ensure compatibility and adequate articulation between formal land management procedures and practices, and neo-customary ones. The main objective of such is to limit the impact of neo-customary land delivery shortcomings on planning, environment and provision of services (advisory planning, conflicts resolution, incremental service delivery). South Africa, Ghana and Benin case studies provide good examples of this.

***The role of community based organisation*** seems to be essential. Co-operation between CBOs and public authorities and other stakeholders has resulted in the improvement of the settlements

concerned, in the increased access to services and income-earning opportunities, in increased community cohesion and good governance, and in improved environmental conditions. The legality of the settlement is also improved (Tanzania).

## **CASE STUDIES**

Current changes in Customary Land Delivery Systems in Sub-Saharan African Countries. A joint PRUD-DFID research project. 2002-2004. Scientific Coordination, A. Durand-Lasserve and Michael Mattingly.

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