

## CHAPTER II LITERATURE REVIEW ON HIV/AIDS AND LAND ISSUES

In the last two decades HIV/AIDS has become a major public health problem and a development challenge of great magnitude in Kenya and elsewhere. From the numerous studies undertaken this section reviews the literature highlighting aspects relating to HIV/AIDS and land issues in Kenya. The chapter looks at the spread of HIV/AIDS globally, regionally and within Kenya, and provides a historic perspective on land rights and land reform in Kenya, the impact of the growing prevalence of HIV/AIDS on land tenure, land reform and ownership, and the impact of HIV/AIDS on marginalised groups.

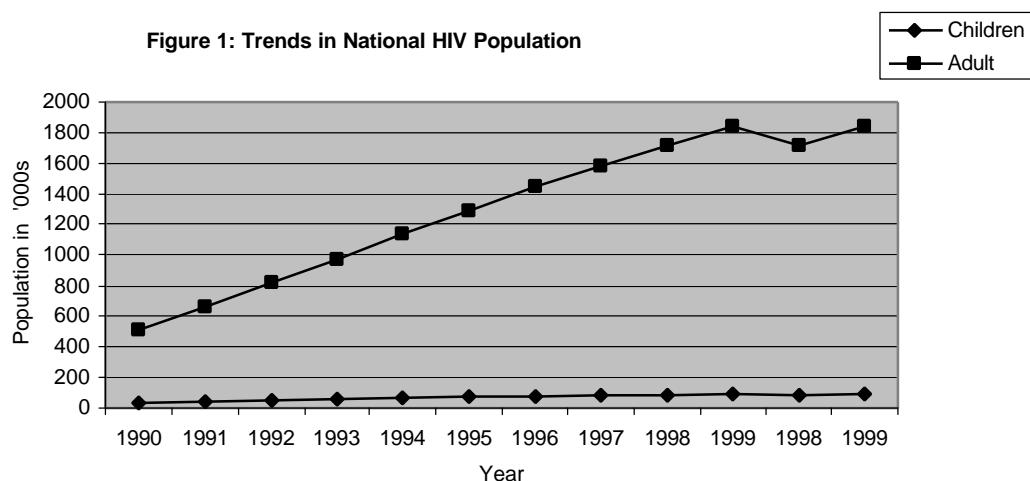
### 6. THE GLOBAL SPREAD OF HIV/AIDS

The first reported case of HIV/AIDS was in the United States in 1981. Since then, the HIV/AIDS pandemic has spread to all countries of the world. By 2002, 18.8 million people had died world wide, 3.8 million of them children. Over 34 million people are living with HIV. Statistics indicate that one in every 100 adults in the sexually active age bracket of 15-49 years is currently living with HIV. By comparison, one in every seven people in Kenya is living with HIV.

Although HIV/AIDS is a global problem, high infection rates are concentrated in developing countries, with 89 per cent of those with HIV/AIDS living in sub-Saharan Africa and Asia (NACC 2000). Over two thirds of all people living with HIV/AIDS, or 22 million people, live in Africa and approximately 87 per cent of the children living with HIV/AIDS are also in Africa (NACC 2000). Southern Africa is the most affected region in the world. In seven of its 12 countries, one adult in five is living with HIV/AIDS. South Africa has the highest infection rate in the world, accounting for 4.2 million new cases each year (UNAIDS 2000). According to a UNAIDS report prevalence rates in Kenya and Ethiopia have reached double digits, while the rate in Uganda has fallen to 8 per cent from a peak of 14 per cent in the 1990s. Similar trends have been witnessed in Zambia, but both countries continue to suffer from the impacts of past HIV infections. Whereas Kenya had a prevalence rate of 10 per cent in 2000 (UNAIDS 2000), this figure is now said to be 14 per cent (PRSP 2001).

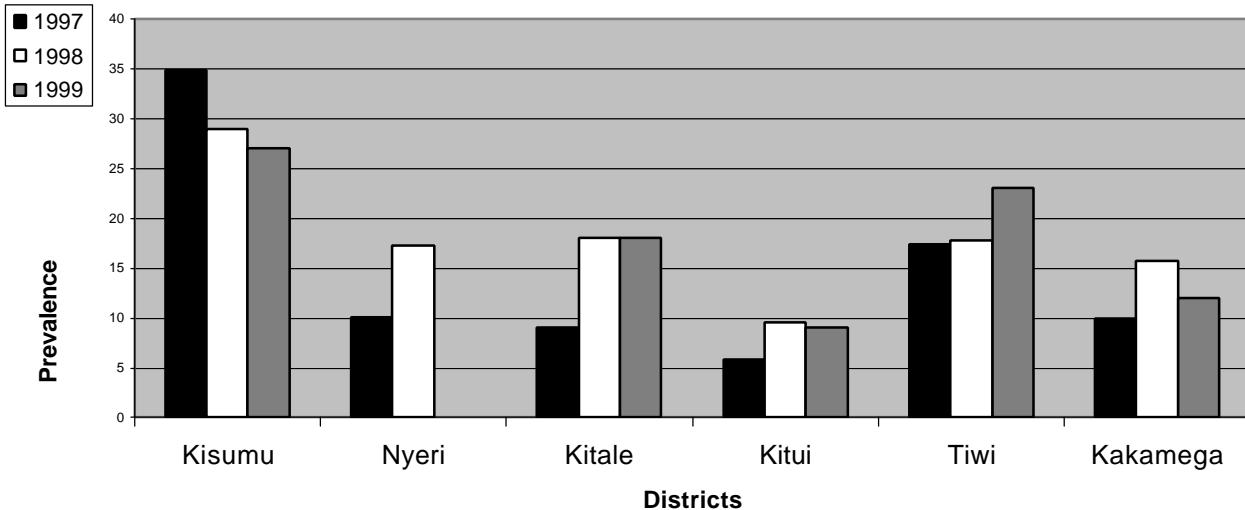
#### 6.1. HIV/AIDS in Kenya

The first HIV/AIDS case in Kenya was reported in 1984. By June 2000, 1.5 million people in Kenya had died of AIDS. This cumulative number is expected to rise to 2.6 million by 2005 unless there is appropriate intervention. At present, Kenya has more than 4.2 million people living with HIV/AIDS and 200 000 new infections per year. NACC estimates show that the national adult prevalence rate rose from 5.3 per cent in 1990 to 13.1 per cent in 1999, but is expected to stabilise at below 14 per cent. Prevalence is generally higher in urban areas, averaging 16-17 per cent and 11-12 per cent in rural areas. **Figure 1** below demonstrates these trends among children and adults. The national sero-prevalence trends in Kenya between 1990 and 1999 depict a grim picture.



*Data derived from the National Aids Control Council, Kenya, 2000*

Figure 2. Prevalence in Selected Districts, 1997-1999



Studies also demonstrate that the prevalence of HIV/AIDS in pregnant women varies. **Figure 2** below demonstrates these differences in HIV prevalence amongst pregnant women in Kenya. The statistics are drawn from diverse cultural groups with varying sexual behaviour, beliefs, gender concerns and traditions. *Data derived from the National Aids Control Council, Kenya, 2000*

## 6.2. HIV/AIDS Policy in Kenya

Following the first reported case of HIV/AIDS in Kenya, the Government has undertaken several measures, with the greatest efforts initiated after HIV/AIDS was declared a national disaster in November 1999. Although Government initiated efforts to address the HIV/AIDS scourge in 1985 with the launch of the five-year Medium Term Plan (MTP-I), unrealistic interpretation of the potential impact of the scourge, inadequate funding, and opposition from religious organizations to sex education among other factors contributed to the lack of concerted action on HIV/AIDS. This changed after the release of surveillance data, the holding of the first National Conference on HIV/AIDS in 1997, and the Minister of Health's declaration of HIV/AIDS as a national crisis. In September 1997 Parliament passed Sessional Paper No.4 of 1997 on *AIDS in Kenya*. In October 2000 the government also launched the Kenya National HIV/AIDS Strategic Plan for the Period 2000-2005.

According to this policy the impact of HIV/AIDS on the country's development is the principle concern, as AIDS kills young, economically productive people, causes hardship to families and increases health expenditure. If the national prevalence rate continues unabated the number of infected people in Kenya is likely to increase to 3.0 million and cumulative deaths will increase from the current 1.5 million to 2.7 million by the year 2005 (NASCOP, 1999). Considering that HIV/AIDS is characterized by a high rate of infection and an increasing number of illnesses and deaths among the country's labour force, there is a growing consciousness that infected Kenyans will eventually die of AIDS or related illnesses, resulting in complex and inter-related crises (AIDSCAP/FHI, 1996). The development of the policy was aimed at eliminating obstacles to Government intervention, which was hampered by a lack of clear policy on controversial issues, resulting in confusion and unnecessary conflicts among groups with special interests in those targeted for intervention.

The policy provides a framework for undertaking AIDS prevention and control efforts for the next 15 years and beyond. The objectives of the policy are to:

- Give direction on how to handle controversial issues while taking into account prevailing circumstances and the social cultural framework;
- Enable the government to play its leadership role in AIDS prevention and control activities, namely to harness a multi-sectoral approach from the diverse actors and to harmonize their roles; and
- To recommend an appropriate institutional framework for effective management and coordination of HIV/AIDS programme activities.

The policy elaborates the challenges of HIV/AIDS, which include:

- Economic impact;
- Morbidity and mortality;
- Costs to the economy;
- Social and cultural aspects;

- Orphaned children;
- Legal and ethical aspects;
- Religion and culture;
- Health care;
- Gender;
- Children; and
- Youth.

### **6.3. The Effects of HIV/AIDS**

Since the government began concerted action on HIV/AIDS in 1994 various studies undertaken on the impact of HIV/AIDS in Kenya, have looked at topics including mortality, morbidity, socio-economic aspects, development, demography, health, the macro-economy, children and women. The AIDS policy highlights a number of these.

A paper by Mullins (2001) identifies three key policy issues that generally arise from the HIV/AIDS pandemic, namely its long wave nature, demography and clustering. He argues that policy projections should factor in a four year lead time in the manifestation of HIV/AIDS, that future demographic structures will comprise relatively fewer people in their prime years with relatively more children and the elderly, and that HIV/AIDS tends to cluster in families, thus some families will be affected more than others, which will likely obscure some people from the perspective of development interventions.

#### ***6.3.1. Social and Economic Effects***

The most direct economic impact of death in a qualified and productive labour force is a reduction in the tax base. There is a corresponding social effect in the form of an increase in demand for social services due to the increase in the number of orphans. AIDS also has a significant effect on the demographic composition and the social and economic structures of the country. Studies on the socio-economic impact of HIV/AIDS, especially in the formal sector, indicate a 24 per cent rise in labour costs and 15 per cent loss in annual profits by 2005. Given cumulative deaths of 2.7 million by 2005 corporate organisations will experience a severe decrease in labour productivity due to the loss of experienced workers (AIDSCAP/FHI, 1996).

Although the Ministry of Finance and Planning observes that no economic impact analysis has been conducted to ascertain the real cost to the economy, evidence from Nyanza Province – the area where one of the villages studied is located – shows that the region spends over Ksh.30 million per month (US\$385 000) on funeral expenses due to HIV/AIDS related deaths (PRSP, 2001). An in-depth poverty assessment in a neighbouring district during the PRSP consultation process indicated that poverty has made it difficult for communities to take care of HIV/AIDS orphans. Family members are forced to sell their land or cattle to meet some of the medical expenses, and families that were initially considered well off are left in very poor circumstances, while those that were poor have become even poorer. The number of orphans and street children in urban centres has increased as a result of the scourge.

#### ***6.3.2. Effects on Women, Children and Orphans***

Women and children represent the highest percentage of people living with HIV/AIDS and are the most vulnerable to infection in the country. The number of Children Affected by AIDS (CAA) was estimated at 600 000 by 2000, with a comparable number of male and female adults affected by HIV/AIDS. A majority of Kenyan children and women live in rural areas. They are engaged chiefly in agriculture or agro-pastoralism, which are energy intensive when compared to other non-agricultural activities. Land ownership and access to credit remain a major constraint to their ability to adequately earn a livelihood and protect their food security (ANP/UNICEF 1997).

The impact of HIV and AIDS on women is particularly devastating because they make a significant contribution to the labour force in farming activities, animal husbandry and other informal occupations (FAO 1989). Studies in East Africa suggest that HIV/AIDS will have a detrimental impact on the productive capacity of rural households in terms of labour quality and quantity, particularly due to illness. Statistics show that women (including girls) bear the brunt of caring for ailing family members (GTZ 1997). Some of the female caregivers may be forced to give up or reduce their income-generating activities, thus tending to become more dependant (Anarfi 1992), while girls may be forced to miss school to help care for the sick (PRSP 2001). On the other hand, many women infected with HIV have been abandoned by their families

(Caldwell 1996). Apart from the stigma associated with HIV/AIDS, poverty among women has also increased due to the lack of ownership of productive assets such as land.

NASCOP defines an orphan as “a child under the age of 15 who has lost a mother to AIDS.” Estimates indicate that there are over 1 million orphans in the country and the number is expected to rise to 1.5 million by 2002 (NACC 2000). Orphaned children are adversely affected by HIV/AIDS. The death of one or both parents from AIDS triggers sociological, economic and psychological effects on an orphan (AIDSCAP/FHI 1996). Often, orphans become vulnerable malnutrition due to food scarcity resulting from problems in the food distribution process, their weak position in the household or loss of knowledge about traditional food plants. Their education is also affected as they may be subjected to heavy domestic responsibilities or lack resources to pay fees, and purchase books and uniforms. In addition they lose physical and social security. In the worst-case scenario, orphans revert to living on the street if they lack caretakers or productive resources (UNICEF/GOK 1998). Although the distribution of household resources largely excludes orphans, many of these households rely on orphan labour to generate income (FHI 1996). Orphans who choose to remain in their parents home rather than be taken in by guardians lack management skills and dispose of productive assets such as land and moveable property, thereby perpetuating the spiral of poverty, landlessness and suffering.

### **6.3.3. Effects on the Agricultural, Food and Land Sectors**

Compared to other sectors of the economy, the impact of HIV/AIDS on the agricultural sector has been widely studied. Given the contribution of agriculture to the economy HIV/AIDS is likely to have a severe ripple effect on all economic sectors. Because the land, food security and agricultural sectors are part of the wider economy, examining the impact of HIV/AIDS at micro- and macro-levels can expose the effects of HIV/AIDS on the labour force in these sectors (NASCOP 1999).

The agricultural sector accounts for 20 per cent of the country’s GDP and 60 per cent of the national income. It provides employment to 80 per cent of the population, and 50 per cent of the labour force. Studies have demonstrated the adverse affects of AIDS in agriculture, including the loss of both skilled and unskilled labour. A study on the impact of HIV/AIDS in five commercial agro-estates in the Nyanza, Rift Valley and Eastern provinces indicates that cumulative AIDS cases in these estates accounts for as high as 30 per cent of the workforce in Nyanza, 12 per cent in Rift Valley, and 3 per cent in Eastern Province. HIV/AIDS has also impacted on labour productivity, as morbidity leads to absenteeism. In labour intensive sectors such as agriculture, labour productivity is the most important determinant of output and profitability. Thus, absenteeism has a major impact on productivity. As demonstrated by Rugalema (1997) and NASCOP (1999), labour losses due to absenteeism can be as high as 2 600 labour days per year.

At household level, family land will be increasingly affected as families care for the sick. This will negatively affect production, with attendant effects on food security (UNDP, 1998). Studies show an effect on food security due to deaths, as well as the performance of ill employees (Gori 2000). These effects appear to be evident among lower cadre staff because they are the majority. According to a recently published FAO/UNAIDS study, the impact is worse where those affected possess fairly technical skills that take long to acquire. The death of extension workers is debilitating to the ill-informed farmers who are also responsible for ensuring food security in the country (NASCOP, MOH and NCPD undated; FAO 1994).

### **6.4. Other Effects of HIV/AIDS<sup>5</sup>**

The impact of HIV/AIDS has reverberated across the entire economy. Three major impacts have been established in the education sector: the supply of experienced teachers is reduced by HIV/AIDS related illness and death; children are kept out of school if they are needed at home to care for sick family members or to work in the fields; and children may drop out of school if their families cannot afford school fees due to reduced household income as a result of an HIV/AIDS related death.

The scourge has exposed many of the country’s social weaknesses and other ethical, legal and economic issues with which society was previously not concerned. HIV/AIDS has also accelerated the increase in demands on social services. Affected people seeking psychological support services have already

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<sup>5</sup> Drawn from NASCOP 1999

overwhelmed the few existing counselling centres. The increase in the number of orphans has overwhelmed the traditional systems of adoption.

Studies have also demonstrated a major impact on the industrial sector, including absenteeism due to prolonged illnesses and death leading to loss of skilled manpower, and the resultant enormous burial expenses. The impact of the pandemic is also expected to cripple effective demand for manufactured products. Other impacts have been recorded in sectors such as the army.

## **7. LAND QUESTION IN KENYA**

### **7.1. The Land Policy**

Land is a sensitive matter in Kenya, and has been since the pre-independence period. It was one of the primary causes of the liberation movements and wars. Consequently, the land policies that were in place at the time of independence have changed little. There is no consolidated land policy; rather, various policies on land are contained in the relevant sectoral policies. For example, the forestry sector contains policies on land that affect tenure of, and access to land in forested areas. In 1999 the Commission of Inquiry on Land (popularly known as the Njonjo Commission), was set up to examine growing dissension in Kenya over land grabbing amongst other issues. According to one of the Commissioners the Commission made recommendations and submitted them to President, who received them favourably, and then handed them to the Chief Secretary for distribution to the relevant Ministries for feedback. However, the scope of work of the Commission and its terms of reference have never been made available to the public. The secrecy around the Commission was prompted by public outcry soon after its establishment over its vague terms of reference and the appointment of Commissioners who's past involvement in land issues was considered questionable.

Kenya's land issues are linked to events and processes in its colonial history that produced the present situation (Kanyinga 2001). The first of these processes was the alienation and acquisition of land during the establishment of the colonial state. The second was the imposition of English Property Law and the introduction of title deeds in alienated areas to safeguard and secure the settler economy. The third was the land tenure reform of the mid-1950s that consolidated these processes.

These three events exacerbated socio-economic inequalities in Kenya through massive displacement of people in the alienated areas. Communities such as the Kikuyu and Maasai were evicted from their territories to pave the way for colonial capital. This marked the beginning of communities without rights of access to and control over land in Kenya (Kanyinga, 1998).

### **7.2. The Evolution of Land Rights in Kenya**

Land rights in this study refer to rights of access, use, control and ownership of land, while land tenure refers to the system that defines these rights.

#### **7.2.1. Traditional Systems**

Prior to the arrival of the colonizers, the traditional land tenure system, which defined land rights in Kenya, was based on communal ownership. Land was not owned in any absolute sense by a person or household that lived on it or by village groups or the chief, but collectively by all these (Wilson 1938). Communal land ownership was premised on land as the free gift of nature and a common asset for all human beings. Every individual had rights of usufruct that were recognized by the community and which provided maximum security of tenure for the individual. However, these individual rights to land were determined on the basis of the individual's social status in the community and ability to meet obligations inherent in that community. In addition, the relationship between the group and the land was complex with individual rights often co-existing with community rights to the same parcel of land (Elias 1975). Therefore, communal ownership of the land was not incompatible with individual ownership of specific rights to portions of group-owned land. In addition there was public land under the supervision of the relevant group organisation (Elias 1975).

Access to land was based on membership in a land controlling social entity defined by birth, marriage, ritual, adoption or incorporation (Adhola 1994). In this system land rights were hereditary. Individuals who were unable to find suitable land often migrated elsewhere, as lineage segments or individuals could be incorporated into communities. Access rights were open to every member of a social group and were equitably distributed on the basis of need to members of the social organisation controlling a particular territory. Land rights tended to be based on function, enabling several people to hold different rights to the

same piece of land for different purposes (Okoth-Ogendo 1976). Thus, a village could claim grazing rights over a parcel of land that was subject to hunting rights of another, transit rights of a third and cultivation rights of a fourth group. Each of these categories carried with it varying degrees of control exercised at different levels of social organisation.

These arrangements ensured an equitable distribution of land rights. Accordingly, Okoth-Ogendo (1991) notes that the purpose of control was to guarantee these rights and to ensure equitable distribution among all community members. This control, although exercised by the family, clan or in some cases, territorial sovereigns lacked the concept of legal ownership (Okoth-Ogendo 1991). Berry (1995) argues that within the communal land tenure system, security of tenure was linked to the overall security of the social and political life, and initial rights were established by first occupation and the continued investment of labour in bush clearing and cultivation. This way, land became the property of the pioneer occupier, individual or clan that assumed the right of control. Collective, inalienable rights of ownership by clan co-existed with individual usufructuary and appropriate rights (Mkangi 1975). Where conflicts arose over access rights, it was common for one party to leave and establish new residence elsewhere, through military conquest, peaceful incorporation or elaborate adoption rituals (Sorenson 1967; Migot-Adhola and Bruce 1994).

Generally a stable and flexible structure of land access and control existed in pre-colonial Kenya, until the establishment of the protectorate in the early 1890's and the colonial state at the beginning of the century (Okoth-Ogendo 1981, 1991). The colonial state altered this structure by appropriating land for settler capitalism and investment to finance the administration.

### **7.2.2. Origins of Kenya's Land Policy**

The ascendance of land to political pre-eminence and the creation of people without rights to land (squatters) came with the incorporation of Kenya into the British colonial empire in the late 19<sup>th</sup> Century and the subsequent establishment of a capitalist economy that shaped the land rights in place today (Okoth-Ogendo 1991).

Although the British protectorate did not carry with it any title to land (Sorenson 1965), the colonial administration imported a series of legislative regulations to guide future appropriations and to give previous ones the necessary judicial support. Subsequent appropriations were done following conflict arising from the imported legislative and administrative regulations (Sorenson 1965). The introduction of these measures was based on an assumption that the relations of local communities to the land did not carry the notion of individual title, and that their rights were confined only to occupation, cultivation and grazing. Thus, unoccupied land reverted back to the territorial sovereign (Sorenson 1965). As a result, several regulations were issued to facilitate land appropriation and the making of land grants to settlers.

The first was the land regulation of 1897 that authorized the protectorate to issue certificates for a short-term occupancy of 21 years renewable for a similar period. In the Council of 1901 this regulation was incorporated into the East African (lands) Order and empowered the Administration to dispose of or lease unoccupied land in the Protectorate. The Crown Land Ordinances of 1902 permitted the sale of land by settlers, but did not confer titles to land. The Ordinance entrusted the State as the landlord, and settlers were subject to strict State control. The Ordinance created a personal and feudal relationship between the State and landholders, a factor that constrained land use in the colony (Sorenson 1965).

The major consequence for access to land was that the Ordinance alienated all the land rights of 'subjects' and vested them in the Crown (Okoth-Ogendo 1991). Occupants of land became tenants of the Crown. The state also located communal reserves in areas considered unsuitable for European settlement. It drew boundaries along ethnic lines and enacted legislation to ensure subjects only resided in their reserves. Problems in the reserves led to unrest due to population pressure, culminating in a political uprising organised around the issue of land control. The colonial State found a quick solution to the unrest by initiating land tenure reform in the reserves.

## **7.3. Land Reform**

### **7.3.1. The Evolution of Land Reform**

The contradictions brought about by the colonial settler economy and state domination eventually set in motion the reform of the land tenure system. The state's neglect of African agriculture in favour settler

agriculture gradually exerted both political and economic pressures. These pressures could only be resolved by addressing African demands for more suitable land, and for greater integration as producers into the expanding cash economy (Okoth-Ogendo 1991). The reform program was introduced around 1956 to arrest the crises arising from land alienation, the creation of native reserves, the imposition of laws to govern agricultural development and the biased promotion of the settler agricultural economy. Land tenure became one of the most complex and serious colonial problems in Kenya and Africa in general (Munro 1970). The Swynnerton Plan, initiated by the colonial government in 1954, was geared towards intensifying the development of African agriculture. It set a precedent for the government to open the “white highlands”, previously racially sacrosanct, to occupation and farming on a non-racial basis.

This period marked the beginning of an evolution in Kenya’s land tenure system with a shift from communal to individual ownership. Consolidation and registration of land holdings were the basis for issuing individual freehold title that conveyed new mobility in land transfer and disposition. In addition this period witnessed land alienation to non-tribal and non-racial buyers and bosses. The consequence was the emergence of a landless class, a phenomenon that was unimaginable under traditional native law. This arose from the accumulation of land holdings and imprudent sale or mortgage of land to raise capital or pay debts (Munro 1976). Ever since, African customary land tenure practices have been undergoing changes.

The traditional pattern was affected by the Royal Commission appointed in 1951 to examine the state of the African economy and make recommendations to deal with the acute problems faced by Africans in the reserves such as congestion, insecure land tenure and the inability of small-scale family farmers in the reserves to preserve the land and achieve yields above subsistence (Harbeson 1973). Land consolidation and registration of individual holdings was an attempt to address the fragmentation and dispersion of land holdings created by the colonial government, but was also viewed as a way to enable the natives to use their land as collateral to acquire development loans. At this point there was still no legal basis for consolidation nor were consolidated holdings recognised in the law. To facilitate this, a moratorium was imposed on all land cases and legislation passed that provided for the consolidation, registration and inheritance of titles. The outcome was the Native Lands Registration Ordinance of 1959 that legalised private land ownership in the reserves (Dauthes undated).

Some of the effects of the Swynnerton Plan were the removal of communal control over land, enhancement of land consolidation, creation of a landed and landless classes, and an increase in the risk of African indebtedness relating to individual ownership and control over land. According to Okoth-Ogendo (1976), the reform process had several significant repercussions on the structure of access to land in the African areas and the control of land in the whole colony. The expropriation of land for settler capitalism and subsequent establishment of a legal framework led to a reduction in the amount of land controlled by affected African groups, and the subordination of customary practice, particularly in regard to land control. Imported laws on private property rights and their gradual institutionalisation meant that the question of control was appraised from a political and legal context that was fundamentally different from customary law and practice. Native reserves eroded the virtues of the customary structure of access to land within the reserves with individual families, rather than the clan or kinship, becoming an important medium for land acquisition (Okoth-Ogendo 1976; Migot Adhola and Bruce 1994). Boundaries within and around the reserves stopped migrations into frontier lands, making it impossible for people to acquire land rights elsewhere. This exerted pressure on the carrying capacity of the land, which had been regulated by the practice of migration under African customary tenure (Okoth-Ogendo 1976 & 1979).

### **7.3.2. Current Legal Framework**

The post-colonial Kenya government inherited, virtually unaltered, the colonial legal framework that governed the reform of land tenure and protection of private land rights. The state adopted all the ordinances relating to land control and enacted them into laws to regulate access to land. The Crown Lands Ordinance of 1915 became the Government Lands Act (Cap 280). As with the Ordinance, which accorded the governor all powers over the control of Crown lands, the Act vested in the state, through the President and Commissioner of Public Lands, all powers to lease, grant and dispose of Government or former Crown land.

The Act also followed the Ordinance in retaining the provision for a Commissioner of Public Lands, recognising the state as the main landlord, and according the President the opportunity to grant land to individuals and corporations. The 1920 Registration of Title Act was enacted to provide for the transfer of

land registered under this legislation. The Registered Land Act (Cap 300), enacted in 1963, conferred absolute and indivisible title on registered landowners. This further eroded the principle of multiple rights over land and enforced exclusivity as espoused in the land reform program. The Act aimed to replace the law on land registration and required those who had registered land previously to reregister under the Act. In essence, customary land rights were extinguished in areas where land had been consolidated and registered. Rights of control, access or use were consolidated into ownership rights.

Land reform therefore produced various types of land tenure systems. In retrospect, the customary tenure system did not vest ownership in an individual; rather, customary rights defined access and use. This system has become obsolete and is not recognised as a registered form of tenure. Where it exists, it is regarded as a system in transition to private tenure in the form of leasehold or freehold.

The demise of the customary tenure system led to the evolution of a freehold tenure system as envisaged in the Swynnerton Plan of 1954. In this system, the landowner holds the piece of land individually, and through heirs or successors can assign this land forever (Wangombe 1998). Unlike the former system, there is no restriction on an individual's occupation of land, although in practice there are conditional freeholds that can restrict the use of a piece of land. The freehold system allows the owner to undertake definite and long-term development based on secure tenure.

Another land tenure system that resulted from the collapse of the traditional land tenure system is leasehold. This was developed to define the ownership of land in former native reserves. The county councils or government, which hold such land as trustees, grant leasehold tenure. The Commissioner of Lands awards it. Additionally, an individual or organisation owning freehold land can grant it. Leases are available for 999 years for agricultural use and 99 years for township plots.

In both leasehold and freehold systems ownership of land is the single determinant of access and control. In total Kenya now has three land tenure systems, namely, public, modern and customary. Public tenure land is owned by the state and is governed by various laws and administered through the Government Lands Act (Cap 280). The modern system is based on the English Common Law, while in the customary system, land tenure is based on the Indigenous Property Arrangement. In the latter system the community collectively owns the land, but neighbours recognise boundaries (Wango 1998).

According to Kyalo-Ngugu (2001) who summarizes the legal framework for the management of land in Kenya, the principal legal regimes governing land management in rural areas are the Constitution, the Trust Land Act, the Land Adjudication Act and the Land Consolidation Acts.

She observes that Chapter IX of the Constitution provides for the governance of trust lands – lands ordinarily accessed under customary land tenure – and vests authority for their management in the county councils within whose jurisdiction they are situated. The management regime is set out in the Trust Land Act. It includes the procedure to administer trust lands, the circumstances under which leases and licenses may be issued, and provides for the Commission of Lands to manage trust lands as an agent of the county councils. The Land Adjudication Act deals with ascertaining and recording rights and interests in land and provides a mechanism for ascertaining and recording title to trust land held under customary tenure. Ascertainment of land rights is done through an adjudication process that involves surveying and demarcating the land and recording the right to it. The Land Consolidation Act provides for the ascertainment of rights and interests in the land, and the consolidation of land in special areas to ensure plots are not divided into undersized unites. Consolidation and adjudication are undertaken concurrently.

## **8. LAND, HIV/AIDS AND FOOD SECURITY IN KENYA**

Food security refers to a situation where all people at all times have both physical and economic access to sufficient food to meet their dietary needs for a productive and healthy life (AID 1992). The World Bank defines it as “access by all people at all times to enough food for an active and healthy life” (Seyoum 2000). In this section, we highlight Kenya’s food security situation and examine the effects of the changes in the land tenure and reform systems on food security.

## **8.1. Kenya's Food Policy**

Kenya's first Food Policy was elaborated in Sessional Paper No. 4 of 1981 on *National Food Policy*, and later consolidated in the Sessional Paper No.1 of 1986 on *Economic Management for Renewed Growth*. Sessional Paper No.2 of 1994 on *National Food Policy*, which currently provides the guiding policy framework on food security followed. The policy states that food self-sufficiency, food security, employment creation, income generation, generation of foreign exchange earnings, rural-urban balance and overall growth are the major national objectives in Kenya's development policy. This suggests that food security is a priority development issue for the country.

A policy review process initiated in 1999 following the World Food Summit is still on hold. The policy review process was aimed at integrating government commitments made at the summit, including the summit target of halving the number of food insecure people in Kenya by 2015, and updating the policy to conform to on-going macro-economic changes, and the agricultural provisions of the World Trade Organization.

In dealing with the Food Security Strategy, the policy stresses the need to continue with the major initiatives spelt out in the 1981 *National Food Policy*, whose objectives are to:

- Maintain self-sufficiency in the main foodstuffs to ensure the ability to feed the nation without using scarce foreign exchange on food imports;
- Achieve a calculated degree of security of food supply for each area of the country; and
- Ensure these foodstuffs are distributed in such a manner that every member of the population has a nutritionally adequate diet.

It also stresses the need for the food policy to be consistent both internally and with the broad objectives of national development, and to be sufficiently flexible to adjust to policy decisions taken in other sectors of the economy, and changes in the domestic and international economic environment. The Ministry of Agriculture, Livestock Development and Marketing, coordinates the policy working closely with other relevant ministries and government agencies.

The Policy elaborates the:

- Food supply situation (as at 1994) and projections of future demand for the main foodstuffs and the nutritional adequacy of the implied diet;
- Policy framework for the major areas of food production and distribution;
- Programmes that need to be implemented or strengthened;
- Financial implications of the major programmes required; and
- The appropriate framework for government decision-making on production, pricing and marketing and distribution.

The policy recognizes that availability of adequate supplies of food at national level will not ensure access to food by households and individuals. Rather, it depends, among other factors, on the ability of households and individuals to grow their own food and generate other forms of income. In light of this and the potential negative impacts of on-going structural adjustment programmes, the policy acknowledges the need to include a strong social dimension in the form of a facility to assist targeted vulnerable groups to maintain or improve their access to adequate diets. It also acknowledges the need to regularly review the definition and identification of such vulnerable groups to ensure efficient targeting of assistance.

## **8.2. Land and Food Security**

The National Food Policy generally governs the agricultural sector, which is characterised by smallholder farmers, 80 per cent of whom own and farm less than two hectares of land, but account for 75 per cent of the output and 50 per cent of the marketed surplus (KDHS, 1993). Food production in Kenya has been declining since the late 1980s. The national food production index (NFPI) stood at over 100 between 1987 and 1992 and dropped to 94 in 1994. One of the effects of the land reform programme was a change in agricultural production, which began to depend on access to and control of land. The emergent class of landless people and the increased fragmentation of land due to population pressure also affected labour patterns and in turn agricultural production and food security. Labour that would have been used in farm production migrated to urban centres in search of jobs. This trend has continued over the years. FAO has estimated that, given the existing patterns of land distribution, the number of smallholders and landless households in the developing

world will increase to about 220 million by 2000. This will affect food security, as more people become migrant labourers and farm sizes decrease to economically unviable levels. To enhance food security a broad based land reform that promotes equity and the creation of new power structures is required (FAO 2000).

The foregoing discussion demonstrated how the land tenure reform programme divided society into landed and landless, providing a conduit through which peasants continue to lose their land rights (Kanyinga 2001). This tenure reform programme failed to protect the peasants and led to the fragmentation of land holdings into economically unviable units. Further, it failed to realise the economic assumptions that led to its formulation as a policy in the 1950s. Owing to demographic pressures and their familial obligation to provide access to land, smallholder peasants continued to subdivide land for subsistence farming and made few attempts to acquire credit for on-farm activities. The Registered Land Act (Cap 300) of 1963 nullified the customary law that governed diverse rights to land, resulting in the rights of control and use being vested in the landowner.

### **8.3. HIV/AIDS and Food Security in Kenya**

Following the 1998 Presidential Directive to review the food policy, a multidisciplinary body constituted in 1999 under the Ministry of Agriculture and the Kenya Freedom from Hunger Council has been examining the impact of HIV/AIDS on Food Security in Kenya. This is probably the first time the Ministry has introduced such a comprehensive initiative to address the impact of HIV/AIDS from a macro-level. A concept paper prepared by the Food Economy Group (FEG) on household food security and HIV/AIDS concurs with Mullins' observation regarding the impact of HIV/AIDS on land reform. Essentially that the impact of HIV/AIDS on rural food security varies over time as a function of the "extent and progression of the disease" and that it also varies over space – what Mullins refers to as localities – due to differences in the ability of households and communities to cope with, and mitigate the negative effects. FEG argues that understanding how HIV/AIDS plays out in different economic settings would enhance understanding of what the differences mean for specific programmes and policies designed to help prevent and respond to the various food and non-food related effects of HIV/AIDS. It is equally important to understand which specific livelihoods strategies might increase the risk of contracting HIV/AIDS and who, within different livelihood zones, employs these strategies.

FEG states that there is increasing evidence that HIV/AIDS seriously threatens the food and livelihood security of households and communities. It identifies short- and long-term effects of HIV/AIDS on food security. Short-term effects include increased impoverishment due to loss of productive and financial assets such as labour and household assets, and increased health care and funeral expenses. The longer-term effects include:

- The negative catalytic effects and widely systemic impact of the epidemic, which may exacerbate existing food insecurity problems and trigger long term structural changes such as breakdown of the rural 'entitlement' and sharing systems, increased marginalisation of the poor and further fragmentation of land, assets, and resources;
- Inter-generational poverty caused by the collapse in the transmission of knowledge and traditional practices and skills to the younger generation;
- Breakdown in social capital; and
- Sectoral-level changes such as the redistribution in assets and changes in wage rates (Topouzi quoted in FEG, 2002).

The paper also discusses the household and village economies and HIV/AIDS, poverty as a risk factor for contracting HIV/AIDS and ways to improve the collective response to the effects of HIV/AIDS. FEG observes that studies in Tanzania have demonstrated that households lose around two years of labour by the time of death, while households with chronically ill members have average reductions in annual income of 30-35 per cent (Rugalema 1999 and Webb 1998 quoted in FEG 2002). At the household level, FEG hypothesizes that HIV/AIDS:

- Reduces available household labour and undermines the balance between the production and consumption units within a household;
- Increases the expenditure requirements of already poor households; and
- Increases the number of dependents in 'foster' households that absorb orphans from AIDS-afflicted households.

Supporting Mullins' argument that HIV/AIDS tends to cluster in families, FEG observes that because HIV/AIDS typically strikes more than one household member, the compounded effects of multiple deaths within the household hit particularly hard.

On this issue of household economy and HIV/AIDS, FEG also makes a number of interesting observations. The poorest economically active households tend to rely more directly on cash income to secure food than agricultural production, as it is these households that tend to lack access to adequate land or capital to meet their food needs through agriculture alone. Studies in Zambia have demonstrated that 40 per cent of poor household food needs were purchased with income from petty trade and piecework. This finding concurs with findings by Kyalo-Ngugi (2001) that subsistence food produced by women was insufficient for food security, and that they engaged in vending, mostly of foodstuffs, in the closest urban areas to make up the difference.

With regard to the village economy and HIV/AIDS, FEG argues that the knock-on effects of HIV/AIDS beyond the affected households make targeting assistance and response planning particularly difficult. The reach stretches to intra-community labour, entitlement and sharing mechanisms that are often key to the survival of poor households. For example, when one richer household is afflicted, it is likely to have a direct bearing on the income and food of at least three poorer households through, reduced opportunities for casual employment amongst other things. Secondly, the large number of AIDS-related deaths is overburdening traditional community sharing systems and social safety nets to the point that they may soon lose their capacity to absorb increasing demands. Again, these observations raise questions about the alternative survival and coping strategies that affected and afflicted communities are engaging in that need to be answered in order to understand the long-term policy implications for food security.

## **9. THE DIMENSION OF MARGINALISED GROUPS**

In this study marginalisation refers to any form of disadvantage, such as racial, gender, class or disability that any segment of society may be subjected to. For the purposes of this study the marginalized groups are women, due to their low socio-economic status, orphans, due to the vulnerable situation they find themselves without proper adult guidance or support, and female-headed households, including widows, due to the diverse forms of harassment that society tends to unleash on them for lack of a "protector."

### **9.1. Gender Dimension**

The concept of gender is rooted in anthropological and Marxist theory and examines the social construction of masculinity and femininity. This study will apply Mbilinyi's conception of gender as "the social relations between and among women and men, usually asymmetrical divisions and attributes, connoting relations of power, domination and rule." (Mbilinyi 1998). Gender concerns include the gender division of power, access to and control of resources and benefits, and social, cultural, religious, economic, political and legal factors and trends that all have a complex and profound influence on gender roles and responsibilities (Teferra 2000).

The Beijing Platform for Action provides a framework for gender-sensitive approaches to combating HIV/AIDS. In one of its recommendations, the BPFA states: "the social, developmental and health consequences of HIV/AIDS and other STDs need to be seen from a gender perspective" (Teferra 2000). Despite many years of activism by women, Kenya still lacks a consolidated gender policy to address women's issues. The House has trashed calls by women Parliamentarians for affirmative action bills. As a result women are engaging in the Constitution Review Commission of Kenya to ensure it addresses gender. Here issues of women are dealt with within the statutory laws governing the country.

#### **9.1.1. Gender Dimension of HIV/AIDS**

The relationship between gender and HIV/AIDS includes the heightened vulnerability of women arising from biological, economic, social and cultural factors. The gender component also includes the recognition that the burden of the disease is much harder on women who are the child-bearers and traditional care givers (Teferra 2000). The productive and reproductive role of women gives them the responsibility of placing food on the table, and in most Kenyan ethnic communities women are the primary subsistence farmers.

Although the ratio of men to women infected with HIV/AIDS is comparable in Kenya, Teferra argues that the biological make up of a woman increases her risk of infection to two to four times that of a man. For this reason younger and post-menopausal women are equally more vulnerable.

The power, access and control aspects manifest themselves in the economic domain. Due to the feminisation of poverty, sex becomes the only bargaining tool available for millions of women to sustain themselves and their children. Wife inheritance and marriage as cultural phenomena in a majority of the African groups may require women to exercise matrimonial obligations, including sex, as the guarantee of access to land. Even where a community is aware that a man may be HIV positive, cultural factors inhibit most women from seeking out information on sex or bringing up the subject, let alone negotiating the possibility of safe sex. According to Teferra, some studies in Africa and elsewhere show that a large number of married women have been infected by their sole partners – their husbands. This conforms to a study in India in which 91 per cent of married women who had never had sex with anyone but their husbands were infected with STDs, 13.6 per cent of them were HIV positive. The potential for domestic violence and dispossession of property, including through remarriage by the man, are constraints. Related to this is the social status associated with child bearing, which exposes married and single women to infection. Many households also spend less on healthcare for women and girls (UNICEF 1990 quoted in Teferra). However, there is also a growing phenomenon in the middle- and upper-classes where women are becoming mistresses of high-level and wealthy males in order to own property, including houses and land, possibly a result of the “glass ceiling” phenomenon, another aspect of power play in the workplace.

According to the Government, the segments of the community in Bondo district “who are affected most by poverty are the landless, widows, orphans, aged, disabled, single mothers, unemployed school leavers, peasant farmers, fishermen, and the chronically sick.” One of the major causes cited for this among women is the lack of empowerment in decision making and leadership (MOFP(b) 2002). In both Bondo and Nyeri districts, high value is attached to childbearing. For the communities studied in Nyeri, children are a woman’s “property”, making them the only asset guaranteed to any woman in this community, irrespective of socio-economic status, unless there are biological barriers. Sex, the only avenue they have (at present) to acquire this property renders women vulnerable to HIV/AIDS.

### **9.1.2. Gender Dimension of Land**

In many societies, including Kenya, land is regarded as property. In an attempt to determine the factors that constrain women’s economic empowerment a number of studies have been undertaken in the region, mostly by NGOs that target women. Most of these studies focus exclusively on this aspect, filling a gap left by the majority of national studies on land issues, which have paid little attention to the gender dimension.

Nzioki (2001), underscores the gender gap in control over land as the single most important economic factor affecting the situation of most women in the East African sub-region – Eritrea, Ethiopia, Kenya, Tanzania and Uganda. Therefore it is the most critical issue for women’s empowerment. Her study concurs with many previous related studies, which argue that providing women with legal rights to land would not only empower them economically but also strengthen their ability to challenge social and political gender inequalities. The protection of women’s rights to full and equal access to economic resources, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology are listed as some of the main critical areas of action for the advancement of women and the achievement of equality between men and women.

Nzioki notes that countries in Eastern Africa have been undertaking land reforms involving varying degrees of policy changes. These include redistribution of public or private land, consolidation of holdings, resettlement schemes, changes in land ownership and tenurial rights, and changes in conditions of tenure such as the conversion from customary to Western statutory rights. Nzioki observes that land reforms do not necessarily promote women’s legal ownership and inheritance rights, but have undermined their traditional user rights under customary land tenure by registering farming land in the names of husbands or sons. She also argues that while reform programmes focus on the household as the unit of production, they fail to consider the sexual division of labour in the management of crops, plots (land) and appropriation of produce. Yet the domestic economy continues to rely heavily on women’s labour and their contribution to household subsistence.

To address women's rights, Nzioki makes a number of recommendations for the national level, including:

- Engenderment of the constitution,
- Formulation of gender policies,
- Law reform,
- Provision of legal programmes,
- Documentation of women's land rights and
- Creation of a national taskforce on women's land rights.

At the sub-regional level, she recommends:

- Building a platform for action on women's land rights,
- Making joint planning, implementation, coordination and monitoring of activities relating to women's land rights,
- Forming a sub-regional taskforce
- Developing a sub-regional programme to address women's access to and control over land in Eastern Africa, and
- Developing an action plan for this programme.

At the national level there are two notable studies amongst a number on women and land in Kenya. Kameri-Mbote (2002) notes that multiple legal norms drawn from statutory, customary and religious laws govern women's ownership of property, including land. In reviewing these laws, she argues that the marital status of women is very critical to the determination of whether they own or have access to property, and that there is a gendered determination of the types of property women can own – mostly movable property and chattels, but not land. Although women have access to land, they do not own it, and in fact, the distinction between access and possession is vague. Access is also predicated on the social standing of a woman in relation to the legal owner. Kameri-Mbote observes that although there appear to be no legal barriers to women's ownership of property, women do not own land due to cultural factors, and highlights two key shortcomings in these provisions. The failure to amend laws of colonial heritage affecting ownership of property by women, laws which have since been amended in the UK, and conflicts that arise between English and Kenyan conceptions of property.

Kyalo-Ngugi (2001), in her study of two communities in Kiambu and Machakos Districts in Kenya, concurs with Kameri-Mbote's observations of what happens on the ground. In Kiambu Kyalo-Ngugi finds that:

- While most land in the study area is registered, few women hold land in their own names;
- Traditional patterns of land inheritance predominate despite individualisation of tenure, with a majority of men inheriting land;
- Unmarried or divorced daughters have no guaranteed share of land within their paternal family; and
- Widows are rarely disinherited of land although most have land still registered in their deceased husband's names, as women are considered trustees of his male heirs.

While results in Machakos district are similar, the study also observes that problems arise when fathers bequeath land to their daughters, who are often eventually evicted by their male siblings, and women become "tenant farmers" on their kin's land, paying for the tenancy through provision of non-quantified labour.

On land use and access, Kyalo-Ngugi concludes that in both locations:

- Land is below 2 acres in size;
- Subsistence farming of crops such as maize, beans, vegetables and fruits predominates, supplemented by animal husbandry; and
- Due to the small farm sizes, women and children provide labour, except in a few larger farms where permanent or temporary labour is used.

Men provide casual labour to the large-scale farms. Whereas in Kiambu spouses make joint decisions on land use, in Machakos women make these decisions. The subjects indicated that generally women control the income generated from the land, except where the proceeds from cash cropping tend to be high. The study also reveals that:

- Women hardly receive services from the government extension service;
- Only occasional use is made of veterinary services; and
- Banking and credit facilities are not accessible to many of the women.

Machakos, however, has a large number of cooperatives that provide some farm-related services. Kyalo-Ngugi and Nzioki concur that women's access to land is dependent upon their relationship to men, and their marital status.

Drawing from an in-depth study in Machakos, Kyalo-Ngugi and Nzioki observe that land issues are handled at two levels – the local elders and the chief, and the Land Control Board. The chief handles at least eight cases a week while the Land Control Board sits once a month to address cases that the elders and chief have been unable to resolve. Most cases are reported by:

- Women on account of land mortgaged without their consent by their spouses;
- Daughters, including unmarried and divorced daughters, or mothers on behalf of their daughters, contesting the exclusion of the daughters in the allocation of land; or
- Widows.

Where cases are deserving, parents or brothers are instructed to allocate them land, although deserving cases depend on the legitimacy of the claim and how valid members of the household consider it to be. An example would be if the claimant were physically disabled and unable to marry.

The position of widows is precarious. Nzioki suggests that inheritance rights of widows to the properties of the deceased husband do not exist in principle, and that although registration of land in the husband's name provides some safeguards, widows are largely granted usufruct rights on behalf of their children. Upon the death of a spouse, women find that the land they had access to suddenly taken from them. To receive redress from the Land Board, proof of marriage is required. In the absence of personal rights to land, the divorced, separated and widowed women face gross injustices and are often forced out of their livelihoods. In Kenya, as in most other African societies where land can be inherited, most women lack rights to inherit land although these are provided for in the law. However, section 32 of the Law of Succession Act (Cap 160) still renders it difficult for women to inherit agricultural land – the mainstay of women in Kenya (Macharia 1995). The death of a male partner due to HIV/AIDS therefore alienates women from their land.

The drastic effect of the death of the male partner on women's land ownership rights is largely because land is still registered through men. Most title deeds do not reflect the name of the woman in the relationship, leaving an opening for unscrupulous relatives to grab the land. However, recent legal developments provide for joint land registration between husbands and wives, conferring security of tenure on women in the event of the death of a spouse. However, the extent to which this law is being implemented in HIV/AIDS cases needs investigation. Women and children are further disadvantaged where their land is sold either to meet the treatment costs of HIV-related illnesses of their male relatives or sold to recover costs incurred after the death of a male spouse. This also contributes to landlessness and increased poverty levels (UNDP 1995).

The foregoing discussion demonstrates a disparity between the law and practice in regard to women and land tenure, access, use and inheritance, which multiplies the effects on widows and all categories of single women. However none of these studies acknowledge the potential impact of HIV/AIDS in their study. The stigma associated with HIV/AIDS raises questions about the extent to which the scourge aggravates these situations. The study of Nyeri district will be particularly instructive on this issue as the ethnic groups found in Kiambu and Nyeri district are the same, except that they straddle different administrative boundaries, and that in Kiambu, the HIV/AIDS prevalence levels are lower and the poverty levels higher.

### **9.1.3. Gender Dimension of Food Security**

A number of factors make examining the gender dimension of food security an important facet of this study. Kenya's approach to food security is based on food self-sufficiency. In most of the country food for consumption is generated through subsistence agriculture which is primarily carried out by peasant farmers, a majority of them women. Commercial farms concentrate on horticulture, where they do grow food crops these are earmarked for export and cannot be relied on to meet the food security needs of the country. The World Bank (1990) observes that agriculture is the backbone of the Kenyan economy and that more women than men play a critical role in food production, thus any policy framework to ensure food security that fails to address the productivity of women is bound to fail.

Seyoum (2000) suggests that it is important to address gender when dealing with food security because

- The low socio-economic status of women renders them food insecure;
- Women constitute a large part of the agricultural labour force and play a key role in achieving food security;
- Women figure more prominently than men in population groups that are considered to be food insecure;
- Women's productive and reproductive roles make them responsible for household food security, health and nutrition maintenance; and
- Women invest more than men in household food security.

Nzioki (2001) suggests that the total production of food in the sub-region is decreasing and cannot adequately feed the growing populations, and argues that the non-availability of productive resources affects women's ability to produce food. She further states that women constitute 80-90 per cent of the labour in subsistence production and the release of their productive potential is pivotal to breaking the cycle of poverty.

Seyoum and Nzioki identify lack of access to and control over productive resources, including land, labour and capital, as a key constraint on women's ability to play a greater role in food security. According to UNICEF/GOK (1998), women's access to land is mostly through husbands, sons or male relatives. Land ownership by women and access to credit therefore still remain a major constraint on ensuring food security. Seyoum also identifies the lack of access to appropriate and efficient technologies and inputs for raising productivity, institutional barriers expressed in customary, religious and civil rights laws, and cultural constraints. Seyoum's assertions are supported by Kyalo-Ngugi's findings that women did not receive any services from agricultural extension officers or any other government extension services. Kyalo-Ngugi also finds that the food produced by women on their land is not sufficient to ensure household food security, thus women supplement their income through vending farm produce in the urban areas.

The reduced household production capacity that has been associated with HIV/AIDS suggests that where women are infected or affected by the scourge, the prospect for food security is threatened further at household and national levels. An effective policy on food security therefore needs to take into account the short- and long-term effects of HIV/AIDS on food security by examining what coping strategies the affected and infected female-headed households are undertaking.

## **9.2. Children and Orphans in Kenya**

That Kenya originated the drafting of the Convention on the Rights of the Child, which was concluded in 1990, suggests the country has a strong interest in children's issues. However, the domestication of that convention is still in process, after Parliament finally adopted the Bill in 2000. In Kenya, the most important policy concerns on children that are advocated are rights to education, especially for the girl-child, elimination of child labour, and the banning of cultural practices (rites of passage) that are considered inhuman such as female genital mutilation and circumcision procedures that fail to meet the required health standards.

The phenomenon of street children has also assumed extreme proportions, but there is limited attention to the problem. This phenomenon is partly attributed to the scourge of HIV/AIDS as children are heavily affected by the death of parents. Mullins (2001) highlights a number of potentially significant changes:

- An alteration of the demographic structures, as the elderly and children below 10 years are likely to be least infected;
- The burden of maintaining households is likely to shift from older to younger people with an increase in child-headed households and orphans; and
- Potential to undermine the opportunities for children to develop as some are pulled out of school.

As with other marginalised groups, it is essential to examine the impacts of HIV/AIDS on children's access to and ownership of land and on coping strategies to determine whether policies are needed to stem these impacts.

Christine (1996) observes that the legal right of orphaned children to family land can be complicated upon the death of their parents. Their vulnerability depends on various factors, including which parent died, the ages of the children at the time of being orphaned, and their guardian(s). In some instances, children are separated when their parent(s) die and their caretakers decide on the fate of their land. If the orphans are

fairly grown up the solution can be for them to remain on their father's property with a guardian. Often, orphans lack the time to look after their land because they have many duties allocated to them by their guardians. Male orphans experience an increasing number of problems in claiming their father's land once they can support themselves. This is not only a threat to orphan's land rights, but also opens avenues for relatives to take land at their expense. This study will investigate the plight of orphans in HIV/AIDS cases in order to identify the policy gaps and issues that need to be addressed.

## **10. THE IMPACT OF HIV AND AIDS ON LAND**

The foregoing discussion demonstrates clear links between agriculture, food security and land. Until now, studies on the impact of HIV/AIDS have tended to focus on labour in agriculture although land is one of the three primary forms of capital.

Mullins (2001) propositions on land reform, poverty reduction and HIV/AIDS provide a useful starting point for such an examination. Mullins presents two propositions: that failure to factor in the impacts and trends of HIV/AIDS as a central feature in the analysis of how to conduct land reform (or any other development activity) in Southern Africa, is to be professionally negligent, misuse poverty reduction resources and risk not achieving the stated objectives; and that there is a need to pay attention to the impacts of HIV/AIDS on people and on the capacity of institutions to survive and to achieve their objectives. Within this context he argues that the impact of HIV/AIDS should be considered within two broad contexts – how it affects the people being resettled and how it is affecting the people running the institutions directly or indirectly supporting land reform, and those which supply essential goods and services and provide markets.

### **10.1. Affected and Infected People and the impact on Land**

Mullins demonstrates these impacts using the livelihoods framework, which incorporates human, financial, physical, social and natural capital with a knock-on effect on land. Despite the usefulness of this framework for analysing the impact of HIV/AIDS on land, Mullins fails to carry his analysis of the effects of HIV/AIDS on affected people to its logical conclusion by demonstrating impacts on land reform (or other land related activities), with the exception of the impact on natural resources. However, in a report (Drimie & Heustice 2001) on a meeting at which Mullins presented the same model, he demonstrates the effects of HIV/AIDS on households, resources (land) and institutions.

As a dearth of literature on the impact of HIV/AIDS on land issues exists, the livelihoods model will be applied to demonstrate the impact of HIV/AIDS on land in Kenya, drawing on the literature reviewed above.

For human capital, HIV-related illness means gradual loss of labour and skills as the illness progresses and the infected person drops some activities, and upon death, the complete loss of skills, labour and knowledge. For those affected, the period of illness is marked by an increasing burden of work as they attempt to take up some of the roles dropped by the infected person. Death ends the possibility of acquiring skills not already passed on. Mullins observes that this shift in the burden of activities means that women and girls take on additional duties.

As human capital plays a particularly important role in crop and food production the impact of HIV/AIDS is evident in land use. Although Nzioki (2000) observed that food security in Kenya is at risk due to a number factors, her study and that of Kyalo-Ngugi failed to establish the extent to which HIV/AIDS may have been a major factor in light of the high prevalence rates in the two districts studied. As this study is mainly focusing on land, and will only carry out a preliminary investigation of food security, the results of the FEG study (if approved) may provide very useful information on aspects of food security and possible links to land issues.

Demand for medical care is the key impact on finances. The cost of drugs and treatment for HIV-related opportunistic illnesses diverts resources from other investments, and reduces the household's creditworthiness for inputs into land. Related to this is the impact on physical capital, as productive assets such as livestock or equipment are likely to be sold off to meet medical costs. The impact on female-headed households and orphans, especially child-headed households, may be particularly severe. Female-headed households are unlikely to get support from the extended family, while child-headed households lack the skills to earn an income or use the land. The clustering impact of HIV/AIDS exacerbates this situation as the extended family may also be burdened, increasing reluctance to provide support. Given the productive roles

of women coupled with social pressure, women may even mortgage their land to other family members in return for loans to take care of the ill, particularly their spouse.

Declining investment in agriculture and lack of creditworthiness are manifest in underused land. Inefficiently used land may revert to bush and be abandoned in the long term. The loss of physical capital as households sell off productive assets to meet financial deficits has similar effects to the loss of financial capital. Mortgaging land has repercussions after the death of the spouse as female-headed households, widows and orphans may have to redeem mortgaged properties by providing farm labour to creditors. The high cost of medical care and low farm wages imply that those affected in this way may take many years to recover their property, and risk losing it eventually. Involvement in paid labour would also constrain the input of affected households on their own land. It may take a long time for households affected in this manner to get title to the land transferred into their names, delaying the potential recovery time. Feminisation of poverty makes widows and single women particularly vulnerable as they may also be pressured into providing sexual favours, exposing them to further risk. On the other hand, orphans may be required to provide farm labour to repay hospital bills. This analysis supports the assertions by the National AIDS Control Council (2000) that growing incidences of HIV-related illnesses and mortality arising from AIDS are impacting profoundly on land tenure among marginalised groups in society, particularly women, children and orphans.

Mullins observes that people with limited financial or physical capital depend on social networks, the extended family, neighbours and fellow church members to meet these deficits. In many rural areas households organise themselves as groups or cooperatives to support each other in many aspects of work including cultivating land, planting, harvesting or even taking turns to perform chores such as collecting firewood and drawing water. If a woman in such a group is infected by HIV/AIDS the group may initially be willing to condone her lack of involvement, but this is unlikely to continue over the long-term, particularly where a large number of group members may themselves be either infected or affected. The end result is under utilisation and possibly eventual abandonment of land.

In cash crop growing areas such as Nyeri district, small-scale coffee growers are organised as cooperatives, with each household required to provide manual labour for the preliminary coffee processing. Illness may be excused initially and an individual household's contribution deferred to allow for their recovery. But as the labour deficit grows with the slow progression of the illness infected families with limited social capacity and financial resources may be forced to withdraw from the arrangement and even abandon labour intensive cash crop production. If the number of households forced to withdraw from the group grows too large the arrangement may collapse altogether.

Natural capital, in this context, refers to common resources such as forests, water, and land. Mullins suggests that where a family lacks the labour to use its own land, and also lacks cash and other resources to hire in skills and labour, an affected household may opt for one of several options – abandoning, renting out, lending or selling land – or the land may be forcibly taken from the household. He argues that many widows face this last situation. A shortcoming of Mullins analysis here is the failure to demonstrate the link between these land issues and natural capital (commonly owned resources).

Given FEG's findings that in general the poorest households lack land they are likely to depend most on common resources. In Kenya the most explicit manifestation landlessness is squatting on land by these households. Often, they farm alongside roads and on land whose title they do not hold, selling the produce. An infected squatter who becomes bedridden and fails to cultivate the "common" land she or he has appropriated will lose it to another squatter. Reclaiming "ownership" will be difficult.

The analysis above concurs with that of Mullins (quoted in Drimie & Heustice) that time spent caring for the sick reduces time spent farming, leading to under utilisation of resources and reduced productivity and to changing land use as households move to less intensive and often less nutritious crops. Land may also be left fallow or abandoned. He also suggests that there is forced removal of widows from land and property grabbing.

In Kenya, there is little land reform going on at the moment except in the form of adjudication, certification and consolidation, as most of the land is held as freehold or lease hold. However, if the scourge of HIV/AIDS results in massive abandonment of land there may be need to review reforms. Within the on-

going Constitution review process, women are also calling for constitutional changes that may culminate in land reform.

## **10.2. Impact on Institutions**

According to Mullins (quoted in Drimie and Heustice 2001), the impact of HIV/AIDS on institutions will manifest itself through changes in their environment, ways of working with people, staff morale and internal capacity. The changes will lead to increased costs for retraining, severance and hiring, loss of time, drain on medical aid funds, increased death benefits and pension payouts, increased staff turnover and increased competition for skilled staff as the pool of skilled and experienced individuals shrinks. For these reasons, Mullins calls for regular assessment and reassessment of the quality and relevance of the services the institutions provide.

This study has a particular focus on the local level. Members of the land boards are the critical staff dealing directly with land. Their main responsibility is to resolve land disputes that the elders, led by the chiefs, fail to resolve. As indicated above, women submit a majority of these reports, and any impact on members of the land boards and the chiefs would impact particularly on the ability of women to receive legal redress. The District Commissioner, who chairs all land board sittings, and the chief, are the two most critical members, as they preside over meetings dealing with land conflicts.

A second category is the technical personnel involved in land adjudication, certification and consolidation. Although most of the private land in Kenya, including ancestral land, has already been adjudicated, this category of staff remain essential when land is subdivided either following marriage or the death of a male spouse. As this mainly affects women and children, the death of administrative staff would leave women in particular doubly disadvantaged lacking both land rights and institutions where they can receive redress promptly. Further, while courts of elders that resolve land issues rarely include women observations in Kyalo-Ngugi (2001) and Nzioki (2001) indicate a dearth of women representatives on the land boards.

Extension service providers make up a third category. The foregoing discussion demonstrates that the services they provide benefit commercial and cash crop farmers, but not subsistence farmers who are mainly women. Therefore impacts on the administrative staff resulting from HIV/AIDS would have a marginal effect on the majority of rural households, which depend on home grown and locally purchased food. However, if the impact on extension services resulted in massive losses in investment and corresponding job losses, women may find their husbands demanding the little income they generate through sale of produce from their subsistence farming.

Finally, the rural communities are also dependent on health services provided by the Government. Rural hospitals in Kenya routinely face a lack of adequate facilities such as fully qualified doctors, hospitalisation facilities, and essential drugs. The illness or death among the already limited staff would further hamper the provision of effective health services to rural people and with it, their ability to produce.

This suggests the need to examine how the institutional setting at local level impacts on land.

## **11. CONCEPTUAL FRAMEWORK**

Mullins framework for analysing the impact of HIV/AIDS is a useful starting point for an examination of HIV/AIDS in Kenya and will, to a large extent be used in the study, with slight modifications.

The discussion above suggests a close link between land, agriculture and food security. This study assumes that an impact on one of these elements will have variable impacts on the others. Therefore, the study presumes that HIV/AIDS has an impact on land. As ownership of land in Kenya's rural and peri-urban areas is exercised at the household level, the impact on land is best examined at this level.

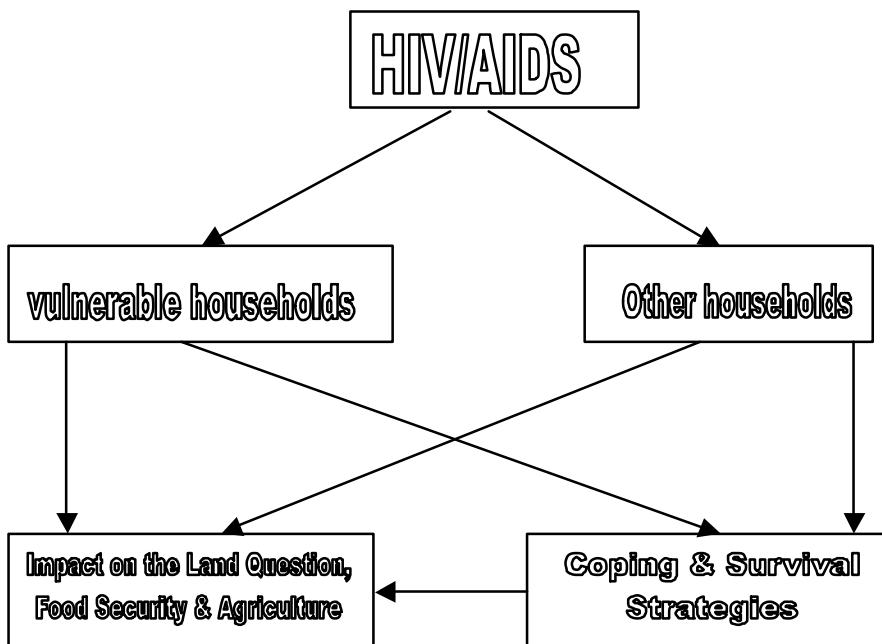
The conceptual model assumes that HIV/AIDS impacts households differently. Marginalised households, among them those of the poor, landless, and female- and child- headed households would feel the impact more than other households due to their vulnerable socio-economic status. The study will examine the impacts of HIV/AIDS on all households, particularly at the social and economic levels.

In this study, marginalisation refers to the social location of an individual or group outside the mainstream.

Within this study, the NASCOP definition of an orphan – a child under the age of 15 who has lost a mother to AIDS – will be applied. AIDS orphans are classified as marginalised groups because the death of a mother denies a child the care and supervision necessary for their psychological development, and AIDS orphans also tend to be stigmatised. Therefore they face a double dilemma – inadequate psychological attention and the social stigma.

During a workshop in Addis Ababa on Gender and HIV/AIDS, women concluded that empowerment of women begins with self-empowerment. The keys are: education, sensitisation, awareness creation and information. This corresponds to the Longwe Framework for Empowerment, which emphasises addressing women's needs at five levels: welfare, awareness, sensitisation, conscientisation and organisation. This framework will form the basis of our examination of the gender dimension of the impact of HIV/AIDS on land.

The model also assumes that the impact of HIV/AIDS on a household triggers survival and other coping strategies at the household and community levels, which manifest themselves in the way land is tenured, rights are exercised and reforms emerge. Changes here are likely to affect agricultural practices and outputs, and food security in the short-term. Unless the effects of the HIV/AIDS pandemic are mitigated in the short-term, the study assumes that these coping and survival strategies, with slight modifications, would become the 'way of life'. Given the financial constraints facing the government, it can be expected that these new 'ways of life' are inevitable. Given that the current land, agricultural and food security policies were designed without any anticipation of a pandemic of the magnitude of HIV/AIDs, it is essential for policy makers to understand the policy gaps and issues that will emerge from this impact in order to determine whether any policy review is required, and if so, to what extent.



In examining the effects on vulnerable and other households, the following aspects will be observed:

(a) Profiles of the affected persons including data on

- Gender
- Age
- Levels of education
- Occupation
- Marital status
- Relationship to the infected person(s) (inferred from the interview)
- When the person died

(b) Household profiles

- Number of people in each household
- Economic activities
- Culture and languages spoken
- Literacy levels
- Number of children
- Head of the household
- Type of dwelling
- Duration of stay in the dwellings
- Ownership of the dwelling
- Ownership of the land
- Land acreage
- Religion
- System of marriage

(c) Gender aspects

- Allocation of household and farming duties
- Who allocates these responsibilities
- Reasons for authority

In examining the impacts of HIV/AIDS, observations will be made at household level on the following aspects:

(a) General observable impacts

- Description of how the affected family sees HIV/AIDS
- Description of how household and farming duties have changed
- Description of what happened after the infected person died

(b) Changing land tenure system

- How land was acquired
- Whether and how land changed hands after the death of the HIV/AIDS infected person
- Whether conflicts have resulted from a change in land ownership
- Causes of the land disputes, if any

(c) Changing Land Rights system (Ownership, access, control and duties)

- Decision maker on use of land
- Person who manages the land (takes central role in ensuring farming continues on a day-to-day basis)
- Decision maker on how the land is to be used and reasons for this authority
- Decision-maker on inheritor of land and reasons for this authority
- Decision-maker on who will use the land and reasons for this authority
- Decision-maker on disposal of land and reasons for this authority

(d) Changing farming and production patterns

- Presence of farming activities
- Types of crops grown

(e) Land administration institutions

- The types of disputes
- Where people go for assistance on land disputes
- The type of assistance people seek

In order to determine the coping and survival strategies, the following aspects will be examined:

(a) At the household level

- How the individual has coped after the death of the infected person

- Strategies the household/family have developed to cope with the pandemic
- (b) At the community level
- Description of how the community responds to HIV infected people
  - Strategies the community has developed to cope with HIV/AIDS
  - Strategies the community has developed to deal with land disputes on land
  - Listing of development agents and agencies the community uses regularly to intervene on HIV
  - Description of the activities undertaken by these agents and agencies
- (c) The effect on land, food security and agriculture
- Changes in the way affected people acquire food after the death of the infected person
  - Nutritional needs of the infected persons
  - Changing nutritional needs over time of the victim

These observations will be analysed in light of the relevant policies in order to identify the gaps and issues, and help in defining the policy implications and requisite recommendations.