

**“KENYA’S LAWS OF SUCCESSION AND THE BILL OF RIGHTS OF THE KENYA  
CONSTITUTION (2010): A STUDY IN LEGAL REFORM”.**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE BACHELOR  
OF LAWS DEGREE, STRATHMORE UNIVERSITY LAW SCHOOL**

**BY**

**KIMIRINY DORIS SOYIAN**

**078652**

**PREPARED UNDER THE SUPERVISION OF**

**PROFESSOR DAVID SPERLING**

**FEBRUARY 2017**

## Contents

<b>ACKNOWLEDGEMENT .....</b>	<b>4</b>
<b>DECLARATION .....</b>	<b>5</b>
<b>DEDICATION .....</b>	<b>6</b>
<b>ABSTRACT .....</b>	<b>7</b>
<b>LIST OF ABBREVIATIONS.....</b>	<b>8</b>
<b>LIST OF CASES.....</b>	<b>9</b>
<b>CHAPTER ONE: Introduction.....</b>	<b>10</b>
<b>1.1 Background .....</b>	<b>10</b>
<b>1.2 Statement of the Problem.....</b>	<b>12</b>
<b>1.3 Justification of the Study.....</b>	<b>13</b>
<b>1.4 Research Objectives .....</b>	<b>13</b>
<b>1.5 Research Questions .....</b>	<b>14</b>
<b>1.6 Hypotheses.....</b>	<b>14</b>
<b>1.7 Assumption.....</b>	<b>14</b>
<b>1.8 Limitations and scope of the study.....</b>	<b>14</b>
<b>1.9 Definition of Terms .....</b>	<b>14</b>
<b>1.10 Chapter Summary.....</b>	<b>15</b>
<b>CHAPTER TWO: Theoretical Framework and Methodology .....</b>	<b>16</b>
<b>2.1 Legal Anthropology.....</b>	<b>16</b>
<b>2.2 Study Design and Methodology .....</b>	<b>17</b>
<b>CHAPTER THREE- Case Study and Topics Related to the Research Questions.....</b>	<b>19</b>
<b>3.1 Problem Areas of the Law of Succession Act .....</b>	<b>19</b>
<b>3.2 Implications of the 2010 Kenyan Constitution .....</b>	<b>21</b>
<b>3.3 Application of Different Succession System .....</b>	<b>23</b>
<b>3.4 Adjudicatory System; Enforcement Mechanisms .....</b>	<b>24</b>
<b>3.5 Comparative Analysis; South Africa .....</b>	<b>26</b>
<b>CHAPTER FOUR: Findings/ Evidence.....</b>	<b>28</b>
<b>4.1 Findings .....</b>	<b>28</b>
<b>CHAPTER FIVE: Discussion .....</b>	<b>32</b>
<b>5.1 Analysis of the Findings .....</b>	<b>32</b>
<b>CHAPTER SIX: Conclusion and Recommendations .....</b>	<b>34</b>
<b>6.1 Conclusion and Recommendations .....</b>	<b>34</b>
<b>BIBLIOGRAPHY.....</b>	<b>37</b>

<b>7.1 Texts .....</b>	<b>37</b>
<b>7.2 Articles .....</b>	<b>37</b>
<b>7.3 Reports .....</b>	<b>38</b>
<b>7.4 Statutes .....</b>	<b>38</b>
<b>7.5 International Instruments .....</b>	<b>38</b>
<b>7.6 Case law .....</b>	<b>39</b>

## **ACKNOWLEDGEMENT**

I take this opportunity to thank God for giving me knowledge, wisdom and good health that made the completion of this dissertation possible.

Secondly, my special thanks go to my supervisor Professor David Sperling for the unwavering support and invaluable guidance throughout the study. His immense knowledge on the topic has shaped the whole of my dissertation. Long live Professor.

I also take this opportunity to thank all my friends and family for their encouragements and prayers throughout the whole study.

Finally, I owe my gratitude to anyone who in any way or another contributed to completion of this dissertation.

## DECLARATION

I declare that this research project is my original work and has not been submitted in any other University.

Signed.....

Date.....

Kimiriny Doris Soyian

078652

This research project has been submitted for examination with my approval as a University supervisor.

Signed.....

Date.....

Dr David Sperling  
Research Professor  
Institute of Public Policy and Governance  
Strathmore University

## DEDICATION

I dedicate this dissertation to my parents, siblings and friends

## **ABSTRACT**

The Law of Succession Act Cap 160 came into force in 1981 and was meant to create a single legal succession regime applying uniformly to all Kenyans; and to comply with international obligations including those enshrined in the Convention on Elimination of Discrimination against Women (CEDAW) adopted by the General Assembly of the United Nations in 1979. Even in its present revised form, the Law of Succession Act (2015 revised), the Act has provisions that apply specifically to Muslims and to the customary laws of the people located in specific areas in the country. As a result the Act discriminates against women on the basis of gender and is inconsistent with the constitutional rights enshrined in the Bill of Rights of the Kenya Constitution (2010).

This study seeks to assess the compatibility of the Law of Succession Act (2015 revised) provisions with the new constitutional dispensation in Kenya whereby the right not to be discriminated against on the basis of gender is guaranteed in accordance with article 27(4) of the Kenya Constitution and also international human rights standards and practice. The study shows that there are numerous factors such as the Kenya marriage laws and practices, judicial enforcement mechanism and political circumstances that affect how succession claims are practised and enforced. A comparative analysis with South Africa is alluded to because it shows how statute law and customary law used to apply to the whites and black people respectively and how they managed to change these laws and eventually created a uniform legal succession regime.

Part of the study focused on Narok County; several interviews there confirmed that the practise of customary succession laws is prevalent in rural Kenya and that women undergo duress and discrimination whenever they try to defend their legal and constitutional rights and to find legal assistance on the same.

The study recommends, among other solutions, that the Law of Succession Commission should enact a new succession law with uniform application excluding discriminatory provisions and also ensure an accessible, cost-effective and reliable enforcement mechanism throughout the country

## **LIST OF ABBREVIATIONS**

CEDAW- Convention on Elimination of All forms of Discrimination against Women

ECWD- Education Centre for Women in Democracy

FIDA- Federation of Women Lawyers

ICESCR- International Convention on Economic, Social and Cultural Rights

KNHRC- Kenya National Human Rights Commission

KWJA- Kenya Women Judges Association

USAID- United States Agency for International Development



## LIST OF CASES

1. *Janet Mukima Kamanga v Easter Njoki Ravael Njeru* [2014] eKLR
2. *Bhe v Magistrate Khayelitsha & Others* [2004] CCSA
3. *Mojekwu v Mojekwu*, [1997], NWLR 283.
4. *Ephraim v Pastory*, (2001) AHRLR 236.
5. *Estate of Lenrionka ole Ntutu, (Deceased)* [2008] eKLR.
6. *Mwathi v Mwathi*, [1996], eKLR.
7. *Estate of Charles Muigai Ndungu*, [2013], eKLR.
8. *James K Otiato V Samson Otieno*, [1993], eKLR.
9. *Shibi v Sithole and Others*, [2004] CCT 49.
10. *Otieno v Ougo Siranga*, [1987] eKLR.
11. *Estate of Charles Muigai Ndungu*. [2002], eKLR.

## CHAPTER ONE: Introduction

### 1.1 Background

Succession is defined as the devolution of the property of deceased persons upon their death.<sup>1</sup> The Law of Succession Act of 1981 was the main statute governing the devolution of deceased persons' property in Kenya until its revised version the Law of Succession Act of (2015) was enacted. Despite the change, the provisions of the revised Act (2015) still do not ensure gender equality with regards to distribution of the property of deceased persons.<sup>2</sup> Death is inevitable and so, usually, are the facts of succession matters. Given its importance, one would hope that legal provisions are fair and non-discriminatory in this area of law.

Before promulgation of common law succession statutes, African communities distributed the property of deceased persons according to customary laws and the immediate beneficiaries would be the family of the deceased.<sup>3</sup> Most Kenyan communities had a patriarchal system of succession except for the Digo and Duruma communities who had a matrilineal system.<sup>4</sup> The legal institution of the title deed had not yet been introduced and ownership of land was communal according to the principle of *usufruct*.<sup>5</sup>

During colonialism, both common law and customary law were practised but customary law applied subject to the repugnancy clause.<sup>6</sup> In 1902 the African Christian Marriage and Divorce Ordinance was promulgated providing that Africans who converted to Christianity were subject to English succession laws.<sup>7</sup> The Wills Act of 1961 enabled Africans to make wills; those Africans who did not make wills continued to be governed by their indigenous customs.

This situation remained unchanged until 1981 when the Law of Succession Act was proposed and promulgated as a result of deliberations undertaken by the Commission on Law of Succession. The Law of Succession Act (1981) was meant to consolidate all existing systems and practises of succession into a single comprehensive statute which placed all interests of Kenyans under one footing before the law.

---

<sup>1</sup> Parry-Hughes D, J.B Clark, *The Law of Succession*, 10th Ed Sweet & Maxwell, 1996.

<sup>2</sup> Section 32, 33, 35, *Law of Succession Act*, (cap 160 of 2015).

<sup>3</sup> Musyoka W, *Law of Succession*, Law Africa, 2014.

<sup>4</sup> Kameri- Mbote P, the law of succession in Kenya: Gender perspective in property management and control 2005.

<sup>5</sup> Kameri-Mbote P, Odote C, Musembi C, Kamande M, *Ours by Right ; Law politics and reality of community property in Kenya*, Strathmore University Legal Press, Nairobi, 2013.

<sup>6</sup> *East African-Order- in Council*, 1897.

<sup>7</sup> Section 39, *African Christian Marriage and Divorce Ordinance*, (1902)

The Law of Succession Act (1981) remained in operation subject to an amendment made in 1990 which exempted Muslims from applying its provisions and recognized the existence and application of Islamic laws on inheritance for Muslim parties.<sup>8</sup> In 2015 a revised Law of Succession Act was enacted but it did not reform any provisions that discriminated against women.

The Law of Succession Act (2015) caters for both testamentary and intestate succession. The Act recognizes the right of a woman to inherit and defines a child for purposes of inheritance to include both a female and a male child.<sup>9</sup> Despite these provisions, however, widespread gender discrimination continued and continues to persist.<sup>10</sup>

Article 27 (4) of the 2010 Kenya Constitution, which forbids direct or indirect discrimination against any individual on the basis of gender, has highlighted various discriminatory provisions of the Law of Succession Act.

Section 32 of the Law of Succession Act (2015) excludes gazetted districts<sup>11</sup> within the country from applying its intestacy rule. Section 33 provides that such districts shall apply customs. In virtually all ethnic groups in Kenya women do not customarily inherit from their parents and therefore it can be seen that, taken together, Section 32 and 33 of the Law of Succession Act discriminate against them. Janet Kaberere Macharia, in her article *Law and the Status of Women in Kenya*, points out that Section 32 of the Law of Succession Act is discriminatory because it permits the use of customs.<sup>12</sup>

Section 2(3) of the Act excludes devolution of the estate of a deceased Muslim from provisions of the Act, thereby validating Islamic Law which favours men who inherit double the share of women.

Section 35 of the Act also denies a widow who remarries a life interest of the deceased estate, a provision which does not apply to widowers. Busalile Jack Mwimali in his journal article; *The Practise in Land Law and Succession Laws in Kenya; Constraints to the Full Enjoyment of Human Rights*, states that the Law of Succession Act (2015) denies widows the power to

---

<sup>8</sup> Statute Law (Misc. Amendment) Act No. 2 of 1990.

<sup>9</sup> Section 3(2), *Law of Succession Act*, (Act Cap 160 of 2015).

<sup>10</sup> *Janet Mukima Kamanga v Easter Njoki Ravael Njeru*, [2014] eKLR.

<sup>11</sup> Legal Notice No. 94/1981.

<sup>12</sup> Macharia K.M 'Law and the Status of Women in Kenya, International Environmental Law Research in Kenya' *International Environmental Law Research Centre*, Kenya (1995).

mortgage land and a life interest of the inherited property upon remarrying.<sup>13</sup> Remedies to these violations are available but the high filing fees in courts are beyond the reach of many ordinary Kenya citizens.

These provisions contravene the anti-discriminatory clauses of the Kenya Constitution.<sup>14</sup> They also go against the International Convention on Elimination of All Forms of Discrimination against Women (CEDAW)<sup>15</sup> and the International Convention on Economic Social and Cultural Rights (ICESCR)<sup>16</sup> which Kenya has ratified.

## **1.2 Statement of the Problem**

Laws on succession are one of the determinants of individual human rights. This is an area of law which the government of Kenya has made little attempt to revise and reform since 1981. The revised 2015 Law of Succession Act still does not ensure gender equality of succession rights for all Kenyan women. The Law of Succession Act (2015) which was meant to come up with a comprehensive all-inclusive law that would apply to all persons regardless of religious or ethnicity grounds still permits the application of different laws, including customary law and practices.<sup>17</sup>

The Kenya constitution 2010 highlights the inadequacies of various provisions of the Law of Succession Act (2015). Indeed various aspects of the Law of Succession Act (2015) are unconstitutional. It contravenes both the discriminatory clause under Article 27(4) that prohibits discrimination on the basis of gender, and Article 45 (3) which entitles parties to marriage equal rights during and on the dissolution of marriage. The FIDA Human Rights Report, *Empowering Women Rights to Inheritance*,<sup>18</sup> tasked with investigating intestate succession in Kenya, found that despite the existence of the Law of Succession Act, widespread discrimination against women still persisted in inheritance of property a fact they attribute to the deficiencies to some

---

<sup>13</sup> Ik Dahl I, Hellum A, Kaarhus R, Benjaminsen A, Kameri-Mbote P, *Human Rights Formalization and Women's Land Rights in Southern and Eastern Africa*, Studies in Women's Law No. 57, Institute of Women's Law, University of Oslo, Norway, 2005.

<sup>14</sup> Article 27(4), *Constitution of Kenya*, (2010).

<sup>15</sup> Article 15, *Convention on Elimination of All Forms of Discrimination against Women*, 18 December 1979, 180 UNTS 34.

<sup>16</sup> Article 3, *Convention on Economic, Social and Cultural Rights*, 16 December 1966, 2200A.

<sup>17</sup> Section 2, *Law of Succession* (Act No 160 of 2015).

<sup>18</sup> Human Rights Report and Proposed Legislation, '*Empowering Women Rights to Inheritance*', FIDA Reports 2009.

of the provisions of the Law itself. The report went further to suggest that not only are such practices discriminatory but they affect the economy of Kenya.<sup>19</sup>

Such human rights anomalies raise some basic key questions. How best can a reform of succession laws be done? Does the political will for succession reform exist? Are there cultural issues related to traditional patriarchal practices that are likely to stall, if not, frustrate reform?

### **1.3 Justification of the Study**

Despite the intended protection by the Law of Succession Act, in practice many Kenyan women inherit nothing from their parents or from their husbands, whose male relatives may end up claiming and taking everything even by force.

Grace M. Mwaura in her journal article; *National Assessment of Gender Mainstreaming in STI and the Knowledge Society in Kenya*, points out that Law of Succession Act stipulates equality in inheritance to be a principle reiterated in the 2010 Kenyan Constitution. Whereas this principle is legislatively decreed, in practice it is not applied because of customary cultural practices and judges who do not respect the law and instead rule that disputes should be determined according to customary law.

Finding appropriate solutions to such legal anomalies could result in a more equitable law of succession to the benefit of those presently discriminated against for instance women.

### **1.4 Research Objectives**

The study seeks to identify the aspects of the Law of Succession Act (2015) that are unconstitutional and how the succession laws might be brought into line with the new constitutional dispensation. Specifically the study seeks to:

1. Review and assess the constitutionality of the present succession laws in Kenya.
2. Assess whether the Law of Succession Act (2015) meets the requirements of Chapter 4-Bills of Rights of the Kenya Constitution 2010 in matters of inheritance.
3. Study and recommend how the Law of Succession Act (2015) can be amended and reformed so as to apply uniformly to all persons throughout Kenya in accordance with the Kenya Constitution 2010.

---

<sup>19</sup> Human Rights Report and Proposed Legislation, '*Empowering Women Rights to Inheritance*', FIDA Reports 2009,136.

### **1.5 Research Questions**

1. Do the provisions of the Law of Succession Act (2015) reflect and respect the content of the Bill of Rights of the Kenya Constitution 2010?
2. What are the legal implications of the Bill of Rights of the Kenya Constitution 2010 for the Law of Succession Act?
3. How best might the Law of Succession Act (2015) be reformed in order to align with the new provisions of the Kenya Constitution 2010?

### **1.6 Hypotheses**

The study has three hypotheses;

1. The Law of Succession Act (2015) does not conform to Chapter 4 of the Kenya Constitution 2010 which guarantees full rights to every citizen, among them the right to non-discrimination on basis of gender;
2. The Law of Succession Act (2015) is in need of reform in order to guarantee gender equity in succession matters.
3. It is possible to reform the Law of Succession Act (2015) in such a way that will end discrimination on the basis of gender.

### **1.7 Assumption**

Traditional African cultural practices excluding women from inheriting property still dominate the current practice of succession in Kenya in spite of the legal and constitutional norms to the contrary.

### **1.8 Limitations and scope of the study.**

The main difficulty experienced was identifying lawyers and magistrates who have special expertise in the administration of the Law of Succession in Kenya and subsequently getting interviews with them.

It was not possible to cover the opinions of many adults, civil servants and other sampled stakeholders in the area as tracing all of them required considerable time.

### **1.9 Definition of Terms**

Gender equality which this study seeks to achieve is with regard to property rights. There are two types of equality, formal and substantive equality. Formal equality is concerned with

ensuring no preferential treatment of persons on the basis of gender while substantive aims at remedying the disadvantage as opposed to maintaining gender neutrality.<sup>20</sup>

Discrimination against women is defined as any distinction, exclusion or restriction made on the basis of gender which has the effect or purpose of impairing or nullifying recognition or enjoyment or exercise of women on basis of equality between men and women of human rights and freedom in the political, social, economic, cultural, civil or any other field.<sup>21</sup>

Patriarchy refers to male domination both in public and private spheres which results in the subordination women. Patriarchy implies that men have more power in the important social, economic and political institutions of society. History states that men have always used the power to oppress and exploit women. Patriarchy is a core belief of traditionalists who believe that men are born to dominate; they regarded this fact as a rule of nature that will forever remain unchanged.<sup>22</sup>

### **1.10 Chapter Summary**

Chapter One seeks to give the reader a good background understanding of the main issues that are addressed in later chapters. It outlines the main legal problem and the intended outcomes of the study thereby giving the reader a glimpse of what the study is all about. The chapter explains the deficiencies of the Law of Succession Act (2015) and its failure to ensure gender equality in succession matters as provided for in the Bill of Rights of the Kenya Constitution (2010).

---

<sup>20</sup> Westen P. "The Empty Idea of Equality", *Harvard Law Review*, Vol. 95, 1982, 537.

<sup>21</sup> Article 1, *Convention on Elimination of all forms Discrimination against Women*, 18 December 1979, 34 UNTS 180.

<sup>22</sup> Firestone S, 'The Dialect of Sex; the Case for Feminism Revolution', *William Morrow and Company Inc*, New York, 1974.

## CHAPTER TWO: Theoretical Framework and Methodology

### 2.1 Legal Anthropology

The underlying theoretical basis for this study arises from the field of studies known as legal anthropology. Early colonial officers in Africa realized that the customary law of the indigenous people reflected their traditions, culture and social circumstances. Thus, in African societies that were patriarchal, women had few of the legal rights accorded to them by English common law. With the introduction of common law practises, there came to be what Girvin called “mixed” legal systems where the courts would apply those laws, whether custom or common, that were appropriate to the person being adjudicated.

C.D Girvin (1996) in his journal article, ‘*Architects of a legal system*’ writes about the colonial period in South Africa where English common law and customary law were practised side by side.<sup>23</sup> The *Black Administration Act (1927)* applied when the estate concerned an indigenous deceased person and devolved according to customs, while the *Intestate Succession Act (1981)* applied to deceased persons who were not subject to customary law.

As common law came to spread more widely throughout the British colonies of Africa and, in particular, after independence with the on-going modernization and social changes that were taking place, the legal basis for the application of the traditional customary laws weakened and was called into question.

A.N Allott in his 1965 article, *Towards the Unification of Law in South Africa*, reiterates that race determined the applicable law in South Africa. Customary law of succession was patriarchal in nature.<sup>24</sup> The rule was struck down and regarded unconstitutional in the case of *Bhe v Magistrate Khayelitsha*<sup>25</sup> because it discriminated upon gender, race and ethnic origin. It was described as ‘exclusionary form of administration imposed on Africans’.<sup>26</sup>

In his book ‘*Law of succession: Restatement of African Law*’,<sup>27</sup> Eugene Cotran indicated the colonial approach on succession matters in the British colony when there were multiple laws addressing succession matters. Already in 1969, he envisages the need for a single codification of the law of succession.

---

<sup>23</sup> Girvin C.D, *The Architects of the Mixed Legal System*, the South Cross, 1996. Indigenous Law defined as black law that applied to black tribes, the aboriginal race of South Africa.

<sup>24</sup> Allott A.N, *Towards the Unification of Laws in South Africa*, INT’L & COMP L.Q (1965) 366.

<sup>25</sup> *Bhe & Others v Magistrate Khayelitsha & Others*, 2004 (1) SA 580 (CC).

<sup>26</sup> South African Law Reform Commission, *Report on the Harmonization of Common Law and Indigenous Law: Conflict of Laws*, Project 90, 1998.

<sup>27</sup> Cotran E, ‘*Law of succession: Restatement of African Law*’, Sweet & Maxwell, Vol 2, London, 1969.



Various other authors also note the incongruence and “injustice” of applying customary law in modern society. In his paper *African Customary Law*,<sup>28</sup> Muna Ndulo, states that African marriage and inheritance were subject to customary law in the era when patriarchy dominated. This practice conflicts with modern human rights norms that guarantee equality between men and women. He points out that the solution lies in eliminating customs that discriminate against women.

He refers to a case named *Mojekwu v Mojekwu* where Nnewi Customs that was practised denied women the right to inherit. In this case the deceased brother inherited the estate of the deceased at the exclusion of the deceased daughter.<sup>29</sup> The court held that this was repugnant to justice and morality. In another case of *Ephraim v Pastory* women were entitled to inherit but they had no right to dispose the land.<sup>30</sup> The above practises were found to conflict with constitutional provisions and international practice. He mentions that the court plays a big role in reforming customary law to ensure that it conforms with international human rights norms when the legislative body is reluctant.

## **2.2 Study Design and Methodology**

Over time, beginning with pre-colonial customary practises and norms, the Kenya legal system with regards to marriage and inheritance has embraced various laws governing different categories of people. For instance, succession laws consisted of Muslim, Hindu, Statutory and customary law. Customary law arose from African customary practices derived from the pre-colonial period, while statutory common law came to be incorporated into the Kenya legal system during the colonial period. Hindu and Muslim laws arose from the religious background and traditions of non-African people resident in Kenya. All these laws have continued to apply up until today. The differences and inconsistencies that arise in succession laws can be attributed to the prevailing practice of legal pluralism.

This study is a descriptive and explanatory study of how a state (Kenya) whose jurisdiction over succession has been legally pluralistic or what is termed as ‘mixed systems’ that is, recognizing and accepting customary, common and Islamic laws, is dealing with modern universal norms of equality, equal treatment of men and women and non-discrimination as reflected in the Bill of Rights of the Kenya Constitution 2010.

---

<sup>28</sup> Ndulo M, “African Customary Law, Customs and Women Rights”, *Cornell Law Faculty Publication*, Pp. 187, 2011.

<sup>29</sup> *Mojekwu v Mojekwu*, [1997], NWLR 283.

<sup>30</sup> *Ephraim v Pastory*, (2001) AHRLR 236.

The study consulted relevant secondary sources such as, books, journals and articles. It examined and assessed eight important cases on succession law from different Courts, the international legal instruments particularly those related to Human Rights for instance, CEDAW and the Reports of human rights bodies and commissions such as reports from KNHRC, USAID and FIDA. It gathered evidence from oral interviews of victims of disinheritance, local elders and oral interviews with lawyers and magistrates who are experienced in succession matters and were able to give valuable insights into the topic of the study.

## CHAPTER THREE- Case Study and Topics Related to the Research Questions

### 3.1 Problem Areas of the Law of Succession Act

The Law of Succession most predominant failure is permitting the use of customary law in enforcing inheritance rights. Section 33 of the Act invokes the use of customs for those Districts excluded to apply intestacy rules of the Act. The most obvious consequence of this section is discrimination of women because customs do not allow them to inherit. For instance in the **Estate of Lerionka ole Ntutu**, a High Court case of 2000, the court ruled that even though Section 32 and 33 of the Law of Succession Act meant applying Maasai Customary law to the estate, the customary law would abrogate the rights of daughters to inherit a matter that was repugnant to justice and morality.<sup>31</sup>

Communities that apply customary law believe that a married daughter for instance is not part of the patrilineal lineage and therefore is not entitled to inherit. Kamau Winifred in his article, *Customary Law and Women Rights in Kenya*, attributes the inability of women to inherit to Kenya customary practises of regarding women as property to be owned rather than subjects to inherit property. This is evidenced by the practise of levirate marriage among the Luo communities, where upon her husband's death, the widow is subsequently married to the deceased's husband's brother.<sup>32</sup>

Legal Notice no. 94 of 1981 clearly states the exempted areas which are subject to customary law. However the Court of Appeal has interpreted Section 32 to mean that all African Estates are exempted from the intestacy rules of the Law of Succession Act. In the Case of **Mwathi V Mwathi** a deceased died testate in 1987 and was unmarried. He was survived by his brother (appellant) and his two sisters (respondents). He hailed from Kiambu District. His will was declared invalid by the High Court on the ground that the estate was subject to Part V of the Law of Succession Act and thus should devolve according to customary law. The Appellants aggrieved by the High Court decision appealed to the Court of Appeal which upheld the decision of the High Court and held that the applicable law was Kikuyu customary law.<sup>33</sup> This case is an illustration of how courts contribute to the use of customs by misinterpreting the law.

---

<sup>31</sup> *Estate of Lenrionka ole Ntutu, (Deceased)* [2008] EKLK.

<sup>32</sup> Kamau W, 'Customary Law and Women Rights in Kenya', (Unpublished article), *University of Nairobi*, 2010.

<sup>33</sup> Musyoka W, 'Law of Succession', Law Africa Publishing Ltd, Kenya, 1ed, 2006.

The property was situated in Kiambu District and thus Sections 32 and 33 of the Act should not apply.<sup>34</sup>

The other problem that arises from Sections 32 and 33 is that there is an assumption that the only people living in the excepted districts are pastoralists sharing customs which justifies them to use customs. However given the various integrated economic activities of the modern era, many Kenyan citizens who are not pastoralist have moved and settled in these areas to trade and carry on business. This gives rise to instances where a person may be subject to customs that are not known or practised by him or her by the mere fact that the property is located in one of the exempted districts. Using my statistic for instance, Narok County estates are subject to part V of the Act, however there are many tribes that have permanently settled there with different customs and would not want their estate to devolve according to custom.

The rationale for this exemption was because most tracts of land in the exempted districts were originally and traditionally community or communal land. Currently in most counties in the country land has been privatised especially because farming has become predominant than pastoralism. Therefore the above rationale do not sufficiently caters the prevailing situation.

The Law of Succession (2015) also fails to protect women from harmful customary cultural practices connected with inheritance. On the death of their husband women may be either evicted from their matrimonial homes or subjected to cleansing (a dangerous unwanted cultural practise that entitles them to inherit) or widow inheritance as mentioned above.<sup>35</sup> If the Law of Succession Act can criminalize intermeddling with the estate of a deceased person<sup>36</sup> it should also criminalize widow's eviction and other harmful cultural practises to protect women. This will not only guarantee their right against gender based violence but will also exemplify a commitment to gender equity.

Section 35 of the Law of Succession Act (2015 revised) is deficient and inadequate as it discriminates against women by providing that the life interest of a surviving spouse who is a widow is determined upon her remarriage. In the **Estate of Charles Muigai Ndungu**, for instance, the court held that a woman who had remarried after the demise of her husband was

---

<sup>34</sup> *Mwathi v Mwathi*, [1996], eKLR.

<sup>35</sup> FIDA and International Human Rights Clinic, Georgetown University Law Center, *Harmful Custom Curtailing Women Equal Enjoyment of the ICESCR Rights*, 2008 at Nairobi.

<sup>36</sup> Section 45, *Law of Succession Act*, ( Act no. 160 of 2015)

not entitled to inherit the life interest of the estate. Therefore it can be seen that even when the Act applies it fails to give women full and equal rights.

Section 2(3) of the Act also discriminates against Muslim women by allowing the use of and recourse to Islamic law. The Muslim community requested the enactment of this provision in 1990 when the provisions of Law of Succession Act were being reviewed on the argument that secular principles embodied in the Law of Succession Act (1981) was contrary to Islamic teachings contained in the Quran. This was eventually enacted by the Law of Succession Commission in 1991. Article 170 of Chapter Ten-Judiciary of the Kenya Constitution (2010) establishes the Kadhis' Courts in order to cater for the judicial rights of Muslims who themselves advocated for the same. It would therefore seem that some of them if not all acquiesce this provision. The solution therefore lies in giving them the option to choose whether to be governed by the Act or Islamic law which means everyone's right to state their clear intent to that effect.

### **3.2 Implications of the 2010 Kenyan Constitution**

The reform of the 1969 Constitution of Kenya was inspired by the 2008 post-election violence. One of the key objectives of reform was to come up with a Bill of Rights that guaranteed rights for all citizens. Also among the objectives was to reform the land administration system in Kenya which had faced many injustices before and after independence.

Before the adoption of the Kenya 2010 Constitution there was no constitutional provision in Kenya on gender equality. Indeed Section 82 of the former Constitution expressly provided for the application of customary law in personal matters such as inheritance and marriage. It thus implied that the Constitution permitted the used of customs that are now perceived to be discriminatory against women.<sup>37</sup> By contrast, the current Constitution permits application of customary law subject to a repugnancy clause and further under article 27(4) it prohibits discrimination on basis of gender. This forms a basis for the reform of the discriminatory clauses of the Law of Succession Act (2015) in order to align them with the new Bill of Rights of the Kenya Constitution 2010.

Kamau Winifred in his article, *Customary Law and Women Rights in Kenya*, points out that before the adoption of the new 2010 Constitution the constitutional position in Kenya had no

---

<sup>37</sup> Kamau W, 'Customary Law and Women Rights in Kenya',

commitment to gender equality. Gender did not constitute grounds for discrimination. Currently it is well established in article 27(4) of the 2010 Kenya Constitution.

The reform of land administration in the current Kenya Constitution is also important, given the intricate connection between succession laws and land laws.<sup>38</sup> The ownership of land under customary law influenced the provisions of Law of Succession Act (2015). Traditionally men own land and livestock while women own movable properties such as utensils. This resulted in women being discriminated upon with regards to inheriting land. It is the community land tenure in Kenya that influenced the exemption of the eight districts from the intestacy rules of the Law of Succession Act (2015).

The current land tenure and ownership in the Kenya Constitution 2010 are important aspects of analysing the Law of Succession Act (2015). Chapter 5 of the 2010 Kenya Constitution outlines various provisions in relation to land ownership and administration. Article 60 (1) (f) states: Land in Kenya shall be held, used and managed in a manner that is equitable...” and in accordance with the principle of “elimination of gender discrimination in law, customs and practices related to land and property in land.”<sup>39</sup> It also classifies land to include community, public and private land.<sup>40</sup> This illustrates that with the new constitutional dispensation, gender discrimination in land allocation and succession is prohibited.

Succession is also closely connected with marriage laws. The core statute on marriage in Kenya is the Marriage Act (2014). Section 6(1) of the Act states that a marriage may be registered under the Act if it is celebrated under customary rites related to any community in Kenya.<sup>41</sup> From this provision it is evident that the Act permits any form of customary marriage. In a levirate marriage a woman who becomes a widow is remarried to the brother of her deceased husband. To illustrate the practise of levirate marriages, in the case of **James K Otiato v Samson Otieno** a son of the woman married under a levirate union was regarded a legal child and was entitled to inherit from the second husband of his mother.<sup>42</sup>

The impact of the above practice is that upon the death of a woman’s husband, instead of inheriting property belonging to her deceased husband, the widow herself is inherited.

---

<sup>38</sup> Kamau W, ‘Customary Law and Women Rights in Kenya’,

<sup>39</sup> Article 60 (1) (f), *Constitution of Kenya*, (2010).

<sup>40</sup> Article 61 (2), *Constitution of Kenya*, (2010).

<sup>41</sup> Section 6(1), *Marriage Act*, (Act no. 4 of 2014).

<sup>42</sup> *James K Otiato v Samson Otieno*,

In the former 1963 Constitution personal matters like marriage and inheritance were subject to customary laws.<sup>43</sup> In the current 2010 Constitution parties to a marriage are entitled to equal rights at marriage, during marriage and at its dissolution.<sup>44</sup> Article 45(4) of the Constitution also imposes an obligation on the Parliament to enact legislation that recognises “marriages concluded under any tradition, or system of religious, personal or family law” provided that such “marriages or system of laws are not inconsistent with the Constitution.”<sup>45</sup> Customary law is also subordinated<sup>46</sup> in our current constitution which gives avenues for person to seek redress whenever customary laws are discriminatory.

The Constitution permits marriages under customary law so long as those laws do not infringe on the rights of either party. Levirate marriage infringes on the rights of women to consent to a marriage and also the right to inherit property since they are regarded as subjects of inheritance rather than legal subjects entitled to inherit.

Therefore ideally all areas of law, such as marriage and land laws should support succession law by aiming at promoting provisions that ensures gender equality.

### **3.3 Application of Different Succession System**

Kenya does is not a single homogenous community; rather it comprises different tribes with diverse cultures, religion, customs and distinct ways of livelihood. Due to the multi-cultural nature of our society the Law of Succession Act was enacted taking into account practices of religion and customs of the various communities in the country.

Bessie House Madamba, writings about, *Legal Pluralism and Attendant Internal Conflicts in Marital and Inheritance laws*, attributes conflict of laws in succession to the regime of legal pluralism. According to her, male domination is totally engrained in inheritance practises affecting Kenyan women in rural areas. The passing of the Law of Succession Act was intended to eliminate such forms of discrimination but it hasn't done so.

The application of different laws within the Law of Succession Act is one of the root courses of contradictions and injustices that have arisen from the past. Exceptions have been made in the Act to give way for the application of different religious law and customs. Customs and

---

<sup>43</sup> Section 82, *Constitution of Kenya* (1996).

<sup>44</sup> Article 45 (3), *Constitution of Kenya*, (2010).

<sup>45</sup> Article 45 (4) *Constitution of Kenya*, (2010).

<sup>46</sup> Article 2(4) *Constitution of Kenya*, (2010).

some aspects of religion that the Act permits their application are patriarchal in nature which determines the inferior position of women in inheriting property.

The ultimate aim of the Law of Succession Act was to apply universally to all person with no regard to religion or custom but this has not yet been achieved because the Act still provide a few exceptions where it does not apply. The Law of Succession Act (2015) does not apply to the administration of the estates of a deceased Muslim and provides for districts that it does not apply.<sup>47</sup>

Historically this is caused by three circumstances. First, during the colonial period some Africans had converted to Christianity while others chose to stay intact with their traditional way of life. This necessitated creating legislation on succession to cater for the devolution of the properties for those Africans who had converted and still allow for customary law for those who had not converted to Christianity.

Secondly, even after conversion to Christianity, some converts retained aspects of their traditional culture and did not intend to be governed entirely by the Western common law and so exceptions were provided to allow for application of customs.

Thirdly, during the colonial period Africans had not started demarcating land and was held communally. Pastoralist communities moved from one place to another looking for pastures for their cattle' and thus the most suitable land holding tenure was community land. Therefore, when it came to the devolution of estates, customary law was the most fitting law applicable.

As it can be seen from these three circumstance, the exceptions in the Law of Succession Act allowing for the application of customs had valid reasons given the prevailing situation during the colonial period. However, looking at the progress made in the international arena on human rights and the present constitutional framework in Kenya, the above historical reasons have now lost their validity.

### **3.4 Adjudicatory System; Enforcement Mechanisms**

The continued practice of gender discrimination in succession matters can also be attributed to the present adjudicatory system. Courts have interpreted Section 32 in divergent ways.

---

<sup>47</sup> Section 32, *Law of Succession*, (Act No.160 of 2015).



Although the exemption under this Section applies only to the gazetted areas in the Law of Succession Act (2015), Courts have misinterpreted this to include all agricultural land even land situated in areas that are not gazetted. Some courts have insisted that there is exclusive applicability of customary law in succession matters. Other courts take customary law to be applicable so long as it is not repugnant to justice and morality. Misinterpretation and misapplication of customary law does not occur only among young magistrates, a Justice of the Court of Appeal has ruled that the Law of Succession Act cannot apply to all rural land in general because women are supposed to be married and go away.<sup>48</sup>

This was illustrated in the case of *S.M Otieno*. S.M Otieno was a prominent lawyer from the Luo community and died in 1986. The issue that arose before the court was whether his rural land could devolve according to customary or statutory law. The court ruled in favour of customary law and the widow who claimed the estate was excluded. The above way of interpreting this Section of the Act contributes to ongoing recourse to discriminatory traditional African customs.

Janet Kaberere Macharia in her article *Law and the Status of Women in Kenya*, argues that the liberal approach to courts are available to those who have access to legal counsel and a large population of women suffer in silence as their male relatives deny them their source of livelihood. The legal framework addressing inheritance rights is not in itself sufficient to cater for the rights of the poor and all citizens.<sup>49</sup> People in the rural areas are unaware of their statutory rights to inherit property and most of them usually resort to other traditional means of instituting their rights. Persons in charge of the estate of a deceased person in the rural areas are elders, almost all of whom are men and their decision and way of devolving the estate will be patrilineal in nature and favour male heirs.

There are also procedural technicalities in the legal forum of redeeming rights. The study of the Policy Project (USAID), in collaboration with KNHRC, entitled; *From Despair to Hope: Women's Rights to Own and Inherit Property*, argued that the existing legal and policy framework aimed at protecting women was not available for those who need it most, that is, indigenous women. The Law of Succession Act (2015) limits the jurisdiction of the Magistrate Courts in succession matters and exclusive jurisdiction is given to the High Court<sup>50</sup>. Magistrate

---

<sup>48</sup> *Otieno v Ougo Siranga*, [1987] eKLR.

<sup>49</sup> Macharia K.M 'Law and the Status of Women in Kenya, International Environmental Law Research in Kenya' *International Environmental Law Research Centre*, Kenya (1995).

<sup>50</sup> Section 48, *Law of Succession Act*, (Act no. 160 of 2008).

Courts are more common, more efficient and more easily accessible to the rural Kenyan than the High Court. Therefore granting exclusive jurisdiction to the High Court makes access to justice more expensive and more difficult, if not impossible, for rural women.

The Report indicated that the existing legal and policy framework aimed at protecting women was not easily accessible to many Kenyan women because of the procedural technicalities present in the legal process of redeeming rights.<sup>51</sup> The Report also associates the high rate of HIV& AIDS in Western Kenya with the displacement of widows and the poverty caused by denying them the right to own and inherit property.

### **3.5 Comparative Analysis; South Africa**

South Africa has been working towards the harmonization of their statute law and customary law in their legal framework for succession matters. A comparative study looking at South Africa will help understand possible procedures to align the present Law of Succession Act (2015) with the constitutional provision of gender non-discrimination.

Harmonization of South Africa statute law and customary law is dated back to the year 1998. The process started when papers titled ‘Succession in Customary Law’ were issued and responses were elicited from the public. The responses led the South African Law Reform Commission of the Department of Justice to draft a Bill titled ‘Customary Law of Succession Amendment Bill’. The Bill extended the general law of Succession in the Will’s Act 7 of 1953 and Intestate Succession Act 81 of 1987 to apply to all persons. The consequence of the Bill would have ensured that the Former Black Administration Act 38 of 1927, which made mandatory for the devolution of the estate of an indigenous person to be devolved according to customary law, ceased to apply. The proposed Bill was however, received with so much hostility from traditional leaders that its enactment was not pursued further.

The South African Law Reform Commission reopened investigations in 1999 that resulted in the Discussion document 74 which contained reforms and recommendation which were later published in 2000. It also contained a draft bill.<sup>52</sup>

In the 2004 case of *Bhe and Others v The Magistrate of Khayelitsha* Black Administration Act (1927) which required the application of customary law that barred women from inheriting property, was declared unconstitutional. In its decision the Court specifically declared Section

---

<sup>51</sup> KNHRC & Project Policy (USAID), *‘From Despair to Hope: Women’s Rights to Own and Inherit Property’*, 2005.

<sup>52</sup> The South Africa Law Reform Commission Discussion Paper 74: Customary Marriages, South Africa, 1997.

4(1) of the Intestate Succession Act that excluded from its operations the people whose estate devolved according to the Black Administration Act unconstitutional.<sup>53</sup>

In another South African case *Shibi v Sithole and Others*, the court ruled that customary law that excluded women from inheriting property was unconstitutional. The rationale of the decision was that, the constitution was the supreme law of the country and any other law inconsistent to it was invalid. It thus declared Section 23 of the Black Administration Act unconstitutional.<sup>54</sup>

The above recommendation by the Commission was welcomed by many South African citizens while a few other people believe it will work out well if the people were given the option to choose whether to be subject to customary or statutory law. This necessitated a consultative process by the Commission with the people to assess the viability of their reforms. They conducted workshops to obtain opinion of the people all over the country. The workshops were a success and their recommendation received much support.

After a critical evaluation and discussion, the draft Bill was revised and the reform of the customary law was put in place where all properties that initially devolved according to customs, devolved according to Intestate Succession Act and the Will's Act establishing a single succession regime where all citizens applied statutory law provisions to testate and intestate succession.<sup>55</sup> The customary law rule of male primogeniture that discriminated against women was changed.<sup>56</sup>

---

<sup>53</sup> *Bhe & Other v The Magistrate of Khayelitsha* [2004] CCSA.

<sup>54</sup> *Shibi v Sithole and Others*, [2004] CCT 49.

<sup>55</sup> The South Africa Law Reform Commission Discussion Paper 74: 'Customary Marriages', South Africa, 1997.

<sup>56</sup> The South Africa Law Reform Commission Discussion Project 90, 'Customary Law of Succession', 2004.

## CHAPTER FOUR: Findings/ Evidence

### 4.1 Findings

This Chapter presents information, including interviews with disinherited women from a wide range of sources including data collected from research conducted by international organizations, governmental bodies, academic as well as and data gathered from interviews and questionnaires.

According to the USAID research 90% of poor people are not aware of the Kenya's formal inheritance laws. It is not correct to say that the existence of formal policy ensures gender equity because people still resort to customs.<sup>57</sup>

Jospine Kesui, a resident of Narok and a mother of three lost her husband three years ago who left her a piece of land. Her brothers-in-law have since tried to chase her out of her matrimonial home and the two acres of land she is left with. They want her to go back to her parent's family and leave only the male children. When I talked to her he was totally unaware of the existence of a law that protected women from being disinherited. She therefore resorted to appealing to the elders when her brothers-in-law wanted to chase her away.<sup>58</sup> This illustrates how women may not know their legal rights and so seek help from elders whose decisions are based on personal views and interest rather than a consistent legal precedent.<sup>59</sup>

Peter Seki, a resident of Narok County, had the same attitude. When he applied for a grant of representation for the estate belonging to his deceased father, the only persons listed as beneficiaries were his brothers. I asked him why he did not include his sisters in the list of beneficiaries. He answered; 'My sisters are married and they are going to get a share of the estate belonging to the families they are married in'.<sup>60</sup>

Although the Law of Succession Act provides for both daughters and sons to inherit when their parents dies intestate, it is rare for women in Kenya to inherit property from their parents equally with their brothers.

---

<sup>57</sup> FIDA & International Human Rights Clinic & Georgetown University Law Centre, *Harmful Customs that Curtails Women Equal Enjoyment of ICESCR Rights*, 2008 at Nairobi.

<sup>58</sup> Interview with Kesui J on 28 November 2016.

<sup>59</sup> Interview with Kesui J on 30 November 2016.

<sup>60</sup> Interview with Seki P on 28 June 2016.

In another interview with, Kisorunka Norkishon, a Maasai woman from Ngong, she narrated that after her parents died, her brothers took the land, sheep, cattle and the entire parent's property claiming that she was not entitled to inherit by virtue of the fact that she was married.<sup>61</sup> The same happened to Ndati Muita, a Maasai woman with seven children. Her brothers inherited everything claiming that because she was married she will be supported by her husband.<sup>62</sup>

Gladys Naisula; is a Maasai widow from Narok County with three children. After her husband died in 2010 she was chased away from her home by her brothers-in-law. Her children were taken away from her and went to live in the house of one of her co-wives. She reported that her property had been grabbed and her children abducted to the police. She was able to get back one of her children, her daughter. Her brothers-in-law kept the two sons. She was not able to get any share of her husband's property which they claimed will later be inherited by her two sons when they grew old. Moreover, her husband's land was occupied by the brothers-in-laws. When I asked her whether she would consider hiring a lawyer she just laughed because for her there was nothing like that.<sup>63</sup>

Mary Saruni, a relative of the late Lorna Saruni who died three years ago narrates, what happened a few years ago. The late Lorna Saruni was married to Daniel Saruni and she had a co-wife. She had two daughters while her co-wife had seven children, five boys and two girls. All the children got married and Lorna Saruni was left alone. A few years later their husband died, at which point one of the sons of her co-wife took all her property away. She tried by all means to claim back her properties but no one listened to her grievances. After a few years suffering at the hand of her co-wife's sons she was chased away. She went and stayed in with one of her daughter's. She aged and her daughter decided to return her home. She died a few years later and was buried in her previous home.<sup>64</sup>

In a 2009 study conducted by FIDA on the Maragoli community in Western Kenya, several women described the hardship they underwent at the hands of the male in-laws. One woman declared:

“After my husband died, the clansman proposed a man to inherit me as his wife which I declined. My father-in-law and his two sons sold my husband's land and when I enquired what

---

<sup>61</sup> Interview with Norkishon K on 5 December 2016.

<sup>62</sup> Interview with Muita N on 5 December 2016.

<sup>63</sup> Interview with Naisula G on 4 December 2016.

<sup>64</sup> Interview with Saruni M on 4 December 2016.

was going on, I was told to pack up and leave. I obliged and went to start an open air business of selling used clothes and shoes to earn a living for my family.”<sup>65</sup>

A woman named Patricia Wairimu from the Maragoli community who was married and living in Nairobi narrates that after her husband died in 1995, her in-laws raided her home and stripped it bare. They even wanted her to be inherited because they had paid dowry. This shows how the payment of dowry can in some cases exacerbate disinheritance.<sup>66</sup>

A survey conducted by the Chronic Poverty Research Centre in Western Kenya found that those women who are most vulnerable to levirate marriages include childless widows, widows with no sons and widows who are regarded to have a bad character.<sup>67</sup> This shows that women suffer under levirate marriages which bar them from inheriting property because when they decline they are evicted and their land is taken away from them.

A research conducted by Mercy Wahome (The National Coordinator for Women and AIDS in Kenya) reached a conclusion that women mostly affected by HIV & AIDS are those frequently ejected from their homes by their husband’s family.<sup>68</sup> According to their research widow’s right to continue living on her husband ancestral land is guaranteed by her acceptance of cultural practices like ‘wife inheritance’. They note that while legislation does avail remedies, it does not stop the abuse from happening; in essence there is no implementation of the law.

In an interview conducted by Human Rights Watch in 2002, Theresa Murunga, a widow from Narok County, said, ‘My in-laws took away my household and chased me like a dog. I was voiceless and I left’. Based on various interviews with widows from the rural areas, Human Rights Watch concluded that when their husbands died, their in-laws took away their land, furniture’, vehicles, livestock and all their household goods. Moreover, the incidents of rural widows’ expected to undergo wife inheritance or cleansing rituals is higher than among urban widows.<sup>69</sup>

Asha Wairimu, a Luyha widow narrates how she had to leave her homestead after her in-laws evicted her. She had the in-law arrested by the police after he ploughed and planted crops in the

---

<sup>65</sup> Moogi Kwako L.E, ‘Widow Inheritance among the Maragoli in Western Kenya’, *Anthropological Research*, 1998.

<sup>66</sup> Human Rights Watch, ‘Double Standards: Women Property Rights Violation in Kenya’, A1505, Nairobi, 2003.

<sup>67</sup> Chronic Poverty Research Centre, ‘Challenges and Opportunities in Inheritance Rights in Kenya’, Policy Notes 2011.

<sup>68</sup> Mercy Wahome, ‘Securing Property and Inheritance Rights in Context of HIV&AIDS’, *Society for Women and HIV&AIDS in Kenya*, 2007.

<sup>69</sup> Human Rights Watch, ‘Double Standards: Women Property Rights Violation in Kenya’ A1505, Nairobi, 2003.

piece of land that her husband had left to her. The police arrested the brother-in-law but he was quickly released and was never prosecuted. She followed up the matter on her own and with the help of legal counsel obtained a judgment declaring that the land was hers. She feared, however, that the judgment was not going to be enforced.<sup>70</sup>

The same pattern of discrimination applies in the case of Muslim women. According to the interview conducted by Human Rights Watch, the Chief Kadhi, Kenya's supreme authority on Islamic Law, said 'Disinheritance of daughters is one of the biggest problems I have'. Farida Mohammed, a thirty-four-year old whose father died in 2000 narrates that she did not inherit because her older brother inherited the land her father had left. Farida's unmarried sisters live on their late father's land but it does not belong to them because they did not inherit. The rationale of allowing only men to inherit was because it was presumed that they would always take care of their sisters. However, this is not always the case, because they can disown or disregard any such responsibility. She attributes this to their religious customs, which drag them back by disinheriting them.<sup>71</sup>

From the interview I conducted in Narok for instance, a village elder told me that usually when a man marries he shows the woman the land and livestock that belongs to her while he knows very well that all the property belongs to him.<sup>72</sup>

These few select interviews as well as a vast amount of other empirical evidence shows that women generally lack control over property and are either unaware of their succession rights or unable to claim them which reduces their potential to inherit property.

---

<sup>70</sup> Interview with Wairimu A on 29 November 2016

<sup>71</sup> Human Rights Watch, 'Double Standards: Women Property Rights Violation in Kenya', A1505, Nairobi, 2003.

<sup>72</sup> Human Rights Watch, 'Double Standards: Women Property Rights Violation in Kenya', A1505, Nairobi, 2003.

## CHAPTER FIVE: Discussion

### 5.1 Analysis of the Findings

Women property rights violations in Kenya are caused by discriminatory laws and customs, inefficient enforcement bodies, official disregard, lack of knowledge and technicalities that impede the enforcement of these rights.

Customary law overtly discriminates on the basis of gender by giving men greater rights than women in owning and inheriting property. The attitude that women should not inherit that has existed from the pre-colonial period still influences how customary law is applied and how legal rights embodied in the Law of Succession Act are interpreted, thereby resulting in and legitimizing inequality in the succession regime in Kenya. The elders of various communities whose views are often influential in rural society determines the application of customary laws and these are the only persons to whom many women victims of disinheritance can seek help from, whenever their property rights are violated.

As is evident from the above cases, one of the main reasons why women are disinherited is because they often lack control or have little control over family property.<sup>73</sup> In most ethnic groups a property acquired in a marriage usually belongs to the husband and is registered in his name. This means they have title and thus can exercise control over the property by either disposing of it or otherwise without consenting the wife.

The Law of Succession Act, which to a large extent determine how inheritance is administered in the courts, have exacerbated gender inequality in inheritance because it allows for the customary allocation of rights by which only male persons are deemed eligible to hold property.

The other reasons for disinheritance of women are lack of the response or disregard by institutions mandated to protect and enforce the law. As seen from the evidence when women report their cases to the police they are often disregarded and so are able to achieve nothing. Many victims prefer the traditional dispute resolution system because it is easily accessible and less costly. Traditional dispute resolution does not require any legal or filing fees and it is accessible because local leaders, usually elected by the members of the community, can be

---

<sup>73</sup> Human Rights Watch, 'Double Standards: Women Property Rights Violation in Kenya, A1505, Nairobi', 2003.



easily reached in the rural areas.<sup>74</sup> However, the local leaders in charge of traditional dispute resolution will almost always opt to apply customary law rather than statutory law.

Additionally, the government has neglected to address or prevent these violations. Programs such as civic education or legal aid system by the government specifically aimed at alleviating women rights violation are lacking. In overall the government of Kenya has not made women property rights a priority.

Another concern gathered from the findings is the lack of knowledge. When I asked that Maasai Woman if she would consider hiring a lawyer she just laughed because for her there was nothing like that. Women are disinherited and they do not resist because they do not know their legal rights and for them to appeal against customary norms is something inconceivable. The FIDA report on; *Harmful Customs that Curtail Women's Equal Enjoyment of ICESCR Rights*, concluded that customs are applied in rural areas because most rural communities are unaware of statutory law governing property.<sup>75</sup>

Courts are supposed to safeguard women rights but they tend to heavily biased against women. This is the reason why women would not opt to seek help from court. In an interview conducted by Human Rights Watch in 2002, Ann Njogu, an executive director for the Centre for the Rehabilitation and Education of Abused Women, said that courts and the judiciary are strong arms to disinherit women.<sup>76</sup> As already alluded to in the *S.M Otieno case*, some judges do not apply the Law of Succession Act (2015) and believe that women should not inherit property because customarily married women leave the homestead of their family of birth and go away.<sup>77</sup>

---

<sup>74</sup> Kariuki F, 'Arbitrability of traditional land disputes' *UON Law Journal* (2014), 27.

<sup>75</sup> FIDA & International Human Rights Clinic & Georgetown University Law Centre, *Harmful Customs that Curtails Women Equal Enjoyment of ICESCR Rights*, 2008 at Nairobi.

<sup>76</sup> Human Rights Watch, *Double Standards: Women Property Rights Violation in Kenya*, A1505, Nairobi, 2003.

<sup>77</sup> *S. M Otieno Case*, [1989] eKLR.

## CHAPTER SIX: Conclusion and Recommendations

### 6.1 Conclusion and Recommendations

The study has shown that under the Law of Succession Act (2015), widows from the Islamic community and from communities located in exempt districts are particularly vulnerable to being denied their succession rights. There are various steps that might be taken to mitigate, if not remove, such inequities.

There is need to enact a uniform statute of succession that applies to all citizens in the country. This should encompass removing customary law and, where appropriate, religious laws, that are discriminatory on basis of gender. The reform should especially target Section 3(2), 32 and 33 of the Law of Succession Act.<sup>78</sup> Of course, the Muslim community of Kenya should remain free to follow their religious norms as dictated by Islamic laws.

To ensure that enforcement of inheritance rights is equitable and effective the Commission on the Law of Succession should expand the jurisdiction of the Magistrate Courts to resolve inheritance matters. As we have seen, the Magistrate Courts are more easily accessible to rural Kenyans than the High Court. In addition to expanding the role of the Magistrate Courts, another way of making justice accessible would be to reduce the administrative costs of the filing etc. so as to cater for all persons including the disenfranchised. Vindicating inheritance rights in court can prove to be highly costly, given the overall cost encompassed in court fees, filing fees, disbursement fees and the advocate's fees. This is hardly affordable to the poor. Amendment of the Law of Succession Act (2015) will ensure an equitable and functional justice system.

A well informed society is in a better position to request and demand its rights. The Commission should organise ways of disseminating full information to all women in Kenya, so that women are more aware of their rights as is outlined in the Law of Succession Act (2015). They should for instance implement an information sharing program to facilitate the same.<sup>79</sup> This could be conducted through administrative officers and chiefs who inform potentially interested parties of their rights and the availability of redress in court. The role of the chiefs and administrative officer would be to secure the property of the deceased immediately upon death, take note of people who have interest in the property and inform them of their legal rights. This procedure

---

<sup>78</sup> Human Rights Report and Proposed Legislation, 'Empowering Women Rights to Inheritance', FIDA Reports 2009 at Nairobi.

<sup>79</sup> FIDA & International Human Rights Clinic, 'Kenya Laws and Harmful Customs Curtails Women's Equal Enjoyment of ICESCR Rights' Georgetown University Law Centre, 2008 at Nairobi.

would ensure that inheritance disputes are not arbitrated by local leaders who are more inclined to apply customs.

There is need to harmonize Marriage and Succession laws. The Marriage Act should be reformed to ensure that any customary law permitted and applied is not inconsistent with the Kenya constitution 2010<sup>80</sup> and is not repugnant to justice and morality<sup>81</sup>. This applies specifically to levirate marriages that are permitted under the Marriage Act (2014) and which, as we have seen, contribute to women being disinherited in violation of the Law of Succession Act (2015). Such harmonization would ensure that levirate marriage is not practiced and will also reduce the chance of women being discriminated against with regard to their inheritance rights.

The political will to effectuate the above reforms need to be strengthened. The Kenyan government must commit fully itself and the necessary resources if reform is to be effective. Past experience shows that inheritance rights are not a priority for either the government or the courts. A report conducted by USAID, concluded that efforts to improve property and inheritance rights for women have been hindered by a general lack of political will and the slow pace of legal change.<sup>82</sup>

One possible way of bringing change would be to focus more on dissemination of information, education and empowerment of women with regard to their rights at the county level, with particular efforts being made reach isolated and marginalized communities whose women are the most affected persons.<sup>83</sup> Women's groups such as the Education Centre for Women in Democracy (ECWD), an organization working to inform women about their rights, has a key role to play here by offering radio programmes where women can air their complaints and ask questions.<sup>84</sup> Ideally such programmes should be conducted in local languages and aired in local radio stations.

Another important factor is the need to change norms of behaviour and attitudes towards women which are one of the core reasons why women are disinherited. The Land Act (2012) provides title for all persons but because of the view that men are heads of households, title

---

<sup>80</sup> Article 2(4), *Constitution of Kenya*, (2010).

<sup>81</sup> Section 3(2), *Judicature Act*, (Act no. 8 of 1967).

<sup>82</sup> USAID & Women in Development Technical Assistance Project, *'Women's Property and Inheritance Rights; Improving Lives in Changing time'*, 2003.

<sup>83</sup> USAID & Women in Development Technical Assistance Project, *'Women's Property and Inheritance Rights; Improving Lives in Changing time'*, 2003.

<sup>84</sup> USAID & Women in Development Technical Assistance Project, *'Women's Property and Inheritance Rights; Improving Lives in Changing time'*, 2003.

deeds are usually written in their names. Statistics show that only 3% of women in Kenya own land.<sup>85</sup> Countering such attitudes and Stereotypes about women requires social change. To achieve this, women must take the lead.

Women policymakers from bodies such as FIDA and the Kenya Women Judges Association (KWJA) have a key role to play here.

---

<sup>85</sup> International Finance Corporation & World Bank, 'Voices of Women Entrepreneurs in Kenya', *IFC Gender Entrepreneurship Markets & Foreign Investments Advisory Service*, 2006.

## BIBLIOGRAPHY

### 7.1 Texts

1. Cotran E, '*Restatement of Africa Law*', 1ed, School of Oriental & African Studies, Kenya, 1969.
2. Musyoka W, '*Law of Succession*', 1ed, Law Africa Publishing Ltd, Nairobi, 2006.
3. Parry Hughes D, Clark J.B, '*The Law of Succession*', 10ed, Sweet & Maxwell, U.K, 1996.
4. Kameri-Mbote P, Odote C, Musembi C, Kamande M, *Ours by Right ; Law Politics and Reality of Community Property in Kenya*, Strathmore University Legal Press, Nairobi, 2013.
- 5.

### 7.2 Articles

1. Bessie H. M, 'Legal Pluralism and Attendant Internal Conflicts on Marital and Inheritances Law', *Italian Institute of Africa*, Vol no. 3 (1994).
2. Kimani M. G, 'Analysis of Gender Discriminatory Laws in Kenya' Kenya, Vol no.3 (2006).
3. Kameri M. P 'The Law of Succession in Kenya: Gender Perspectives in Property Management and Control' *International Environmental Law Research Centre* (1995)
4. Macharia K.M 'Law and the Status of Women in Kenya, International Environmental Law Research in Kenya' *International Environmental Law Research Centre*, Kenya (1995).
5. Mwimali J.B, 'The Practice in Land Law and Succession in Kenya; Constraints on the Full Enjoyment of Human Rights, *Lunda University, Faculty of Law*, (2006).
6. Ndulo M, 'African Customary Law, Customs and Women Rights', *Cornell Law Faculty Publications*, Ghana, Paper 187 (2011).
7. Ingunn Et Al, Human Rights Formalization and Women Land Rights in Southern and Eastern Africa, *Studies in Women's Law No. 57, Institute of Women's Law*, Oslo University, Norway, (2005).
8. Girvins C.D, Architects of a Mixed Legal System, *the South Cross Publishers*, South Africa, (1966).
9. Allott A.N, Towards the Unification of Law in South Africa, *INT'L & COMPL.Q* South Africa, Vol 14 (1965).

10. Firestone S, 'The Dialects of Sex; the Case of Feminism Revolution', *William Morrow & Company Publishers*, New York (1974).
11. Grace M.M & Natasha L.F, National assessment of Gender Mainstreaming in STI and the Knowledge Society in Kenya, *African Centre for Technology Studies*, (2016).

### 7.3 Reports

1. FIDA and International Human Rights Clinic, Georgetown University Law Center, *Harmful Customs Curtailing Women Equal Enjoyment of the ICESCR Rights*, 2008 at Nairobi.
2. KNHRC & Project Policy (USAID), *from Despair to Hope; Women Rights to own and Inherit Property*, 2005 at Kenya.
3. South African Law Reform Commission Discussion Paper 74 on Customary Law 1998, South Africa.
4. The International Women's Human Rights Clinic Georgetown University Law Centre and The Federation of Women Lawyers: Kenya, *Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation* Kenya 2009, at Nairobi.

### 7.4 Statutes

1. Black Administration Act, (Act no. 38 of 1927) South Africa.
2. Constitution of Kenya, (2010).
3. Intestate Succession Act, of (1981) South Africa.
4. Law of Succession Act, (Act no 160 of 2008).
5. Marriage Act, (Act no 4 of 2014).
6. Land Act, (Act no 6 of 2012).
7. African Christian Marriage and Divorce Ordinance, (1902), Kenya.
8. Wills Act, of (1961), Kenya.

### 7.5 International Instruments

1. International Convention on Elimination of All Forms of Discrimination against Women, 18<sup>th</sup> December 1979, 34 UNTS 180.
2. International Convention on Economic Social and Cultural Rights, 3<sup>rd</sup> January 1976, 2200A.
3. International Convention Civil and Political Rights, 19<sup>th</sup> December 1966, 14468.

## 7.6 Case law

1. *Janet Mukima Kamanga v Easter Njoki Ravael Njeru* (2014) eKLR
2. *Bhe v Magistrate Khayelitsha & Others* (2004) CCSA
3. *Mojekwu v Mojekwu*, [1997], NWLR 283
4. *Ephraim v Pastory*, (2001) AHRLR 236.
5. *Estate of Lenrionka ole Ntutu,(Deceased)* [2008] eKLR.
6. *Mwathi v Mwathi*, [1996], eKLR.
7. *Estate of Charles Muigai Ndungu*, [2013], eKLR.
8. *James K Otiato V Samson Otieno*, [1993], eKLR.
9. *Shibi v Sithole and Others*, [2004] CCT 49.
10. *Otieno v Ougo Siranga*,[1987] eKLR.
11. *Estate of Charles Muigai Ndungu*. [2002], eKLR.