

A precedent-setting case of allodial ownership of customary land in Ghana

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Abstract

Land has always been an important aspect in defining and reshaping relationships between individuals and groups of people. Anthropological studies in sub-Saharan Africa indicate that territory is an important criterion for defining a political system. Besides its crucial role of supporting livelihoods, land also has symbolic value, as a criterion for group identification. Most pre-colonial sub-Saharan African societies practiced communal ownership of land, which was congruent with the prevailing subsistence economy and the political system centred on the tribe. Demographic growth, urbanization, globalization and cultural change, coupled with diversification and modernization of the economy have had major implications for land tenure systems. Customary tenure forms react to such changes in various forms. In some cases, the powers of customary authorities responsible for land administration increase while others lose power. This paper is a case study narrative of a precedence-setting case where the allodial rights of land were conferred on a sub-group by the Supreme Court of Ghana against the custom. The ruling is significant because traditional land administrators have been sent a signal that they cannot do what they want in the name of custom to the neglect of customary freeholders. The study also highlights the need to build capacity in traditional leadership in areas such as records keeping and conflict management to make them more effective.

1. Background

Customary tenure systems vest land in the tribe, group or community, with individuals, in theory, enjoying only user rights. A basic tenet of traditional African customary tenure is that land belongs to the ancestors, the present generation and the generation yet unborn (Ollennu, 1962; Abdul-jalil, 2006). Thus, land is more than an economic asset; it has cultural and social values intimately connected to people's identities, statuses and social networks (Jul-Larsen and Mvula, 2009). In modern times, some traditional authorities have taken advantage of their entrenched position to enrich themselves.

1.1 Customary land administration

Customary land administration is a flexible way of managing land relations for a specific community based on custom and prevailing traditions. Customary land administrators are able to

adjust land right systems to current needs (Fitzpatrick, 2005; Arko-Adjei, 2011). Customary land administration usually provides secure tenure for its members and significantly reduces encroachment by outsiders.

In functional customary tenure areas, land is administered by community leaders and family heads on behalf of the community. The community is consulted on all major decisions such as alienation of land and disbursement of proceeds on land sales (da Rocha and Lodoh, 1999). In other areas, as a result of rapid urbanisation, increased population, and non-adherence to cultural values, customary struggles over land and entitlements are mingled with socio-political dynamics (Amanor, 2008; Berry, 2009b). These aspects lead to dysfunctional customary tenure systems. In such areas customary authorities circumvent traditional checks and balances aided by relatively recent changes in the environment. Lack of accountability may result in abuse of power and self-enrichment. Weaker members of the community are disadvantaged and may lose their land rights in the process (Akrofi, 2013).

1.2 Customary land administration in Ghana

Berry (2009b) posits that in Ghana, the constitutional recognition of the authority of chiefs over stool lands has reinforced traditional hierarchies and lead to proliferation of formal and informal governing agents and institutions. This, she asserts, may disrupt or subvert open governance and sustainable resource use instead of helping to create sustainable development and democratization (Berry, 2009b). Amanor (2008) agrees and asserts that the empowerment of chiefs to control land enables them to transform and re-invent tenure systems in the interest of elites, for their own benefit. He associates chieftaincy with “the process of accumulation and the re-definition of tradition in support of accumulation” (Amanor, 2008: 77). He argues that although chieftaincy may promote the process of decentralisation it may lead to uneven development (Amanor, 2008).

There are many varieties of chiefs ranging from mere ceremonial heads to autocrats who are very powerful (Meek, 1940; Kyeremanten, 1971; Barrows and Roth, 1990). There are also chiefs who are considered embodiment of deity (Meek, 1940; Bamfo, 2000) and in recent times ‘development’ chiefs who may not belong to the royal family (Arko-Adjei, 2011). Chieftainship in the olden days was surrounded by innumerable taboos. Validity of divine chieftainship rests ultimately on the continued faith of the people (Meek, 1940).

The chief is usually the male head of the most powerful lineage or the head of the lineage who first settled in the area (Meek, 1940; Gluckman, 1969). Other lineage heads become the chief’s councillors. The individual owes allegiance first to his/her lineage head and then through the lineage head to the chief (Kyeremanten, 1971; Gluckman, 1969). The chief and his/her councillors are responsible for management of all aspects of the community including land allocation.

Chieftaincy was affected in many ways during the colonial period through indirect rule and subsequently by post-independence administrations (Meek, 1940; Bamfo, 2000; Crook, 2008,

Berry, 2009a; 2009b; 2013). Chieftaincy, as an institution, was powerful for a very long time before the arrival of the colonial powers in many parts of Africa. During the colonial era and after independence, various governments gradually undermined the powers of chiefs. Despite this, chieftainship has not died out, but on the contrary, it has entrenched itself and in some places made substantial gains. Chiefs and traditional institutions have shown themselves to be indispensable and resilient in rural and peri-urban areas. The institution continues to be the centre of authority and symbol of unity in most customary areas in Africa, even in new communities composed of heterogeneous people (Meek, 1940; Bamfo, 2000; Morapedi, 2010). Chieftaincy has become central to governance and cannot be discarded. It is an institution with immense clout and appeal, playing an indispensable role in customary land management, dispute resolution and preservation of cultural heritage (Morapedi, 2010). The institution has not, however, been devoid of internal contestations due to fear of potential displacement. Chiefs challenge one another's claims, or find that land they had acquired or used in the past has been reallocated or sold by others without their knowledge (Berry, 2009b).

In most parts of Ghana, the chief is the custodian of all land within his/her jurisdiction. He/she can dispose of unoccupied lands and, when one of the subjects wants to transfer land, his/her consent must be sought (Ollennu, 1962; Kyeremanten, 1971; Delville, 2007). The chief and his/her elders may also give land to non-indigenous people for a fee or tribute. The chief, however, cannot deprive an indigene of his/her land rights in favour of a non-indigene (Ollennu, 1962). Asante (1965) asserts that the chief's position vis-a-vis stool land is that of a fiduciary. As the top executive functionary, he/she has authority to manage and administer the property, in the interest of the subjects.

Of late, the role of custodianship has been abused by some chiefs (Kasanga and Kotey, 2001; Ubink, 2007, Ubink, 2008). Ubink (2008) is of the view that chieftaincy has gained popularity in recent years due to the renewed interest shown in it by African governments, international institutions and donor countries. Traditional authorities have been popular in recent times for several reasons.

After independence it was anticipated that the new political elites would deliver on their promises of socio-economic development (Buur and Kyed, 2005) and render chieftaincy irrelevant. However, eruption of internal conflicts and civil wars in some states resulted in renewed interest in chieftainship. Interest in traditional authority also deepened in well-functioning states where there was elected multiparty democratic governance. Traditional leaders are seen as representatives of local interest groups (Ubink, 2008; Morapedi, 2010), who are more accessible to the local communities than elected state elites and therefore can take part in governance (Buur and Kyed, 2005). Finally, in some areas, traditional authorities are seen as popular alternatives for dispute resolution, law enforcement and community development (Bamfo, 2000; Arko-Adjei, 2011). Despite the increasing popularity there are inherent democratic challenges that must be overcome by most chieftaincy institutions, to effectively administer land for the benefit of all

citizens. The role of democratic governments in ensuring equity in traditional administration is paramount.

1.3 Government reaction to democratic issues in traditional authority

Bentley (2005) identified three approaches that governments used in interfacing with traditional authorities:

- The non-interference approach: Here, the state is restrained from intervening in traditional authority and their norms, even when these norms are non-egalitarian and potentially a threat to individual rights of members (Ubink, 2008). This often leads to land disputes between traditional leaders and land right holders.
- Enforcement on the part of the state: This is the approach of liberal egalitarians, who insist that equal recognition for one's culture cannot conceptually include using that recognition to treat others unequally. This approach critiques entrenched cultural rights that give some people power over others. It rejects the compatibility of traditional leadership and women's rights. It requires high cost of enforcement on the part of the state to ensure equal rights.
- Compromise: This option requires deliberation and negotiation of a compromise. It upholds both the rights of members and the group. This approach insists that all parties must be regarded as having an equal say in what their norms are. Traditional communities could agree to different arrangements that accommodate the powers of traditional leaders and recognize democratic rights of all members of the community including those of women (Bentley, 2005). The compromise approach is critical in ensuring efficient land delivery with active participation of all stakeholders.

Erosion of customary checks and balances on the functions of traditional leaders and policies of non-interference of some governments in chieftaincy affairs (Ubink, 2008c) often disrupts communities by restricting access to land for the vulnerable, creating avenues for misappropriation by influential elites and exacerbating economic inequality. This paper examines a precedence setting case where the Supreme Court of Ghana grants allodial ownership to a subordinate chief and how the land is being managed.

2. La Stool lands

The paper is based on data from the first author's PhD field work. Coincidentally, four of the six case study areas in Accra, Ogbojo, Teiman, Amrahia, and Maledjor had La as their ancestral home (see Figure 1). The data collection was based on key informant interviews and focused group discussions. Fifteen or more people were interviewed in each case study area. This number comprised of traditional leaders, family heads, indigenous men, women and youth and strangers, who have acquired land and live in the community. These were supplemented by documentary evidence obtained from some formal institutions.

La (formerly Labadi) is a coastal town in the eastern part of Accra (Figure 1). La is divided into seven Quarters and each Quarter has its own land as well as the land on the outskirts adjoining the quarter. The head of the Quarter is responsible for the administration of all land in the area. The chief of La does not give out land because land belongs to Quarters and is administered by Quarter leaders (Tsuru iii & Sai, 2010).

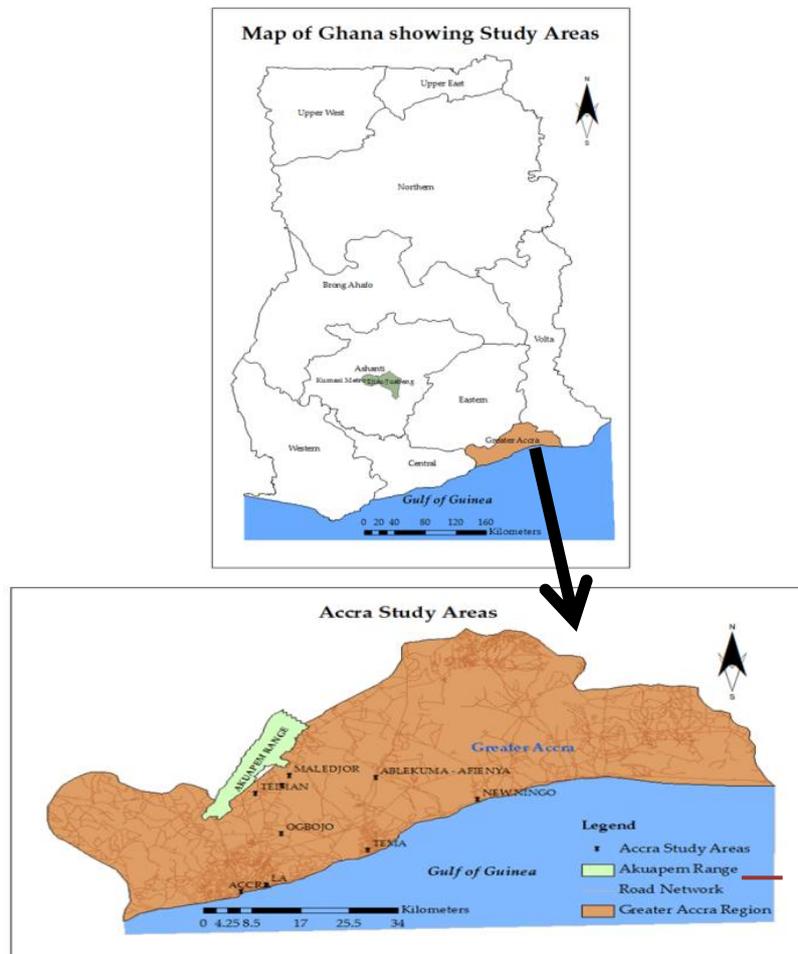


Figure 1: Case study Area

Most of the La rural lands were seized from Nungua in 1690 (Tsuru III & Sai, 2010). Nii Odai Atsen II and his Mankralo Okang Mashie fought and defeated the Nungua and gained access to a large tract of land stretching to the Akuapem Hills.

La Stool Lands were settled by subjects of the La. Such settlements owe allegiance to the La Stool. The La Stool is the allodial owner of such lands (Tsuru iii & Sai, 2010). Heads of La rural villages make grants to subjects of La for subsistence farming or for construction of dwelling units. Grants to strangers are only valid with the prior approval of the La Chief (Mantse). His signature on the document indicates approval (Tsuru III & Sai, 2010).

Not all La ancestral villages accept that the La Chief should control their land. Although Amrahia, Maledjor, Ogbojo, and Teiman all claim La as their ancestral town, only Maledjor and Teiman consider their land as Stool lands. Amrahia and Ogbojo are considered family lands and therefore the Chief of La has no control over land in these towns. The chief and people of Ogbojo had to contest this, as far as to the Supreme Court, the highest judicial body in Ghana, before the 20-year land dispute was brought to a close. The youth of Amrahia, Maledjor and Teiman strongly oppose the idea of their land being under the control of the La stool (Akrofi, 2013). The leaders of Ogbojo have contested the matter in the law courts.

2.1 Ogbojo

Ogbojo is bounded to the south by Mpehuasem, on the north by Ashalley Botwe and Sraha and on the west by Madina (Nkwantanang). It has no boundary disputes with any of its neighbours. The traditional leaders have lodged the Supreme Court ruling with the Title Registry to protect their land (AO1, pers. comm., 2011). The rapid urbanisation of Ogbojo is attributed to the relocation of people from Nima at Madina in the 1970s during the construction of the Nima Highway (AO1, pers. comm., 2011) and other urban infrastructure in the vicinity.

Ogbojo is a fast developing peri-urban area in Accra situated very close to East Legon, a first-class residential area in Ghana. Land in Ogbojo is in high demand because of its geographic location, near renowned educational institutions, such as the University of Ghana, the Institute of Professional Studies and the Institute of Local Government Studies.

The founder of Ogbojo was Okotse Adjah (also called Torgbortse Adjah), who found the land unoccupied through hunting and searching for medicinal herbs around 1730 (AO1, pers. comm., 2011). Nii Okangfio later joined him and together they established Ogbojo village. The descendants of these two men claim ownership over Ogbojo land (AO1, pers. comm., 2011). Consequently, the Anahor and Dzrase families claim absolute right over Ogbojo land. Although they admit they are originally subjects of La, they assert that the La stool has no proprietary title right, or interest whatsoever in Ogbojo village or lands (AO1, pers. comm., 2011). Da Rocha and Lodoh (1999) argue that the acquisition of the allodial title was as a result of “discovery by hunters or pioneers of the stool of unoccupied land and the subsequent settlement thereon and use thereof by the stool and its subjects. The allodial title accrues in such circumstances to the community to which the occupying individual belongs, not to the individual concerned” (Da Rocha and Lodoh, 1999 pp 8). Subsequent acquisition of allodial title is either voluntary (sale or gift) or involuntary (conquest) transfers (Da Rocha and Lodoh, 1999). This has been the general perception about the initial acquisition of allodial title for vacant virgin land in Ghana, until the ruling of the Ogbojo case. On January 18, 1994, the La Mantse issued a writ of summons and a statement of claim against the chief of Ogbojo, and placed a perpetual injunction restraining the chief and elders of Ogbojo from disposing of land without the approval of the La stool. The High Court dismissed the case because the people of Ogbojo and their ancestors occupied the land as their property before 1865, without

any interruption from the La stool. The land has been treated as family land for all the subsequent years. The judge asserts that the La stool is putting up claims for the Ogbojo lands because of the commercial value the land has now gained (Tsuru III & Sai, 2010).

The La stool filed an appeal in the Court of Appeals and on the 17th of January 2008, the Court of Appeal set aside the judgment of the Trial Court and declared Ogbojo lands as part of La rural lands, which belong to the La Stool (Tsuru III & Sai, 2010).

The Chief and people of Ogbojo, led by the current Chief, Joseph Nii Torgbor Obodai, appealed to the Supreme Court and on the 15th of July, 2010, the court ruled in their favour.

It must be stressed that it is the allodial title that is in issue and therefore on the facts of this case, clearly the position is that either the appellant or the respondent has that title. ... It must also be stressed that it is the respondent's case that apart from grants to La citizens no form of grant of La lands can be made to a stranger except by the La Stool. Quite clearly where the alleged allodial owner as here, sits down and watches grants of virgin land to strangers without timeous objection such a person cannot seriously claim an allodial title to the land in question, (Tsuru III & Sai, 2010, 7).

This is a landmark case because customary law asserts that long and uninterrupted use by member of a stool does not extinguish the allodial rights of the stool in favour of the occupants (Ollenu, 1962). This case demonstrates that, if members of a stool assert their claim that land belongs to them absolutely, and refuse to recognise the allodial title for more than 12 years (the Limitation Decree [NRCD54], 1972), the allodial owners may lose their title. The La Stool lost the case because they stood by and never raised any objections to the alienation of Ogbojo lands to strangers, neither did they make any grants of their own in Ogbojo. “Long and uninterrupted possession, occupation, coupled with the incidents of ownership and occupation together with the overt acts of ownership are crucial in any determination between rival claimants of allodial title ... where one of the claimants is a Head-Stool and the other a sub-stool” (Tsuru III & Sai, 2010: 59). This landmark ruling is likely to have enormous effect on stool lands throughout the country. The next sections examine how the traditional leaders in Ogbojo are managing their allodial land.

2.1.1 Land administration in Ogbojo

The people of Ogbojo practice patrilineal inheritance. Most indigenes live in their fathers' home. The urban sprawl of Accra reached the village, mainly as a result of resettlement of a community displaced due to the construction of the Nima Highway. Agricultural lands were converted to residential use and a residential layout of properties developed. Indigenes were allotted plots to build their own houses and in return they paid ‘drink money’ to the elders of the community as their indication of appreciation (AO1, pers. comm., 2011). The ‘drink money’ was a token and also served as evidence that a particular parcel of land had been given to specific community members (AO2, pers. comm., 2011). “We were made to pay the ‘drink money’ because the elders claimed it

was part of our culture; some parents paid for their children who could not pay or did not want to pay” (AO4, pers. comm., 2011). Both males and females were given land without gender-based discrimination (AO1, pers. comm., 2011). The granting of equal rights to land for males and females in a patrilineal area is not a normal practice and the female beneficiaries expressed their gratitude to the elders.

Some of the youth sold their plots to strangers and returned to the homes of their fathers within a matter of months (AO1, pers. comm., 2011). The sites for the indigenes were on the outskirts of the town and they were advised not to sell their plots, but some sold their land to provide capital to enter the other business including transport, which they could not sustain (AO1; AO2, pers. comm., 2011). Training in skills required for alternative ways of making a living is vital for the youth, especially for those who are not well-educated, since all the farm lands are being converted to residential use (AO1; AO2, pers. comm., 2011).

2.1.2 Land reserves

There are pockets of land left for future generations and the elders are doing all they can to protect them. One strategy for doing this (AO1, pers. comm., 2011) is to raise the price of land. However this is not working: “Whatever you say people should pay for land here, they are ready to pay, the price does not scare them. People are desperate to build and live in Accra” (AO1, pers. comm., 2011). This is an indication that raising the price of land is not a sufficient deterrent to stop urban sprawl. Brody (2013) posits that sprawl results from a complex set of interrelated socioeconomic and cultural forces. Land value, however, is often considered the chief driver of urban sprawl along with population growth and rising income levels. There is pressure on land owners to utilise every available piece of land, even lands that had been compulsorily acquired by government. “The government took some land without compensation and the purpose for which it was taken is being abused. Strangers are taking over the land so we petitioned the government through our lawyer and they saw that we were right” (AO1, pers. comm., 2011). There is a growing demand by communities throughout Ghana for government to return unused land, which had been compulsorily acquired, to former owners (Akrofi, 2013). The government has promised to release some land to the Ogbojo community, and it is hoped that this can be conserved for future development (AO1, pers. comm., 2011). In addition, a large tract of land has been given to estate developers for rental residential development. The land has been given as the family’s share of the investment. It is anticipated that upon completion each family will receive cash dividends regularly to supplement their income. These investments will benefit future generations (AO2, pers. comm., 2011). This is an innovative way of ensuring that the Ogbojo indigenous community have perpetual rights in their land.

Traditional leadership is closely linked with land management and if there is no reserved land, traditional leadership may run into trouble (AO1; AO2, pers. comm., 2011). An example is given of a neighbouring community, Nkwantang, whose land is exhausted. The chief is dead and no one

wants to take up the position because there is no land to generate revenue for development (AO1, pers. comm., 2011). The Chief of Ogbojo is of the view that if care is not taken to preserve land for the various traditional areas, the issue of culture and the whole institution of chieftaincy may disappear. The pressure on land in the area is enormous, however, community rights in the land can be preserved by entering into partnerships approaches with developers, such that, the perpetual rights of indigenes and traditional leaders can be ensured.

2.1.3 Distribution of land proceeds

The government and the District Assembly is doing very little to help in terms of developing the area. The elders have made land available for the development of a Polyclinic but response from government has not been encouraging (AO1; AO2, pers. comm., 2011). The elders of Ogbojo initially agreed to divide all land proceeds into three portions. One portion was earmarked for the land-owning families, another for infrastructure development and the third for investments in the town (AO1, pers. comm., 2011). This arrangement was aborted when some elders insisted that all moneys should be shared (AO1, pers. comm., 2011). An elder (AO2, pers. comm., 2011) explained that "... keeping some money for infrastructure development is laudable but in the absence of regular channels of accountability, and lack of visible signs of infrastructural development, it is difficult to trust authority" (AO2, pers. comm., 2011). Accountability and transparency are crucial ingredients for efficient customary land administration; absence of these vital principles of good land governance poses a setback for development.

2.1.4 Record keeping

The chief started by keeping record of land transactions in a notebook. Hard copies of indentures are also kept at a safe place (AO1, pers. comm., 2011). However, when he was busy fighting litigation, the records were not kept up-to-date. Currently Ogbojo depends on the Lands Commission records, since purchasers are encouraged to register their plots with the Land Title Registry. Thus, those who do not register their titles with the Lands Commission are not captured in the records (AO7, pers. comm., 2011). The land surveyor also keeps some records (AO1; AO7; AO9, pers. comm., 2011). The chief and elders work in close association as far as land records are concerned. The land surveyor stays in the community and is responsible for all survey works in Ogbojo (AO12, pers. comm., 2011). The need for an up-to-date record of land in the community is vital to prevent disputes or aid dispute resolution, since the community is no longer homogeneous as more and more strangers acquire rights in land in the area.

2.1.5 Dispute resolution

There is a committee of 23 elders who meet every Tuesday to settle disputes. Anyone living in the community can approach any of the elders who live among them, or they may appear before the Committee of elders anytime and put across his grievances. The appearance of disputants before the Committee is an expression of confidence in the Committee (AO1, pers. comm., 2011). In the

unlikely event that a disputant does not agree to the settlement reached, he/she can take it to the formal courts (AO2; AO7, pers. comm., 2011).

Sometimes encroachment and trespass cases are sent to the police, but this avenue is seldom straightforward and the formal courts are expensive for most peri-urban dwellers (Akrofi, 2013). Consequently most disputes are handled by the committee of elders (AO3, pers. comm., 2011).

No violent dispute has erupted between indigenes and strangers in Ogbojo (AO1; AO2; AO3; AO5; pers. comm., 2011). However, there are some disturbing incidences between indigenes and strangers that are worrying to the elders:

- Renaming of new areas e.g. ‘Nanakrom’, ‘New Ogbojo’, ‘Shalom Town’ etc. There is a strong objection to these names by indigenes (AO3; AO5; AO8, pers. comm., 2011).
- Political party issues: An incidence was cited where people from a particular tribe wanted to replace an indigene as chairperson of a political party in the area because they claimed he was not doing his work well (AO1; AO9; AO11, pers. comm., 2011). Timely intervention of the elders saved the situation from becoming violent.
- Sale of land by indigenes without the right documentation to strangers (AO1, pers. comm., 2011).

Ogbojo is apparently free of major land disputes due to the effectiveness of the committee of elders in resolving disputes. However, there seems to be structural incompatibility between the goals of strangers and indigenes, which has the potential to lead to open conflict as evidenced by the opposition of the elders to renaming of settlements. The development of a conflict resolution institution with representation from all factions of the community may ensure continuous harmony.

3. Conclusion

The outcome of the Ogbojo land dispute is very significant in many respects. Firstly, it gives the local chief and his/her elders power in administering their land taking into consideration the local prevailing conditions, without fear of an external influence. It also serves as a warning to other allodial owners in Ghana that the government (judiciary) will not stand aloof for traditional authorities to abuse power in the name of custom.

The study also highlights some of the challenges of traditional leaders in administering land, especially in the areas of record keeping, disbursement of land proceeds and dispute resolution. Further research is required in building knowledge and capacity in areas such as Ogbojo and to develop tools to assist customary leaders to be more efficient in land administration.

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