



**STRENGTHENING LAND GOVERNANCE SYSTEM FOR SMALLHOLDER
FARMERS IN MALAWI PROJECT**

**LESSONS FROM PILOTING INCLUSIVE
CUSTOMARY LAND GOVERNANCE**

REPORT

TABLE OF CONTENTS

| | Page |
|--|-------------|
| List of Acronyms | 3 |
| Acknowledgments | 4 |
| Executive Summary | 5 |
| 1. Background and Introduction | 6 |
| 2. Methodology | 6 |
| 3. Establishment of CLCs and CLTs | 7 |
| 3.1 The office of the Land Clerk | 7 |
| 3.2 Election of CLC members | 8 |
| 3.3 Responsibilities and Capacity of CLCs | 8 |
| 3.4 Appointment of the CLT | 11 |
| 3.5 Responsibilities and Capacity of CLTs | 11 |
| 4. Registration and Titling of Customary Estates | 12 |
| 4.1 The mandate for registration of customary estates | 12 |
| 4.2 Application for registration of a customary estate | 13 |
| 4.3 Adjudication and Demarcation | 16 |
| 4.4 Survey Issues | 17 |
| 5. Conclusions and Emerging Policy Issues and Proposals | 18 |

LIST OF ACRONYMS

| | |
|------|--|
| CEPA | Centre for Environmental Policy and Advocacy |
| CLA | Customary Land Act |
| CLC | Customary Land Committee |
| CLR | Customary Land Regulations |
| CLT | Customary Land Tribunal |
| GVH | Group Village Headman |
| LC | Land Clerk |
| TA | Traditional Authority |
| TLMA | Traditional Land Management Area |

Acknowledgements

The Strengthening Land Governance System for Smallholder Farmers in Malawi Project implemented by Oxfam and Centre for Environmental Policy and Advocacy (CEPA) would like to thank the key stakeholders that provided valuable information for the documentation of lessons from the Project. These include officials from the Ministry of Lands Housing and Urban Development (MoLHUD); District Council staff from Phalombe, Kasungu and Rumphu; members of customary land committees and tribunals from the three districts; members of the Women Forum in Phalombe and Kasungu; and project staff from Oxfam and CEPA. Above all, the Oxfam-CEPA consortium is grateful to the European Union for providing financial resources that enabled documentation of these lessons as one of the deliverables from the project.

Special thanks are due to the Consultant, Mr Gracian Banda, for investing his time and skills in this exercise.

Executive Summary

The implementation of the *Strengthening Land Governance Systems for Smallholder Farmers in Malawi Project* has provided useful lessons for scaling up the titling and registration of customary estates provided for under the Customary Land Act 2016 (CLA) and the Customary Land Regulation 2018 (CLR). In particular, all the pilot sites have reported significant enthusiasm to register their customary land from amongst communities involved in the Project and in neighbouring areas. There are a number of lessons that can be utilized to improve the governance of customary land in general and registration of customary estates in particular.

Firstly, the report has highlighted the importance of the office of the Land Clerk (LC) and the need to integrate this in the local government authority framework. This entails recruiting LCs for each TLMA and providing them with the requisite capacity to undertake the tasks they have been assigned under the CLA and the CLR. As most stakeholders have observed the LC should be an office, with staff that can provide different competences required in land administration.

Secondly, the CLCs have important functions to perform and although the LC provides technical support, it is important that the members have the requisite public confidence as well as the competence to handle those tasks. There has been concern as to whether election can produce such calibre of people. We have therefore recommended that the CLA needs to be revised to provide for appointment of CLC members rather than election. This however is a long term proposal as it requires amendment of the Act.

Thirdly, the report has highlighted the need to integrate customary land administration into local government framework not only in terms of the recruitment of the LC but also the establishment of land registries at district level and the office of the land registrar as required under the CLA and the CLR. The Project missed the opportunity to provide a learning space for harmonizing land administration with the operations of district councils in terms of adjudication and demarcation maps, title plans and production of customary land certificates.

Fourth, it has been noted that the preparation of Traditional Land Management Area (TLMA) and Group Village Headman (GVH) maps and the issuance of TLMA customary land certificate are the condition precedent for the mandate of CLCs to carry out customary land administration. While mapping of TLMA boundaries was done through a national TLMA demarcation programme, the exercise did not include GVH boundaries. This affected facilitation of adjudication and demarcation of customary parcels. In scaling up there is need to facilitate mapping of GVHs as it gives the basis for individual parcel registration.

The fifth issue concerns the need to revise the design of Form A to facilitate the inclusiveness of applicants that can enter the register. In particular, Form A should provide space for as many applicants as possible, including all family members as may be the case. It should also highlight the recording of what capacity the applicant is applying and his or her authority to represent the interests such as those of minors, the disabled or those who are ill. In that regard the report recommends the need for guidelines for CLCs to use to prevent fraudulent registration or situations in which those pretending to represent the infirm may abuse their role to deprive the rightful owners of their right to register customary parcels.

The registration of family land or joint registration can have significant implications for land investments as well as the relationship between spouses and clan members. The report recommends more sensitization so that spouses who choose to register land to the exclusion of the other spouse do with full information. As the traditional values change over time such information can facilitate a more inclusive registration that meets family needs and national development.

1. Background and Introduction

In 2015 the consortium of Oxfam and CEPA commenced implementation of the *Strengthening Land Governance Systems for Smallholder Farmers in Malawi Project* (the Project) whose specific objective is to pilot, test and recommend for scaling up improved gender sensitive governance systems for customary estates provided for under the Land Act 2016, the Customary Land Act 2016 (CLA) and the Land Survey Act 2016 and other land related legislation. In addition to sensitizing local communities in the pilot sites in Phalombe, Kasungu and Rumphi in the regulatory framework for customary land governance, titling and registration and dispute management, the Project facilitated the establishment of Customary Land Committees (CLC) and Customary Land Tribunals (CLT) in the three pilot sites. The Project implementation process has provided useful insights in the regulatory framework which can be used for the upscaling of the project in accordance with the provisions of the new land related legislation.

Consequently, Consortium has documented lessons learned from the implementation of the Project and developed policy proposals for consideration during the roll out of the inclusive customary land governance system across the country.

2. Methodology

The focus of the Project was to provide space for testing the interaction of the regulatory framework as provided for in the new land related legislation with the customs and institutions prevalent in the pilot areas. This entailed the establishment of CLCs and CLTs which are part of the new institutional framework that will essentially replace existing customary institutions and norms, where necessary.

The assignment therefore reviewed the opportunities and challenges that the implementation of the Project has highlighted and what, if any, modifications need to be made in order to ensure smooth implementation of the new land related legislation. This required a consideration of the key legal provisions, the review of literature pertaining to similar or related legislation as well as the evolution of customary norms and the extent to which these have had impact on local customary land governance systems. The assignment considered Project reports at various stages of implementation to consolidate information and provide comparator with literature review findings.

Secondly, the assignment required undertaking stakeholders consultations to understand local perceptions of the pilot intervention. Interviews were held with policy makers and project staff who were involved in the pilot project and those who are directly involved in customary land administration at central, district and traditional leadership levels (see Annex 1). We also interviewed CLC and CLT members, including TAs, in the pilot sites in focus groups (see Annexes 2-4). The stakeholders consultations have been used to assess and validate the Project findings as recorded in Project reports above and provide a more comprehensive information source for developing policy proposals for scaling up the titling and registration of customary estates across the country.

The findings from the foregoing have been used to develop policy proposals for the implementation of a gender sensitive customary land governance system. The policy proposals have been presented in such a way as to identify specific interventions in the policy process. This includes policy proposals for field guidance, for new regulations or for any amendments

to the existing land related legislation. The aim is to put in place mechanisms for effective implementation of gender sensitive customary land governance systems.

3. Establishment of Customary Land Committees and Customary Land Tribunals

The implementation of customary land governance system is predicated on the establishment of new institutional frameworks at local level that seek to entrench the decentralization of land governance in accordance with the National Decentralization Policy 1998, the Local Government Act 1998 as amended, the National Land Policy 2002, the Land Act 2016, the CLA and the Land Survey Act 2016. These include the office of the land clerk (LC), the CLC, the CLT, the District Land Tribunal and Central Land Board. This pilot phase was instituted to test and scale up the implementation of the CLC and the CLT which are the basic institutions for registration of customary land to proceed. This part therefore evaluates the experience in establishment of these local committees in the registration of customary land in the three pilot areas.

3.1 The Office of the Land Clerk

Part II of the Customary Land Act 2016 provides for the appointment of the LC for each Traditional Land Management Area (TLMA). The LC is appointed by a local government authority to act as secretary to any land committee established under the Act¹. The LC is required to possess competence in land tenure management, map preparation and land use planning to meet the duties and responsibilities outlined under the Act². When read together with the duties of the LC under the Act³, it is fair to say the LC should be more of an office establishment than an individual. This is one of the observations made during the consultations in the pilot areas.

The consultation established that in all the pilot areas the Ministry of Lands provided a LC⁴. On the other hand, the experience with the LCs appointed by the Ministry would suggest that it is better for the LC to be appointed by the local government authority as provided under the CLA⁵. On the other hand, there are capacity issues in using existing local government authority personnel to act as LC, as Table 1 below demonstrates:

During consultations with the LC for the Phalombe Pilot site where the district council had to assign its Lands Officer to perform the functions of the LC for the pilot phase, it was noted that there were a number of challenges including allocating time to the process as well as logistical issues in terms of travel costs to and from the pilot site when at the same time staff member had to attend to district council matters.

¹ Section 8 (1) of the Customary Land Act 2016.

² Section 8 (2) of the Customary Land Act 2016.

³ Section 8 (3) of the Customary Land Act 2016.

⁴ In Phalombe the District Council assigned its Lands Officer when the LC left.

⁵ The LCs in Phalombe and Kasungu left before the work was completed. In Phalombe the district council had to appoint their Lands Officer to act as LC for the pilot phase.

Election of CLC members

Part II of the CLA provides for the establishment of the CLC in each TLMA at GVH level⁶. The CLC shall comprise of the GVH, who shall be the chairperson, and six elected members, three of whom must be women⁷. In accordance with Part II of the Customary Land Regulations 2018 (CLR) members of CLC are elected by the community in the Group Village Headman where the customary land registration is to take place. The CLR make some provision for the election of CLC members in terms of nomination and qualification of candidates and the electorate. The conduct of the elections is however not specifically provided for; hence balloting, vote counting and management of results among other electoral procedures had to be improvised.

The other area that has raised questions is the interpretation of the phrase ‘at least three of whom shall be women’ in the CLA⁸. The concern is that the provision does not guarantee equal representation of men and women in the CLC. Surprisingly Rumphi which is a patrilineal area elected more women in the CLC than men and hence raising the need to review the provision. This is further compounded by the fact that the GVH, who is the Chair, is herself a woman. There was a question from communities on whether the regulations and/or the law should specify that men will compete for three positions while women will also compete for the other three positions of the six elected positions so that there is a balance of men and women in the committees. It is clear however that the intention behind the CLA provision that at least three of the members must be women is that the number of women in the CLC must not be less than three. The Rumphi situation is legally allowed under the CLA; indeed, it is lawful for the entire CLC to be composed of women only.

The consultations however found that the election process for the CLC generally went well in all the three sites. In Rumphi the CLC and CLT members confirmed the elections were properly administered. No specific issue was raised in Kasungu. In Phalombe, however, it was noted that there was some commotion during the election process as the procedures for the election provided for under the CLR was not comprehensive, hence the election officials had to improvise on their feet. Another concern in Phalombe was that some candidates were spending substantial amounts of money for campaign to be elected. This was raised in the context of the expectations of CLC membership benefits⁹, a point that is discussed under section 3.4 below.

3.2 Responsibilities and Capacity of CLC

The responsibilities of the CLC are quite substantial. They include:

- (a) clarify all rights of occupation and use of customary land by land users in the area under the jurisdiction of the group village headman of the area;
- (b) ensure all other categories of land and their respective boundaries within the jurisdiction of the group village headman of the area are clear and known;
- (c) adjudicate customary land rights either sporadically or systematically for purposes of registration of land;

⁶ Section 5 (1) of the Customary Land Act 2016.

⁷ Section 5 (2) of the Customary Land Act 2016. This is a deliberate provision to make the CLC gender inclusive. There had been concerns regarding the power dynamics in the configuration of the CLC decision making process which may render the statutory provision of limited consequence. See generally Institute for Policy Research and Social Empowerment, 2017, *Gender and Power Analysis of the Customary Land Governance under the Customary Land Act 2016*, LandNet Malawi, Lilongwe.

⁸ Section 5 (2) of the Customary Land Act 2016,

⁹ The fact that the GVH nominated his wife to CLC membership illustrates this concern.

- (d) process applications for and make grants of customary estates subject to the consent of the Traditional Authority;
- (e) prescribe amounts of land that can be allocated to an individual, a family, group of persons, or an organization;
- (f) liaise with and consult institutions and bodies within the jurisdiction whose activities and mandates affect land use, water, forestry, mining, agriculture, and development planning;
- (g) in consultation with the Commissioner, levy any fees or charges on customary estates granted to organizations or bodies or annual rent on customary estate leases granted or sub-leased to organizations or bodies;
- (h) inspect and verify whether the conditions subject to which a customary estate is granted are being complied with;
- (i) approve any transactions on customary estates within the first five years of registration;
- (j) carry out public outreach campaigns on any matter concerning the Act; and
- (k) recommend to a local government authority, the appointment of any staff it may need to carry out its duties and responsibilities.

Thus, although the CLA requires the LC to provide technical advice on land matters to members of the CLC¹⁰, the overall responsibility for land administration rests with the CLC. In particular, the CLA requires that the CLC must ‘manage customary land within its area of jurisdiction, on trust, as if the committee were a trustee of and the residents in the area were beneficiaries under a trust of the customary land’¹¹. In addition, a CLC is required to apply certain principles and interface with public institutions responsible for matters related to customary land matters¹². Hence not only must the CLC have the requisite competence to meet these public obligations, they bear fiduciary responsibilities over customary land under their jurisdiction. CLCs have taken over from the trusteeship that traditional leaders held under customary law in land administration.

During consultations it became clear that the CLCs were cognizant of the enormity of this responsibility. While acknowledging that some capacity building has been conducted in form of training after their election, CLC members in all the pilot sites highlighted that more need to be done, including possibility of study tours to ensure they can broaden their understanding and application of land administration principles. They further pointed out that their functions require interfacing and where necessary providing advice to individuals and institutions with superior technical and financial resources than they had. This requires CLCs to be prepared to deal with institutions at that level. Examples were given in relation to individuals and institutions who hold leaseholds in areas under the jurisdiction of the CLCs in Rumphu¹³ and Kasungu. These have far superior technical and financial resources which can overwhelm the efforts of the CLC members who are essentially volunteers and most of them not so well conversant with land administration and related matters.

It was also in the context of the need for capacity that stakeholders in Phalombe expressed disdain over the election of CLC members. The contention is that elections can usher into office persons with questionable competence or interest in community work and preferred a method of appointment as CLT members are appointed. There are two considerations which may be

¹⁰ Section 8 (3) (e) of the Customary Land Act 2016.

¹¹ Section 6 (1) of the Customary Land Act 2016.

¹² See section 6 (2) of the Customary Land Act 2016.

¹³ In Rumphu, the example given by the LC is that of Phwezi Foundation which holds a lease of substantial amount of land in Mzokoto but the boundaries are contested.

used to address the concerns over possible bias. The first is to prepare guidelines to be followed by appointing authorities so that there is objectivity in appointments. The second is to provide for approval of nominations so that there is a second tier of objectivity in the process of appointment. While the process of appointing the CLT was considered a better approach, it is clear that process is fraught with delays and unnecessary bureaucracy, a point highlighted in section 3.5 below.

It is also important to highlight that the composition of the CLC does not include village heads, yet they wield considerable power over land allocation and administration. It was noted in the consultations that many of them are unhappy for being excluded and may sabotage the work of CLCs. It is clear however that the CLA deliberately left out village headmen from land administration and replaced them with elected members for CLC members. The only way they can be included is through election or appointment, as the case may be. In addition, the CLR only recognizes gazetted GVHs, yet there are numerous ungazetted ones with jurisdiction over land and can wield considerable influence in land administration. There is the danger these GVHs may frustrate the process of registering customary land in their areas.

Finally, the consultations highlighted the fact that the pilot customary land registration has been made possible through a project grant. These funds have enabled the CLC to be established and for members to be given certain allowances. The project has provided incentives such as lunch allowance for attending to CLC functions and clothing and equipment for members of the CLC. It is not clear whether these can be sustained once government takes over the responsibility over customary land registration both in the pilot areas as well as the entire country.

One possible means for ensuring sustainability is to integrate the customary land governance within the local government authority framework as provided for under the CLA¹⁴. Due to the limited time for consultation, we only had a single opportunity to consult with district council administration when we interviewed the Phalombe District Commissioner. The DC was confident that the council would integrate the activities of the CLCs and the CLTs from its recurrent expenditure and can use locally generated revenues to support the work of these committees.

3.3 Appointment of the CLT

The CLA requires the establishment of a Customary Land Tribunal in every TLMA to adjudicate on customary land disputes in the area¹⁵. Its composition consists of the Traditional Authority who is the chairperson and six community members, three of whom must be women¹⁶. The six members of the CLT are nominated by the TA and approved by the Commissioner for Lands. The criteria for nomination are based on:

- (a) knowledge of customary land law of the area, including boundaries and the history of settlement of the people in the area;
- (b) experience in handling social issues; and
- (c) standing and reputation of a nominee in the community as a person of integrity¹⁷.

¹⁴ The scheme of the Customary Land Act 2016 is to decentralize customary land administration by assigning the technical support through the Land Clerk who is an appointee of the district council where the land is located: see section 8 (2) of the Act. The local government authorities also have specific mandates under sections 9 and 10 of the Customary Land Act 2016.

¹⁵ Section 44 (1) of the Customary Land Act 2016.

¹⁶ Section 44 (2) of the Customary Land Act 2016.

¹⁷ Section 44 (3) of the Customary Land Act 2016.

In addition, the CLA excludes a number of persons based on positions they hold which may conflict with the responsibilities as CLT members or their residence, or knowledge of the area. These include a member of a land committee; a person not ordinarily resident in the District in which the tribunal is to function; a member of the National Assembly; a ward councillor; a magistrate; a political party official; a person under the apparent age of eighteen; a mentally unfit person; a person who has been convicted of a criminal offence involving dishonesty or moral turpitude; or a person who is not a citizen¹⁸.

As pointed out earlier¹⁹, some local community stakeholders were of the view that appointment is a better method of constituting a CLC than the electoral process. It was however noted that the appointment of CLT members faced major delays in almost all the three pilot areas mainly because of the need for approval of the nominees to be done by the Commissioner for Lands²⁰. It was pointed out that in addition to how busy the Commissioner for Lands gets to consider these nominations, it is unclear how the Commissioner can evaluate whether the nominees have the qualifications stipulated under the CLA²¹. This is much more so considering that there is little likelihood that the nominees would have curriculum vitae for the Commissioner to evaluate.

Finally, it is worth considering whether the nominations done by the TA can adequately address all the factors to be considered to ensure the appointees not only have the confidence of the communities they are required to serve in terms of character and diversity of origin but also the qualifications necessary to meet their obligations. The approach of Senior Chief Lukwa is worth considering:

Box 2: Process of nominating CLT members used by Senior Chief Lukwa in Kasungu

Senior Chief delegated the responsibility of nominating the CLT members to the GVH and the members of the Area Development Committee. He provided the criteria that the GVH and area development committee members used for selecting CLT members. GVHs nominated individuals to be considered for the position of CLT member, thereafter a forum of GVHs and area development committee members discussed and selected suitable individual men and women to occupy positions in the CLT. As a result of this process, in Kasungu, membership of CLT were selected from different geographical areas under the Senior Chief Lukwa’.

Although this procedure is not provided for under the CLA or the CLR, it meets the requirements of these instruments and facilitates a more inclusive process of appointment. It is proposed that guidelines should be prepared to be used by TAs and GVHs (if and when the law is revised to appoint CLCs members). The example of the process used by Senior Chief Lukwa can be a model to be incorporated in the guidelines.

3.4 Responsibilities and Capacity of the CLT

The CLT is only responsible for dispute resolution on matters of customary land in its area of jurisdiction. Neither the CLA nor CLR define what disputes can be taken to the CLT. However according to the CLR, the CLT shall hear disputes referred to it by complainants who are aggrieved with outcomes of mediation efforts facilitates by the CLC. During consultations it was clear that the CLC was mediating or handling disputes in the course of adjudication and demarcation process. In Phalombe, for example, the CLC handled 14 disputes, settled 8 of

¹⁸ Section 44 (4) of the Customary Land Act 2016.

¹⁹ See section 3.3 above.

²⁰ Section 44 (2) (b) of the Customary Land Act 2016.

²¹ See note 15 above.

them while 6 are pending. One dispute was referred to the CLT but was eventually withdrawn. Similarly, in Kasungu and Rumphi the CLC were involved in dispute resolution. This raises the question whether the CLC should have been given mandate under the CLA to mediate disputes, rather than having to appoint a mediator from elsewhere.

4. Titling and Registration of Customary Estates

4.1 The Mandate for Registration of Customary Estates

The CLA gives for power to the Commissioner for Lands to issue a certificate of customary land for each TLMA whose boundaries are demarcated or agreed in accordance with the Act or any other law or administrative procedure²². This certificate has important implications for the registration of customary estates. According to the CLA²³, the certificate of customary land over a TLMA,

- (a) is issued in the name of the TA for the TLMA;
- (b) confers upon the CLC, functions of management of customary land; and
- (c) affirms use and occupation rights of all persons holding customary land in the TLMA.

It follows from this provision that the TLMA customary land certificate is the primary title on the basis of which registration of individual customary estate parcels can be carried out. It is also the basis upon which CLC are mandated to manage customary land in the TLMA. The pilot project clearly did not commence with this titling. There are practical considerations that are likely to have militated against this. In the first place, the TLMA boundaries are notoriously fluid and would have engendered considerable acrimony to the detriment of the Project. The creation, promotion of TAs in recent times has not kept up with mapping and demarcation.

The same concerns seem to have played a role in the registration process in the pilot areas. The mandate to manage customary land is conferred on a land committee which is established at GVH level. It follows that the GVH area of jurisdiction must be clearly demarcated so that each CLC can identify its area of jurisdiction. The CLR clearly require maps for district, TLMA and GVH jurisdiction as a basis for adjudication and demarcation²⁴. While maps for TLMAs were produced through a national TLMA demarcation programme, GVH maps were not available. As a result, the CLCs proceeded on the basis of what the GVH informed them. This was not without serious consequences. In Rumphi this led to some areas of GVH Chimalabanthu being left out during the sensitization, thereby delaying the adjudication and demarcation process. As stakeholders pointed out in all pilot areas, the absence of maps resulted in conflicts with some GVHs, especially those who are not gazetted.

It follows from the foregoing that the need for maps that provide clear boundaries for the district, TLMA and the GVH provide both the mandate and authority to register customary estates as well as the certainty required for orderly adjudication and demarcation of individual customary estates.

4.2 Application for Registration of a Customary Estate

²² Section 3 (2) of the Customary Land Act 2016.

²³ Section 3 (3) of the Customary Land Act 2016.

²⁴ See Part III of the Customary Land Regulations 2018.

The CLA allows an individual, a family, a group of persons recognized at customary law to apply to CLC for a grant for a customary estate. For this purpose, the CLR provides for an application Form A²⁵. There a number of issues that have a risen during the pilot phase with regard to the application for a grant of customary estate.

The first issue is the perception that the application suggests the customary holders are applying for land. The application is for titling of what the applicant already owns, it is not an application for ownership of the land. The CLA is clear that the applicant is applying for a grant of a customary estate whose characteristics are outlined under the Act. A customary estate once granted is, inter alia, of indefinite duration, and is inheritable and transmissible by will²⁶. These are the title attributes that registration of a customary estate grants to the applicant. They are akin to a freehold estate and can be transacted in a manner that unregistered land could not, including sale, transfer, charging subject to the provisions of the CLA and the Registered Land Act 1967 as amended in 2016. Hence a customary estate title gives these attributes which customary law did not provide.

The second issue is the design of Form A (Application Form) and Form D (Certificate of Customary Estate)²⁷. The stakeholders consultations highlighted that Form A and D seem to have been designed to accommodate one applicant and does not adequately provide for multiple or joint applicants as the CLA envisages. In particular, the Form provides for fewer applicants, essentially no more than two²⁸. The space for a list of children in Form A is primarily for purposes of inheritance and does not address the anomaly. A family may wish to apply together as a unit in which case there should be space for their details in Form A and D. This is primarily a design issue nevertheless it is important to revise these forms to accommodate the various interests and capacities of various applicants.

It has also been observed that Form D provides two spaces for conditions of the grant. We recommend that the blank space for conditions be removed since the conditions stipulated at the bottom of the certificate are adequate. Alternatively, only the blank space be retained in case it is envisaged there will be different conditions for different grants.

The third issue is the definition of family, as neither the CLA nor the CLR provide for definition. Within the cultural context of the pilot sites and indeed Malawi as a whole, this could mean the nucleus family consisting of husband, wife and their children. Family could also mean the extended family including uncles, nephews, cousins. It could also mean an entire clan²⁹. There were a number of consequences for the wide choices in relation to who can register what land parcels and who can be on the register. These range from the *ndunda* registration system in Lilongwe South West where land was registered for the benefit of a whole clan, to registration of individual owners or joint owners such as husband and wife or registration of a maternal uncle to hold the land for the benefit of the clan. All these were encountered in the pilot sites in different ways. For example:

²⁵ Regulation 30 of the Customary Land Regulations 2018.

²⁶ Section 20 (2) of the Customary Land Act 2016.

²⁷ See Annex 5 and Annex 6.

²⁸ This may have been as a result of a reading of section 21 (2) of the Customary Land Act 2016, which states that no less than two people, representing the family or as group leaders, should sign the form where the application is by a family or a group recognized by customary law.

²⁹ See Institute for Policy Research and Social Empowerment, 2017, *Gender and Power Analysis of the Customary Land Governance under the Customary Land Act 2016*, LandNet Malawi, Lilongwe at page 52.

Box 3: A village headman refuses to allow registration of farmland in individual/family

In Rumphu Charles Nyasulu who resides in Mgomankhanda in Group Village Chimalabanthu was keen to register his land and obtain certificate of customary estate for security of his land. The Village Headman however declared that none of the individuals/subjects will be allowed to register farming land except for residential land. CLC members tried to convince him to allow his subjects register their pieces but the village headman refuses and claims he has not allocated any land to his subjects permanently. Rather, he allocates each family a land to cultivate each growing season something the villagers dispute but to date none of the individuals/families have registered their pieces.

Box 4: GVH seeks to register land rather than individual parcels

In Kasungu a residential section of Ching'amba village was registered based on individual parcels. GVH Ching'amba encouraged the project team to discard it and instead, register as village. He was advised to convene a meeting with his people and the first meeting, he did it alone without involving CLCs and Land Clerk. He was told to reconvene the meeting so as to include Land Clerk (to record minutes). This second meeting was reportedly non-democratic and no one was allowed to ask questions. The meeting also did not discuss boundaries of the village. Project staff were faced with resistance when they went to re-demarcate the village and main reason was that the village boundaries as directed by the GVH were overstretched into nearby farmlands. Villagers brought the issue to the CLC which advised that the farmland be given back to the 'individuals.' The GVH made an appeal to the Lukwa CLT which upheld the CLCs' decision with minor adjustments on the boundaries of the village.

In addition, there are a number of instances where some in the wider family have taken upon themselves the role of guardian, especially where minors, widows, disabled or critically ill beneficiaries are unable to participate in the registration. The most obvious case is that of orphaned minors who are unable to go through the registration process on their own³⁰. In most cases there will be guardians that provide support. It is important that Form A should provide space where a guardian can apply for a grant of a customary estate and should provide that the guardian does so and will hold the land where necessary as a trustee for the benefit of the minor.

Similarly disabled or persons with any incapacity that makes them unable follow the process of adjudication, demarcation and registration can be taken advantage of as happened in the case below:

Box 5: Family taking advantage of incapacity in Phalombe

Mrs. Fanny Gwembere is an elder sister to Mrs. Eluby Gwembele. During adjudication and demarcation, Mrs. Fanny Gwembere was very ill and could not participate in the process. Her sister promised to get the parcel for Mrs. Fanny Gwembere registered in the name of Fanny Gwembele as the main holder with Fanny's Children as beneficiaries. During public display when fanny came for inspection, it was discovered that the sister lied to her elder sister by getting the parcel registered into the name of Eluby Gwembele as the Main holder and Children of Eludy as beneficiaries living. When this was discovered, both Fanny and Eluby were called and Eluby admitted that she changed the details and that the rightful owner Fanny Gwembele together with her children.

It is clear from the foregoing case that family can be both a source of deprivation as it can be one of support and reliance. It is important therefore that, in addition to providing specific

³⁰ The Customary Land Act 2016 is silent as to whether a minor can apply for a grant of a customary estate. Generally property law does not prohibit transfer or vesting of property in a minor but once vested the minor can not deal with the land by way of transfer, for example.

space for recording the capacity of the applicant, the CLC must be vigilant in verifying ownership so as to protect vulnerable groups who can be taken advantage of.

The fourth issue concerned the registration of land involving married couples. The CLA provides space for choice to register land either individually or jointly as a couple. This is consistent with the Malawi Constitution³¹. The consultations in Kasungu and Phalombe brought out interesting perspectives, with Phalombe stakeholders fervently protecting the right of everyone to choose whether to register land jointly with a spouse or individually, while in Kasungu, the pro-choice approach was viewed with disdain as the Senior Chief Lukwa representative loudly wondering what culture can justify depriving a woman of land she is or has been working on the grounds other than that of being a woman, irrespective of matrilineal or patrilineal divide. Box 4 below illustrates the consequences of the various cultural and customary norms pertaining to marriage and property.

Table 1: Distribution of parcels registered in individual, joint and communal names

| Pilot Site | Female | Male | Joint Registration | Communal Registration |
|------------|--------|------|--------------------|-----------------------|
| Rumphi | 236 | 693 | 0 | 17 |
| Kasungu | 152 | 173 | 714 | 85 |
| Phalombe | 1491 | 650 | 35 | 11 |
| Total | 1879 | 1516 | 749 | 112 |

The table above provides a prism for understanding the shifting cultural dimensions that the pilot sites have tested. There is no surprise in terms of the results in Rumphi; being predominantly patrilineal, the registration is overwhelmingly male dominated. Nevertheless, the female registration is highly significant in a society associated with patriarchal norms. What is in fact more surprising is the fact that the GVH for the pilot site is female. In Phalombe where the pro-choice was most prominent, one can understand how strong the matrilineal system has influenced the registration of customary estates.

The question of choice was in direct response to the observation that in Kasungu the community were more in favour of joint registration of family land. Consequently, Phalombe comes across as more conservative than the rest of the pilot sites, despite the predominant pro-female registration. Phalombe has the least number of both male and joint registration, followed by Rumphi, while Kasungu has the highest number of joint registration and almost equal male and female registration. These figures reflect the sentiments expressed by the stakeholders regarding the manner they perceive land ownership³².

³¹ Section 28 of the Constitution provides that every person shall be able to acquire property alone or in association with others.

³² Project staff in Phalombe informed the consultant that the Project had initially recorded 61 joint registration but during public display the number dropped to 35 when the women were informed that joint registration with their spouse meant joint ownership of the land.

There are however indications that the question of joint registration requires clarity in Phalombe to enable women make informed decisions. During the last public sensitization for the Project held in February 2020 some women expressed interest to change the registration to include their spouses after clarification. This was partly on the basis there has been some realization that husbands tend to hold back family investments if they do not own family land. It will be interesting to see how this dynamic manifests in the near future as well as when the national registration rolls out. Nevertheless, it is important to continue to provide information on the implications of joint registration in the context of divorce, death or its impact on traditionally clan land in matrilineal societies.

4.3 Adjudication and Demarcation

The CLA provides for area adjudication covering a TLMA, district adjudication covering a whole district³³ and spot adjudication upon application of an individual or group of persons³⁴. The Act gives responsibility for area adjudication to a CLC³⁵, which is required to publish a public notice on the relevant land specifying the area of land to be covered, requiring persons indicate their land claims at a time and place indicated in the notice, and requiring such claimants to mark or indicate their parcel boundaries prior to the date for claims indicated in the notice³⁶. The CLC is then required to prepare an adjudication map in accordance with the Land Survey Act and a provision adjudication record which shall be posted in a prominent place in the area³⁷. In accordance with the CLR, the responsibility for undertaking the technical work for preparing public notices, demarcation maps, processing land claims, and adjudication record is given to the LC³⁸.

The consultations highlighted different experiences with regard to customary land adjudication and demarcation. In Phalombe the stakeholders did not experience significant issues with boundaries as land owners have trees, bunds or flowers demarcating their parcels already. In Rumphi, demarcation in areas where there was institutional land or trading areas paused significant problems. The example of Phwezi Foundation which holds a lease of about 300 hectares was highlighted to have caused problems as surrounding communities contested the boundaries. A similar issue was raised concerning boundaries of Mzokoto TDC land, which had been significantly encroached by shop owners as there is a trading centre around the TDC. The CLC had to mediate in these cases and in the case of Mzokoto TDC it was agreed the TDC offer the shop owners leases and will therefore pay rent to the TDC. The impact of existing leases during customary land adjudication was also highlighted in Kasungu as Box 5 illustrates:

Box 6: Adjudicating customary land around leasehold estates

There is a land dispute currently before the CLT in Senior Chief Lukwa. The applicant applied to register a parcel of land she claims was given to her in 1979 by GVH Tembwe before she got married to the respondent's grandfather. On his part the respondent contends that the land is leased and is in the name of his grandfather, a fact disputed by the applicant. The land is now confirmed as leasehold of 19.2 hectares, though the adjudication and demarcation process shows the land is 35.456 hectares. The explanation for the difference is that part of the land was swampy and was not included in the leasehold demarcation. The question remains whether the land can be registered considering the lease expired and whether the CLT can continue to handle the dispute.

³³ Section 37 (1) of the Customary Land Act 2016.

³⁴ Section 42 of the Customary Land Act 2016.

³⁵ Section 37 (2) of the Customary Land Act 2016. There seems to be an anomaly in the drafting since a TLMA has more than one CLC, in essence area this should have read as land committees.

³⁶ Section 39 (1) of the Customary Land Act 2016.

³⁷ Section 39 (2) of the Customary Land Act 2016.

³⁸ See Part III of the Customary Land Regulations 2018.

The above cases illustrate some red flags for the CLC to take into account during adjudication and demarcation. The consultations highlighted that the designation of leasehold estate boundaries hardly involved owners of surrounding land and was therefore not consensual and remain contested. The boundaries will cause significant adjudication and demarcation issues in relation to registration of adjoining customary parcels. In the Kasungu case in Box 5, the applicants also wanted the land to be registered as customary estate, especially since the lease had expired. The fact that a customary estate does not attract rent and does not expire will attract many leaseholders to change their leases to a customary estate. This will require government to accept surrender of such leases, if not expired, or where the lease expired to return the land to customary status so that a customary estate can be registered.

4.4 Survey Issues

As pointed out in section 4.3 above, the preparation of maps is the responsibility of the CLC, with technical support provided by the LC. The CLA specifically requires that the demarcation map be prepared in accordance with the Land Survey Act 2016³⁹. In particular, the CLR also requires that the LC for each TLMA prepares a base map and land use plan in accordance with instructions from the Surveyor General and the Commissioner for Physical Planning in accordance with the Land Survey Act 2016 and the Physical Planning Act 2016. These statutory instruments highlight the importance of the Surveyor General and the Commissioner for Physical Planning in the registration of customary estates.

The consultations highlighted some challenges regarding responsibility for the maps, title plans and related database. The Project engaged the Survey Department from the inception of project implementation including in relation to:

- Development of the technical manual for land titling process,
- Two weeks training technical field staff which had 4 facilitators from the Surveys Department
- Supervision of the adjudication and demarcation of the customary land parcels for 21 weeks which involved one Land Surveyor to supervise the field work and one Cartographer who supervised the office Data Processing work.
- 60 Days Public inspection of the adjudication record. This engaged one Cartographer.
- 7 weeks of title plans production.
- 3 weeks of title plans re-production (on new template recommended by SG as explained below.

Nevertheless, the finalization of the work delayed in Kasungu essentially because the Survey Department did not agree to take responsibility for and sign off on the product. The main reason for this is likely to be that the Survey Department was not the lead as expected. Although this may not be a major concern if Government takes over at scaling up, it still remains the case that the Survey Department will not have the requisite capacity to conduct surveys for customary estate registration while undertaking its many other responsibilities. The likelihood is that scaling up will require other institutions to provide human and technical support to meet the capacity requirements to undertake the surveys required for scaling up customary estate registration. In that regard, specific protocols have to be agreed in advance such as signing memorandum of understanding between the Surveyor General and the non-state sector institution, providing for technical support, use of equipment and the formal production of data,

³⁹ Section 39 (2) (a) of the Customary Land Act 2016.

maps and title plans. A similar consideration should be made regarding the preparation and adoption of land use plans involving the Commissioner for Physical Planning.

5 Conclusions and Emerging Policy Issues and Proposals

The foregoing discussion has highlighted a number of lessons that have been experienced during the implementation of the Project in Rumphi, Kasungu and Phalombe Pilot sites. The discussion has considered the manner in which the legal framework interfaced with field operations commencing with the establishment of CLCs and CLTs as necessary institutions to carry out the task of registration of customary estates involving sensitization, preparation of demarcation maps and adjudication records, processing applications for registration and land claims, data entry and management, preparation of title plans and customary certificates, among other activities.

The report has highlighted some key lessons around the office of the LC and its role in customary land governance, the elections of the CLC and appointment of CLTs and their respective mandates and responsibilities, titling and registration of customary estates including the application process, who can and should be on the register, adjudication and demarcation and survey issues. The following are the observations and policy proposals from the foregoing discussion:

5.1 The office of the Land Clerk

The LC has important functions in customary land administration in general and registration of customary estates in particular. In essence, CLCs cannot function without the LC. In view of the magnitude of the statutory mandates of the LC under the CLA and the CLR, it is almost impossible for one person to undertake the tasks expected of him or her. We recommend that the LC be an office which can also provide for other staff with requisite competences required to support the mandates of the CLCs.

Secondly, the Project used LCs deployed from the Ministry of Lands, Housing and Urban Development which posed a number of challenges. In addition, these LCs were not employed by or integrated into the district councils as required by the CLA. It is proposed that District Councils commence the process of recruiting LCs to be based at TLMA. Considering some of the recommendations we make in relation to the need to prepare maps for TLMA and GVHs prior to and in preparation for customary estate registration, the recruitment process needs to commence as soon as possible. Preferably the LC should come from the TLMA to ensure they have a better understanding of issues in the area.

5.2 Election of CLC Members

The CLA requires that CLC members be elected by the community, the rationale being this allows for a more democratic way of constituting the CLCs, thereby facilitating community acceptance of and confidence in the office bearers. This however may not be the case in all areas and there is merit in considering appointments of office bearers, using guidelines that promote inclusiveness⁴⁰. The only consideration is that the revision will require amendment of the CLA.

5.3 Responsibilities and Sustainability of CLCs and CLTs

The report has highlighted the enormity of the tasks assigned to CLCs in customary land administration. In order to facilitate sustainability, it is necessary for local government

⁴⁰ See Box 2 in section 3.4 above.

authorities to integrate them in their overall plans and budgets. In Phalombe, the DC confirmed this is already being done. Overall, there is need for policy interface between ministries responsible for lands and local government to facilitate policy integration and sustainability of CLCs and CLTs within council frameworks. This is much more so given these institutions are established at GVH level, hence there will be so many of them that will need to be accommodated within the statutory funds or locally generated revenues from district councils. One possibility for easing this burden would be to revise the Second Schedule of the CLR to increase some of the fees charged thereunder.

Finally, it is worth considering whether the regulation providing for appointment of a mediator before a matter is referred to the CLT will serve a useful purpose. The practice so far is that the CLCs have been handling disputes in the course of the adjudication process and can continue with that role after registration. In any event, any aggrieved party will still retain the right to go to the CLT if they feel the CLC cannot be objective in handling the complaint. The CLR can therefore be revised to remove the requirement to appoint a mediator.

5.4 Titling and Registration of Customary Estates

A number of observations have been made regarding the statutory basis for CLC mandates in customary land administration. The Project did not facilitate the mapping of TLMAs or GVH lands or the issuance of certificate of customary land for TLMA, which are the *sine qua non* for the CLC mandates in customary land administration in general and registration of customary estates in particular. While TLMA boundaries were mapped through a national TLMA demarcation programme after the project had started, GVH boundaries were not. As highlighted in section 4.1 above, we recommend the process of mapping GVH boundaries should commence as soon as possible in preparation for rolling out the registration of customary estates countrywide.

For purposes of facilitating a more inclusive application process, we have proposed that Form A be revised so that it provides space for as many applicants as possible, accommodates the record of as many capacities of applicants as possible such as guardians, trustees or agents, with clear authority to represent the rightful claimant of the land in question. It is important that either the CLR or guidelines be prepared that CLCs can use to ensure they are vigilant in scrutinizing possible frauds or situations that may compromise rights of vulnerable groups. In the same vein, it is recommended that the CLR provide a definition of the word family so that persons do not take advantage of orphans or widows on the pretext of being family. The lack of definition of family in the CLA provides opportunity to define the same in the CLR to address this gap.

We further recommend that it is important to sensitize communities on the importance and benefits of registering land as a family, even in the context of prevailing customary norms. In addition to inculcating a sense of responsibility and hence promoting family investment, family or joint registration will reduce conflicts with the extended family and the need to use inheritance legislation upon the demise of a family member who is the registered owner. It is also important to emphasize that joint or family registration will depend on whether the land is part of clan land, commercial land or land acquired outside the village context.

We have further noted that the status of leaseholds that have expired or the policy towards lessees who would like to register their leased land as customary estate needs to be clarified. We recommend Government prepares a policy guidance note that will allow existing leases for

small scale farmers or those that have expired to be converted to customary land and registered as customary estate.

5.5 Adjudication and Demarcation

In addition to the need to have TLMA and GVH maps highlighted in sections 5.1 and 5.4, there is need to clarify the status of leasehold estate around customary land holdings. This is especially important because the boundaries of these parcels were marked without the participation of surrounding communities many of them are still aggrieved to date. In addition, the status of leases whose terms expired and are idle need to be clarified. Many communities are hopeful these may provide opportunity for the landless to access land, especially in areas where landlessness is high. This is a policy issue to be addressed in the context of the National Land Policy 2002 which directed these estates to revert to customary status⁴¹, yet none of the ensuing legislation addressed this issue.

5.6 The role of district councils

Although the CLA and the CLR require customary land administration to be decentralized with specific requirements for establishment of district registries and district land registrars, the Project did not test this framework, as the LC was an employee of the Ministry of Lands Housing and Urban Development. Only Phalombe seemed to have been a little more engaged in the pilot Project compared to Kasungu and Rumphu where the role of councils was minimal. We recommend that the establishment of district land registries and recruitment of land registrars should commence in advance of the scaling up of the registration of customary estates.

⁴¹ See section 4.10 of the National Land Policy 2002.

Annex 1: List of Policy Makers and Project Staff Consulted

| Name | Institution | Designation |
|-------------------|--|--|
| David Chilonga | Ministry of Lands, Housing and Urban Development | Team Leader, Land Reform Implementation Unit |
| Masida Mbanu | Ministry of Lands, Housing and Urban Development | GIS/Land Surveying Specialist, Land Reform Implementation Unit |
| Jonas Thomu | Kasungu District Council | Lands Officer |
| McDonald Galimoto | CEPA | Project Officer |
| Joshua Mlenga | Ministry of Lands, Housing and Urban Development | Land Clerk |
| Vincent Moses | CEPA | Programme Officer |
| Rodric Mateuma | Phalombe District Council | District Commissioner |
| Anne Chimalizeni | Phalombe District Council | Lands Officer |
| Haswell Mollande | CEPA | Project Officer |
| Herbert Mwalukomo | CEPA | Acting Executive Director |
| Andrew Mkandawire | Oxfam | Programme Officer – Land Governance |

Annex 2: List CLC, CLT and Women Forum Members consulted in Phalombe

| NAME | Designation |
|--------------------------------|--------------------|
| Senior Chief Nazombe | CLT Chair |
| Blessings Chikopa | CLT Member |
| Alinafe Nkhoma | CLT Member |
| Emmanuel Jameson | CLT Member |
| Mary Phwiza | CLT Member |
| Aida Noniwa | CLT Member |
| Annie Mwanankhu | CLT Member |
| Stainer Mollen (Sub T/A Maoni) | CLC Member |
| James Likovo | CLC Member |
| Alinafe Walasa | CLC Member |
| Mary Mayenda | CLC Member |
| Precious Chikwatu | CLC Member |
| Erick Molande | CLC Member |
| Joyce Muleso | CLC member |
| Doreen Nyadani | Maoni Women Forum |
| Elube Makina | Maoni Women Forum |
| Efelo Muhowa | Maoni Women Forum |
| Falida Jonasi | Maoni Women Forum |
| Magret Richard | Maoni Women Forum |

Annex 3: List of CLC and CLT Members Consulted in Kasungu

| Name | Designation |
|--------------------|--------------------|
| Vincent Banda | CLT member |
| Emilida Phiri | CLT member |
| Maria Gideon | CLT member |
| Salifu Banda | CLT member |
| Felesia Kamtogo | CLC member |
| Rhoda Mwale | CLT member |
| Richard Jobo | CLC member |
| Tamara Phiri | Women Forum member |
| Mavuto Tembo | CLC member |
| Zelifa Banda | CLC Member |
| Annes Banda | CLC Member |
| Saukani Chigwa | CLC Member |
| Chika Phiri | GVH |
| Senior Chief Lukwa | CLT Chair |

Annex 4: List of CLC and CLT members Consulted in Rumphi

| Name | Designation |
|----------------------------|--------------------|
| Chihana | CLC member |
| Eggie Banda | CLC member |
| Emily Kayira | CLC member |
| Magie Chihana | CLC member |
| Stowell Kaluwa | CLC member |
| Pachalo Mvina | CLC member |
| Mariana Mhango | CLC member |
| Victoria Nyirenda | CLC Chair |
| Aaron Nyirenda | CLT Member |
| Manase Ngwira | CLT Member |
| Lazarus Sotwani | CLT Member |
| Towera Nyirenda | CLT Member |
| Charity Msowoya | CLT Member |
| Ellina Kumwenda | CLT Member |
| Senior Chief Mwankhunikira | CLT Chair |

Annex 5:

FORM A
APPLICATION FOR A CUSTOMARY ESTATE
(Section 23 and regulation 30 (2))

1. Full name and address of applicant in BLOCK LETTERS: *In the case of a partnership registered under the Business Registration Act, a company incorporated under the Companies Act, a trust incorporated under the Trustees Incorporation Act or a co-operative society incorporated under the Co-operative Societies Act, the name and residential addresses of all partners, members, directors and trustees must be given.*
.....
.....
2. Marital status of the Applicant
.....
3. Names of children and their ages (*if any*)
.....
.....
.....
4. If married, are you applying jointly with a spouse or as a family?
.....
.....
5. Particulars of registration under the Business Registration Act, the Companies Act, The Trustees Incorporation Act or the Co-operative Societies Act (*if applicable*)
.....
.....
6. Nationality of applicant: ID
No.....
7. Particulars of freehold, leasehold property or customary estate already held in Malawi (*State plot number or description, Deed or instrument number, use of property and whether or not developed*)
.....
.....
.....
8. Purpose for which land is required
.....
.....
9. Particulars of land
 - (a) Place in which land is situated.....
 - (b) Size of land in hectares.....
 - (c) Unique parcel number
.....

Dated this day of, 20...

.....
Signature of Applicant

Annex 6

FORM D

CERTIFICATE OF A CUSTOMARY ESTATE (ss. 23 (5) and 27, reg. 33)

Adjudication Section..... Title

No.:.....

This is to CERTIFY that:is/are
now granted a customary estate over the land at Unique Parcel
Number.....

The following conditions apply to this customary estate:

.....
.....
.....
.....
.....
.....
.....
.....
.....

.....
Signature of Grantee

.....
.....

Chairperson
Customary Land Committee

Land Clerk

Given under my hand and the seal of the.....
District
Registry this..... day of,
20.....

.....
District Land Registrar

This grant is made subject to the conditions that-

- (a) The occupier shall use, keep and maintain the land in good state, and, in the case of land to be used for farming, farm the land in accordance with the practice of good land husbandry ordinarily used in the area;
- (b) No building shall be erected until all required permissions have been obtained;
- (c) The occupier shall pay any applicable rent, fees, charges, taxes, and other requirements, if applicable, in respect of the occupation of the land;
- (d) The occupier shall comply with all rules, including by-laws applicable to the land and all lawful orders and directions given by a land committee relating to the use and occupation of the land;
- (e) The occupier will retain and keep safe all boundary marks, whether natural or otherwise; and
- (f) The Commissioner and a land committee representative may enter and inspect whether the conditions under which a customary estate is granted are being complied with.