

**WOMEN'S RIGHTS TO INHERIT LAND  
CASE STUDY OF EMBAKASI CONSTITUENCY, KENYA**

**BY**

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**CERTIFICATION**

The undersigned certifies that, she has read and hereby recommends for acceptance by the Kampala International University a dissertation titled Women's rights to inherit land: Case Study of Embakasi Constituency, Kenya, in partial fulfilment of the requirement for the Degree of Bachelor of Laws.

SIGNED



DATE

9/7/2010

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**DECLARATION**

I, KIBUNGI S. WANJIRU, do hereby declare that the work presented in this dissertation is my own, except where acknowledged, and it has never been submitted or examined in any university as an academic requirement for any award.

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## DEDICATION

*I dedicate this research to my mother Catherine Njoki who is forever in my heart  
and also to my father J.S Kibungi for being inspirational in my life.*

KIBUNGI S.WANJIRU  
JUNE 2010

## ACKNOWLEDGEMENT

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## LIST OF INTERNATIONAL INSTRUMENTS

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The African (Banjul) Charter on Human and Peoples' Rights (African Charter)

Convention on the Elimination of All Forms of Discrimination against Women  
(CEDAW)

Universal Declaration of Human Rights (UDHR)

The International Covenant on Civil and Political Rights (ICCPR)

## LIST OF STATUTES

The Constitution of Kenya (1997)

The Land Disputes Tribunal Act, (2004) Cap. 287

Land Disputes Tribunals (Forms and Procedure) Rules, 1993, (2004) Cap. 287

The Married Women's Property Act, (1882) Cap. 75

The Judicature Act, (1967) Cap. 8

Land Control Act, (2004)

Law of Succession Act Cap 160

Registered Land Act, Cap 300 of laws of Kenya



## LIST OF CASES

1. **Elizabeth Wambui Wanjohi v Official Receiver & Interim Liquidator**  
(Civil Application No.140 of 1988)
2. **Fathiya Essa v. Mohamed Alibhai Essa, (1995) Civil Appeal 101 of 1995**  
(H.C. Nairobi) (unreported)
3. **Jacinta Wanjiku Kamau v. Isaac Kamau Mungai C2006) 59 K.L.R. 9**  
(C.A.K.) (Kenya)
4. **Hyde V Hyde [1861 - 73] ALLER 175**
5. **Esiroyo V Esiroyo. [1973] E.A 388**
6. **Kanyi V Muthiora [1984] K.L.R 712**
7. **Mukindia Kimuru v Margaret Kanario Nyeri court of Appeal civil Appeal**  
no.19/1999
8. **Advocacy for Women in Uganda v Attorney General Constitution petitions**  
Nos.13/05&05/06 [2007] UGCC.
9. **Uganda Association of Women Lawyers v The Attorney General**  
Constitutional petition No. 2 of 2002

## CHAPTER ONE

### 1.0 INTRODUCTION

The right to inherit land is a cross-cutting right that traverses the realm of civil, political, economic, social and cultural rights. It's central to the true empowerment of all in the society and is key developmental right. It is the common right to all societies and cultures and a right that was shared by all members of the community (men, women and children) in all cultures. It is therefore central to securing the dignity of all members of society.

The Constitution of Kenya provides for the fundamental rights and freedoms of the individual under **Chapter Five**<sup>1</sup>. These rights and freedoms are accorded to both men and women which include protection from deprivation of property as provided for under **section 75(1)** of the Constitution of Kenya. This section is to the effect that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired. This in essence means that every person has a right over property.

**Section 70** of the Constitution guarantees the enjoyment of the fundamental rights and freedoms to every person in Kenya irrespective of race, tribe, and place of origin, colour, creed, or sex. Despite the provisions of section 70 of the Constitution, **section 82** of the Constitution which is concerned with protection against discrimination affects more women than men.

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<sup>1</sup>The Constitution of Kenya Revised Edition 1992

The key legislation in regard to the subject matter which is the rights of women to inherit land is the Law of Succession Act of Kenya. The succession Act was the result of deliberations of a presidential commission appointed in March 1967 to recommend a new comprehensive and uniform code on succession to apply to all persons. It has been hailed as an achievement toward ensuring equality of both sexes. However, a number of provisions of the Act leave doubt on its effectiveness in curbing persistent discriminatory practices hence the need to carry out the research.

In Kenya there are many instances which portray the denial of rights to women to inherit land. A good example is that of Angeline Siparo which led to the carrying out of this research.

On November 20, 2002, a few months after burying her beloved husband Billie, Angeline Siparo, an educated, articulate Kenyan woman, fired off an e-mail heard round the world. With the subject line, "gender dimensions of loss," her e-mail began:

Through this experience of losing Billie, I have learnt some things about the gendered experience of loss: Within the Kenyan community — and this is regardless of whether you are Luo, Luhya, Maasai or Kamba — as a woman you own nothing and have no right to property. If and when the woman is economically empowered, this is then used as an excuse that she does not deserve anything more and she can make 'her own money'. I have learnt the difference between having laws in books and enforcement of these laws.

Siparo, Kenyan by birth, runs the country office for the POLICY Project in Nairobi. Her e-mail went to several people within the USAID and collaborating agency world, including

the Interagency Gender Working Group. Since that time, there have been many assessments, many blueprints, and some action. First, Angeline's story has spread. Second, attention has been drawn to the situation of women in Kenya and particularly to women's inheritance rights there. And third, advocacy projects on women's inheritance rights in Kenya have been supported and strengthened.

### Angeline's Story

When Angeline's husband Billie died on August 21, 2002, from complications of meningitis, she was to come up against traditions and customs that she had never anticipated. On the morning that Billie passed away, his mother, who had been living with Angeline, suddenly moved out. That same morning Billie's family (with whom Angeline had had a good relationship) seized the trucks from a transport business that Billie and Angeline had owned together.

*"When I tried to pick up my trucks," Angeline remembers, "the police were called in and there was a huge row outside the police station."*

What followed was a court battle, intimidation, and harassment that went on for more than a year. "I remember being tailed," Angeline says.

*"One night at 3 a.m. three people came to my house with guns and harassed the night watchman. I was so scared. I locked myself in the house every evening at 7 o'clock."*

Eventually, one of Billie's brothers told Angeline that he wanted to discuss the property situation. They underwent arbitration and came to a settlement. "But Billie's family went back on their word," Angeline says. Despite the painfulness of this second betrayal, Angeline believes her willingness to undergo arbitration (as well as the fact that her

father's friend, who was a Justice of the High Court, stood by her) was very important to the final disposition of the case.

In July 2003, Angeline won her court case. One of Billie's brothers, Angeline says, testified that they had indeed undergone arbitration and what had been "set down" had been true.

Angeline said,

*"this brother did a 360-degree turn because his wife said to him, 'Do you realize what you have done to Angeline, your brothers would come and do to me... and I don't even have a job. I would be left penniless'."*

## 1.1 The Situation in Kenya

Since Angeline's ordeal began, a new government has come to power in Kenya and a new constitution is expected, albeit still delayed. But how much has changed for the women of Kenya, who, according to a report by Human Rights Watch constitute 80 percent of the agricultural labor force and provide 60 percent of farm income, yet own only 5 percent of the land?

When asked if she has seen improvements as a result of the new government, Angeline says that she believes there is less intimidation by police now and that more stories are being covered by the media.

*"While the government has not yet honored a lot of its promises, what I have seen is a more open government where I no longer fear speaking up or police intimidation.... This is now the time to do things around women's rights, for sure."*

Angeline adds that there are indeed laws on the books that protect women's rights, but

*"as I said in my e-mail, 'there is a difference between laws in books and laws in practice.' I have gone ahead and gotten my property back, but if I had been the one to die and Billie would have been left, no one would have touched him... And, for me, that's the injustice that I want to address. Why can't a woman be left in peace?"*

In an April 2003 hearing by the Human Rights Caucus of the U.S. Congress, the briefing co-chair, Rep. Julia Carson (D-IN), said, "Now is a pivotal time to confront women's property rights abuses in Kenya and across the continent of Africa. Failure to do so will perpetuate women's inequality, doom development efforts, and undermine the fight against HIV/AIDS." In fact, the **Millennium Development Goals (MDG) Task Force 3 on Education and Gender Quality** has stressed inheritance rights as a strategic priority if the goals are to be achieved by 2015.<sup>2</sup>

A woman in rural Africa who loses her husband to HIV/AIDS often becomes the victim of local laws and traditions that prevent her from inheriting the family house and farm. This scenario is repeated every day in countries where women's rights to land and property are not recognized. As for intervention, there is no one-size-fits-all approach to promoting women's property and inheritance rights.

That fact came out of a 2008 study of local groups in Kenya and Tanzania that received grants from USAID's Office of **Women in Development (WID)**. Those that use several approaches to help women hold on to their property were most effective, the study found.

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<sup>2</sup> This website was prepared by the Population Reference Bureau for the Interagency Gender Working Group (IGWG), with funding provided by the U.S. Agency for International Development (USAID) under the BRIDGE project (GPO-A-00-00004-00).

WID awarded 20 small grants in 2001 to groups in Africa and Asia that help women gain property and inheritance rights—a difficult prospect in many cultures where men dominate political, legal, and family life.

The study highlighted challenges that women face in accessing formal court systems, including high costs, long distances, case backlogs, corrupt judges, and bad lawyers. Local dispute resolution institutions are often more accessible to women, but can be affected by the bias against women’s property rights in rural communities.

Study participants stressed the need for approaches to target more men and local authorities—including those making decisions based on customary law—if attitudes and local decision-making on women’s property rights are to truly change.<sup>3</sup>

The Law of Succession, which governs inheritance rights, provides for equal consideration of male and female children; however, in practice most inheritance problems do not come before the courts. Women often are excluded from inheritance settlements, particularly if married, or given smaller shares than male claimants. Moreover, a widow cannot be the sole administrator of her husband’s estate unless she has her children’s consent.

Most customary law disadvantages women, particularly in property rights and inheritance. For example, under the customary law of most ethnic groups, a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage. Societal

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<sup>3</sup> [frontlines@usaid.gov](mailto:frontlines@usaid.gov) (accessed 19 January 2010)

discrimination is most apparent in rural areas. Rural families are more reluctant to invest in educating girls than in educating boys, especially at the higher levels.<sup>4</sup>

Kenya's legal system contains a mix of statutory and customary law that has resulted in conflicts between overall guarantees of human rights and their extension to women and girls. Within Kenya's legal hierarchy, the Constitution supersedes any other law. The role of customary law within the Kenyan legal system is spelled out in **section 3(2)** of the **Judicature Act**, stating that "African customary law" shall govern in "civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law...."<sup>5</sup> In practice, however, the "repugnancy" exception to the application of customary law has rarely been invoked successfully in cases dealing with women's equal rights. Statutory and constitutional deference to customary law harms the rights of women under the ICESCR, and thus must be immediately amended.

## **1.2 The Succession Act Fails to Sufficiently Protect Widows**

The Law of Succession Act is a double-edged sword which somewhat serves women by providing inheritance rights, but denying them inheritance rights equal to those of men. Provisions of the Act that benefit women include **Section 38**, which states that absent a will, male and female children shall inherit from their parents equally, and **Sections 35 and 36**, which guarantee the surviving spouse a life interest in the whole residue of the net intestate estate, thus protecting against the practice of widow eviction.

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<sup>4</sup> [Elin.nordhagen@afrol.com](mailto:Elin.nordhagen@afrol.com) (accessed 19 January 2010)

<sup>5</sup> The Judicature Act, (1967) Cap 8, S.3(2) (Kenya)



However, that life interest guaranteed in Sections 35 and 36 is terminable upon remarriage if the surviving spouse is a widow. Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry. In the case of an intestate who dies and leaves behind no spouse or child, that person's property passes first to the father, and then in the case that there is no father, it devolves to the mother.

Common misapplication of the Law of Succession further disadvantages women. The law is meant to supersede customary law except in cases of livestock, agricultural land, or crops located in exempted areas of land that have been specified in the Gazette, but in practice, it is applied much less often, especially in rural areas. This is because rural communities "remain unaware of statutory laws relating to property" and are instead "inclined to use customary laws in matters of inheritance." The misapplication of customary law is not limited to the uninformed. A justice on Kenya's highest court, the Court of Appeal, stated,

***"The Law of Succession Act can't apply [to rural land in general] because women are supposed to be married and go away."***<sup>6</sup>

Widows also encounter difficulties inheriting property because of the Registered Land Act. The Act makes it highly unlikely that any of the marital property will be registered under a woman's name when her husband dies, giving greater weight to her in-laws' argument that she ought to receive very little, if any, of the marital property upon her husband's death. The negative impact of this common scenario would be lessened if the Law of Succession, which grants the surviving spouse a life interest in the estate, were enforced.

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<sup>6</sup> Human Rights Watch interview with Justice Richard Kwach, Kenya Court of Appeal in Nairobi, Kenya (November 7, 2002)

### 1.3 BACKGROUND

The current state of gender relations treats male dominance as legitimate, natural, obvious and inevitable. The effect is to create a social-power hierarchy, in the context of which women are, by-and-large, reduced to powerlessness, economic marginalization, social vulnerability, and cultural inferiority, without any regard to their actual level of contribution to the processes of social production and development.<sup>7</sup>

Women's rights to property are unequal to those of men in Kenya. Their rights to own, inherit, manage and dispose of property are under constant attack from customs, laws, and individuals including government officials who believe that women cannot be trusted with or do not deserve property. The devastating effects of property rights violations including poverty, disease, violence, and homelessness harm women, their children, and Kenya's overall development.

Women's access to most property rights was through male relatives usually husbands, fathers, brothers or sons. In most Kenya's ethnic groups a husband's clan essentially "absorbed" a woman upon marriage.

Land in particular could not be transferred without the approval of clan elders who were always men.<sup>8</sup>

Notably, although women's property rights were limited social structures protected both men and women against exclusion from land which is Kenya's most important asset.

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<sup>7</sup> Report of the Task Force for the Review of Laws Relating to Women, Nairobi, 1998

<sup>8</sup> [Http://www.hrw.org](http://www.hrw.org) (accessed 26 January 2010)

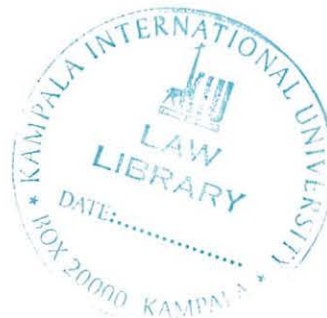
‘Within the customary tenure structure before the English system was imposed, there were elements of discrimination under the patrilineal system’, said one land rights expert.” But women were guaranteed land use rights. Control was not with men or women, but rather the elders. Everyone therefore accessed the land.

In most ethnic groups, inheritance was patrilineal. A married woman did not inherit from her parents since her husband’s family was expected to provide for her.

Women did not inherit from their husbands, but if they had sons, they could continue to live and work on the husband’s land, holding it in trust for the sons. Sometimes women were inherited by the male relatives of the deceased husbands.

After the British colonized in the late 1800s, colonial clan based property eroded as colonial authorities expropriated land ,uprooted many indigenous Kenyans from their ancestral lands , crowded them on ‘native reserves’ and later introduced an individual titling system.

The land titling system recognized men’s rights to allocate land for agricultural use as more akin to ownership, and men gained title deeds. Women’s rights to use land received no legal recognition. Their secure land tenure evaporated as land became a commodity that men could sell on clan approval.<sup>9</sup>



<sup>9</sup>Human Rights Watch interview with Odenda Lumumba, October 2002

In post-independence Kenya, decades following independence, some colonial era laws lingered and many new laws were introduced none of which adequately protected women's property rights.

Moreover, the laws of succession for the different groups in Kenya have developed along different lines. It is therefore necessary to outline briefly at the outset these different paths since they are relevant to the discussion on women's rights.

The declaration of the protectorate status for Kenya in 1895 paved way for the promulgation of the **1897 East Africa Order in Council** which at **Article 2** provided that African Customary law was applicable to natives so long as it was not repugnant to justice and morality.

However, an African who had embraced Christianity was deemed to have technically abandoned African customary law and was therefore not subject to it. **Article 64** of the **Native Courts Regulations** governed native Christians in India. It was unclear whether the law of succession would be the English law of inheritance or the Indian Succession Act. Further, the **1902 East Africa Marriage Ordinance** provided that natives married under the ordinance divorced themselves from customary law and henceforth adopted the English way of life.

Under **section 39** of this ordinance, where a person was married under the ordinance or was a child of such parents, English law applied in case of intestacy. The section was silent on testate succession and it was assumed that the applicable law was the English law of

wills. In 1904, the Native Christians Marriage Ordinance, provided that all Africans Christians or otherwise were to apply African succession law.<sup>10</sup>

Nevertheless, inheritance is about property and colonialism changed the mode of property holding to a significant extent. The introduction of new notions of property rights holding and new types of property changed inheritance patterns significantly. These changes should have opened avenues for women to inherit property but have not significantly done so due to the prevalence of notions that preclude such inheritance or ownership of property. It is thus imperative that changed gender roles are taken into consideration in determining the rights of women to inherit property.

#### **1.4 STATEMENT OF THE PROBLEM**

Women's rights to inheritance involve the rights as provided for by the Constitution of Kenya and the key legislation which is the Law of Succession Act<sup>11</sup> passed in 1972. This legislation had the objective of unifying the law of succession under the personal laws. Thus except in the case of Muslims, exempted from the Act through<sup>12</sup> all male and female children enjoy equal rights of inheritance. Thus these laws attempt to protect the enjoyment of the right to inherit land without discrimination.

However, a number of provisions under the **Law of Succession Act** leave doubt on its effectiveness in curbing persistent discriminatory practices. A good example is **Section 32<sup>13</sup>** states that the provisions of the Act on intestacy shall not apply to;

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<sup>10</sup> Patricia Kameri-Mbote, *The law of succession in Kenya: Gender perspectives in property control and management*(1995) at 15

<sup>11</sup> Cap 160 of the Laws of Kenya

<sup>12</sup> L.N 21 of 1990

<sup>13</sup> Law of Succession Act Cap 160 of the laws of Kenya

- (a) Agricultural land and crops thereon; or
- (b) Livestock, situated in such areas as the Attorney –General may notice in the Gazette specify.

Further, it is stated that under **Section 33 of the Act** the property aforesaid shall be governed by the law or custom applicable to the deceased's community, tribe, religion or sect as the case may be.

This states that property set out in **Section 32** aforesaid continue to be regulated by the various Laws of Succession which govern the four systems of family Law. This has far reaching consequences for women particularly those governed by customary law and communities where land and livestock are the most important forms of property.

This research will try to find out the obstacles that women face when attempting to enjoy the right to inherit property under the Constitution and subsidiary laws and to suggest possible solutions to such obstacles.

## **1.5 OBJECTIVES OF THE STUDY**

### **1.5.1 GENERAL OBJECTIVES**

To examine women's inheritance rights on land in Kenya as provided for under the Constitution and other subsidiary laws.

### **1.5.2 SPECIFIC OBJECTIVES**

1. To identify the obstacles that women face when attempting to enjoy the right to inherit land under the Constitution and the subsidiary laws.
2. Strategies aimed at deepening the women understanding of the legal, cultural and economic consequences of their oppression as regards their rights to inherit land.

3. To identify loopholes that are within the law which are exploited to deny women their rights to inherit land.

## **1.6 RESEARCH ASSUMPTIONS**

- i. There are specific laws that allow women to inherit land in Kenya.
- ii. There are loopholes within the laws which are exploited to deny women their rights to inherit land.
- iii. There are no unmarried women who inherit land from their parents.
- iv. There are no married women who inherit land from their deceased husbands.
- v. There are no divorced women who inherit land from their husbands.

### **1.6.1 RESEARCH QUESTIONS**

- i. Are there specific laws that allow women to inherit land?
- ii. Are there loopholes within the laws which are exploited to deny women their rights to inherit land?
- iii. Are there any unmarried women who inherit land from their parents?
- iv. Are there any married women who inherit land from their deceased husbands?
- v. Are there any divorced women who inherit land from their husbands?

## **1.7 SCOPE OF THE STUDY**

### **1.7.1 GEOGRAPHICAL SCOPE**

This study covers Embakasi constituency in Kenya where the majority of the women are faced with obstacles in their attempt to inherit land.

This is as a result of customs, cultural and statutory laws that discriminate against women concerning inheritance of land rights. The study area which is Embakasi constituency in Nairobi province of Kenya has representatives from more than five cultures that are

present in Kenya. These include the following; Kikuyu, Luo, Kalenjin, Meru, Maasai, Luhya, Kamba and Kisii communities.

### **1.7.2 TIME SCOPE**

The research covers the period between September 2009 and June 2010.

### **1.7.3 SUBJECT SCOPE**

The study examines the obstacles that women face in their attempt to enjoy the right to inherit land under the Constitution and other subsidiary laws and suggest possible solutions to such obstacles in Embakasi constituency in Nairobi province of Kenya.

## **1.8 SIGNIFICANCE OF THE STUDY**

The right of women to inherit land is very fundamental and so should be upheld by all Kenyans. This is because the Constitution being the supreme social contract has explicitly stated so. Moreover, the issue of women's inheritance rights is more important today than ever before because of its relationship to HIV/AIDS. Women, who have always been vulnerable in the region, are doubly vulnerable because of HIV/AIDS epidemic. An example is when a husband dies of HIV/AIDS, whether a woman is HIV negative or not, the in-laws will often circulate the death certificate so that the widow will be subject to stigma and discrimination in order to isolate her. She may even feel unworthy of the inheritance because of this sense of isolation. In addition some even allege witchcraft in order to disinherit the widow. A good example is that of the Kamba community of Kenya where witchcraft is still rampant.

The study will therefore help in the identification of obstacles that women face in their attempt to enjoy the right to inherit land and to suggest possible solutions to such obstacles.



The research is aimed at providing basic influence and data for further research.

There is also a need to recommend for the abolition of customs, cultural and statutory laws that discriminate against women concerning inheritance rights.

### **1.9 JUSTIFICATION OF THE STUDY**

This study focuses on how the existing institutional and legal regime in Kenya and its enforcement can be strengthened so as to improve the observance of women's rights to inherit land in the country. It also examines the international legal framework and other mechanisms in place to improve women's inheritance of land rights. This study therefore, is vital and timely during this period when the Government of Kenya is working out means for ameliorating women's plight. To that extent the study becomes a handy tool especially to policy makers, legislators, researchers, teachers, and the general public both international and local levels. The study generally adds to the realm of knowledge on the subject examined in this study.

## CHAPTER TWO

### LITERATURE REVIEW

#### 2.0 INTRODUCTION

Women's limited ability to own, acquire and control property in Kenya is the product of historical, political, legal and social developments in a society that has only haltingly addressed its extreme gender inequality.

In a book titled; *The role of property in a family structure*<sup>14</sup> the author states that the family is essentially attached to property and resources. The writer however, shows a situation whereby a woman is supported while the man appropriates property. Though the book does not conclude the status of women in particular it points out a situation where women do not own property but their needs are catered for by men while the man owns the family property as the head of the family. The author gives an example where a widow is expected to continue sharing from the family estate without individual entitlement to the husband's property.

In a research paper named; *The law of succession in Kenya; Gender perspectives in property management and control*,<sup>15</sup> it is stated that Kenya as a state cannot be easily categorized as belonging to the gender sensitive group. There is certainly no laudable policy and legislative programmes, in practical terms aimed at ensuring gender equity and social justice in the ownership, management and control of property whether within marriage or under conditions closely related to the state of matrimony. Indeed **Section 82** of the Constitution which permits discrimination on the basis of sex in matters regarding

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<sup>14</sup>Robert Gray, family Estates in Africa.

<sup>15</sup>Published in Nairobi: women and law in East Africa, 1995 by Dr. Patricia Kamari-Mbote

succession, that is devolution of property on death or other matters of personal law. The research paper goes ahead to show that **Section 82(4) (b)** which permits discrimination with respect to personal law and customary law negates any measures aimed at achieving justice in the distribution of matrimonial property. It is important to note that there is need to repeal <sup>Article</sup> **Section 82(4) (b)** of the Constitution of Kenya which permits the enactment of discriminatory legislation on matters of adoption, marriage, divorce, burial, devolution of property on death or other or other matters of personal law.

In the same booklet is important to note that one of the pressures on matters of succession arises from what is regarded as the dichotomy or continuum between traditional African and Western approaches to succession. Mainstream Western Jurisprudence locates matrimonial property within the narrow confines of the family. The family being defined in terms reminiscent of **Hyde v Hyde**<sup>16</sup> to consists of the man, one wife and children of the marriage. In Kenya, customary law and practice has always defined and regarded the family in more expansive terms.

Matrimonial property in African customary law is managed and controlled in a manner that benefits the extended family. In case of land for instance, where there is a family consisting the extended family and not the mother or wife. However, in the case of **Mary Anne Kivuitu v Samuel Kivuitu**<sup>17</sup> Justice of Appeal Gachuhi remarked in Kivuitu's case that "the time when an African woman was presumed to own nothing at all, and all she owned belonged to her husband and was regarded as a chattel of her husband has long gone".

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<sup>16</sup> [1861-73]ALLER 175

<sup>17</sup> (1991/92-Kenya Appeal Reports 241)

In essence this booklet addresses the question of succession or inheritance vis –a-vis the Kenyan woman. It also examines the link between marriage and succession and land law and succession.

The issue of contention as elucidated in this booklet is that the introduction of western and property laws has adversely affected women in Kenya. In the case of land for instance, where one person has to be registered as proprietor, it would be the eldest male relative and not the woman (widow or eldest daughter). Where a family member is registered as an absolute proprietor under the RLA (**Registered Land Act**), he can disinherit his wife /mother and children/siblings.

In the book; *Women's Land Rights Privatization in East Africa*<sup>18</sup> the vast majority of married women, interests in family land are held on account of marriage relationship which for most women is based on customary law. Unmarried daughters living on land registered in their fathers' or brothers' names are in a similarly precarious position. In the absence of legal recognition of customary interests registered, the entitlements of women in these situations have no independent legal existence. The Kenyan Court of Appeal ruled in 1988<sup>19</sup> that a wife's interest under customary law cease to exist once her husband becomes the formally registered owner. Therefore as a widow she could not rely on her customary law entitlements in the face of third parties with competing registered claims, in this case, the financial institution to which the land had been mortgaged.

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<sup>18</sup>Edited by Birgit Englert&Elizabeth Daley

<sup>19</sup> Elizabeth Wambui Wanjohi v Official Receiver & Interim Liquidator (Civil Application No.140 of 1988)

In another report; *The right of women to inherit property*.<sup>20</sup> Emerging legal and social trends, as they relate to the ownership and inheritance of property, indicate a practice that has largely worked out to the detriment of women is virtually all communities and social classes in Kenya. They include the laws relating to property, to marriage and dissolution of marriage, the land registration systems and the social and cultural attitudes that determine the actual enjoyment of this right.

There is also the increasing alienation of women and the emerging trends of the abandonment of community responsibility on the care of the vulnerable within society. Most of the resources in the country are in the hands of men. Women own less than 5 % of land in the country based on a report by the Jaramogi Oginga Odinga Foundation yet they provide bulk of the workforce in agriculture and are the main managers of family land for subsistence farming; only a small percentage of women can access credit since the majorities don't have property in their names. Although experiencing relative political stability, poverty and traditionalism remain two serious obstacles to women's equal rights in Kenya. Government policy, legislation and the media favor women's rights, but the traditional low status of women is hard to overcome in Kenyan society. Kenya is however one of the African countries that has gone furthest in addressing women's rights.

In a booklet; *The Case for women in the proposed new Constitution of Kenya*<sup>21</sup> Kenya Land Alliance holds the view that the denial of women's land rights is a key contributing factor to their inability to overcome poverty. Thus from whichever vantage point, the proposed New Constitution presents an opportunity toward outlawing the discriminatory

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<sup>20</sup>Jaramogi Oginga Odinga Foundation

<sup>21</sup> By Kenya Land Alliance Publishers

customary and social practices that are largely responsible for women's inequalities. Therefore, to redress the ever-widening gender asset gap in Kenya, it is important that the Constitution as a supreme social contract in the society provided for women's land rights. Otherwise women's enjoyment of full and equal rights and freedoms is likely to remain illusory and subject to whims of tradition and political expediency.

In the book; *Restatement of African Law, Kenya*,<sup>22</sup> Cotran states that since discriminatory customary law often prevails in matters of inheritance, widows in Kenya suffer human rights violations on the basis of their sex and marital status. Some widows are evicted by in-laws who use customary law to claim that a widow has no right to her deceased husband's property. Others are coerced into marrying a male in-law, "inherited" by him as part of their husbands' estate, and evicted from her home and banished from the community if they refuse. Still others are forced to have sex with a "jater," originally the levir in some communities<sup>23</sup> and today known as a professional cleanser who rids the widow of her deceased husband's evil spirits, because the village elders insist that custom demands it. These practices violate the ICESCR protections for non-discrimination, an adequate standard of living, including housing, and the best attainable standard of health. They lead to still more horrific consequences for the widow and her children, including increased risk of HIV-infection, poverty, and life in the slums.

A report by Kenya Land Alliance and FIDA Kenya provides that Kenya's land statutes discriminate against women by (1) vesting in men absolute sole ownership rights to

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<sup>22</sup> By Cotran succession ,at 167(1969)

<sup>23</sup> For an example in the Luo community, see COTRAN, RESTATEMENT OF AFRICAN LAW, KENYA, vol. 2 succession ,at 167(1969)

registered land; (2) invoking customary law which generally confers exclusive control of land to men to govern land rights, and which is insulate from appeal and judicial scrutiny. Kenya has over 75 land laws, which create a confusing and anachronistic legal framework that fails to recognize women's land rights.<sup>24</sup> In the draft National Land Policy, the government acknowledged the injustices this framework has caused, in particular to women.<sup>25</sup> The bodies that govern land lack adequate procedural safeguards to protect the rights of women because: women are nearly absent from land bodies; the land disputes procedures remain biased against women; and husbands may sell matrimonial land without their wife's consent.

In a report titled; *Breathing life into dead theories about property rights in rural Africa*<sup>26</sup> it is stated that exclusion from formal title renders women's interest in family land insecure. Moreover, the formalization process reinforces the existing relative insecurity of women's customary land rights. Formalization of title has therefore become synonymous with transformation and increased visibility of men's control over land and the simultaneous disappearance or invisibility of women's established usage rights. In addition, even in countries where in countries where recent reforms have required special attention to the property interests of wives and ex-wives, there is still evidence of practices that circumvent the law and result in dispossession.

Nyamu-Musembi in the same report continues to state that the weakening of women's claims to family property is illustrated by the manner in which courts have decided cases concerning property in Kenya. Since there is no Act of parliament specifying the rights of

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<sup>24</sup> Kenya Land Alliance and FIDA Kenya, policy brief: women, land and property rights and the land reforms in Kenya.

<sup>25</sup> Ministry of Lands, National Land Policy

<sup>26</sup> Celestine Nyamu- Musembi

spouses to family property following marital breakdown, courts apply an English statute, the Married Women's Property Act of 1882. This statute follows the common law doctrine of separate property which means that each spouse retains as personal property whatever he or she owned before marriage as well as what he or she acquired during marriage. The property holding unit is the individual, not the family unit. Marriage alone does not confer a proprietary interest on the other spouse. Further, regardless of the duration of a marriage, a wife must strictly prove her contribution to the assets required during the marriage.

The research report; *Women's Access to Land and their role in Agriculture and decision making on the farm*<sup>27</sup> the empirical work conducted by Achola Pala in the Luo community in western Kenya illustrates the aspect of the general gendered effects of formalization. It is shown that in the Luo language, the term for owner of land (*wuon lowo*) is understood in two levels. First, it refers to the person often male generally in the position of a grandfather, who has the right to allocate land to others. At the second level, it refers to a person male or female who has a recognized right to use a particular piece of land over a long period of time. This right exists by virtue of his or her relationship to the person who has the authority to allocate land. Achola Pala argues that the process of formalization of title has focused on the first level only which is exclusively male and ignored the second sense of land ownership which would allow for more gender inclusiveness. In essence only men end up registered as owners of land.

In equating ownership of land to only the first sense of *wuon lowo*, the process transforms men's allocate authority into an absolute right of ownership which includes the

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<sup>27</sup> Pala, Achola O, 1983, Journal of Eastern African Research and Development, 13



right to alienate land without any safeguards for the rights exercised by women and other family members as owners and users of land in the second sense.

A report named; *Gender and Land Rights in Murang'a District, Kenya*<sup>28</sup> the writer makes an argument regarding the protection 'lesser rights' and the rendering of men's interests in land into rights of outright ownership. She goes on to argue that the precarious position of these 'lesser rights' is made less secure in light of the weakening of social institutions that would otherwise have played a supervisory role in the way men exercise those interests.

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<sup>28</sup> Mackenzie, Fiona, 1990, *Journal of Peasant studies* vol.17/4,609

## **CHAPTER THREE**

### **METHODOLOGY**

#### **3.0 INTRODUCTION**

This chapter comprises of research design, study area and population, sample techniques and size, data collection methods such as interviews, questionnaires, observations, data processing and analysis, and the limitation of the study.

#### **3.1 RESEARCH DESIGN**

The researcher used the most suitable design which gave successful results to the study.

The qualitative and quantitative methods of research gave the deeper effects of women's rights to inherit land in Kenya.

The researcher adopted the qualitative research simply because it is mainly an analysis of existing phenomena with reference to the existing studies done by other researchers. In the case of the topic women's rights to inherit land, the researcher is basically interested in the quality of the law and also its application. The question then is whether the law addresses the issue of women's rights to inherit land or not.

The main tools of data collection under this type of research are in-depth interviews and document analysis.

On the other hand, the researcher adopted the quantitative because the study called for the phenomena relating to the employment of formal methods of data collection such as questionnaires.

The information found in this research also includes description of qualitative data and presentation on tables.

### 3.2 STUDY AREA AND POPULATION

The study involved both men and women in Embakasi constituency of Nairobi province.

This constituency consists of different cultures among them the Kikuyu, Luo, Kamba, Kalenjin, Maasai, Kisii and Luhya communities. Women and men in this constituency were selected randomly. These included the married, unmarried and divorced women, the clergy, journalist, farmers and even professionals like lawyers.

**Table 1 Target population**

<b>Category</b>	<b>Frequency</b>
Married women /widows	8
Unmarried women	2
Divorced women	5
Clergy	2
Lawyers	3
Journalist	1
Men	6
<b>Total</b>	<b>27</b>

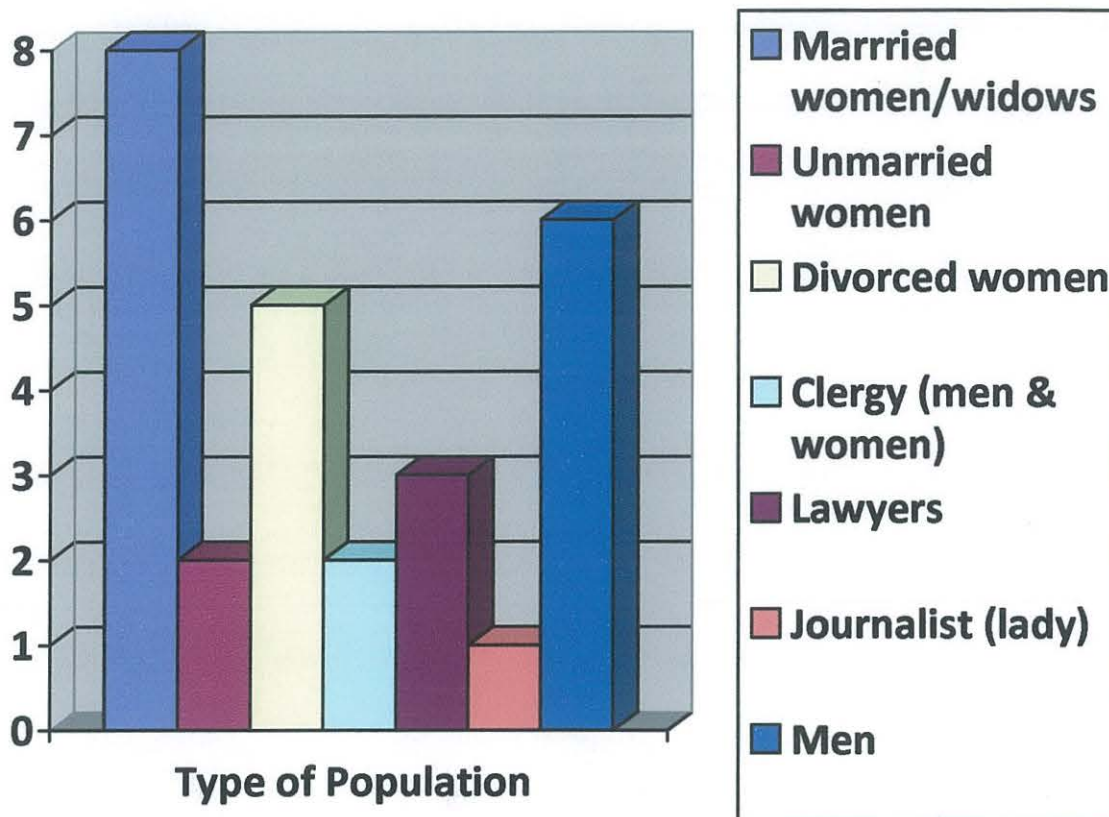


Figure 1 Graph showing the type of population interviewed

### 3.3 SAMPLE TECHNIQUES AND SIZE

The researcher used random sampling, use of questionnaires and observation so as to cover a broad section of the community to be interviewed.

### 3.4 DATA COLLECTION

#### 3.4.1 INTERVIEWS

The researcher mainly used face-to-face interviews. This is a direct conversation between the interviewer and the respondent with a purpose of eliciting certain information from the respondent. In the research, the main respondents were both women and men where adequate information was obtained in relation to women's rights to inherit land. Nevertheless, Interviews were advantageous in the research because they provided a fast

hand experience and personal contact with interviewees. They also provided high capability for facial validation which is instrumental in gaining insight into the reasons for certain responses from participants.

### **3.4.2 QUESTIONNAIRES**

A questionnaire is a set of interrelated questions used to obtain information from the respondent. Questionnaires were used in the research because they provided the respondents a chance to objectively give their opinions and in return enabled data to be collected over a large area. They also enabled the respondents to fill them in at their convenience which reduced bias and incomplete responses attributed to lack of time and being timid in the presence of the researcher. Moreover, questionnaires were used mainly because they were cheaper than personal interview. In using questionnaires as a method of data collection, the researcher was targeting the study population that could read and write for instance the professionals who normally had tight schedules to spare time for personal interviews.

### **3.4.3 OBSERVATION**

Observation is a purposeful, systematic and selective way of watching and listening to an interaction or phenomenon as it takes place. It is appropriate in situations where full and or accurate information cannot be elicited by questioning, because the respondents either are not so cooperative or are unaware of the answers because it is difficult for them to detach from the interaction. In essence the researcher used the mode of data collection because she was interested in the behaviour than the perceptions of individuals. The other advantage that led to the use of observation as a mode of data collection was because it provided the researcher with the chance to validate responses from the respondents with

what is actually on the ground on a first hand basis. The target population in this case was the widows who are often kicked out of their matrimonial home by their in-laws.

### **3.5 DATA PROCESSING AND ANALYSIS**

Data processing and analysis refers to bringing information together used in deciding or discussing something. A good example is in relation to the research topic which is women's rights to inherit land, where information was brought together in order to come up with solutions to the research questions. Data was therefore sorted manually and qualitative data analysis was used as well.

### **3.6 LIMITATION OF THE STUDY**

There was a poor response by the Respondents. This problem was solved by using a method of data collection appropriate in situations where full or accurate information cannot be obtained by questioning such as observation. This is because in most cases poor response of the respondents was evidenced in cases of obtaining information by use of questionnaires and also while conducting interviews.

There was also limited time in which the research was carried out and this resulted to interruption with the researcher's studies. This was remedied by spending more time than expected in carrying out the research.

The other limitation was in regard to numerous expenses involved in the research which included travel expenses and also costs of printing the research work. To overcome all these limitations in terms of expenses, there was more financial support from the parents.

## **CHAPTER FOUR**

### **DATA ANALYSIS, PRESENTATION AND INTERPRETATION**

#### **4.0 INTRODUCTION**

This chapter deals with the analysis of data obtained from interviews and questionnaires as obtained from various respondents. Through the information gathered from the raw data, the researcher discusses various issues related to the study on women's rights to inherit land.

In addition, the International and National Legal instruments in relation to the study are briefly discussed in the same chapter.

#### **4.1 INTERNATIONAL LEGAL STANDARDS**

The International Human Rights Law proscribes discrimination on the basis of sex. It sets out certain civil, political, economic, social and cultural rights and requires Governments to respect and fulfil those rights in a non-discriminatory manner. Human rights law also contains the principle that states have a duty to affirmatively protect human rights even from abuses committed by private actors.

Kenya has ratified or acceded to international human rights treaties and has obligations under them, including in respect to women's property rights. For example Kenya has ratified the following treaties; **Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**<sup>29</sup>, the **International Covenant on Civil and Political Rights (ICCPR)**<sup>30</sup>, the **International Covenant on Economic, social and Cultural**

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<sup>29</sup> Entered into force September 3,1981 and acceded to by Kenya on March 9,1984

<sup>30</sup> Entered into force March 23,1976 and acceded to by Kenya on May,1 1972

rights (ICESCR)<sup>31</sup>, the Universal Declaration of Human Rights (UDHR) and the Banjul Charter on Human and Peoples' rights<sup>32</sup>

CEDAW obliges states to "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation" and to take all appropriate measures to eliminate discrimination against women by any person organization or enterprise.<sup>33</sup>

It also requires that states take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.<sup>34</sup> The fact that men have greater rights than women when it comes to owning, accessing and inheriting property like land in the Constitution, the Law of succession Act and customary laws violates the principle of non-discrimination.

CEDAW also recognizes that many Women's rights abuses emanate from society and culture and compels governments to take appropriate measures to correct these abuses.

CEDAW therefore requires the governments to modify the social and cultural patterns of conduct of men and women with a view of achieving the elimination of prejudices and customary and all practices which are based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.<sup>35</sup>

Kenya's laws and customs violate women's marriage and family rights under CEDAW. The coercive nature of wife inheritance arrangements, where widows do not have a

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<sup>31</sup> Entered into force January 3, 1976 and acceded to by Kenya on May, 1 1972

<sup>32</sup> Adopted June 26, 1981 by and acceded to by Kenya on January 23, 1992

<sup>33</sup> CEDAW, Article, 2

<sup>34</sup> *Ibid*

<sup>35</sup> *Ibid*, Article 5(a)



reasonable alternative and cannot choose the union freely, violates the right to choose a spouse and enter into marriage with free and full consent. Women and men have vastly different property rights especially under customary law, during marriage and its dissolution. Since women are unable to inherit and retain property upon separation or divorce on an equal basis with men, their rights are unequal to men's in respect of owning, acquiring, enjoying and disposing of property.

The right to property is also guaranteed under the **African Charter on Human and peoples' rights** which also requires that all rights be implemented in a non-discriminatory way.<sup>36</sup> On the other hand, the **protocol to the African Charter on Human and peoples' rights of women in Africa** under **Article 21** provides for the right to inheritance. That women and men shall have the right to inherit in equitable shares their parents' properties.

The **Universal Declaration of Human Rights** which is widely regarded as customary International law provides that everyone has the right to own property alone as well as in association with others.<sup>37</sup> At a minimum, this right means that men and women must have equal property rights. That is not the case in Kenya, where women have lesser rights than men to inheritance and, in practice, division and control of matrimonial property.

Women's equal right to inherit property while not explicit in International treaties can be inferred from rights to equality and non-discrimination. Moreover, several treaty bodies have recognized women's equal inheritance rights. The Human Rights Committee noted in

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<sup>36</sup> African Charter, Article 14

<sup>37</sup> UDHR, Article 14

a general comment that women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by death of one of the spouses.<sup>38</sup>

International law guarantees housing rights, which include equal rights to security of tenure and access to housing and land. The ICESCR recognizes the right of everyone to adequate standard of living for himself and the family including adequate ..... housing.<sup>39</sup>

The Kenyan government has done almost nothing to create a condition conducive to women's exercise of their property rights as evidenced by the coercive wife inheritance and cleansing practices, discriminatory laws and customs and violence women face if they try to assert their rights. Moreover, the fact that the judges, magistrates ,police officials and local authorities outright admit that they do not apply legislation and case law on inheritance and division of property demonstrates that Kenya is violating its obligation to provide an effective remedy to women's property rights violations.

## 4.2 NATIONAL LAWS

The Constitution of Kenya 1963(as amended in 1982, 1997) under chapter five provides for the fundamental rights and freedoms of the individual. These rights include the protection from deprivation of property and also protection from discrimination.

**Section 70** on non-discrimination provides that every Kenyan is entitled to the fundamental rights and freedoms of the individual whatever his or her sex; but those rights can be limited to ensure that the enjoyment of these rights does not prejudice the rights and freedoms of others or the public.

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<sup>38</sup> Human Rights Committee, General comment 28,para. 26

<sup>39</sup> ICESCR, Article 11

Section 82 of the Constitution deals with the question of discrimination. Subsection 1 of the section provides that no law shall make a provision that is discriminatory either in itself or in the effects and neither should a person be treated in a discriminatory manner by a person acting by virtue of any written law or in performance of functions of a public authority.

Under section 82 (3) discrimination is defined as affording different treatment to different persons attributable wholly or mainly to the race, tribe, place of origin or other local connection, political opinions, colour, creed or sex.

However, Section 82(4) exempts certain laws from the discrimination prohibition. It permits discrimination with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.

The laws exempted by section 82 (4) are in areas that directly affect women. One therefore finds that women's enjoyment of the fundamental freedoms guaranteed by the constitution is severely restricted.

Section 82 (4) legitimizes the traditional position which accorded women fewer privileges than men in matters concerning their families, marriage, divorce and succession. This presents problems when we seek to apply statutes such as the law of Succession Act (CAP 160) which gives both men and women equal rights in matters of succession.

Under the current constitution, women can acquire, own and dispose of property as they wish. However, under the Patriarchal (the ordering of society under which standards-

political, economic, legal, social- are set by and fixed in the interests of men) customary settings, women do not own property such as land.

The constitution's claw back clauses at **Section 82** sanctions discrimination and application of customary law and this can be used to deny women the right to own property.

As land is the most accepted form of security to acquire credit and because women generally lack land, they cannot mobilize loans to buy property.

The Law of Succession Act serves women by providing inheritance rights equal to those of men. However, there are provisions of the Act that benefit women and include **section 38** which states that absent a Will, male and female children shall inherit from their parents equally.

**Section 35 and 36** guarantee the surviving spouse a life interest in the whole residue of the net intestate estate thus protecting against the practice of widow eviction.

On the other hand, that life interest guaranteed in sections 35 and 36 is terminable upon remarriage if the surviving spouse is a widow. It is unfortunate in this case, that widowers on the contrary do not lose their life interest regardless of whether or not they remarry.

In the case of an intestate who dies and leaves behind no spouse or child, that person's property passes first to the father and when there is no father it devolves to the mother.

Exceptions and misinterpretations also undermine the Law of Succession Act. The Act was amended in 1990 to exempt Muslims, who protested the equality provisions.<sup>40</sup>

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<sup>40</sup> Act No. 21 of 1990. Muslims are subject only to Islamic laws on succession.

### 4.3 GENERAL INFORMATION

In trying to inquire on personal information, the researcher asked for information on areas pertaining;

1. Specific laws that allow women to inherit land,
2. Loopholes within the laws which are exploited to deny women their rights to inherit land,
3. No inheritance of land from parents by unmarried women,
4. No inheritance of land from husbands by widows and
5. No inheritance of land from husbands by divorced women.

#### 4.3.1 Specific laws that allow women to inherit land

Kenya's constitution outlaws discrimination under **Section 82(l)** on basis of sex, but the exemptions largely eviscerates the non-discrimination provisions. **Section 70** of the constitution provides that all Kenyans are entitled to fundamental rights and freedoms regardless of their sex.

Nevertheless, the Law of Succession Act of 1981 which attempted to bring some uniformity to succession on Kenya should have improved women inheritance rights.

**Section 38** of the Act states that absent a Will, male and female children shall inherit from their parents equally. Further, **Sections 35 and 36** guarantee the surviving spouse a life interest in the whole residue of the net intestate estate thus protecting against the practice of widow eviction.

The researcher found that most women did not know of the existence of the laws that give them the right to inherit land which is clearly enunciated in the Constitution and The Law of Succession Act of Kenya. One of the respondents, a widow from Dandora estate in Embakasi Constituency stipulated that she had no idea that the law of succession exists, and that if it exists then the problems that she faced when her husband died, (she was evicted by her in-laws from her matrimonial home) she would have sought for a legal remedy.

On the contrary, a married woman who was another respondent in the same area stated that she knew of the existence of the succession law and the draft Constitution which protects the women's rights to inherit land. However, she lamented that the biggest problem was the enforcement of the laws since the customary laws seemed to supersede the legislation, in that women under the patrilineal system are not allowed to inherit land. Another respondent, a man from Nyayo estate in the same constituency stated that he knew of the existence of the law of Succession Act but in practice only sons inherit land from their parents.

When asked whether the customs should change or get abolished, one of the respondents, a man from Civil servants estate replied, 'while making changes women shouldn't be given freedom because they will misuse property most specifically land.'

The issue of existence of the law yet there seems to be no applicability of the same was also emphasized by one of the Justices in Kenya's highest Court who told Human Rights

Watch that the Law on Succession Act can not apply to rural land because women are supposed to be married and go away.<sup>41</sup>

On the first assumption therefore, one widow, a respondent, was of the view that she was not aware of any laws that allow women to inherit land. However, a married woman stated that she knew of the existence of the laws that allow women to inherit land but the enforcement mechanisms were not active. In addition two men were of the view that there were laws that address women's inheritance rights but in practice they were not applicable. It was from the above findings that the researcher's first assumption was approved and also disapproved at the same time.

In summary, the case study to a large extent clearly shows that the practice of making laws is not simply a matter of writing down rules. The threat to women's land rights has not only come from unfair laws but also from a way of using rules which have evolved in a context where gender power relations remain unequal.

#### **4.3.2 Loopholes within the laws exploited to deny women their rights to inherit land.**

**Section 82(4) of the Constitution** exempts certain laws from the discrimination provision. It permits discrimination with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law with respect to the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons.<sup>42</sup>

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<sup>41</sup> Human Rights Watch interview with Justice Otieno Kwach, Court of Appeal, Nairobi, November 7 2002

<sup>42</sup> Constitution of Kenya Section 82 (4) as amended in 1998

In essence this means that in areas vital to women's property rights, such as marriage, inheritance, and the application of customary law discrimination is sanctioned.

The life interest guaranteed in Sections 35 and 36 of the Law of Succession Act is terminable upon remarriage of the spouse if the surviving spouse is a widow. Widowers on the other hand do not lose their life interest regardless of whether or not they remarry.

This depicts that the law of Succession Act is a double edged sword which somewhat serves women by providing inheritance rights, but denying them inheritance rights equal to those of men.

In addition Section 32 of the Act exempts agricultural land, crops and livestock in certain 'gazetted districts' designated in a legal notice in the official gazette from the intestacy rules. In those districts, customary laws apply.<sup>43</sup>

Kenya's land statutes discriminate against women by;

- (1) Vesting in men absolute sole ownership rights to registered land;
- (2) Invoking customary law which generally confers exclusive control of land to men to govern land rights, and which is insulate from appeal and judicial scrutiny.

Kenya has over 75 land laws, which create a confusing and anachronistic legal framework that fails to recognize women's land rights.<sup>44</sup> In the draft National Land Policy, the

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<sup>43</sup> The following districts are exempted; West Pokot, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok. Pastoral communities predominantly inhabit these districts. Legal Notice 94 of 1981

<sup>44</sup> Kenya Land Alliance & FIDA Kenya, Policy Brief: Women, Land and Property Rights and the Land Reforms in



#### 4.4 CRITIQUE

Women continue to suffer property discrimination sanctioned by Kenya's constitution, laws, and practices. Legislative reforms have faltered, but the constitutional reform process holds some promise.

Land law reform has been a constant theme of public debate since independence but with an emphasis on ethnic and socioeconomic equality, not gender equality. The extreme gender imbalance in land ownership resulting from the colonial titling system persists. A commission on land laws recently reviewed Kenya's many and somewhat contradictory land laws, but its report was not publicly released up to today.<sup>61</sup>

Where the government has neglected its obligation to end discrimination against women, NGOs have worked to fill the void. Human rights and women's organizations work tenaciously to provide services, information, and advice to women denied property rights. They provide civic education, represent women in legal proceedings, provide them shelter and other basic needs, offer small-scale lending programs, coordinate women-owned housing cooperatives, and advocate for legislative and social change. These organizations operate with virtually no financial and little moral support from the government. On occasion, they suffer threats and harassment. These same organizations are now pushing women's equal property rights as a priority for Kenya's new government.

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<sup>61</sup> The Commission of Inquiry into the Land Law Systems of Kenya (also known as the "Njonjo Commission" after its chairman, Charles Njonjo) was appointed in 1999. Its mandate was to review land legislation and customary laws and to make recommendations for a land policy framework. It submitted a report to the government in November 2002 but this report was never made public.

The Married Women's Property Act of 1882 (MWPA), a woefully inadequate remnant of British colonial rule, remains the only statute to govern married women's right to property acquired during a marriage, whether during the marriage or at its dissolution. The MWPA applies to all Kenyan marriages regardless of the type of marriage or regime governing the marriage, including marriages contracted under Customary or Muslim law.<sup>62</sup> Under the MWPA, married women have express claim to separate property (presumably registered in her name) acquired before or during the marriage.<sup>63</sup> Married women's claim to matrimonial property, however, is all but completely left out of the statute. This Act is severely limited as it neither defines matrimonial property nor provides guidance about the equitable division of such property.<sup>64</sup> The women of Kenya continue to be governed by an antiquated Act, ill-equipped to deal with the realities of their lives or to protect their human rights. The legal vacuum on equitable division of property at divorce resulted in judicial decisions that undervalue and dismiss the immense contribution of women to their families and the household.

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<sup>62</sup> Telephone Interview with Evelyne Opondo, Senior Counsel, FIDA-Kenya (Jan. 30, 2008). For example, the MWPA has been applied in Muslim marriages in *Fathiya Essa v. Mohamed Alibhai Essa*, (1995) Civil Appeal 101 of 1995 (H.C. Nairobi) (unreported)

<sup>63</sup> The Married Women's Property Act, (1882) Cap. 75 Section 1 (Kenya).

<sup>64</sup> *Ibid* Section 1

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.0 INTRODUCTION

There is a fundamental flaw in the Kenyan Constitution which claims erroneously that courts have been “proactive” in issuing progressive decisions.

In reality, courts and other tribunals (especially bodies handling land allocation and disputes) bound by sex-discriminatory laws continue to curtail women’s access to land, property, and housing. For example, a 2007 decision by Kenya’s highest court, *Echaria v Echaria*,<sup>65</sup> eviscerated any perceived progress on women’s rights to matrimonial property.

Moreover, despite the laudable and tireless efforts by the Kenya Law Reform Commission in producing bills that ensure women’s equal rights to property, including matrimonial property, parliament has consistently failed to table, much less pass, such key legislation.

The government of Kenya should take immediate steps to improve systematically women’s property rights in law and in practice and remove obstacles to their realization.

Kenya’s current constitution outlaws discrimination on the basis of sex, but exemptions for discrimination in personal and customary laws eviscerate the non-discrimination provisions. A new constitution may be the best hope for legal protection of women’s property rights. Kenya’s constitutional review process commenced in 2009. After consultations with local people in all provinces, a draft constitution was released in September 2010 and the new government has pledged to commence debates on the draft in the first half of 2010. The draft constitution revamps the bill of rights and includes provisions that would be an enormous improvement over the current constitution in

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<sup>65</sup> [2007] eK.L.R H.C.C.C. No.4684 of 1987(O.S)

terms of women's property rights.<sup>66</sup> In response to arguments of Muslim leaders that constitutional equality would violate Islamic law, the draft excludes Muslims from the equality provisions of the bill of rights in relation to marriage, divorce, and inheritance, in contradiction of human rights principles.<sup>67</sup>

Upon consideration of the information provided in this submission, the researcher considers the following recommendations to alleviate the inequality in ownership of property in Kenya:

## 5.1 CONCLUSION

Kenya's new government has great potential to make significant progress towards the equal protection of women's social, political, and economic rights. Working within the ICESCR mandate, the government can ensure protections for women's rights to non-discrimination, dignity, health, and an adequate standard of living, including housing, and property. Kenya conform existing legislation and pass new laws to account for women's rights under the ICESCR to ensure that women do not face destitution in the event of divorce or the death of a spouse. It should ensure equal access and control of property by

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<sup>66</sup> The provisions that would improve women's property rights prohibit discrimination on the basis of sex and marital status; guarantee women's right to equal treatment with men, including equal rights to inherit, have access to, and control property; prohibit any law, culture, custom, or tradition that undermines women's dignity, welfare, interest, or status; guarantee every person the right to acquire and own property; ensure that every person has the right to adequate housing; and require parliament to enact laws protecting matrimonial property, including the matrimonial home, during and at the termination of marriage and laws protecting spousal rights to inherit land. Draft Bill of the Constitution of Kenya Review Commission, Articles 34, 35, 38, 54, 59, and 235(4)(a)(iv) and (v).

<sup>67</sup> Section 31(4) of the draft constitution provides: "The provisions of this chapter on equality shall be qualified to the extent strictly necessary for the application of Islamic law to persons who profess the Muslim faith in relation to personal status, marriage, divorce and inheritance." Muslims are estimated to constitute between 5 and 30 percent of Kenya's population.

women, particularly widows, and outlaw harmful, dangerous, and degrading practices such as widows' inheritance and ritual cleansing.

Unequal property rights and harmful customary practices violate international law. Kenya has ratified international treaties requiring it to eliminate all forms of discrimination against women (including discrimination in marriage and family relations), guarantee equality before the law and the equal protection of the law, and ensure that women have effective remedies if their rights are violated. International law also obliges states to modify discriminatory social and cultural patterns of conduct. Kenya is violating those obligations. With a new government in office and a new draft constitution containing provisions that would enhance women's property rights set for debate, this is a pivotal time for Kenya to confront the deep property inequalities in its society. It must develop a program of legal and institutional reforms and educational outreach initiatives that systematically eliminates obstacles to the fulfillment of women's property rights.

## **5.2 Legal Reforms**

Parliament should adopt key provisions in the draft constitution, including those that:

- prohibit discrimination on the basis of sex and marital status;
- guarantee women's right to equal treatment with men, including equal rights to inherit, have access to, and control property;
- prohibit any law, custom, or tradition that undermines women's dignity, welfare, interest, or status;
- guarantee every person the right to acquire and own property;
- ensure that every person has the right to adequate housing; and

- require parliament to enact laws protecting spousal rights to inherit land and laws protecting matrimonial property during and at the termination of marriage.

These constitutional rights should apply equally to women from all religions and ethnic groups: any concessions to religious or customary laws should not diminish women's equal constitutional rights.

If a new constitution is not adopted in the near future, **Sections 82(4) and (6)** of the current constitution, which sanction discrimination against women in personal and customary laws ought to be repealed or totally done away with.

Pending constitutional reform, the judiciary should be instructed to interpret the exceptions in **Section 82(4)** of the Constitution to allow only that customary law which is not repugnant to any international human rights treaties to which Kenya is a party, including the ICESCR. In essence, judicial activism should be encouraged to emulate other jurisdictions like Uganda as enunciated in the case of **Uganda Association of Women Lawyers v The Attorney General**<sup>68</sup> where a petition was brought under **Article 137**

Of the Constitution of Uganda In this petition the Divorce Act which was enacted in Uganda in 1904 contravened and was inconsistent with the Constitution. Several provisions of the divorce Act such as Sections 4(1), 4(2), 5, 21, 22,23 and 26 of the Act were inconsistent and in contravention with Articles 21 clause 1 and 2, 31(1), 33(1) and 6 of the Constitution. Consequently, these impugned sections of the Divorce Act were declared inconsistent with the Constitution of the Republic of Uganda and hence they were null and void.

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<sup>68</sup> Constitutional petition No. 2 of 2002

There is dire need for the amendment or repealing of all laws that violate women's property rights. This includes the provisions of the Law of Succession Act which terminate widows' inheritance rights upon remarriage; exempt certain districts from the rules relating to inheritance without Wills; and privilege fathers over mothers for inheritance from children should be done. A good example to emphasize the repealing or amending all laws that violate women's rights is the case of **Advocacy for Women in Uganda v Attorney General**<sup>69</sup> the Constitutional court found that section 154 of the Penal code constituted discrimination based on sex and therefore inconsistent with Articles 21(1)-(3), 24, 31(1), and 36 of the Constitution on equality before the law and non-discrimination on the basis of sex.

Parliament should enshrine in law and titles women's occupancy and secondary (or derivative) land rights and ensure the availability of alternative forms of collateral to land, and, as a corrective action, lengthen payment periods for loans are extended to women. Also, the amendment to the Law of Succession Act that exempts Muslims should be repealed as all persons are equal under the law.

Kenya's legal system contains a mix of statutory and customary law<sup>70</sup> that has resulted in conflicts between overall guarantees of human rights and their extension to women and girls. Within Kenya's legal hierarchy, the Constitution supersedes any other law.<sup>71</sup>

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<sup>69</sup> Constitution petitions Nos.13/05&05/06 [2007] UGCC 1

<sup>70</sup> UN THEME GROUP ON HIV AND AIDS, PROPERTY AND INHERITANCE RIGHTS OF WOMEN AND GIRLS IN KENYA IN THE ERA OF HIV AND AIDS 12 (2006)

“African customary law” shall govern in “civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law....”<sup>72</sup> In practice, however, the “repugnancy” exception to the application of customary law has rarely been invoked successfully in cases dealing with women’s equal rights. Statutory and constitutional deference to customary law harms the rights of women under the ICESCR, and thus must be immediately amended.

Enactment of legislation that prohibits gender-based discrimination and promotes women’s equal property rights should be done. This includes laws that:

- create a presumption of spousal co-ownership of family property;
- establish a presumption that family property should be divided equally upon separation or divorce;
- require that all marriages be registered in a central registry;
- promote women’s access to and ownership of land;
- require family consent for transfers of family land and housing;

Implementation and domestication of the Convention on the Elimination of All Forms of Discrimination against Women should be done to ensure that substantive and formal equality is observed.

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<sup>71</sup> CONSTITUTION, Section 83 (rev. 2001) (Kenya): “This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

<sup>72</sup> The Judicature Act, (1967) Cap. 8 Section 3(2) (Kenya).



Parliament should enact a framework for requiring spousal consent in transactions, such as the sale, rental, use as collateral, and mortgage, involving matrimonial property; and enact clear rules for equal division of matrimonial property at separation or divorce.

Place legal protections on women's property during marriage, so that it is not sold or traded without their consent.

Parliament should also make amendments for land disputes to guarantee the right to an advocate and the right to appeal decisions based on customary law.

There should be an Incentive for joint ownership and registration of matrimonial property by giving tax breaks for the registration of joint ownership, and by eliminating fees and taxes upon land registration, such as the stamp duty and conveyancing fees. In conjunction, parliament should amend **Section 101(3)(a)** of the **Registered Land Act** to restrict the Minister of Lands from exercising discretion to limit joint registration to one proprietor, except where there are legitimate, compelling circumstances, and land registration boards should instead require joint registration of marital property.

Legislation should be passed to override the harmful aspects of the *Echaria v Echaria* decision, which rejected unpaid contribution to a marital household – such as childbirth, childcare, cleaning, and agricultural labor – in dividing matrimonial property at divorce.

The law should also require that all marriages be registered and enact incentives, such as tax credits and subsidies, to encourage registration. The registration of all customary and

polygamous unions is necessary to protect the wife's or wives' rights in marriage and in matrimonial property.

Parliament should pass without delay the Marriage Bill and the Matrimonial Property Bill which will give spouses equal interests in matrimonial property during marriage and at divorce.

Kenya's succession laws should be reformed to reflect the equal inheritance rights to widows and widowers granted by international human rights treaties to which Kenya is a party, including the ICESCR.

Parliament should explicitly eliminate the exception in the **Law of Succession Act sections 32 and 33** allowing discriminatory customary law to apply to Gazetted agricultural land and livestock.

The government should also design and implement an information-sharing program, such as the one recommended to Kenya by the CEDAW Committee in 2007, which would inform rural women of their rights regarding inheritance.

Laws should be passed to require administrative officers, chiefs, and assistant chiefs – who are already obligated to report a death, secure property of the deceased, and locate people who appear to have an interest in the property and to inform potentially affected parties of their legal rights under the Law of Succession Act.

Lastly, Parliament should also enact laws that establish penalties for widow evictions, and criminalize wife "inheritance" and ritual "cleansing."

### **5.3 Institutional and Programmatic Reforms and Initiatives**

The Government in conjunction with NGOS should launch awareness campaigns to inform the public about women's property rights. Distribute information in local languages about rights to inheritance and division of family property; writing wills; registering marriages; co-registering property; and the health risks of customary sexual practices tied to property rights, such as the risk of contracting HIV/AIDS. Public service announcements should be aired, such as through the Kenya Broadcasting Company and other radio and television stations with significant reach in the country, that provide information on women's property rights and also establish information centers throughout the country to distribute this information.

Nevertheless, the Government should create and implement programs that address the link between property rights violations and women's vulnerability to HIV/AIDS, including in public education campaigns and other initiatives of the National AIDS Control Council. The programs should be based on consultations with nongovernmental and community-based organizations.

The whole country in general should address harmful social and cultural patterns of conduct based on the idea of women's inferiority and stereotyped gender roles. In particular, the government should encourage traditional leaders to transform discriminatory customary laws relating to property by emphasizing that, in keeping with their evolving and flexible nature, they should be interpreted to promote women's equality and support greater participation by women in decision making at the community level.

There should also be an improvement in mainstreaming of women's equal property rights issues in government offices and programs should be sought by establishing gender units within ministries and appropriately funding the women's rights activities of the new Ministry of Gender, Sports, Culture and Social Services.

Training for judges, magistrates, police, and relevant local and national officials on laws relating to women's equal property rights and their responsibility to enforce those laws should be provided by the government.

The government should therefore include women's property rights in the required curriculum of police training academies and law schools.

There should be implementation of reforms of the court system aimed at eliminating backlogs and corruption and streamlining procedures.

Establishment of family divisions in courts outside Nairobi should be done and the judicial branch of the Government should ensure that family division judges and magistrates have expertise in family law and women's rights.

A national legal aid system with the capacity to represent indigent women in civil property matters should be set up to help women because of the costly nature of litigation which deters women from seeking legal remedies.

The government should support the activities of nongovernmental organizations that provide legal services to women whose property rights have been violated.

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