

BRIEFING NOTES

to improve our understanding and ability to ask the right questions and take effective action on land matters in West Africa

“Land Tenure & Development” Technical Committee

Securing market land transactions in rural West Africa

by Jean-Philippe Colin¹, July 2017

Land markets emerged in certain regions during the colonial era, but have become particularly dynamic in many West African countries over the last few decades. Securing land transactions is a major development issue because of the implications of land markets for investments and social peace. Market transactions in rural West Africa include a variety of arrangements, most of which are ‘informal’ or ‘extra-legal’. This note explains why it would be more pragmatic to secure transfers of rights rather than the land rights themselves (as current public policies aim to do) and, given the constraints to legal formalisation, why priority should be given to recognising and consolidating local practices that are already implemented by actors.

Current types of land transaction

Market transactions refers to the transfer of rights of appropriation or use against a due consideration, on

the basis of an equivalence system, without systematically implying the use of money.

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Market land transactions include:

- a) **permanent transfers of appropriation rights**, usually through purchases/sales. Other mechanisms include certain types of plantation contracts, when a landowner (the assignor) provides land to a farmer (the taker), who develops a perennial tree crop plantation and maintains it until production starts, with then a sharing of the plantation and the land that bears it;
- b) **non-definitive transfers of use rights** through tenancy contracts:
 - land renting corresponds to the transfer of a right to use a parcel against the payment of a fixed rental rate based on the area. The rent can be paid in cash (usually before cultivation) or in kind (after harvesting). These contracts are usually short-term, although urban elites and agribusiness firms have begun to make arrangements that last for several decades;
 - sharecropping: access to land (and possibly other factors of production) is charged as a percentage of the produce, with or without the assignor’s participation in production;
 - certain forms of pledge, when use rights are transferred to the lender;
 - access to land in exchange for various types of service: providing manual or mechanised labour or creating a ‘turnkey’ plantation, as in certain types of plantation contract (when the plantation or produce is shared, but not the land).

Here, the term ‘contract’ refers to an agreement that may or may not be formalised.

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Tensions and conflicts over market land transactions

Conflicts over land transactions can take various forms:

a) The assignor's rights and ability to transfer them are contested. The assignor's right to the property may be challenged by someone outside the family (during boundary disputes, or when indigenous actors who have granted incomers access to land deny them and their descendants the right to sell the land) or by family members (if the assignor has transferred inherited family land and other members of the family challenge the legitimacy of the assignment).

b) Disputes over the type or terms of the transaction, rather than its existence. This can be the case when the rights transferred through a 'sale' remain largely unspecified, opening the transaction to divergent interpretations: Was it a sale of land or a long-term assignment of use rights?

c) Non-compliance with contractual commitments: With leases, this includes failure to pay rent on time or return the parcel to its owner on time; with sharecropping, there may be disputes over the distribution of produce. Other cases involve acquirers from urban elites not fulfilling their promises to contribute to the development of the village or community.

d) Tensions and conflicts caused by openly fraudulent practices, such as assigning the same parcel to different takers, or transferring a parcel to which the assignor has no rights.

On the whole, tenancy contracts seem to generate few conflicts, as they usually involve actors who know each other and are agreed for a short period in an explicit contractual framework.

Land sales currently cause the most problems in terms of securing market transactions.

More or less effective local practices to secure transactions

Actors use various strategies to secure land transactions and reduce the risk of disputes over property rights or compliance with contractual commitments:

a) Clauses in the contract to forestall problems: these include asking for the payment of the rent at the start of the contract (to avoid defaults at the end of the cycle) and restrictions on the tenant's use rights, such as a ban on planting trees (to avoid the tenant making subsequent claims to ownership), etc.

b) Visible signs of possession: installing signs, markers or fences, making concrete investments in the land (plantations), employing guardians.

c) Mobilizing or building social capital: this entails concluding a contract with 'trustworthy' actors, using networks to determine whether a potential partner is reliable, involving witnesses, or behaving like a 'good stranger' if the taker is not a local.

d) Extra-legal 'local formalisation' of the agreement through written documents, ranging from rough handwritten scraps of paper to typewritten or computerised contracts. Village authorities may be involved in local formalization ('endorsing' the document), or through a procedure they enacted. Local administrations are also frequently involved in local securing procedures through the legalization of the signatures carried on the document. Even if this does not give legal

value to the content of the transaction, it gives weight to the act. The involvement of these administrations sometimes goes further, such as when they propose models of contracts or produce administrative documents (plantation certificates, etc.). Although those practices have no legal force, the documents issued may be taken into consideration by a judge and could help the acquirers get their rights recognised if the dispute goes to court.

Uncertain outcomes of policies to legally register rights

Some conflicts over land transactions stem from uncertainty about the assignor's rights to the parcel concerned, rather than the contract itself.

The great majority of rural land transactions in West Africa involve property rights that are not legally recognised. Many conflicts over transfers of rights would be resolved if the assignors' rights were formally recognised, and various countries have accordingly adopted policies to formalise rights and make registering individual or family rights to land parcels a pre-condition for registering transfers of these rights. But in reality, access to mechanisms for formalising customary rights is still very limited in many countries, and will probably stay this way for a long time given the organisation and resources required, the cumbersome procedures involved, the costs incurred by applicants and potential bottlenecks in the certification/titling process (especially during the identification of rights and rights holders).

One alternative in these conditions would be to register transfers of rights. Although this type of mechanism is often regarded as less legally robust

than registering the rights themselves, formalising and registering transfers in contexts where most tenure insecurity arises from land transactions could be the most pragmatic and effective way of tackling this problem and contributing to social peace.

Some principles for flexible mechanisms for formalising transfers of rights, including rights to parcels that have not been legalised

In contexts where a tiny minority of rural actors can get their rights legally recognised, and where this situation is unlikely to change, upholding the principle that the only transactions that can be formalised are those involving parcels that are 'in the legal system' will mean that the great majority of land transactions remain illegal. What is needed are pragmatic procedures that can secure transactions involving non-legalised parcels, even if this includes solutions that are legally flawed. The local formalisation practices described above provide local responses to these risks, but cannot address the underlying need for reliable and accessible mechanisms. It is up to the public authorities to make these available.

The first issue that these mechanisms need to address is the legitimacy of transfers, especially transfers of family lands. This can be done by making it a requirement to have written minutes of family meetings authorising land transfers before such transactions can take place. Even though these family councils have no legal existence, it is harder to contest the legitimacy of a sale when there is a written record showing that the majority of rights holders (or actors with greater social weight) agreed to the transaction.

Providing model contracts for the most common types of transaction should encourage actors to clarify the clauses in their agreements and avoid the kind of ambiguity that leads to conflicts, with standard contracts for sales explicitly stating that the vendor renounces all rights to the parcel concerned. Moves to formalise long-term tenancy arrangements in writing should also be encouraged, with key clauses stating which crops may or may not be grown, rent levels, conditions for implementation, etc.

All long-term or definitive transactions should include a topographic survey to demarcate the parcel. To keep costs down and make them more accessible, it should be possible for these surveys to be conducted by other actors apart from specialist surveyors (qualified agricultural technicians), even though they may be less precise.

Procedures for sales and all long-term transactions should also include written validation of the contract by a legitimate authority, to affirm the contractual link between the parties, clarify their wills and give the agreement a certain solemnity and publicity. This could be done by notaries, but as they are usually expensive and hard to access in rural African contexts, it is often recommended that local communities should be involved in defining and securing rights and securing transfers of rights. In contexts where high social tensions over transactions (especially between indigenous and incomer populations) are a threat to social peace, the validation procedure should preferably be undertaken by local representatives of the State (such as sub-prefectures).

In conclusion, the most appropriate way to secure transactions involving



rural land in sub-Saharan Africa that is not 'in the legal system' is through simple devices that will lack the rigour of legal processes. In the interests of social peace, there needs to be a trade-off between rigorous legal procedures that could only concern a tiny minority of actors in the short and medium terms, and the cheaper and less administratively cumbersome option of 'pragmatic imperfection' discussed above, which could help secure much larger numbers of transactions (albeit imperfectly). ●

FOR FURTHER INFORMATION

- >> Colin J.-Ph., 2017, "Emergence et dynamique des marchés fonciers ruraux en Afrique subsaharienne. Un état des lieux sélectif", *Contribution à l'Etude régionale sur les marchés fonciers ruraux en Afrique de l'Ouest et les outils de leur régulation*, WAEMU, Dakar, IPAR (115 p.).
- >> Colin J.-Ph., 2013, "Securing rural land transactions in Africa. An Ivorian perspective", *Land Use Policy* 31: 430-440.
- >> Fitzpatrick D., 2005, "Best practice options for the legal recognition of customary tenure », *Development and Change* 36 (3), 449-475.
- >> Lavigne Delville Ph., 2010, "Land securitisation, formalisation of rights, land regulatory institutions and investments. For an expanded conceptual framework", *Revue des questions foncières* 1 (10): 5-33.

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