

Local understandings of land ownership and their implications

by Rosalie Kingwill

Two case study areas were selected for doctoral research into local land tenure practices in community contexts where the deeds registry is not the authoritative source of legitimate land rights. Somewhat paradoxically two areas with long-standing freehold title were chosen.

The choice was informed by symptoms of 'lapsed' titles in these areas. It was thought, too, that a study of this nature would turn up valuable insights into the long-term effects of surveying discrete parcels of land and registering them in the name of individuals in a context where previously the concept of title did not exist. The findings are backed up by close observation of land administration systems in so-called 'informal' or 'communal' contexts over an extended period as a researcher in an NGO and later as a research consultant to the Department of Land Affairs, provincial government, municipalities and donor organisations.

The evidence in both studies suggests that there is a considerable mismatch between local norms and practices with regard to recognition and transmission of property, and the administrative processes expected at the formal legal-institutional level. However, what was first assumed to be a legal-

administrative disjuncture between different forms of tenure that could be solved by tinkering with existing official institutions, turned into a more complex problem as this article attempts to show.

Broad research findings

The provisional research findings are taken from a 10% sample of landowning families in Fingo Village and Rabula. Fingo Village was created as a township of Grahamstown when 320 properties were surveyed and registered in freehold title in 1856 (see Fig. 1). Rabula is in the Keiskammahoek district (former Ciskei) approximately 30 km from Kingwilliamstown. Here 186 properties were surveyed between 1865 and 1870. The system of freehold title has thus persisted for roughly 150 years.

Both areas are commonly associated with their private land ownership arrangements due to the rarity of freehold titles that have survived in

African areas over the long term. There are nevertheless numerous cases of other forms of individual titling in the Eastern Cape as it was Cape colonial policy to extend title to black rural settlements within the colony. In urban areas, titling tended to be on an individual basis. Fingo Village is unusual in that the land was surveyed and titled en bloc.

Fingo Village is locally distinguished by long-held freehold tenure rights and large plots surrounded by vegetation perhaps not typical of a black urban township (see Fig. 2). Several houses show features of erstwhile Victorian architecture and are more spacious than those in nearby black townships. A relatively small number are large and modern. However, other differences are not immediately discernible: service delivery was negligible in the past, and poverty and crumbling infrastructure are ubiquitous. Many houses are dilapidated.

Rabula features private freehold ownership of surveyed arable allotments surrounded by common property (see Fig. 3). Homesteads are strung along the perimeter of the fields in several scattered localities. Houses are of a noticeably better quality, size and structure than most rural settlements. Title-holders are referred to locally as *notengas* (those who bought) or 'farmers', not 'freeholders' or 'title-holders'. This connotes a difference in social status rather than tenure, which historically had ethnic associations but no longer so.

With respect to spatial characteristics, the plot sizes in Fingo Village have remained stable, around 1 000 m², which is large by any urban standards. Plots have not been formally subdivided, though there are multiple residences on some plots, including tenancy dwellings. In Rabula the



Fig. 1: View of Fingo Village.

original surveyed arable plots varied from around 3,5 to 37 ha. Though the formal surveyed boundaries have changed very little, there is evidence of a great deal of informal subdivision among individual siblings, male and female. It has been extremely rare for properties to be formally subdivided through surveys and registration. Related families live in separate homesteads surrounding the property (see Fig. 4).

Local understandings of ownership, shared among the vast majority of families and households in both samples, reveal a concept of family property and succession that have far more in common with customary principles of property ownership and devolution than with the formal registration system, despite the presence of title deeds. It is through structured family relationships that rights are claimed, rather than the deeds registry that identifies specific owners with proprietorial powers. In fact, the principles underlying ownership constrain powers of alienation and underline family-based descent systems and relationships. These are anchored through – but not determined by – joint ownership of property.

The studies show that customary principles survive in the absence of the involvement of chiefs and headmen in land administration. In Rabula, there were headmen historically, and

there is currently a chief linked to a tribal authority/traditional council. Their jurisdiction does not, however, include the function of land allocation on freehold land. It is accepted that freehold land is owned by families and devolves according to family norms.

The findings are in keeping with research in other parts of Africa that customary tenure is seen as 'family property' because individuals and family units have defined rights to specific areas of land, and that family units co-exist in social and political relationships with other wider social units. This interpretation challenges the conventional notion of 'communal' tenure as conferring inseparable rights on all community members.

Customary or "vernacular" concepts of property ownership

The visible level of disjuncture between customary titled land and the 'formal' system of registration lies in the land administration records themselves. Title deeds generally lack currency due to the failure on the part of owners to transfer titles into the names of current registered owners. Non-current registry information has long dogged titling efforts, but the phenomenon was kept from view through segregated deeds and administrative processes historically.

Officials and lawyers tend to regard the indifference to legal procedures

as the result of ignorance, poverty, lack of education or indiscipline. Land administrators at all levels of the civil service and the private sector have throughout history berated the situation as 'chaotic'. A closer look into the world of property as seen through the eyes of the owners, however, reveals a picture far removed from administrative anarchy.

Respondents in Rabula and Fingo Village articulate an understanding of property as essentially 'family property' subject to a range of family obligations – as opposed to property that can be alienated by a single owner with dominion over the property. The idea is becoming increasingly nuanced as family forms change, as municipal services and state housing become more widely available and as market forces begin to penetrate. Although a 'first generation' purchaser of a property is relatively free to behave as a 'proprietor', once property passes to the next generation it becomes subject to family obligations and moves towards 'family property'. This is widely considered to be a non-marketable asset.

Although the 'official' rationale of titles is ignored, titles are valued as a symbol of property ownership. Contrary to the certainty created through the registration of a current owner, the name of a common ancestor on the title is a positive attribute from whom genealogies can be traced and family membership defined. In this sense a title represents a fulcrum around which family relationships revolve. It is a pliable system, sustaining family networks through generations. The flexibility paradoxically increases security of tenure for family members.

It stands in stark contrast to the rigidity created through registration of a current owner who may use his or her legal power to alienate the land. Indeed the history of titling demonstrates the tragic loss of freehold property to African owners in many instances, resulting from white elites misusing (in some cases fraudulently) their access to the formal legal-institutional system to prise land from black owners. Similarly, in urban contexts, a man in the family, whom the formal system recognises as the rightful registered heir or owner may sell land from under the feet of other



Fig. 2: There is a great variety of housing in Fingo village ranging from mud, to zinc, to cement constructions varying in quality, design and size.

family members, causing their eviction.

These situations lead to family conflicts that spill over into contestations over the ownership of the family property for generations. This phenomenon demonstrates that titling increases tenure insecurity, not only for family members (particularly women and children), but for the new owners whose rights are not recognised in the social context.

Although conveyancing is generally ignored, there are public norms and practices marking the exchange of properties. It is the physical title deed that is exchanged when properties change hands intentionally. The 'handing over of the title deed' is usually accompanied by local witnessing and ceremonial events to sanction the sale and legitimise the new owner. (There were similar performances in pre-registration European land administration systems.)

New forms of public witnessing of sales have also been recorded by researchers in KwaZulu-Natal where the moment of transaction is the important step, and hence local witnesses provide public recognition, rather than registration. In Rabula, the (unregistered) sub-division of property among the children of title-holders is similarly a ceremonial event, accompanied by feasts and formality.

'Defective' title deeds are thus not seen to jeopardise ownership. There is nevertheless growing discomfort as other institutional imperatives require current title status, such as municipal 'developmental' mandates which require updated property records, for example for housing projects or taxing and billing purposes.

Succession and gender

Property passes to succeeding generations as part of a broader set of principles governing social relationships through descent.

The closest approximation of a defined owner is the concept of a 'responsible person', a concept that permeates people's articulation of property management rather than property ownership. A responsible person is usually designated by the family to manage the property on behalf of all its co-owners (the recognised family members). The responsible person protects the integrity of the family and maintains the property for future generations. Older customary systems conferred this role according to strict



Fig. 3: Rabula features private freehold ownership of surveyed allotments surrounded by commonage.

rules of descent, but the flexibility of customary practices has led to the emergence of adapted practices (demonstrated in Fingo Village and Rabula) that allow for the appointment of a capable and suitable person, rather than someone pre-defined by position and gender.

A responsible person is required to act in the interests of the entire family and does not have proprietorial powers to exclude family members from the property: he or she is validated by family consent rather than by a title deed. One respondent said that 'the law cannot produce a person to represent the home.' Another stated: 'One person is the responsible person. That doesn't mean they can sell. Property belongs to the whole family who decide'.

The Xhosa word to capture the concept is *umgcini*, meaning 'keeper' (some respondents used the word 'housekeeper'). The English terms most resonant with the concept are 'custodian', 'guardian' or 'trustee' which capture both the physical keeping of the house ('someone [who] is looking after the house, and repairs and maintains it on behalf of the family') as well as the responsibility for caring for the young and aged, and for ensuring that bills are paid so that services can be delivered.

In older customary systems, the term used is *indlalifa*, which has connotations of the eldest adult male who assumes responsibility for the integrity of the family and household. The switch to *umgcini* suggests that customary systems are adapting to socio-economic shifts such as

urbanisation and high levels of mobility between urban and rural homes.

In Fingo Village women are increasingly appointed as custodians. One of the factors influencing this phenomenon appears to be that women are seen to be more reliable as insurance against sale of family property; men are regarded as more likely to engage in spontaneous or impulsive sales, or to get indebted to microlenders who may take over the property.

The idea that a responsible person should have personal attributes and responsibilities clashes fundamentally with the idea of formal inheritance of the property through the pre-selection of an appointed heir. Such attributes cannot be predicated on wills; nor can division of material property substitute for the role of a caretaker and property manager. Customary law experts suggest that the concept of 'succession' encapsulates the customary practice of succeeding to a status in the family (such as *indlalifa* in older customary systems) and is thus more in keeping with customary understanding of property succession than 'inheritance', which has more to do with inheriting material property. Wills are consequently rare, and even when drawn up, are not always enforced because it is considered unjust to 'eat the inheritance alone'.

Rights are held by recognised family members and are thus exclusive. Family membership is understood

as a process of active engagement rather than determined by a uniform set of rules. Rights are kept active through ongoing participation in family affairs and by contributing to the physical maintenance of the home and caring for the young and aged. Most respondents stressed the importance of family property for hosting family ceremonies; and conversely, the importance for family members to record their family 'belonging' by attending them. Acquiring family property has a major symbolic and practical significance in demonstrating capacity to host family occasions and in so doing become a repository of family unity.

This concept of active participation is very different from the concept of an heir who could conceivably be completely removed from the property and family in time and space. That would be unthinkable in Fingo Village or Rabula.

Implications

The findings suggest that freehold tenure in the African context has been subverted to accommodate ongoing customary practices, which have, however, been modified. 'Freehold' in these contexts could be said to have evolved into a hybrid form of ownership, borrowing from both customary practices and western legal concepts such as 'title'. From a policy perspective these findings suggest that tenure insecurity can be exacerbated by titling; and that, partly to manage this problem, new title holders are likely to disregard the strict provisions of the law as they have done in Fingo Village and Rabula, raising serious questions about the expense of extending the cadastre as currently constructed.

The findings accord with other research findings in Africa that:

- Titling does not transform customary principles of property management – though it reshapes relationships. Where titling has been imposed, e.g. South Africa and Kenya, property tends to revert to family control and the avoidance of spatial and textual registration procedures.
- Property is generally managed at family or lineage level, even in 'communal' contexts. Higher



Fig. 4: A typical homestead in Rabula with several related families living on one property with one title in separate homesteads.

authority levels provide a broader customary and/or official framework of rule-making and may be invoked for such functions as dispute resolution or adjudication and allocation of rights to 'newcomers'. The actors collectively or individually juggle between the multiplicity of authority structures to advance particular interests in order to achieve the most desired outcome, resulting in some cases in high levels of contestation and negotiation. These struggles in turn further reshape the relationships.

It is therefore inaccurate to regard customary systems as stagnant and unchanging 'traditional' or atavistic systems that do not recognise property rights or promote secure tenure. On the contrary customary systems are able to adapt to new circumstances, just as the common law continually evolves. The difference is that in customary systems rights do not coincide with exclusive control, as implied by our common law.

- Accumulated research in Africa has revealed that titling per se has not promoted increased agricultural investment and productivity. Production in many parts of Africa has intensified in the absence of title. The World Bank itself has endorsed this finding.

Conclusion

The term 'informal' tenure is a misnomer. Even in visibly informal settlements there are norms and

practices defining rights to land that are generally understood among the members of these communities, though they may not be legally recognised by the official registration system. For ease of reference these 'other' tenure systems may be referred to as 'social tenure' systems, though any attempt to define them tends towards oversimplification. The problem is that the official deeds registration system cannot interpret socially-based norms and practices as they are informed by an understanding of property that cannot easily be captured through parcelling land and registering identified owners associated with one particular parcel.

Social and registered tenure systems respectively are associated with different sources of authority, hence the term 'legal pluralism' or 'parallelism' characteristic of tenure in post-colonial African contexts. Legal pluralism in land tenure is often over-simplified into two broad counterposing systems of tenure, namely, 'communal tenure' and the deeds registration system. The problem with this set of oppositions is that it disguises the underlying value systems in each, and privileges registered property as a more highly evolved form of ownership in contrast to 'communal' ownership seen as primitive and antithetical to human progress.

In social tenure situations rights are in fact complex, involving multiple and overlapping uses and claims. Rights are bound up with power relations and are embedded in social networks. The term in social science that is generally

used to define these social relationships is 'social embeddedness'. Socially embedded norms and practices differ significantly from the official ways of recognising ownership of property in the so-called 'formal system'.

Legal enforcement in the formal system rests on three institutional pillars: the surveying and subdivision of land into parcels; conveyancing of land transfers; and registration of ownership in the deeds registry. This interpretation of ownership derives its legal direction from the common law. In social tenure contexts, on the other hand, rights and authority are nested within different layers of social organisation. It is counter-intuitive to link particular individuals to particular surveyed parcels that thereby gain legal recognition through the registration of that relationship.

A new wave of thinking about African property systems is emerging with many similarities to other post-colonial and post-socialist societies, questioning the self-evidence of titling. Indigenous cultural values the world over are being taken more seriously, not as non-proprietary but socially embedded. There are also signs that the conventional ways of thinking about property concepts and the cadastre are changing in the western world as environmental concerns come to the fore and new forms of property emerge such as digital information, intellectual property, genetic property, etc.

Way forward

In the wake of the private-communal tenure debate in post apartheid South Africa, the Department of Land Affairs settled for a compromise. 'Communal' forms of tenure are legally recognised within the private property paradigm, e.g., Communal Property Associations and the Communal Land Rights Act (CLARA). Legal protections for 'informal' rights are seen as temporary pre-emptive rights only. This approach effectively recognises land rights through privatisation under group landholding entities.

The results of this compromise have been mixed, largely negative. The problem merely appears to be resolved by recognising community ownership through surveying an outer boundary, conveyancing the transfer

and registering the legal entity in the deeds registry. Internal subdivisions or individual surveys are seen as the next 'evolutionary' step. This 'integrationist' approach fits with a broadly accepted view - supported by constitutional principles - that land ownership should be deracialised.

This trajectory provides the rationale that the state is extending land tenure security to a large number of people as expeditiously as possible. The article has attempted to show that these solutions do not deal with the underlying philosophical differences in approach to property - they are technical solutions to social issues with little or no understanding of the latter, particularly the notion of family property and separable individual rights within families and communities, though these are layered and elastic. Nor does it deal with the evidence of increased tenure insecurity.

The legal principles underlying privatisation through titling differ significantly from the socio-cultural principles underlying social tenures. The existing disjuncture is likely to widen rather than narrow, leading to increased social tension. From a technical-legal point of view, the process is comparable to hammering 'square pegs into round holes'. The result could paradoxically result in loss of tenure security, along with significant public revenue expenditures that may not be recoverable through increased investments.

Numerous alternatives have been suggested, for e.g. starter titles in urban parts of Namibia which do not require survey and registration - properties are geo-referenced and locally registered using points rather than parcels. Registering in a 'family name' rather than individual names is a further innovation that needs serious consideration. Local record offices or 'property shops' are essential if people are to develop trust in maintaining records.

In Mozambique customary rights are legally recognised, though rights holders are vulnerable to the predations of urban elites and investors, meaning the law has yet to find the right mix between customary rights and investment. Mapping property rights is being tested in complex systems in

West Africa. GIS/GPS technologies for mapping rights have been applied in innovative ways in South Africa, South America and other parts of Africa but lack legal recognition.

In South Africa the constitution recognises the legal parity between customary and common law, but there is little evidence that this imperative has been thoroughly thought through. For example, what would that mean for freehold title that has reverted to customary norms, or customary tenure that is forced into the official registration system.

The idea of non-parcel property is nevertheless gaining ground. Terms like "fuzzy boundaries" and "spaghetti parcels" are increasingly seen as plausible units for addition to new cadastral formulations, not only in the context of customary tenure, but also, for example, to accommodate environmental regions and infrastructural installations that cross-over cadastral boundaries and cannot be parcelled. The International Federation of Surveyors (FIG) is actively supporting research into alternative thinking around cadastral reform.

The first hurdle to overcome is the inbuilt prejudice against the idea of family co-ownership and non-parcel property. The second hurdle to overcome is the technical question. It is here that the challenge lies for finding a better fit between social realities and rigid systems thinking.

Acknowledgement

This article is based on a presentation to the Map Africa 2007 Conference held on 29-30 October 2007 entitled 'Conflicting land tenure rights in the formal and informal sectors in the Eastern Cape'. The author is affiliated to a local land tenure research network, LEAP (Learning Action Project in promoting land tenure security), and is currently undertaking research towards a Ph.D through the Programme for Land and Agrarian Studies at the University of the Western Cape supported by the Cape Programme for Rural Innovation (CAPRI) funded by the Dutch government.

Contact Rosalie Kingwill,
Tel 082 569-4787,
rosiekingwill@gmail.com ©