

# In Search of Order

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## Property Rights Enforcement in Kibera Settlement, Kenya

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## **In Search of Order: Property Rights Enforcement in Kibera Settlement, Kenya**

### **Abstract**

In Kibera, Nairobi Kenya's largest slum, getting property rights enforced is no simple matter. Structures are owned by one person and rented by another, neither of whom have rights to the land on which the structure stands. Rental contracts are the subject of frequent dispute for residents and government conflict resolution mechanisms are inaccessible. Using structured interviews and working with local community based organizations we were able to identify three different mechanisms for contract enforcement that developed apart from the formal government channel: 1) bureaucratic entrepreneurs willing to act outside of their area of authority; 2) community based organizations; and 3) ethnic gangs. All of these mechanisms assist people in getting their property rights contract<sup>1</sup>s enforced. In this paper we establish a rubric for the assessment of welfare maximization based on extant literature in new institutional economics. We find that these organically developed solutions to the inaccessibility of government mechanisms for contract enforcement are not obviously superior to the formal institutions.

**Keywords:** property rights, Kenya, Africa, land, law, non-state actors

### **Introduction**

This research began with a fairly simple premise; that the urban bias suggested by Robert Bates with respect to agriculture policies would extend to other policy arenas (Bates 2005). We expected that property rights would be enforced in urban areas more consistently than they are in rural areas. This premise is based on the idea that the further away an area is from the center of power in a country, the less likely it is to have judicial decisions and laws regarding property rights enforced. The urban bias thesis corresponds with recent literature on the political geography of power in Sub-Saharan Africa (Boone 2003; Herbst 2000). As we began to research property rights enforcement in an urban setting, we discovered that institutions governing property rights are more complex than usually assumed, and that there are numerous margins for measuring the effectiveness of the definition and enforcement of property rights. Hence, this paper does not deal directly with the urban bias issue, but does shed light on the degree and efficacy of state policy with respect to property rights in urban areas. In the process of analyzing alternative institutions governing property rights we develop a multi-faceted measure for evaluating institutional outcomes. This measure is a new contribution to the property rights and transaction cost literature.

Kibera, the research site that we chose, is centrally located in Kenya's capital, Nairobi and is the largest informal settlement in Sub-Saharan Africa (see Appendix A).<sup>2</sup> The people who move into Kibera are typically migrants from rural areas who are looking for an inexpensive place to live. Residents first settled in Kibera in 1912 and there is now a sizeable permanent population estimated at 700,000, including an adult generation born and raised in the settlement. Studying Kibera allowed us to examine the property rights regime of people who are not wealthy or privileged, but who are located in an urban area and have serious concerns regarding the definition and enforcement of their property rights. In Kibera, the property right most threatened and of greatest concern is tenancy. We find that the absence of effective authority and a clear definition of property rights causes residents to choose informal channels for enforcement of their property rights.

This paper proceeds in four parts. First, the argument regarding the political geography of state power is presented. This is followed by a history and description of the study site. The different mechanisms available to residents to enforce their rental contracts are then detailed. Finally, we apply a social welfare assessment measure to the various enforcement mechanisms and draw conclusions.

*The Geography of State Power*

The effectiveness of government administrative structures in rural areas far from the center of power has been questioned in the literature on the state and development (Boone 2003; Herbst 2000) and in work on public administration in Africa (Olowu and Wunsch 2004). The standard view, substantiated by empirical studies, is that the strength of the state is greater in the center of the country - the area nearest the capital city. Power, understood in this context as the reach and effectiveness of state institutions, decreases the further from capital city those institutions may be, like ripples of water that lose their strength the further they move from the source of disturbance. The implications of uneven state power include: the dominance of regional strongmen or warlords in regions outside of the state's control; poor health and education services; and accentuate poverty resulting from poor infrastructure and limited market access.

While the most serious implications of this limited reach of the state for those on the periphery are limited access to basic services and personal security, we would also expect their legal property rights to be poorly enforced relative to those of the urban population. One can find many areas of rural Africa that "seem to lie entirely beyond the shadow of the law." (Ellickson 1991: 283).

*Kibera Settlement*

Kibera is centrally located in Kenya's capital, Nairobi, and is the largest informal settlement in Sub-Saharan Africa (see Appendix A).<sup>3</sup> The people who move into Kibera are typically migrants from rural areas looking for an inexpensive place to live. Residents first settled in Kibera in 1912. The permanent population, estimated at 700,000, includes several adult generations born and raised in the settlement. Studying Kibera allows us to examine the property rights of urban people who are not wealthy or privileged. Despite their proximity to the center of state power, residents have serious difficulties with the definition and enforcement of their property rights.

Squatter settlements in Kenya began during British colonization as a result of colonial land policy. The Crown Lands Ordinances of 1902 and 1915 designated all 'empty' land in Kenya as the property of the Crown. This policy also prevented Kenyans from owning property, compelling Kenyan employees of the British Government, provided with neither housing nor basic services, to become squatters on government land (Syagga 2002).

Kibera began in 1912 as a temporary residence site for former Sudanese soldiers who had fought for the British in World War I. Their descendents, still

called Nubians, continue to live within the settlement. Nubians comprise approximately 1% of the population of Kibera. Their long tenure in the slum has given them a strong economic role and social structure (Bodewes 2008). 'Kibera' is the Nubian word for forest. The colonial administration offered Nubians permits to construct temporary structures but the land remained reserved for the government under the Crowns Land Ordinance (Bodewes and Kwinga 2003:222). This policy ensured that houses would remain low-quality, as permanent structures were prohibited.

In 1928 residents of Kibera were required to prove their Nubian descent and were declared to be Tenants of the Crown, "meaning the Commissioner of Lands could terminate their tenancy at any time... [and] the government retained the right to demolish any structure" (Bodewes 2005: 34). The colonial government attempted to remove Nubians from Kibera in 1932, asserting that they did not possess title deeds. Their efforts were unsuccessful and not repeated as The Kenya Land Commission "expected that the Sudanese would eventually die out and no new settlers would follow them to Kibera" (Bodewes 2005: 35). Instead, Kibera became an entry point for rural migrants and railway workers employed by the British. The British government turned a blind eye to settlement in Kibera, allowing residents there to circumvent the restrictive housing policy. In 1950 the British government granted official permission to the Nubian community to remain in Kibera.

Following Kenya's independence in 1963, waves of landless people migrated to urban areas in search of employment. The new Kenyan government retained the land policies of the colonial regime and inhabitants of Kibera did not receive property rights to the land they occupied. The Crowns Land Ordinance was renamed the Government Lands Act and the president was given authority to allocate unalienated government land, including Kibera (Government of Kenya 2005: 8). In line with its policy of 'slum-clearance', the Government of Kenya declared Kibera to be government land and officially terminated Nubian claims to the land in 1969. In the 1960s and 1970s, the state began to reclaim the land that had been allocated to the Nubians in order to construct middle-class housing estates. Though the Nubian Member of Parliament, Yanus Ali, presented a motion that passed unanimously requesting that Nubians receive title deeds for the land they occupied, it was never implemented and the government continued to claim the land (Church 2002). In spite of the government control of the land, settlement continued. The 1960s and 70s brought an influx of Luo tenants fleeing violence in rural areas following the assassination of a Luo cabinet minister and KANU Secretary General, Tom Mboya. As Luos settled in Kibera, the ethnic diversity of the settlement increased dramatically. A further influx of residents arrived in the 1980s when the government cut social spending and assumed a more lax attitude toward settlements.

Despite Kibera's lack of official recognition in the eyes of either the British or Kenyan governments, local government officials with the title of 'chief', continue to grant permission for the construction of houses in return for payment, although this falls outside their legal authority.<sup>4</sup> Chiefs are members of the Provisional Administration and, as such have the right to grant temporary occupation licenses on government land (Neuwirth 2006: 93). However, housing in Kibera is far from temporary and those receiving permission from the chiefs to build are acting as landlords. This practice, along with a lack of political will to enforce the formal rules and the absence of an official housing policy in Kenya has allowed people to continue to construct dwellings without any clear lease or title to land.

#### *Housing and Tenancy Contracts in Kibera*

Property rights in Kibera are based on informal tenancies. Landlords in Kibera are referred to as 'structure owners' as they have no legal title to the land on which they construct and rent dwellings. Studies have shown that Kibera is the most profitable place in Nairobi to own property. Not surprisingly, structure owners are typically from a higher socio-economic class than tenants. In a recent survey of 120 structure owners, the majority (80-90%) were absentee landlords living in middle class housing estates outside of Kibera who hired agents to collect rent on their behalf. Fifty-seven percent of the structure owners were public officials (Syagga 2002). This group of officials clearly has a vested interest in maintaining the status quo, but it is unclear whether or not they actually exert influence to block reforms. Furthermore, the fact that the majority of structure owners are from the Kikuyu or Nubian communities, while tenants tend to be ethnically Luo, Luhya, and Kamba, results in an ethnic division of owners and tenants.

Property disputes in Kibera revolve around the structure owner/tenant relationship rather than the physical land of the settlement. The most common areas of dispute are rent payment and eviction. Rental disputes fall into two distinct categories: cases in which the structure owner increases rent, usually failing to provide due notice; and cases in which the tenants refuse to pay. Evictions may result from both forms of conflict or other factors, including a desire to house tenants who are willing to pay higher rent for the same structure.

Property disputes are highly emotional and can become violent as they overlap with ethnic identity, political patronage, and socio-economic status. One Kikuyu resident structure owner reported that her tenants "disrespected" her by urinating into bags and throwing them at her door to assert that they would not be paying rent.<sup>5</sup> Upon requesting rent from one particular tenant, the tenant, a woman, stabbed her in the head (JG 2007). The perception among tenants in Kibera that they are being exploited by members of different socio-economic, tribal, and/or religious associations lends symbolic meaning to property disputes, compounding

the potential for these conflicts to become violent. Property disputes often serve as proxies for wider, national, political conflicts, exploding when political leaders see the opportunity for gain from civil unrest. In a 2001 incident, Raila Odinga, now Prime Minister, announced that tenants should reduce their monthly rent payments by 50% due to inadequate housing conditions. Violence broke out between Luo tenants and Nubian structure owners in reaction to this statement, resulting in at least 25 deaths (Bodewes 2005). This outbreak of violence was explicitly political as the president at that time, Daniel arap Moi, was talking about recognizing the property rights of the Nubian community and there was fear that Kibera would ‘be carved up.’ (Bodewes 2008). Raila Odinga’s statement mobilized his Luo base of support and shifted political power in Kibera significantly.

### *Methodology*

This chapter draws on interviews and focus group discussions to explore the types of resolution mechanisms available to residents of Kibera when they have tenancy disputes (see the Appendix for a complete list). Initial interviews were semi-structured and conducted with tenants in Kibera to determine the most common property conflicts. Contributions were sought from stakeholder groups within the settlement representing differences in tribe, religion, property ownership status, and socio-economic status. In total, the study draws on interview data from 76 tenants and 15 structure owners (both resident and absentee). Interview sites were selected in different villages within the settlement due to variations in the nature and frequency of property disputes.<sup>6</sup> Further, because ethnic affiliation can influence the selection of a property dispute resolution path, respondents from all major tribes in Kibera (Luo, Kamba, Luhya, Kikuyu and Nubian) were interviewed. Cases of 24 individuals personally involved with property disputes were also surveyed at a legal aid clinic within the settlement. Individual perceptions of the fairness and accessibility of the available resolution mechanisms were also assessed.

Interviews in Kibera revealed multiple paths for the resolution of property disputes that include formal government mechanisms, public officials acting informally, illegal ethnic gangs and alternative dispute resolution. To assess formal mechanisms of dispute resolution, we conducted interviews with local government officials, including three Chiefs and Assistant Chiefs, a member of Nairobi City Council and representatives of the two police forces with jurisdiction over Kibera.<sup>7</sup> Chiefs and Assistant Chiefs represent the central government appointments closest to the community, have offices within Kibera, and often exhibit rent-seeking behavior. We also sought the perspectives of officials at the provincial and national levels, including the Deputy Commissioner of Lands, the Chief Registrar of Lands, the Deputy Permanent Secretary of Lands, the District Commissioner of Nairobi West, and the District Officer of Kibera.<sup>8</sup>

We identified informal systems of governance in Kibera as well as those formal systems discussed above. Informal governance existed in village elders, or *wazee wa vijiji*, and ethnic gangs. In total, five village elders were interviewed, in addition to nine members of the Kamkunji (also known as the Taliban), a Luo gang and the largest of its type in Kibera. Additionally, community based organizations (CBOs), Kenyan nongovernmental organizations (NGOs), and legal aid personnel provided guidance for the research. Both the village elders and the Kamkunji represent alternative sites of power within Kibera distinct from, and often in opposition to, formal legal authority. Both groups provide conflict resolution that may substitute for or supplement the formal options. For example, village elders provide Chiefs with information about incidents within the settlement in exchange for a portion of the payment extracted by the Chief.

### *Enforcement Regimes*

There are four competing resolution processes for disputes between structure owners and tenants in Kibera. First, the Rent Tribunal is the formal avenue of property dispute resolution offering a legal framework for housing conflicts arising in low-income areas. Second, Chiefs and Assistant Chiefs, appointed as public officials under the Provincial Administration, demand payment for enforcing property rights and thus constitute an informal avenue for addressing these disputes.<sup>9</sup> Third, ethnic gangs throughout Kibera offer conflict resolution based on violence or coercion. Lastly, there are community based NGOs which promote alternative dispute resolution (ADR) for rental conflicts.

### *Rent Tribunals*

The Rent Tribunals were created by the Kenyan Rent Restriction Act of 1982 (Cap. 296, sec. 4) as a formal mechanism for arbitrating rent disputes in low-income areas. The act stipulates that tenants paying less than 2,500 Kshs. per month in rent represent “protected tenancies” (Kenya 1982:sec. 2(c)). Landlords must receive permission from the tribunal before evicting or increasing the rent of any tenant in this category. Additionally, both tenants and landlords may bring cases before the Rent Tribunal if the other party is not upholding their contract (e.g. refusing to pay rent, demanding increased rent or threatening eviction). While Kibera is government land and the resulting property regime is not formally recognized, the Rent Tribunal nonetheless claims jurisdiction over the settlement to protect the terms of landlord-tenant agreements. The Tribunal sits in Nairobi’s business district, approximately a seven kilometer walk from Kibera.

Although the Rent Tribunal offers formal protection to tenants of Kibera and residents of Nairobi's other informal settlements, respondents indicated they would be unlikely to take a case there.<sup>10</sup> Indeed, very few tenants even know about the Rent Tribunal (GD 2007). Those that knew about the Tribunal provided five main reasons why it is avoided. First, it is too slow, taking anywhere from two to five years to resolve a case. During this time, a tenant already would have been forcibly evicted or would have hired gang members to prevent the owner from collecting rent (DO 2007). Second, filing a case is perceived to be prohibitively expensive, as the filing fee is 800 Kshs., over twice as much as the average tenant pays per month in rent (which is about 300 Kshs.). Third, the Tribunal is perceived to be biased: while landlords typify it as a "tenant's court", tenants characterize the body as favoring the side of the landlord. Hilary Korir, the chairperson of the Rent Tribunal, admitted that "not a single landlord has been charged with going against tenancy agreements in the last year" (Aron 2007). However, structure owners are also hesitant to bring a case before the Tribunal as they are afraid that their structure will be categorized by the Tribunal as 'inadequate housing' with a maximum monthly rent of 100 Kshs., reducing earnings by approximately two-thirds. Fourth, the Tribunal has no enforcement mechanism. The Tribunal cannot remove people from a property and it lacks the coercive power to compel rent payment within Kibera (SO 2007). The Tribunal is removed from the context of Kibera and does not exercise authority on the ground.

### *Chiefs and Assistant Chiefs*

Chiefs in Kibera offer an informal system of dispute resolution. Chiefs are not leaders of ethnic groups, but government appointees with legally defined responsibilities and specific territorial jurisdictions. Four Chiefs and eleven Assistant Chiefs administer Kibera. While formally employed by the Provincial Administration under the central government's Office of the President, Chiefs in Kibera operate in areas outside their specified authority, require payment for service, and rely on violence to enforce decisions. These Chiefs are bureaucratic entrepreneurs, exhibiting rent-seeking behavior in exploiting their formal office to secure personal gain. In this manner, Chiefs constitute informal actors as their practices exceed legal responsibilities.

Chiefs rotate locations within the city on an annual or biannual basis and cannot exercise jurisdiction in the area in which they live (Doka 2007). In Kibera this means that chiefs often lack an accurate understanding of the settlement, creating a demand for knowledge and advice from village elders from the community. These *wazee wa vijiji* are officially appointed by the chief and are not elected by the community itself.<sup>11</sup> Elders generally collect bribes from tenants on behalf of the Chiefs and take a share themselves.<sup>12</sup>

In Kibera, Chiefs function as the first point of contact for speculative structure owners. As Kibera occupies government land that is outside the legal regime, purchasing property requires social networking with chiefs as the authority figures on the ground. Throughout the history of the settlement, chiefs have illegally allocated land to prospective structure owners in exchange for payment. Despite the consensus that “Kibera is now full,” Chiefs continue to allocate land. When a current structure owner wishes to sell his units, he and the new owner will meet together in the Chief’s office and the Chief will authorize the transaction and require both parties to sign a written agreement (Doka 2007). This behavior exceeds the formal, legal duties of the office of the Chief and gives some economic insight into why the informal settlements in Kenya continue to grow.

When Kibera residents experience a rent dispute or eviction threat, they may bring their case to the Chief with jurisdiction over their village. However, the pre-existing relationship and pattern of payments established at the initial purchase of the structures tend to bias chiefs toward the owners. Indeed, tenants indicate that structure owners have usually already provided a payment to the Chief before tenants arrive at the office to lodge their case. Regardless, tenants are also expected to pay the Chief in order to secure an audience (HA 2007). Since structure owners have a higher socio-economic status than tenants, they can pay more giving Chiefs an incentive to decide in favor of a structure-owner (AB 2007, HA 2007, HB 2007, KV 2007).

An alternative outcome is possible if the chief and tenant are of the same tribe and the structure owners’ tribe is perceived as adversarial. For example, a Luo chief would generally side with a Luo tenant against a Kikuyu structure owner despite the smaller payment offered by the tenant (LV 2007). However, the overarching perception is that it is useless for a tenant to approach a Chief. One tenant summarizes this position: “We have some corrupt Chiefs. They definitely do not help the poor tenant. Tenants believe if they go there, nothing will happen” (KV 2007). Moreover, Chiefs depend on the Administration Police force or hired thugs to enforce their decisions, using violence rather than diplomacy to secure their authority (Mwatha 2007).<sup>13</sup> In this regard they are again operating outside of their area of legal authority

### *Ethnic Gangs*

Ethnic gangs within Kibera offer another means of conflict resolution. The Luo Kamkunji, who also refer to themselves as the ‘Taliban’, is the largest and most powerful gang within the settlement. The gang is concentrated in Gatwekera Village and Sarangombe Ward, in the western area of the settlement, though it has a wide membership base throughout. It convenes weekly meetings on Sundays at 10 am at the Kamkunji grounds in Gatwekera, an open dirt field within Kibera

commonly used for political purposes. Members gather to address the local and national concerns of Luo residents, who may attend the meetings and bring personal grievances for members to address. Such cases include eviction, rent increases, reports of theft, and employment issues (KG 2007).

The Kamkunji began as part of the Liberal Democratic Party's youth wing, and first began to have influence in 1992 during Kenya's first multi-party elections.<sup>14</sup> Members held meetings without seeking necessary permission from the Chief, though government approval was required to hold a meeting of over five people. Kamkunji members describe the time before 1992 as "dark days" when the chief could exercise arbitrary authority over the settlement (KV 2007). Ignoring this regulation became the first instance of the Kamkunji's pattern of challenging governmental authority. In 2001, the Chiefs tried to exert authority in Kamkunji territory by deciding rent disputes, resulting in violent clashes and the consolidation of gang power. The gang has since prevented both structure owners and government agents, including Chiefs and higher-ranking officials, from entering Sarangombe Ward. Kamkunji members view the Chiefs and Provincial Administration as 'dictators' who have overstepped the 'boundaries' of their authority within Kibera (AB 2007, KG 2007, KV 2007). On three separate occasions since 2001, efforts of Chiefs to re-assert control have resulted in the burning of their offices of their offices (KV 2007).

The Kamkunji provides 'services' to Kibera's Luo residents and staunchly oppose the Chiefs and structure owners. The gang describes its activities as "liberating the tenants" from the "oppression" of the structure owners who try to collect exorbitant rents (KG 2007). The Kamkunji has ensured that the area's Luo tenants stay in Kibera without paying rent, or paying less than half of the amount agreed to by the structure owners. The gang is well organized in a rigid hierarchy that links them from local councilors up to current prime minister, Raila Odinga (Bodewes 2008). Though the Kamkunji claim to provide a public good within their area of Kibera, non-Luos generally fear the group and its violent tactics.

In opposing the Chiefs in Kibera, the Kamkunji conceive of themselves as providing a key service to tenants. One Kamkunji member describes the gang as "a forum for civic education", informing residents that they need not pay rent and protecting them from arbitrary rent hikes (AB 2007).<sup>15</sup> Another member recounts learning about the Rent Tribunal's decision that houses in the settlement area should not be rented for over Ksh 100 per month. The Kamkunji announced this information at the weekly meeting and they continue to 'educate' tenants about their 'right' to fair rent levels. In addition, tenants in Kibera may bring personal cases of property disputes to these meetings, at which the Kamkunji will interrogate the petitioner and seek out the structure owner for questioning. Members emphasized that this process required force and that they would not end the interrogation 'until the truth

had been revealed'. When the Kamkunji reaches a decision, they enforce it through violence (KG 2007). For example, a group of members explained their intervention in the case of a single mother who had been widowed and was threatened with eviction for failure to pay rent. When the structure owner tried to evict her, the Kamkunji intervened, threatening the landlord and ensuring that the tenant would be allowed to stay in her house. Since that time, the structure owner has not returned to collect rent (KG 2007). Though gang members portray their 'service' as voluntary and free to community members, (describing themselves as 'more cosmopolitan' and less tribal than commonly perceived (KG 2007) some community members report paying for gang services.

While Kamkunji members depict themselves as providing a public good, the gang remains overtly ethnically focused and relies on violence to achieve its objectives. Their weekly meetings are 'open to the public' (KG 2007), but are held in the Luo tribal language, effectively excluding non-Luos from participating. The crowds of several hundred who attend meetings intimidate both Chiefs and non-Luo residents. Additionally, members take pride in burning Chief's offices and having stoned the Provincial Commissioner, a high-ranking official under the Provincial Administration, when he came to resolve rent disputes (SA 2007). The Kamkunji perceive violence as necessary to combat the chief's Administration Police and the 'goons' structure owners may hire to forcibly collect rent. This arrangement is similar to recorded patterns of mafia violence in other parts of the world in which gangs step in where the state fails.

"As far as the underworld is concerned, the mafia banks on the inefficiency of the state in supplying efficient protection to legal transactions: the more confused the legal framework of a country, the more incompetent the police, the more inefficient the courts, the more the mafia will thrive" (Varese 2005: 5).

The corruption of the chiefs lends popular legitimacy to the Kamkunji's use of force in providing an alternative form of governance within the settlement, but access to the gang is dependent on tribal affiliation and enforcement is carried out through violence or threat of injury.

The Kamkunji is one of several gangs operating in Nairobi. Perhaps the most famous is the Mungiki, which controls the transportation networks in the city, is extremely violent and has received a lot of press coverage for its role in the post-election violence in 2008. While the government has on several occasions attempted to crack down on gang activities in the country the gangs continue to flourish (Baldauf 2008; Nzioka and Njagi 2009).

### *Non-Governmental Organizations (NGOs)*

Several community based organizations in and around Kibera provide alternative dispute resolution (ADR) to assist with rental disputes. Kituo Cha Sheria is a Kenyan legal aid organization that assists with ADR in rental disputes regarding urban land. Hakijamii, a Kenyan community based organization, facilitates community participation in public policy for the urban poor and occasionally becomes involved in rental issues. However, the most significant provider of ADR in Kibera is the Human Rights Office at Christ the King parish, a sizable Catholic church in the middle of Kibera. The parish human rights office is staffed by lawyers who regularly negotiate rental disputes through ADR. The parish has four outstations in addition to the main compound, and thus reaches a variety of constituencies within the slum. Every ethnic group is represented within Christ the King parish. The human rights office is not limited to rental disputes. It handles family issues such as divorce and child support as well. Christ the King is based in Kibera and because of its proximity, the Human Rights Office is a readily accessible forum for ADR. Moreover, the Human Rights Office will intervene in disputes brought to them where chiefs have taken bribes and make the chiefs to repay the money (Bodewes 2008). They turn to the District Officer, the head of the Provincial Administration, when Chiefs are found to be operating in an entrepreneurial fashion and taking payments.

A survey of case files at the human rights office in November of 2007 showed 24 cases of rental disputes over the past three years. Discussions with the staff indicate that there have been more rental disputes that were resolved but have no files. However, even if we assume double or triple the number of cases, it is clearly just a tiny percentage of all the rental disputes from a community of 700,000 people with the degree of informality we see in Kibera.

### *Evaluating Enforcement Regimes*

From this discussion it is clear that people in Kibera have choices regarding their contractual enforcement mechanisms. We evaluate these choices according to five criteria identified in the literature on institutions: predictability, accessibility, equity, effectiveness, and restraint.<sup>16</sup> It is important to note that in this context we are not evaluating the fairness or adequacy of existing property law, but only the enforcement of that law.<sup>17</sup>

The government Rent Tribunal is predictable in its tendency to favor landlords. The Tribunal is somewhat accessible to people from Kibera in terms of proximity as it is only an hour's walk from the settlement, but would still require a full day commitment in order to arrive, file paperwork or wait for a case to be called. A tenant employed as a *kibarura*, or casual laborer, in Nairobi's industrial area,

would be taking a risk of being fired for taking a day off to file a case. Additionally, the Rent Tribunal is too expensive for most Kibera residents and thus is financially inaccessible. The greatest barrier of all to accessibility is the general lack of awareness of the Tribunal. The strength of the Tribunal is that it represents the most ethnically impartial resolution process available to residents of Kibera. Nonetheless, it is slow, lacks an enforcement arm and is too physically distant from the settlement to project authority there. Finally, the Rent Tribunal uses restraint in its resolution of property disputes insofar as it rests on the authority of the state and only indirectly on violence to enforce its decisions. Below we assess the social welfare of the formal institution of the Rent Tribunal against the non-governmental alternatives using the five criteria identified.

**Assessment of Welfare Maximization**

3=high, 2=moderate, 1= low, higher scores mean greater social welfare

	<b>Rent Tribunal</b>	<b>Chiefs</b>	<b>Gangs</b>	<b>NGOs</b>
<b>Predictability</b>	2	2	3	3
<b>Accessibility</b>	2	3	2	2
<b>Equity</b>	3	1	1	3
<b>Effectiveness</b>	1	2	3	2
<b>Restraint</b>	3	2	1	3
<b>Net Benefit</b>	<b>11</b>	<b>10</b>	<b>10</b>	<b>13</b>

It is not surprising that the government does not perform optimally. Government, as Fred McChesney has noted, may be the cheapest definer and enforcer of property rights, but it is not necessarily the best (McChesney 2003). In this case the government dispute resolution mechanism is slow, inefficient and relatively difficult for people to access. When a tenant is threatened with immediate eviction, a rental dispute process that may take years is far too long to wait for assistance.

When we assess the functioning of the Chiefs we find similarly ambivalent results. The Chiefs are accessible to all as they are located within the slum, and predictable insofar as they will decide in favor of the disputant who gives them the largest payment. Yet this violates the principle of equity, as Chiefs are less likely to be concerned with the merits of a case or its adherence to the law. Disputants are more likely to take their problems to a Chief who is of their ethnic group because of the perception that they will be more favorably disposed to settle in their favor.

Chiefs also rely on violence to enforce their decisions using hired thugs or sometimes members of staff to threaten and coerce people to follow their decisions.

Ethnic gangs in Kibera are extremely effective in enforcing their extralegal decisions. The Kamkunji constitute the most predictable avenue for resolving property disputes for Luos, as they habitually side with Luo tenants against Kikuyu structure owners or chiefs. They are accessible insofar as they are available to resolve the conflicts of people in their own ethnic group, but non-Luos are excluded from the Kamkunji's help. It could be argued that for Luo tenants, the Kamkunji are the most equitable path of dispute resolution available for rental disputes, though this equity fails outside the Luo tribe. Further, it is necessary to pay the Kamkunji when soliciting them to act on one's behalf. Once paid, they effectively take care of the problem. However, they show no restraint in their use of force.

The NGOs that are involved in resolving property disputes are staffed by qualified legal professionals and effectively resolve conflicts via ADR. Their involvement tends to preclude turning to other forms of conflict resolution as Chiefs refuse to get involved in disputes that the Church is handling and the gangs did not have a positive relationship with the multi-ethnic parish (Bodewes 2008). Often people turn to the parish Human Rights Office for the settlement of disputes because it was the cheapest option of all. That said, our survey of cases at the office indicated only a limited number related to property disputes. This low number of cases, given our overall assessment of social welfare leads us to assume that there is something preventing the use of NGOs in Kibera that we were not able to identify. Perhaps, the use of ADR takes more time than turning to a gang or a Chief or people are more interested in a conflict being resolved in their favor than resolved according to the law. We have ranked NGOs as moderately accessible on our scale because they are handling very few rental disputes, when we know these disputes to be pervasive. We also perceive a potential problem in NGOs in that they can be transient and often do not have the resources to address effectively all of the conflicts that exist. They are the most welfare maximizing of all of the institutions that we have assessed, yet they lack capacity to be a true alternative to the state.

#### *Lessons from the slums*

This research raises interesting questions about the nature of the contracts that exist in informal settlements and the problem of property rights recognition that occurs. Whose rights should be recognized if formal legalization of property rights were to be attempted: the landlords, the tenants, the original settlers on the land? De Soto would argue for the formalization and, presumably, the defense of property rights that are already in existence. Ronald Coase posited that it does not matter to whom property rights are assigned as they will be bought and sold until an equilibrium is reached (Coase 1960). It is unclear in the case of Kibera whether formalization would mean the allocation of title to the structure owners, many of

whom are Kikuyu government officials who hold their properties informally, or to the tenants themselves who are Luo, Luhya, Kamba, Kikuyu and Nubian. The ethnic dimensions of this question have thus far prevented government action, and the post-election violence in 2008 and resulting political uncertainty have worsened the situation. Granting formal rights to either structure owners or tenants would result in widespread violence within Kibera and would not lead to an increase in economic opportunities (De Soto 2000) or an improvement in the living standards of those dwelling in informal settlements (Field 2005) without the addition of accessible and effective conflict resolution systems.

In this paper we have demonstrated that in the absence of accessible state enforcement mechanisms for property rights, other mechanisms for enforcement arise. However, contrary to the existing literature on privately-ordered institutions, we argue that these institutions may not be welfare maximizing. We identify three mechanisms for conflict resolution which have developed outside of the state in a single context. The first is that of bureaucrats with positions in administration operating outside their area of legal authority and resolving property disputes for profit. The second is ethnic gangs who use violence to threaten and intimidate or to protect those who purchase their services. The third are community-based organizations which provide ADR to Kibera residents. These mechanisms have developed alongside a formal government process of dispute resolution which is widely viewed as biased and ineffective, yet by our rough measure of social welfare only one of these mechanisms exceeds the government Rent Tribunal.

There are several serious and pertinent questions left unanswered here. We do not offer suggestions for improvement in law, although there are certainly changes that need to be made. Additionally, we know from comparative research in Ghana that the migration patterns that have led to more permanent settlement in Kibera are not similar to those in other informal settlements in which residence is viewed as temporary. We believe the issue of pattern of migration to be extremely important in determining what sorts of institutions develop and their degree of welfare maximization. In-migration can bring in new participants who do not have established relationships of trust with others and would take some time to develop those sorts of relationships (Ostrom 2000). Lack of trust increases the likelihood that people will turn to violence for enforcement of contracts.

### *Conclusion*

Kibera is decidedly unique. Few slums have the settlement pattern and overlapping informal property rights evident there. The development of three different property rights enforcement systems outside the state demonstrates a need for the enforcement of tenancy agreements. Acemoglu and Johnson argue that property rights are more important than contract enforcement (Acemoglu and Johnson 2005). While this research does not directly challenge their findings it

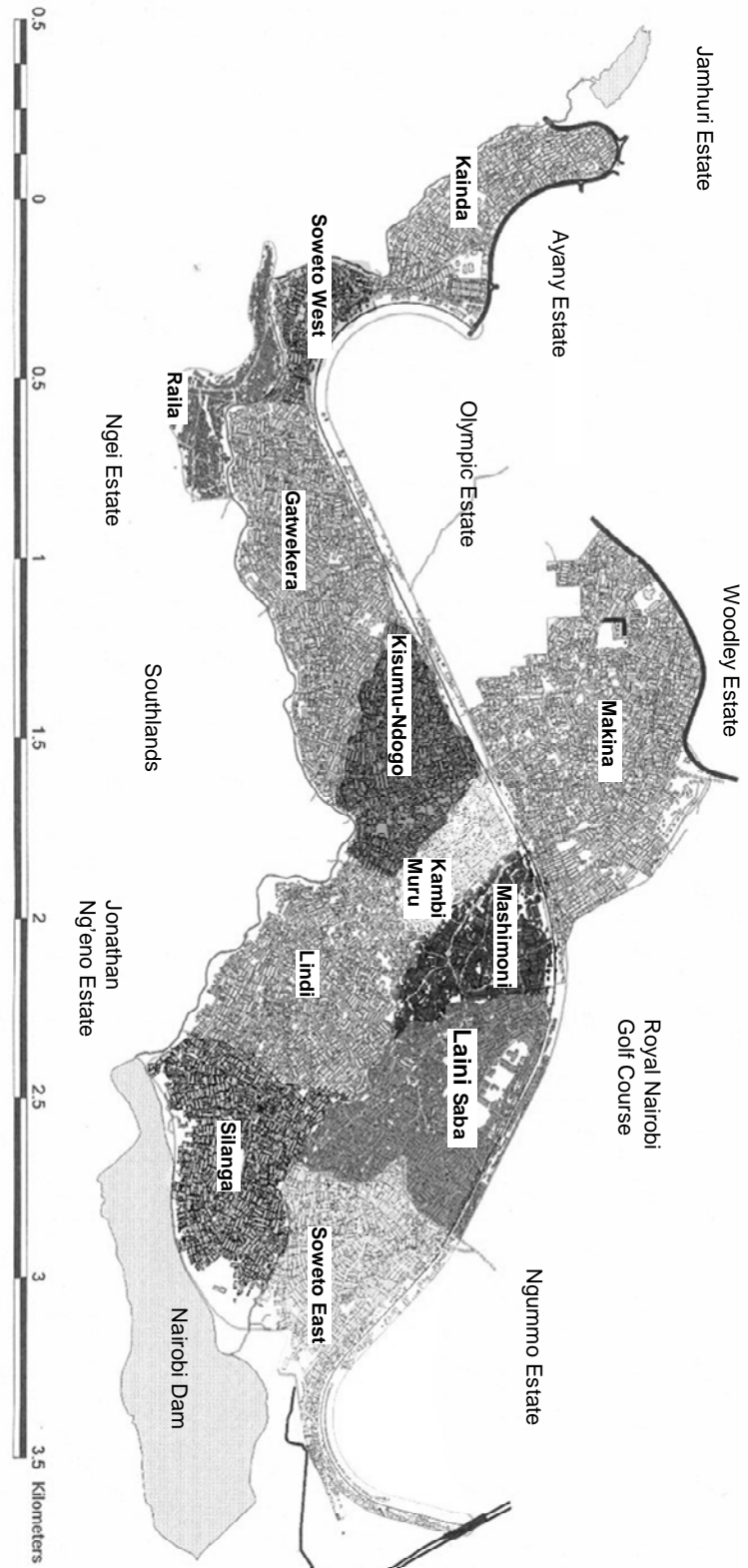
raises interesting questions as to how we might understand settings in which informality has blurred the line between property rights and contract enforcement. Property rights exist only through informal contracts.

We agree with Bates (2005) that urban riots present a serious threat to governments. Post-election violence in Kibera in 2008 punctuated the threat of unrest that exists where citizens are poor, without clear property rights and at risk of political manipulation. Kibera includes exactly the sort of urban dwellers we would expect to see the state try and appease in order to prevent them from rioting. Yet there is no evident bias towards them in terms of definition of property rights and the enforcement of contracts. Indeed, the government has been content to allow undefined property rights to persist in Kibera for generations.

Kibera is a pocket of statelessness located directly in the geographic center of power of the Kenyan state. The lack of definition and enforcement of property rights in Kibera is not a problem of state strength, but rather a lack of political will. Riots in Kibera in 2008 resulted when the electoral institutions, properly used, were then undermined by government officials. In response to this electoral malfeasance violence broke out in Kibera and around the country as people sought to have the 'correct' results enforced through extralegal means – in this case mob violence. The similarity of response to the failure of enforcement of property law and the failure of the enforcement of electoral law is apparent. The situation in Kibera leads us to conclude that the appropriate enforcement of property rights in informal settlements has an effect not just on growth, poverty alleviation or quality of housing, but also on peace and personal security.

What occurs in Kibera is a microcosm of the kinds of enforcement mechanisms we see developing in other areas of common law Africa where the state does not actively defend legal property rights. Three kinds of alternatives arise: bureaucratic entrepreneurs, similar to the Chiefs in Kibera, who have no legal purview over property rights, but engage in dispute resolution and the allocation of property rights for payment; specialists in violence who will define and enforce property rights for payment; or non-governmental organizations that step in and enforce rights where the state is absent. Whether these institutional alternatives maximize social welfare or not depends on the characteristics of each, whether they are predictable, accessible, effective, equitable and demonstrate restraint in the use or threat of violence.

APPENDIX A: MAP OF KIBERA



APPENDIX B: INTERVIEWS AND FOCUS GROUP DISCUSSIONS CONDUCTED

**Table 1. Contributions from Tenants and Structure Owners**

Property cases surveyed at legal aid clinic, Kibera	
Tenants	11
Structure Owners, All	6
(Resident)	(5)
(Absentee)	(1)
Total Cases	17
Interviews and Focus Group Discussions	
Tenants	65
Structure Owners (Resident)	9
Total	74
<b>Total number of contributions</b>	
<b>Tenants</b>	<b>76</b>
<b>Structure Owners</b>	<b>15</b>

**Table 2. Ethnicity of Respondents \***

Luo	15
Luhya	7
Kikuyu	5
Kamba	3
Nubian	2
Meru	1

**Table 3. Village Home to Respondents**

Gatwekera	18
Laini Saba	18
Makina	10
Mashimoni	8
Lindi	6
Soweto East	6
Kianda	4
Raila	3

## Bibliography

- AB. 2007. Focus Group Discussion. Makina Village, Kibera, Nairobi., November 22.
- Acemoglu, Daron, and Simon Johnson. 2005. "Unbundling Institutions." *Journal of Political Economy* 113 (5):949-95.
- Aron, Morris and Isabella Mukumu. 2007. "Landlords clash in outdated rent regulations." *Business Daily*, May 31.
- Baldauf, Scott. *Kenya's infamous Mungiki sect gears up for reprisal killings* (January 29). *Christian Science Monitor* 2008 [cited May 28, 2009. Available from <http://www.csmonitor.com/2008/0129/p12s01-woaf.html>].
- Bates, Robert H. 2005. *Markets and States in Tropical Africa: The Political Basis of Agricultural Policies*. Berkeley, California: University of California Press.
- Bodewes, Christine. 2005. *Parish Transformation in Urban Slums: Voices of Kibera, Kenya*. Nairobi, Kenya: Pauline Publications Africa.
- . 2008. Interview. Maryland, March 28.
- Bodewes, Christine, and Ndaisie Kwinga. 2003. "The Kenyan Perspective on Housing Rights." In *National Perspectives on Housing Rights*, ed. S. Leckie. The Hague: Kluwer Law International.
- Boone, Catherine. 2003. *Political Topographies of the African State: territorial authority and institutional choice*. New York: Cambridge University Press.
- Church, Christ the King Catholic. 2002. Re: Land-Related Clashes in Kibera. Laini Saba Village, Kibera, August 13.
- Coase, Ronald. 1960. "The Problem of Social Cost." *Journal of Law and Economics* 3 (October):1-44.
- CS. 2007. Interview. Nairobi.
- DO. 2007. Interview. Kibera, Nairobi, July 24.
- Doka, Miriam, Assistant Chief. 2007. Interview. Raila Village, Kibera, Nairobi, November 14.
- Ellickson, Robert C. 1991. *Order Without Law: How Neighbors Settle Disputes*. Cambridge, Massachusetts: Harvard University Press.
- Field, Erica. 2005. "Property Rights and Investment in Urban Slums." *Journal of the European Economic Association* 3, no 2/3:279-90.
- GD. 2007. Interview. Gatwekera Village, Kibera, Nairobi, November 23.
- HA. 2007. Focus Group Discussion. Kibera, Nairobi, October 31.
- Herbst, Jeffrey. 2000. *States and Power in Africa: Comparative Lessons in Authority and Control*. Princeton, NJ: Princeton University Press.
- JG. 2007. Interview. Kibera, Nairobi., November 20.
- Joireman, Sandra Fullerton. 2006. "The Evolution of the Common Law: Legal Development in Kenya and India." *Journal of Commonwealth and Comparative Politics* 41 (2).
- Kenya, Government of. 1982. "The Rent Restriction Act." Government Printer, Nairobi.
- KG. 2007. Focus Group Discussion. Kamkunji Grounds, Gatwekera Village, Kibera, Nairobi, November 25.
- KV. 2007. Focus Group Discussion. Kianda Village, Kibera, Nairobi., November 25.
- LV. 2007. Focus Group Discussion. Lindi Village, Kibera, Nairobi, November 27.

- McChesney, Fred S. 2003. "Government As Definer of Property Rights: Tragedy Exiting the Commons?" In *Property Rights: Cooperation, Conflict and Law*, ed. T. Anderson and F. McChesney. Princeton, NJ: Princeton University Press.
- Mwatha, Charles, Assistant Chief. 2007. Interview. Soweto East Village, Kibera, Nairobi, November 9.
- Neuwirth, Robert. 2006. *Shadow Cities: A billion squatters, a new urban world*. New York: Routledge.
- Nzioka, Patrick, and John Njagi. 2009. *Mungiki kill villagers in night raid* (Tuesday, April 21). Daily Nation 2009 [cited May 28 2009]. Available from <http://www.nation.co.ke/News/-/1056/562702/-/u4b2eb/-/index.html>.
- Olowu, Dele, and James S. Wunsch. 2004. *Local Governance in Africa*. Boulder, CO: Lynne Rienner Publishers, Inc.
- Ostrom, Elinor. 2000. "Collective Action and the Evolution of Social Norms." *The Journal of Economic Perspectives* 14 (3):137-58.
- SA. 2007. Interview. Kibera, Nairobi.
- SO. 2007. Focus Group Discussion. Soweto East Village, Kibera, Nairobi., November 14.
- Syagga, Paul, Winnie Mitullah, and Sarah Karirah-Gitau. 2002. "Draft Nairobi Situation Analysis Supplementary Study: A Rapid Economic Appraisal of Rents in Slums and Informal Settlements.". Nairobi: Prepared for the Government of Kenya and the United Nations Settlements Program under the Collaborative Nairobi Slum Upgrading Initiative.
- Varese, Federico. 2005. *The Russian Mafia: Private Protection in a New Market Economy*: Oxford University Press.

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<sup>2</sup> We choose to use the term 'informal settlement' rather than 'slum' or 'people's settlement' both of which are used by some of the residents, because we feel it is an accurate descriptor of the place with regard to property rights.

<sup>3</sup> We choose to use the term 'informal settlement' rather than 'slum' or 'people's settlement' both of which are used by some of the residents, because we feel it is a more accurate descriptor of the place with regard to property rights.

<sup>4</sup> "Chief" is a government position, not a traditional title. Chiefs in Kenya are part of the provincial administration and have specific responsibilities delineated in the Chiefs Act.

<sup>5</sup> Names have been changed to protect anonymity.

<sup>6</sup> Interviews were conducted in eight of the twelve villages of Kibera, including Soweto East, Laini Saba, Mashimoni, Lindi, Makina, Gatwekera, Kianda, and Raila. Kibera is so large and so diverse that these villages are like distinct cities within the settlement.

<sup>7</sup> There are two police forces with jurisdiction over Kibera: the Kilimani Police, a division of the Kenya police force, and the Administration Police, which directly enforces chiefs' orders.

<sup>8</sup> Despite Kibera being Government Land under the central government, the Nairobi City Council remains an important actor within the settlement. The City Council was heavily involved in the 1971 Nyayo High rise upgrading initiative, an effort to construct high-rise apartments for residents of Kibera in Soweto East Village. The City Council is under the Local Administration, two Councilors function within Kibera, adding another layer of political authorities within the settlement

<sup>9</sup> The chiefs do not have responsibility for resolving property or rental disputes; this is legally the responsibility of the courts and the Rent Tribunals.

<sup>10</sup> Currently the Rent Restriction Act is being reformed to increase the ceiling of its jurisdiction from 2,500 Kshs. to 20,000 Kshs. This is likely to further exclude residents of Kibera as middle class tenants are more able to pay the court filing fee in addition to potential bribes to Tribunal members. With an increased caseload, the Tribunal is likely to choose to hear these cases over those brought by tenants of informal settlements. The tribunal is already backlogged and prohibitively expensive for residents of Kibera, and thus this reform measure will effectively exclude low-income tenants from any protection under the Rent Restriction Act. A Luhya male tenant voiced his concern regarding this process: “now they have turned so people from posh areas are heard and the Tribunal will not take cases from a poor person” (AB 2007).

<sup>11</sup> This is another example of the use of traditional titles for official positions within the Provincial Administration.

<sup>12</sup> This practice is so common that we report its occurrence not just as the result of information collected in interviews but also from direct observation.

<sup>13</sup> The Administration Police is appointed as the enforcement arm of the chief’s office. Offices of the Administration Police are located in the same compounds as Chief’s offices within the slum. A sergeant in the Administration Police explained that he fills in for the chief when the Chief is out of the office and takes over the duties of arbitration and dispute resolution (CS 2007).

<sup>14</sup> The Liberal Democratic Party was a splinter of the Kenyan African National Union (KANU) that joined with the National Alliance Party of Kenya in 2002 to form the NARC coalition which under Mwai Kibaki won the election and deposed Daniel arap Moi. However, the LDP left NARC in 2005 following the failed constitutional referendum and established the Orange Democratic Movement with Raila Odinga at its helm. Raila Odinga, the current prime minister, is the common thread through all of these name changes. Kibera is in his constituency and he wields a tremendous amount of power there, both politically and through the Kamkunji.

<sup>15</sup> “Civic education” is a popular metaphor for informal education.

<sup>16</sup> A detailed justification of these criteria is available from the first author.

<sup>17</sup> This is particularly important to note in the Kenyan context as several attempts have been made recently to change property law in a new constitution and also in a new national land policy. These efforts have so far failed, but the need for new law is evident to Kenyan politicians and lawyers. See (Joireman 2006) for a discussion of Kenyan property law.

\* Represents only respondents who chose to indicate their tribal affiliation.