

EXAMINING WOMEN'S ACCESS TO JUSTICE WHEN USING TRADITIONAL DISPUTE  
RESOLUTION MECHANISMS TO SECURE THEIR LAND RIGHTS IN KENYA

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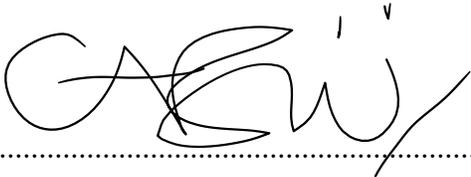
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## Declaration

I, CYNTHIA NABWILE SIFUNA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: .....7/11/2021.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .....

Ms Purity Wangigi

## **Abstract**

The crux of the study was to assess the effectiveness of traditional dispute mechanisms (hereinafter, TDRMs) in facilitating women's access to justice when securing their land rights in land disputes. The objectives were therefore to assess the status quo regarding the nature and functioning of TDRMs, to analyse the effectiveness of TDRMs in improving access to justice for women with regard to safeguarding their land rights by asking the African woman question and to recommend practical ways that state and non-state actors can apply substantive equality to remove impediments to women accessing justice using TDRMs to secure their land rights. The scope of the study was limited to Kenyan communities and only the use of the woman question, specifically the African woman question, among the three tools that feminist jurisprudence (also called feminist legal theory) suggests for the analysis due to its suitability for the research topic. The study employed the desktop doctrinal research method, and specifically socio-legal research, by using mainly secondary resources to focus on the social context of the legal problem and finding their points of intersectionality. The qualitative research and analysis of the secondary data using the African woman question revealed that despite the progress and efforts at international and regional levels to address discriminatory practices against women, negative cultural practices and attitudes still present in customary laws governing TDRMs have continued to impair African women from accessing justice and fully enjoying their fundamental rights and freedoms. Based on substantive equality, the paper made recommendations to both state and non-state actors, requiring them to work in tandem, to remove the barriers to access to justice for women using TDRMs and to bring the operations of TDRMs in line with human rights standards set by the 2010 Constitution and other regional and international human rights instruments that Kenya has ratified.

## **List of abbreviations**

1. ADR- Alternative Dispute Resolution
2. AJS- Alternative Justice Systems
3. CEDAW- Convention on the Elimination of All Forms of Violence Against Women
4. FIDA- International Federation of Women Lawyers
5. ICCPR- International Covenant on Civil and Political Rights
6. ICESCR- International Covenant on Economic, Social and Cultural Rights
7. KDHS-Kenya Demographic and Health Survey
8. KELIN- Kenya Legal & Ethical Issues Network on HIV and AIDS
9. LAC- Land Adjudication Committee
10. NLC- National Land Commission
11. TDRM- Alternative Dispute Resolution Mechanism
12. UDHR-Universal Declaration of Human Rights
13. WCLRF-Women and Children Legal Research Foundation

## List of cases

### a. International cases

1. *Bhe & Others v Magistrate Khayelitsha & Others* (2005) Constitutional Court of South Africa.
2. *Ramantele v Mmusi & Others* (2013) Court of Appeal of Botswana.
3. *Ukeje v Ukeje* (1999) Supreme Court of the Federal Republic of Nigeria.

### b. Kenyan cases

1. *Esiroyo v Esiroyo* (1973) eKLR.
2. *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others* [2017] eKLR
3. *Virginia Wambui Otieno v Joash Ochieng Ougo* (1987) eKLR.

## **List of legal instruments**

1. *Constitution of Kenya* (2010).
2. *Environment and Land Court Act* (No. 19 of 2011).
3. *Judicature Act* (No. 8 of 1967).
4. *Land Adjudication Act* (Cap 284 Laws of Kenya).
5. *Land Control Act* (Act No 34 of 1967).
6. *Land Registration Act* (No. 3 of 2012).
7. *National Land Act* (No. 6 of 2012).
8. *National Land Commission Act* (No. 28 of 2016).

# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction and background

Land in Sub-Saharan Africa is considered to be the most important asset as it carries with it social, economic, political, cultural and even religious importance.<sup>1</sup> Its permanence and durability, which very few other assets have, set it apart in its intergenerational stability.<sup>2</sup> Due to its status and far reaching impacts, securing a land title and proper protection of land rights is paramount. Traditional Dispute Resolution Mechanisms (TDRMs) have been championed by the transformative spirit of the 2010 Constitution of Kenya<sup>3</sup> and are hailed for improving access to justice.<sup>4</sup> While this can be argued to be true *prima facie*, the experiences of women in the grassroots, with the customary laws upon which these TDRMs are founded, beg probing into the accessibility of justice for this vulnerable group when trying to secure their land rights.

This paper is written in the context of a patriarchal society where there is a big imbalance of power and authority between men and women. In most African communities, men are the ones who are permitted to own land and have other autonomous rights over the land while women are merely accorded the rights to use and occupy land.<sup>5</sup> Women and men have rarely, if ever, had identical claims to land in practice, largely because the genders have very differentiated positions within the kinship systems that are the primary organising order of land access.<sup>6</sup>

Findings from the International Federation of Women Lawyers (FIDA)'s study on women and land holding in Kenya show that about 65% of land tenure in Kenya is controlled using customary law. Furthermore, of all the registered land titles, only 1% are held by women while

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<sup>1</sup> Kariuki F, Ouma S and Ng'etich R, Property law, Strathmore university Press, Nairobi, 2016.

<sup>2</sup> Agarwal B, 'Gender and command over property: A critical gap in economic analysis and policy in South Asia' 22 *World Development* 10, 1994, 1470.

<sup>3</sup> Article 159 (2)(3), *Constitution of Kenya* (2010).

<sup>4</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020, 3.

<sup>5</sup> Griffiths A, 'Reconfiguring law: An ethnographic perspective from Botswana' 23 *Law & Social Inquiry* 1, 1998, 615.

<sup>6</sup> Whitehead A and Dzodzi T, 'Policy discourses of women's land rights in Sub-Saharan Africa: The implications of the return to the customary' 3 *Journal of Agrarian Change* 1, 2003, 109.

only about 6% are held jointly with their husbands.<sup>7</sup> With a whopping 80% of the labour force on land being women, it is gravely unfair that such a minute percentage have secure land titles.<sup>8</sup>

The explicit and unequivocal protection of the status and property rights of women is one of the greatest legacies of the 2010 Constitution of Kenya. For instance, the non-discrimination clause forbids the direct and indirect discrimination on the basis of sex, creates an obligation to have affirmative action programmes and policies to redress any disadvantages suffered in the past by them, and makes an outright averment that women and men have the right to equal opportunities in all spheres of life.<sup>9</sup> Also, the right to property available to all individuals,<sup>10</sup> principles of land policy<sup>11</sup> such as equitable access to land and elimination of gender discrimination in law, customs and land practices related to land and property in land are some examples showcasing the clear intention of the 2010 Constitution to improve the status of women when it comes to property rights. Moreover, legislation such as the *National Land Act*<sup>12</sup>, *National Land Commission Act*<sup>13</sup> and the *Land Registration Act*<sup>14</sup> together with the international treaties and conventions signed and ratified by Kenya equally embody these land policy guidelines in favour of elimination of discrimination against women in land disputes.

Despite the equal protection safeguards adopted by the law which seek to guarantee equitable ownership of land, women are still marginalised or even excluded from owning land, leaving this vital resource in the hands of men in many parts of Kenya.<sup>15</sup> Their access to land, as will be seen in the case studies, is pegged on their relationship to a man- whether a father, son or husband. The probability of a woman getting access to land after the death of the owner of the land, even just for use, is determined by factors *inter alia* the age and gender of her children (and whether she has any), payment of bride price, how respectable she is considered to be and her HIV status.<sup>16</sup> Women

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<sup>7</sup> Kelin Kenya, A commentary on trends, actors and initiatives that impact women's inheritance rights in Eastern, Nyanza and Coast provinces, 2010, 45.

<sup>8</sup> Federation of Women Lawyers (FIDA) Kenya, Women's land and property rights in Kenya, 2009.

<sup>9</sup> Article 27, *Constitution of Kenya* (2010).

<sup>10</sup> Article 40, *Constitution of Kenya* (2010).

<sup>11</sup> Article 60, *Constitution of Kenya* (2010).

<sup>12</sup> Section 4, *National Land Act* (No. 6 of 2016).

<sup>13</sup> Section 3(a) and 67(2)(f), *National Land Commission Act* (No. 28 of 2016).

<sup>14</sup> Section 93, *Land Registration Act* (No. 3 of 2012).

<sup>15</sup> Kameri-Mbote P, 'Fallacies of equality and inequality: Multiple exclusions in law and legal discourses' Inaugural lecture, University of Nairobi, 24 January 2013, 21. In *Ukeje v Ukeje* (2014) FWLR Supreme Court of Nigeria, this practice was considered to be unconstitutional and discriminatory towards women.

<sup>16</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 47.

therefore remain dependent on their relationship to men to access this vital resource or otherwise get trapped in intergenerational poverty.<sup>17</sup>

Kenya's legal pluralism permits the use of customary law to govern one's personal status, communal resources and land organisation to the extent that they are consistent with the 2010 Constitution and other written laws.<sup>18</sup> Despite justice dispensed through formal courts seeming to take centre stage in the administration of justice, the reality, according to a survey by the Judiciary in conjunction with the Hague Institute for Innovation of Law, is that only 10% of Kenyans use the formal justice system to resolve their disputes.<sup>19</sup> Traditional Dispute Resolution Mechanisms (TDRMs) are the various rules and principles used by communities to resolve their differences without reference to written laws.<sup>20</sup> TDRMs can be as varied as the number of communities that exist and thus can also be understood as the dispute resolution mechanisms based on customary law of a particular ethnic group practised since time immemorial.<sup>21</sup> However, the most common TDRM is the use of elders and religious leaders from the community.<sup>22</sup> Even though customary law has greater control in rural settings, it also affects urban dwellers through marriage and inheritance regimes as was seen in the famous *S. M. Otieno Case*.<sup>23</sup> The importance of TDRMs in adjudicating land disputes has been encouraged by the 2010 Constitution<sup>24</sup> as the method is arguably cheaper, more accessible, more expeditious, maintains relationships, results in mutually satisfying outcomes, promotes social inclusion, focuses on substantive and restorative justice, is less adversarial, uses more creative remedies, reflects the lived realities of Kenyan communities, is a tool for re-legitimizing the State and is better understood by the communities compared to

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<sup>17</sup> Ik Dahl I *et al*, 'Human rights, formalisation and women's land rights in Southern and Eastern Africa' in *Studies in Women's Law*, Oslo Institute of Women's Law, University of Oslo, 2005.

<sup>18</sup> Article 2(4), *Constitution of Kenya* (2010).

<sup>19</sup> *Justice Needs and Satisfaction in Kenya survey*, 2017 available at <[Justice Needs and Satisfaction in Kenya | HiiL](#)> on 5 October 2020.

<sup>20</sup> Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20n%20Traditional%20justice%20terminology.pdf> on 4 October 2020.

<sup>21</sup> Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20n%20Traditional%20justice%20terminology.pdf> on 4 October 2020.

<sup>22</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015.

<sup>23</sup> *Virginia Wambui Otieno v Joash Ochieng Ougo* (1987) eKLR.

<sup>24</sup> Article 60, *Constitution of Kenya* (2010).

formal court systems.<sup>25</sup> However, access to justice, particularly for women with regard to land rights, still has many barriers; most of which can be attributed to the inadequate legal and policy guidelines to govern TDRMs in a way that is cognisant of the patriarchal nature of customary laws applied and the lived experiences of women in this context.

In trying to identify harmful or skewed practices and legislation, Dorujaye E. and Oluduro O. propose that legislators, judicial and quasi-judicial bodies must always ask themselves the ‘African woman question’ whenever they are addressing matters dealing with the expression, enjoyment and enforcement of African women’s rights. This means that they must address the peculiar experiences of African women, the context in which their human rights exist and address the historical injustices and disadvantaged standing point of women due to the patriarchal nature of most African communities.<sup>26</sup> This standpoint is also well-pronounced in *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others [2017] eKLR para. 39* by Justice Mativo where he opined that individuals are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made.<sup>27</sup>

Therefore, by asking the African woman question, the implication of the seemingly neutral customary laws regarding land rights to women will be assessed for indirect discrimination or bias and further form the basis of the recommended solutions to bridge the gap between the existing legal framework protecting women and their execution on the ground. Asking the African woman question will also remind the decision-maker to address the historical prejudice against African women and probe judicial or quasi-judicial bodies to assess laws and policies that are potentially discriminatory.

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<sup>25</sup> The Judiciary of Kenya, ‘Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)’ August 2020, 4.

<sup>26</sup> Durojaye E and Oluduro O, ‘The African Commission on Human and People’s Rights and the woman question’ *Feminist Legal Studies* 24, 2016, 315.

<sup>27</sup> *Li Wen Jie & 2 others v Cabinet Secretary, Interior and Coordination of the National Government & 3 others [2017] eKLR para. 38*

## 1.2 Statement of the problem

The right to access justice is fundamental in any democracy guided by the rule of law.<sup>28</sup> The United Nations Development Programme defines access to justice as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.<sup>29</sup> The use of TDRMs has come in as a step in the right direction in reducing the general operational costs of attaining justice and also in the use of laws better understood by the communities.<sup>30</sup> The Bill of Rights, the *National Land Act*,<sup>31</sup> treaties and conventions signed and ratified by Kenya and other pieces of legislation have attempted to address the historical and current inequalities and injustices faced by women with regard to property rights. Acknowledging the heavily patriarchal society perpetuating gender bias, TDRMs are mandated to operate within the constitutional safeguards set to protect women.<sup>32</sup>

Despite the international, regional and local development of instruments and legislation that aim at preserving the dignity of women and championing their wholesome development tied to land rights in a cultural context, women are in practice still burdened by sexist and patriarchal undertones that exist in cultural and religious practices used to govern the land regime in Kenya. Some cultural practices used in TDRMs, such as inheritance being a preserve for male children among the Kisii, keep women in cyclical poverty and entirely dependent on men thus affecting their wholesome development, enjoyment of other rights and freedoms and the society's general development.<sup>33</sup>

This study uniquely uses the African woman question to air out the biases that Kenyan women face in trying to actualise their land rights when using TDRMs by exposing the indirect discrimination masquerading as neutrality. It further provides recommendations based on substantive equality on how all state and non-state actors should pitch in to ensure Kenyan women

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<sup>28</sup> Louis Schetzer, et. al., *Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, p.7, Background Paper, August 2002, Available at [www.lawfoundation.net.au/ljf/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf) [Accessed on 6th February 2019]

<sup>29</sup> UNDP, (2004) "Access to Justice."

<sup>30</sup> Kariuki Muigua, *Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies*

<sup>31</sup> *National Land Act* (No. 6 of 2012).

<sup>32</sup> Article 159, *Constitution of Kenya* (2010).

<sup>33</sup> Ikdahl I et al, 'Human rights, formalisation and women's land rights in Southern and Eastern Africa' in *Studies in Women's Law*, Oslo Institute of Women's Law, University of Oslo, 2005.

can enjoy the benefits of TDRMs without sacrificing their human rights at the altar of oppressive cultural practices.

### **1.3 Justification of the study**

Some studies and scholarly work have discussed the injustices faced by women in accessing land rights; 34 others have purely discussed the woman question<sup>35</sup> and others have praised the use of TDRMs as alternative dispute resolution methods to formal court systems.<sup>36</sup> This study sets itself apart by using the African woman question to assess the effectiveness of these TDRMs in promoting access to justice for women in land disputes and gives recommendations that involve all stakeholders for the protection of women from the violation of their land rights. Furthermore, this study looks at ways these recommendations can be practically implemented in a manner that complements the current formal court systems.

### **1.4 Significance of the study**

The findings from this study are important not only for the actualisation of women's land rights but also lead to the development of the entire community. By ridding TDRMs of the prejudice they directly and indirectly impose on women, access to justice is increased to an acceptable level for a country governed by the rule of law. Since women contribute massively to the economy and social advancement of African countries dependant on land, it is in the best interest of the common good to ensure their well-being is secured.<sup>37</sup> The findings will also guide policy makers, legislators and judicial or quasi-judicial bodies in asking the African woman question, not only with regard to land rights, but also other human rights. This will ensure that the experiences of women are put at the forefront in discussions and decisions directly and indirectly affecting them. Further, it ensures the protection of the other rights that women are currently unable to fully exercise through TDRMs. Further, this study provides wholesome recommendations that target all state and non-state actors in order to achieve a comprehensive solution to the problem at hand.

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<sup>34</sup> See Kameri-Mbote P, 'The land has its owners! Gender issues in land tenure under customary law', UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action Nairobi, October 31 – November 3, 2005.

<sup>35</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016.

<sup>36</sup> Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework', July 2015.

<sup>37</sup> Forum for African Women Educationists, 'Education of girls and women in Africa.' Lusaka, 1995.

## **1.5 Aims and objectives**

The main aim of this study is to debunk the assumption that the mere presence and use of socially embedded systems of dispute resolution are enough to guarantee easier access to justice for women regarding land rights in Kenya.

The objectives of this study are:

1. To assess the status quo regarding the nature and functioning of TDRMs.
2. To analyse the effectiveness of TDRMs in improving access to justice for women with regard to safeguarding their land rights by asking the African woman question.
3. To recommend practical ways that state and non-state actors can apply substantive equality to remove impediments to women accessing justice using TDRMs to secure their land rights.

## **1.6 Research questions**

1. What is the status quo regarding the nature and functioning of TDRMs?
2. What is the effectiveness of TDRMs in improving access to justice for women with regard to safeguarding their land rights?
3. What practical actions, guided by substantive equality, can state and non-state actors take to remove impediments to women's access to justice when using TDRMs to secure their land rights?

## **1.7 Hypothesis**

TDRMs as they currently exist disproportionately impede women's access to justice when securing their land rights.

## **1.8 Theoretical and conceptual framework**

This paper will employ the African woman question, which is a tool or subset of the feminist legal theory (also known as feminist jurisprudence), to assess, point out and remedy the biases and prejudices arguably present in the TDRM structures in order to improve women's access to justice.

This paper uses Catharine MacKinnon's suggested definition of feminist jurisprudence which is the examination of the relationship between law and society from the point of view of all women.<sup>38</sup> The most crucial aim of global feminist jurisprudence is to oppose and reform impediments to women's active participation in the public sphere of life. The fundamental premise is that the second-class citizenship caused by the inequity cannot be justified in societies governed by the rule of law and respect for human rights. Sadly, MacKinnon notes, the law puts the burden of justification on the reformer since precedent is skewed in favour of the status quo.<sup>39</sup>

Feminist jurisprudence further identifies the pervasive influence of patriarchy and masculinist norms on legal structures and demonstrates their effects on the material conditions of women and girls and those who may not conform to cisgender norms. It also considers problems at the intersection of sexuality and law and develops reforms to correct gender injustice, exploitation, or restriction. To these ends, feminist jurisprudence applies insights from this intersectionality to understand how legal institutions enforce dominant gendered and masculinist norms.<sup>40</sup>

According to Bartlett, feminists often ask a set of questions formulated by Heather Wishik known as 'the woman question', designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.<sup>41</sup> Asking the African woman question means the unique experiences of African women, the context in which their human rights exist, the historical injustices and the current subordination of women to men must be considered whenever matters directly or indirectly affecting women's rights are discussed in order to result in justice.<sup>42</sup> According to Christopher Joyner, asking the woman question means "examining how the law fails to reflect the experiences and values that seem more typical of women than of men". The method is cognisant of the fact that historically, women have been, and are, in fact still, a disadvantaged group that requires special attention. Specifically with regard to law, asking the woman question

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<sup>38</sup> MacKinnon C, 'Developing Feminist Jurisprudence' Panel Discussion at the 14th National Conference on Women and Law, Washington, D.C. 9 April, 1983.

<sup>39</sup> MacKinnon C, 'Feminism, Marxism, methods and the state: Toward feminist jurisprudence' 8 *Journal of Women in Culture and Society* 4, 1983, 658.

<sup>40</sup> Stanford Encyclopedia of Philosophy, 'Feminist philosophy of law' 24 October 2017 -< <https://plato.stanford.edu/entries/feminism-law/#MulMet>> on 8 December 2020.

<sup>41</sup> Bartlett K, 'Feminist legal methods' 103 *Harvard Law Review* 4, 1990, 837.

<sup>42</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016, 315.

would imply examining how the law has omitted to reflect experiences and values that are more peculiar to women than men.<sup>43</sup>

This study will thus employ the following Heather Wishik's set of questions to answer the general research question and to meet the set objectives throughout the chapters:

- a. What experiences of women are involved in the statement of the problem?
- b. What assumptions exist in the law and in the status quo regarding the problem?
- c. What disconnect is created by the existence of these assumptions?
- d. What patriarchal interests are served by the mismatch created?
- e. What reforms are being proposed to fill in this lacuna and how do they affect women both ideologically and practically?
- f. What would the ideal situation be for a woman without the existence of the said problem and how can the law come in to reach that ideal?<sup>44</sup>

The legislative and policy provisions in Kenya relevant to meet the main aim of this study include constitutional provisions on non-discrimination, the right to equal protection before the law, the principles governing land use and management, promotion of alternative dispute mechanisms by the Judiciary and the limits within which customary law applies; statutes reiterating the principles of land use and management and the use of customary law such as the National Land Act, National Land Commission Act, Land Registration Act, Environment and Land Court Act, Judicature Act, Land Adjudication Act and the Land Control Act; regional and international human rights instruments imposing the duty on signatory states to ensure gender equity and access to justice such as the Maputo Protocol, UDHR, ICCPR, CEDAW and the ICESCR and the recommendations from the Alternative Justice Systems Framework Policy.

## **1.9 Research methodology**

This study uses a desktop doctrinal research, and specifically socio-legal research, by focusing on the social context of the problem it exists in. In order to understand the application of theories such as the woman question, it is paramount to understand that these TDRMs apply in a heavily patriarchal system existing in an era of cross-contamination of legal systems.

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<sup>43</sup> Joyner C, 'United Nations and International Law' *Cambridge University Press*, Cambridge, 1997, 183.

<sup>44</sup> Wishik H, 'To question everything: The inquiries of feminist jurisprudence' 64 *Berkeley Women's Law Journal* 5, 1985, 69.

Both primary and secondary sources will be used to get data that will be analysed, interpreted and presented in the study. Primary sources to be relied on include the 2010 Constitution of Kenya which is the supreme law of the land<sup>45</sup>; domestic legislation on succession, marriage, land use and land holding, matrimonial property, among others; regional and international instruments such as the CEDAW, and case law on the matter. Secondary sources such as books, journal articles, reports and Kenyan case studies relating to the matter will also be used to crystalize the theory and ideologies to what actually happens in practice.

## **1.10 Literature review**

### **1.10.1 Introduction**

A stellar study of literature and jurisprudence has revealed various standpoints regarding the use of the African woman question. Bartlett, for example, gives three feminist methods of responding to human rights violations against women: feminist practical reasoning, feminist consciousness<sup>46</sup> and asking the woman question. This study prioritises the last method for its suitability in meeting the set objectives. Various scholars explore their understanding of the best forms of equality to be applied in levelling the playing field for women in a patriarchal society. The age-long discussion on substantive equality versus formal equality takes the spotlight with Catharine MacKinnon battling it out with other scholars.

### **1.10.2 Analysis**

From time immemorial, society has placed a dichotomy between attributes of a man and those of a woman. While men are perceived to be logical, aggressive, independent and providers, women are perceived to be nurturing, submissive, emotional and in need of constant protection.<sup>47</sup> It is these perceived differences that have been used to justify the subordination of women, allocation of gender roles that exclude them or limit their opportunities economically, socially and politically and consequently the application of cultural and religious practices that not only infringe on the women's rights, but also undermine their dignity to a point of living as second class citizens.<sup>48</sup> The

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<sup>45</sup> Article 2, *Constitution of Kenya* (2010).

<sup>46</sup> Mackinnon C, 'Feminism, Marxism, methods and the state: Toward feminist jurisprudence' 8 *Journal of Women in Culture and Society* 4, 1983, 657.

<sup>47</sup> Mackinnon C, 'Feminism, Marxism, methods and the state: Toward feminist jurisprudence' 8 *Journal of Women in Culture and Society* 4, 1983, 640.

<sup>48</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016, 317.

2010 Constitution of Kenya's Bill of Rights, one of the most progressive of its kind,<sup>49</sup> has explicitly undertaken the task of addressing these historical injustices throughout the text and especially the non-discrimination clause. In unequivocal terms, the non-discrimination clause avers that:

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including...sex, pregnancy, marital status...
- (6) the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.<sup>50</sup>

Following closely on the aspect of affirmative action that aims at redressing past injustices and inequalities experienced by minorities and marginalised groups, Article 56 instructs the State to put in place affirmative action programmes to ensure that women, in this case, participate and are represented in governance and other spheres of life and are provided special opportunities in accessing employment, educational and economic fields.<sup>51</sup> The principles of land policies embodied in Article 60 are echoed in subsequent legislation such as the *National Land Act*, *National Land Commission Act* and the *land Registration Act*. The relevant principles include:

- (a) equitable access to land;
- (b) security of land rights;...
- (d) transparent and cost effective administration of land;
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and

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<sup>49</sup>Osogo J and Mbundenyi M, *New constitutional law of Kenya: Principles, government and human rights*, 1 ed, Lawafrica Publishers, Nairobi, 2012, 79.

<sup>50</sup> Article 27, *Constitution of Kenya* (2010).

<sup>51</sup> Article 56, *Constitution of Kenya* (2010).

(g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

The 2003 Protocol to the African Charter on Human and People's Rights is commonly referred to as the international bill of rights of women in Africa and signatory states such as Kenya are mandated to follow its obligations to ensure substantive equality.<sup>52</sup> Article 1(f) widely defines "discrimination against women" as *any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life*. Article 2(1)(c) obliges State Parties to *integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life*- which is basically calling for the asking of the woman question. Article 2(1)(d), on affirmative action, avers that *State Parties should take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist*. Article 2(2) calls on State Parties to *commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men*. Lastly, Article 8 guarantees access to justice and equal protection before the law.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also tackles gender equity in various articles. For instance, Article 2(b) mandates State parties to adopt appropriate legislative and other measures, to prohibit discrimination against women; Article 2(c) obligates State parties to establish legal protection of the rights of women on an equal basis with men; Article 15(1) requires State parties to accord women equality with men before the law; and Article 15(2) avers that State parties shall accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity

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<sup>52</sup> See the application in *Ramantele v Mmusi and others* (2013) Court of Appeal of Botswana.

Lastly, the African Charter on Human and Peoples' Rights ('Banjul Charter'), being the precursor that necessitated the Maputo Protocol, guarantees every individual equality before the law and protection of the law in Article 3.

According to Durojaye and Oluduro, asking the African woman question means that the unique experiences of African women, the context in which their human rights exist, the historical injustices and the current subordination of women to men must be considered whenever matters directly or indirectly affecting women's rights are discussed in order to result in justice.<sup>53</sup> In asking the woman question, Tamale questions the convenience of the structural arrangements of patriarchy in the cultural systems, institutional frameworks and legislation that consequently subordinate women to men.<sup>54</sup>

Indeed, in so many ways, feminists in Africa have asked the African woman question. At other times, Tamale has asked the African woman question when she questions the patriarchal arrangements of African societies that limit economic opportunities for women, defines women's lives by the ideology of domesticity and fail to acknowledge women's contribution to labour productivity in the region.<sup>55</sup> More so, Banda has asked the African woman question when she concludes that laws and institutional frameworks on women in Africa are structured in a way that disadvantages women.<sup>56</sup> The African Court on Human and People's Rights also asked the woman question in the famous *Doebbler Case*<sup>57</sup> where it requested for abolition of a legislation on public decency that indirectly targeted and dehumanised women.<sup>58</sup>

However, other African feminists such as Nzegwu and Oyewumi<sup>59</sup> hold a different view. They both argue that distinctions and hierarchies are made upon social status as opposed to gender. They contend that Western feminists that are quick to label any hierarchies that involve men and women

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<sup>53</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016, 315.

<sup>54</sup> Tamale S, 'Gender trauma in Africa: enhancing women's link to resources' 48 *Journal of African Law* 1, 2004, 58.

<sup>55</sup> Tamale S, 'Gender trauma in Africa: enhancing women's link to resources' 48 *Journal of African Law* 1, 2004, 63.

<sup>56</sup> Banda F, 'Women, law and human rights: An African perspective' 1 ed, Hart Publishing, Oxford, 2005, 87.

<sup>57</sup> *Francis Doebbler v Sudan* (2003) AHRLR 153 ACHPR.

<sup>58</sup> Article 152, *Sudan Criminal Law* (1991).

<sup>59</sup> Oyewumi O, *The invention of the woman: Making an African sense of Western gender discourse*, 1 ed, University of Minnesota Press, Minneapolis, 1997, 54.

as being oppressive to women are dangerous and propagate the idea that African cultures are barbaric and should follow the Eurocentric blueprint.<sup>60</sup>

Scholars such as Nyambu-Musembi,<sup>61</sup> Conolly<sup>62</sup> and Penal Reform International<sup>63</sup> reflect in their writings the common assumption that TDRMs are more accessible to people because of the advantages mentioned in this study. As neutral as this assumption is, and it is true to an extent, Henrysson and Jareman, in a study on Kisii women, note that it ignores the fact that African women have less social capital than men and are thus more vulnerable to infringement upon or loss of their property rights in land conflicts. The study by Henrysson concludes that even though TDRMs are cheaper than the formal system, they are still too expensive for the average rural woman to access considering their smaller financial muscle attributed to inaccessibility of land rights.<sup>64</sup> The study also reveals that these TDRMs are also challenged by factors such as corrupt elders and lack of knowledge by women of the right fora to approach.<sup>65</sup>

Catharine MacKinnon proposes the use of substantive equality to address human rights violations against women.<sup>66</sup> In applying this to get practical recommendations, substantive equality means that the differences between men and women in standing are recognised while still affirming that they are equal thus allowing for the application of affirmative action as obligated by the 2010 Constitution;<sup>67</sup> placing of an obligation on stakeholders such as the State to actively take steps to correct the environment and institutions that have enabled the subordination of women; and mandating policy makers, legislators and judicial officers to ask the African woman question whenever they make decisions concerning the rights of women.<sup>68</sup> Moreover, it provides an avenue

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<sup>60</sup> Nzegwu N, *Family matters: Feminist concepts in African philosophy of culture*, 2 ed, Suny Press, Albany, New York, 2006, 68.

<sup>61</sup> Nyambu-Musembi C, *Review of experience in engaging with 'non-state' justice systems in east Africa*, 1 ed, Institute of Developmental Studies: Sussex University, Sussex, 2003.

<sup>62</sup> Conolly B, 'Non-State justice systems and the State: Proposals for a recognition typology' 38 *Connecticut Law Review* 1, 2005, 259.

<sup>63</sup> Penal Reform International, *Access to justice in Sub-Saharan Africa: The role of traditional and informal justice systems*, 1 ed, Astron Printers, London, 2000.

<sup>64</sup> Fitzpatrick D, 'Evolution and chaos in property rights systems: The third world tragedy of contested access' 115 *Yale Law Journal*, 2006, 996.

<sup>65</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 48.

<sup>66</sup> Mackinnon C, 'Feminism, Marxism, methods and the state: Toward feminist jurisprudence' 8 *Journal of Women in Culture and Society* 4, 1983, 640.

<sup>67</sup> Article 27, *Constitution of Kenya* (2010).

<sup>68</sup> Mackinnon C, 'Feminism, Marxism, methods and the state: Toward feminist jurisprudence' 8 *Journal of Women in Culture and Society* 4, 1983, 650.

for remedial measures to be taken to address socio-cultural inequality African women often encounter in society.<sup>69</sup>

Critics to the use of substantive theory that are highlighted and critiqued by Bartlett include: It furthers the highlighting of differences between the genders thus is divisive and causes alienation and that it fails to address the differences that exist within groups that prima facie look like they hold women with homogeneous circumstances.<sup>70</sup>

The woman question requires the judge to ‘wear a gender lens’ which will enable him or her to see beyond laws or rules that seem innocuous on the surface but are indirectly full of discriminatory contents. It is to be understood that in such a situation, the judge is by no means called upon to do a favour to women; rather he or she is called upon to apply the law in such a way that will pay attention to the lived experiences of women.<sup>71</sup>

### **1.10.3 Conclusion**

Even though the presence of legal pluralism has proven to be advantageous in that people are able to negotiate uncertainties through varied channels, the cross-contamination of legal systems dealing with land tenure has brought about the gap between the progressive written law and the actual cultural practices employed in TDRMs. This study agrees with Durojaye and Oluduro that stakeholders such as the regional courts, the Judiciary, policy makers, legislators and scholars must play an active role in asking the African woman question whenever they are faced with any issue that may directly or indirectly affect the rights of women. It also agrees with the discussions in the 1995 Forum for African Women Educationalists that the impact of women empowerment is freedom not only to women but also the entire society and that the opportunity cost is too much.<sup>72</sup>

### **1.11 Limitations or delimitations**

With the understanding of intersectionality of various factors such as gender, marital status and economic status, the findings of this study are to be held strictly within the Kenyan context. Furthermore, different cultures in Kenya have varied forms of TDRMs and different identities and

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<sup>69</sup> Durojaye E and Oluduro O, ‘The African Commission on Human and People’s Rights and the woman question’ *Feminist Legal Studies* 24, 2016,16.

<sup>70</sup> Bartlett K, ‘Feminist legal methods’ 103 *Harvard Law Review* 4, 1990, 860-878.

<sup>71</sup> Durojaye E and Oluduro O, ‘The African Commission on Human and People’s Rights and the woman question’ *Feminist Legal Studies* 24, 2016,16.

<sup>72</sup> Forum for African Women Educationalists, ‘Annual report and audited accounts’, 1995, 49.

circumstances that may make their experiences in the system defer. However, it is important to note that all these women have one thing in common- the institutional nature of patriarchy still affects their ability to fully enjoy their land rights. Also, of the three tools used in feminist jurisprudence (also known as feminist legal theory), this paper only uses asking the woman question, in particular, the African woman question.

## **1.12 Chapter breakdown**

This study will consist of four chapters that will exhaustively answer the general research question and test the hypothesis posed. Chapter one paints a clear picture of the status quo with regard to the problem statement. It also sets forth the research objectives and the tone of the entire study by giving the legal and social situation regarding women's land rights, TDRMs and explains what asking the African woman question entails in relation to assessing effectiveness of TDRMs in improving access to justice for women in a heavily patriarchal society. Chapter two comprehensively tackles the TDRMs, their characteristics, their historical background, the legal and institutional framework in which they currently exist and the various forms they take in the contemporary Kenyan society. Following closely, chapter three discusses the nature of women's rights to property under TDRMs and the government initiatives currently in place. This chapter also sets out the findings from the study and heavily relies on the African woman question to analyse the said findings. Chapter four employs a tripartite method of summarising the findings of the entire study, makes a conclusion on the state of the hypothesis and finally provides recommendations for a way forward.

## CHAPTER TWO

### TRADITIONAL DISPUTE RESOLUTION

#### 2.0 Introduction

This chapter comprehensively tackles the TDRMs, their characteristics, their historical background, the legal and institutional framework in which they currently exist and the various forms they take in the contemporary Kenyan society.

Traditional Dispute Resolution Mechanisms are among the alternative justice systems envisioned by the 2010 Constitution of Kenya.<sup>73</sup> When referring to localised approaches by communities to attain justice, terms such as community, traditional, non-formal, informal, customary, indigenous and non-state justice systems are often used interchangeably. Since these systems are unique to every ethnic group, no umbrella definition has been accepted<sup>74</sup> and thus this paper defines TDRMs as dispute resolution mechanisms based on customary laws of a particular ethnic group practiced since time immemorial.<sup>75</sup>

#### 2.1 Characteristics and advantages of TDRMs

TDRMs are characterized by their uniqueness from one community to the other and this can be seen, for instance, in the different forms of offences and their prescribed punishments.<sup>76</sup> TDR mechanisms derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDR mechanisms is to foster peace, cohesion and resolve disputes in the community.<sup>77</sup>

The other advantages of TDR mechanisms and other community based justice systems are that: traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDR are resolution

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<sup>73</sup> Article 159(2)(c), *Constitution of Kenya* (2010).

<sup>74</sup> FIDA Kenya, *Traditional justice systems in Kenya: A study of communities in Coast province of Kenya*, 2008, 2.

<sup>75</sup> Kariuki F, 'Community, customary and traditional justice systems in Kenya: Reflecting on and exploring the appropriate terminology' available at <http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20n%20Traditional%20justice%20terminology.pdf> on 4 October 2020.

<sup>76</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, 22.

<sup>77</sup> AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," *An International Multidisciplinary Journal*, Ethiopia, Vol. 8 (2), Serial No. 33, April, 2014, 154.

mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDR and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions.<sup>78</sup>

TDR mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grassroots' level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic development, foster love, cohesion, integrity and promote respect for each other.<sup>79</sup>

## **2.2 Historical background**

As documented by the Alternative Justice System Policy Framework, Kenyan communities had their own modes of dispute resolution in pre-colonial times. Colonialism brought with it a dual system of justice consisting of Native courts applying customary laws to African communities with regard to family matters, succession matters and land tenure, and colonial state courts applying laws from England for the white settlers.<sup>80</sup>

According to Okoth Ogendo, customary law went through a long period of expropriation, suppression and subversion.<sup>81</sup> This, however, did not lead to the complete neglect of customary laws. As Francis Kariuki puts it, “ It should be noted that after almost a hundred years of neglect, customary laws and other indigenous traditions have remained resilient.”<sup>82</sup> Apart from customary law applying exclusively to civil cases of the subject matters stated above, a repugnancy clause

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<sup>78</sup> Muigua K, *Resolving Conflicts through Mediation in Kenya* 1 ed, Glenwood Publishers Limited, Nairobi, 2012, 24-26.

<sup>79</sup> Hwedie K and M. J. Rankopo, Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, University of Botswana, 33.

<sup>80</sup> The Judiciary of Kenya, ‘Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)’ August 2020, 1.

<sup>81</sup> Okoth-Ogendo, ‘The tragic African commons: A century of expropriation, suppression and subversion,’ 2010.

<sup>82</sup> Muigua, K , *Resolving Conflicts through Mediation in Kenya* 1 ed, Glenwood Publishers Limited, Nairobi, 2012, 30.

was attached to ensure that customary law would be applicable provided it was neither repugnant to justice and morality nor inconsistent with any written law.<sup>83</sup> Justice and morality, in turn, were interpreted from the perspective of English Common Law and the English people.<sup>84</sup>

At the end of colonial rule, Kenya's 1963 Constitution recognized traditional dispute mechanisms as part of Kenya's post-colonial legal system. Traditional dispute mechanisms, however, applied only to the extent that they were not 'repugnant to any written law'. African Customary Law was placed on the lowest rung of the legal ladder: lower than the Constitution, Kenyan Statutes, English Statutes of General Application, and Common Law. However, because Africans used both the formal and informal systems, there continued to be significant interaction between them, and it was unreasonable to expect the two systems to operate in isolation. They were bound to and influenced each other both in terms of process and outcomes.<sup>85</sup>

The 2010 Constitution revived the prominent place of African Customary Law and traditional systems through Article 159(2)(c) which gives the Judiciary the mandate to promote traditional methods of dispute resolution while at the same time subjecting these mechanisms to the human rights framework of the Bill of Rights (the constitutionality test).<sup>86</sup> Thus, the use of TDRMs has continued to endure.<sup>87</sup>

## **2.3 Legal framework**

### **2.3.1 Provisions of the Constitution**

The Constitution, which is the supreme law of the land, obligates the Judiciary to promote alternative forms of dispute resolution, including traditional dispute resolution mechanisms subject to alignment with the Bill of Rights, the morality and repugnancy test and consistency with the Constitution and other written laws.<sup>88</sup>

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<sup>83</sup> Section 3, *Judicature Act* (No. 8 of 1967).

<sup>84</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020.

<sup>85</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020.

<sup>86</sup> Article 159(3), *Constitution of Kenya* (2010).

<sup>87</sup> Judiciary of Kenya, 'Alternative Justice Systems Framework Policy', 2.

<sup>88</sup> Section 159(2)(c) and (3), *Constitution of Kenya* (2010).

### 2.3.2 Regional and International Frameworks

The Constitution of Kenya states that the general rules of international law and treaties or conventions ratified by Kenya form part of the legal system in Kenya.<sup>89</sup> To that effect, Kenya has an obligation as a signatory to various international and regional treaties and conventions to actively promote gender equity and access to justice for women to enable them to fully enjoy their other human rights and fundamental freedoms. These include, *inter alia*, the Universal Declaration of Human Rights (UDHR);<sup>90</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>91</sup> Convention on the Elimination of All Forms of Violence Against Women (CEDAW);<sup>92</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>93</sup> the African Charter on Human and People's Rights (Banjul Charter);<sup>94</sup> and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).<sup>95</sup>

### 2.3.3 Land Act 2012

After, the Constitution's chapter on land use and management, the Land Act is Kenya's principal legislation on the substantive aspects of land and land management and serves to implement and enhance. In line with the Constitution's mandate to promote the use of TDRMs and other community-based dispute resolution mechanisms, Section 4 of the statute reiterates the principles guiding land use and management as follows:

- a. Encouragement of communities to settle land disputes through recognized local community initiatives<sup>96</sup>

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<sup>89</sup> Article 2, *Constitution of Kenya* (2010).

<sup>90</sup> Article 8 guarantees full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations.

<sup>91</sup> Article 2(3) requires an effective remedy by a competent authority; Article 14 provides for the right to equality before the Courts and tribunals and to a fair trial; and Article 26 avers that all persons are equal before the law and are entitled without any discrimination to the equal protection and benefit of the law

<sup>92</sup> Article 2(b) mandates State parties to adopt appropriate legislative and other measures, to prohibit discrimination against women; Article 2(c) obligates State parties to establish legal protection of the rights of women on an equal basis with men; Article 15(1) State parties shall accord to women equality with men before the law; and Article 15(2) State parties shall accord to women in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.

<sup>93</sup> Article 17(2) provides for the right of everyone to take part in the cultural life of their community.

<sup>94</sup> Article 3 guarantees every individual equality before the law and protection of the law.

<sup>95</sup> Article 8 guarantees access to justice and equal protection before the law.

<sup>96</sup> Section 4(2)(g), *Land Act* (No. 6 of 2012).

b. Participation, accountability and democratic decision making within communities, the public and the Government<sup>97</sup>

c. Alternative dispute resolution mechanisms in land dispute handling and management.<sup>98</sup>

### **2.3.4 National Land Commission Act, 2012**

In tandem with the obligation under Article 67(2)(f) of the Constitution to promote the use of TDRMs in land issues, The National Land Commission Act mandates the National Land Commission to encourage and promote the use of TDRMs to resolve land disputes.<sup>99</sup> Further, Section 6(3) of the Act that outlines the functions of the NLC do not commit its functions to the strict rules of evidence, thereby legitimizing the nature of customary law that governs the operation of TDRMs.

### **2.3.5 Environment and Land Court Act, 2011**

Section 20 of this Act contends that in the promotion of ADR, the Court is not precluded adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including *inter alia* TDRMs. In addition to that, where ADR, including TDRMs, is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.<sup>100</sup>

### **2.3.6 Customary Law**

Customary law has been defined as a set of general rules and peculiar to African communities that administer *inter alia* the personal status, communal resources and local organization of the people.<sup>101</sup> Article 159(3) of the Constitution and Section 3 of the *Judicature Act*<sup>102</sup> give recognition and legitimacy to the operation of customary jurisprudence and consequently TDRMs in Kenya. According to Article 159 of the Constitution, customary law only applies within the bounds of public policy, the Bill of Rights, to the extent that it is not contrary to any written laws and within the understanding of morality and justice.

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<sup>97</sup> Section 4(2)(h), *Land Act* (No. 6 of 2012).

<sup>98</sup> Section 4(2)(m), *Land Act* (No. 6 of 2012).

<sup>99</sup> Section 5(2)(f), *National Land Commission Act* (No. 28 of 2016).

<sup>100</sup> Section 20, *Environment and Land Court Act* (No. 19 of 2011).

<sup>101</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 40.

<sup>102</sup> Section 3(2), *Judicature Act* (Cap 8, Laws of Kenya).

This clause has, however, been used by the courts to claim jurisdiction over cases that can be solved under TDR51. Another major problem that is brought about by this repugnancy clause is that it subjects customary law to the scrutiny of Western laws and moral codes- where the nature of morality is understood as being subjective. The clause carries a negative connotation against morality of customary law, a concept that has been increasingly westernized, then it is repugnant and as such should be shunned.<sup>103</sup>

## **2.4 Institutional framework**

### **2.4.1 Families**

The first unit of TDRMs is the family, which is headed by the husband who is considered to have unquestioned authority over affairs such as bride price, inheritance and where applicable, land and assets of the household.<sup>104</sup> Whenever there was a dispute involving two families, the husbands or oldest male members of the families would be the ones to try and settle the matter before proceeding the next level. For instance, among the Pokot, disputes in a family or affecting a few members of families would be solved without resort to other institution unless the need to arise. The husband, being the head of the families in a majority of the Kenyan communities was seen to have unquestionable authority<sup>105</sup>

### **2.4.2 Council of elders**

The council of elders is the most common dispute resolution institution in a majority of the Kenyan communities.<sup>106</sup> The great importance and respect for the council of elders across the communities of Kenya makes it paramount in resolution of disputes, including land disputes (land being one of the most essential assets in Kenya).

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<sup>103</sup> See Tamale, Sylvia. 2008. The right to culture and the culture of rights: A critical perspective of women's sexual rights in Africa. *Feminist Legal Studies* 16(1): 47– 69, where she has noted that Western scholars tend to make erroneous conclusion that all African cultures are bad and capable of eroding the human rights of women. In her view, this is misleading as some African cultures are positive and do promote harmony and congruity in society. While she admits that some cultural practices in Africa can be harmful, she contends that this is not peculiar to Africa and therefore it is misleading to label all African cultures as harmful and as potential threats to human rights. She further submits that such arguments are not only dangerous but also myopic and tend to create an extremely restrictive means by which African women challenge domination, for example.

<sup>104</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 *Mich. J. Race & L.* 57, 2007, 61.

<sup>105</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 *Mich. J. Race & L.* 57, 2007, 61.

<sup>106</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015, 4.

Council of elders, tasked with overseeing the operations of the community, providing counsel and settling disputes, were known by various names in different communities and their membership had specific characteristics and composition.<sup>107</sup> Among the Marakwet, the council of elders, known as Kokwo is the highest institution of conflict management.<sup>108</sup> In most instances, as can be seen of the Njuri Ncheke among the Meru and Jodongo among the Luo,<sup>109</sup> of male elders considered to be wise men and to have extensive knowledge in the history and customs of the community.<sup>110</sup> Among the Agikuyu, the council of elders, known as the Kiama, in dispute resolution acted as mediators or arbitrators.<sup>111</sup> This institution was available whenever there arose a dispute, the fact that it consisted of wise elders made their decisions respected making it one of the most important dispute resolution institution.

The council of elders enjoyed a wide jurisdiction, they basically resolved any dispute in the community. The spirit of brotherhood in African communities was important in ensuring the success of the dispute resolution institutions.<sup>112</sup> As Chris Kwaja observes, customary law affects the whole community and not just an individual hence its importance.<sup>113</sup> Some communities had council of elders in each individual clan. The leader of these councils then represented their clans at the main council of elders. In such cases, most disputes were resolved at the clan levels.<sup>114</sup> These institutions owed their success partly to the fact that they focused on the maintenance of relationships between disputing parties due to the importance of values such as brotherhood.<sup>115</sup> The decision arrived at by the council was respected due to the social norms and the beliefs of the

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<sup>107</sup> Laurence B, 'A history of alternative dispute resolution,' *7ADR Bulletin* 7, 2005, 1.

<sup>108</sup> Laurence B, 'A history of alternative dispute resolution,' *7ADR Bulletin* 7, 2005, 4.

<sup>109</sup> Lumumba P, *Luo Kitgi gi timbe ki E Ngima Masani*. Sahel Books Inc, Nairobi, 2014, 5.

<sup>110</sup> Kwaja C, 'Globalisation and Africa's endogenous knowledge systems' *2 Africa Peace and Conflict Journal* 1, 2009, 72.

<sup>111</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015.

<sup>112</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015.

<sup>113</sup> Harrington A and Chopra T, 'Arguing traditions: Denying Kenya's women access to land rights', World Bank, Justice for the Poor Program, No. 2 /2010.

<sup>114</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015.

<sup>115</sup> Madu J, 'Gender inequality and the indigenous systems of peace-making and governance' *2 Africa Peace and Conflict Journal* 1, 2009, 63.

community which gave them legitimacy. In the most extreme cases, the fear of excommunication ensured the observance of the decisions.<sup>116</sup>

## **2.5 Forms of TDRMs**

The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication amongst others.<sup>117</sup> These forms are employed in TDRMs to settle disputes.

### **2.5.1 Negotiation**

Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate and thus is the most common mechanism used in the resolution of disputes in traditional justice systems.<sup>118</sup> Negotiation aims at harmonizing the interests of the parties concerned amicably through the parties themselves, without involving a third party, exploring options for resolution of the dispute without involving a third party.<sup>119</sup>

The winning strike for negotiation is that it is a voluntary process and thus parties, whether of equal or unequal stature, were open and flexible in coming up with creative solutions that would benefit both parties. These solutions are then adhered to since they were arrived at freely. Negotiation focused on the maintenance of relationships with the focus being on resolving the conflict rather than on winning.<sup>120</sup>

### **2.5.2 Mediation**

Unlike the formal process of mediation common in Alternative Dispute Resolution processes, mediation in TDR was an informal process.<sup>121</sup> It mostly comes into play when the negotiation process does not yield much fruit, so a third party is involved and as such is a continuation of the

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<sup>116</sup> Musembi C, 'Review of experience in engaging with non-State justice systems in East Africa', Governance Division DfID, 2003, 18.

<sup>117</sup> Laurence B, 'A history of alternative dispute resolution' *ADR Bulletin* 7, 2005, 1.

<sup>118</sup> United Nations, 'Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities.' Study by the Expert Mechanism on the Rights of Indigenous Peoples. August 2014. A/HRC/27/65.

<sup>119</sup> Mwangi M, 'Conflict in Africa: Theory, Processes and Institutions of Management' Centre for Conflict Research, Nairobi, 2006, 115.

<sup>120</sup> Muigua K, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010,' 2015.

<sup>121</sup> Muigua K, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010,' 2015.

negotiation process.<sup>122</sup> Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The roles of elders in a TDR hearing include *inter alia* urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.<sup>123</sup>

Francis Kariuki contends that the third party is a neutral person or entity freely chosen by the parties who serves to facilitate the free process and possible solution to the dispute. The autonomy of the parties is just as it is in negotiation and is evidenced by the parties being free to select the mediator and determine the process.<sup>124</sup>

### **2.5.3 Adjudication**

This method was applied after the failure of negotiation and mediation. It involved the community head, the king or the chief, or the council of elders summoning the parties to the disputes then deciding the dispute based on the issues, evidence and applicable customary law. The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.<sup>125</sup>

### **2.5.4 Reconciliation**

Under reconciliation, once a dispute is heard before the Council of Elders, the parties are bound to undertake certain obligations towards settlement. These are mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there is reconciliation which results in restoration of harmony and mending relationships of the parties, mostly through a form of purification.<sup>126</sup>

## **2.6 Conclusion**

This chapter has achieved the first objective of the study which is to assess the status quo of the nature and functioning of TDRMs by defining what TDRMs are, their characteristics, their

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<sup>122</sup> Muigua K, Resolving Conflicts through Mediation in Kenya,' 28.

<sup>123</sup> Muigua K, Resolving Conflicts through Mediation in Kenya,' 27-28.

<sup>124</sup> Kariuki F, 'Conflict resolution by elders in Africa: Successes, challenges and opportunities' Chartered Institute of Arbitrators Centenary Conference, Livingstone, 15 July 2015

<sup>125</sup> Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," 150.

<sup>126</sup> J. Kenyatta, Facing Mount Kenya, The Tribal Life of the Kikuyu, Vintage Books Edition, October 1965,

historical background, the legal and institutional framework in which they currently exist and the various forms they take in the contemporary Kenyan society.

## CHAPTER THREE

### NATURE OF WOMEN'S LAND RIGHTS UNDER TDRMS

#### 3.0 Introduction

Having understood the nature of TDRMs and the legal and institutional frameworks under which they exist, this chapter discusses the interaction of women and their land rights when using TDRMs. The chapter commences by painting a picture of women's rights, proceeds to lay out the injustices they face, gives three case studies from the Kisii, Luhya and Pokot communities then outlines the findings therefrom. The chapter concludes by using the African woman question to analyse the findings.

#### 3.1 Background

All over the world, women have been the oil in the wheel of economic and agricultural production. This is the case especially in Africa where women contribute a whopping eighty percent of the workforce in an economy that revolves around agriculture and livestock production.<sup>127</sup> Women's contribution to small scale crafts, localised industries, production of raw materials for the industrial sectors and trade cannot be ignored when looking at the statistics of national production in Kenya.<sup>128</sup>

Despite women being more than men in Kenya by over half a million,<sup>129</sup> they barely have secure title to reasonable forms of property, have inadequate access to the same and are rarely involved in making decisions regarding the allocation and use of natural and economic resources.<sup>130</sup> There has been a systematic exclusion of women and other marginalised groups from land access in Kenya despite the fact that access to land is a cardinal element in elevating the said groups.<sup>131</sup> Francis Kariuki in *Property Law* notes that the application of customary and religious laws in

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<sup>127</sup> Boserup E, Tan S and Toulmin C, *The role of women in economic development*, 1 ed, Routledge Publishers, Milton Park, 2007, 14.

<sup>128</sup> Kameri-Mbote P, 'The land has its owners! Gender issues in land tenure under customary law', UNDP International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action, Nairobi, October 31 – November 3, 2005, 1.

<sup>129</sup> The World Bank, 'Population, female (% of total population)- Kenya' -< [Population, female \(% of total population\) - Kenya](https://data.worldbank.org/SD/SP.YO.CD.FE.CD) | Data (worldbank.org)> on 5 January 2021.

<sup>130</sup> Kameri-Mbote P, 'Gender issues in land tenure under customary law', 1.

<sup>131</sup> Kariuki F , Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 183.

practice has seen control over land matters being monopolised by certain segments of society while overlooking the land needs of women.<sup>132</sup>

In many parts of Kenya and Africa, women do not traditionally own land and other immovable property. At best, their relationship to a male relative such as a brother, father or husband accords them usufruct rights.<sup>133</sup> This precarious position women find themselves in due to the fact that the access to the land may be dependent on the whims of their male relatives is detrimental to women and the general economy. A study on Inheritance Laws and Practices in Kenya by Women and Law in East Africa (1995) revealed that women only own land to the extent that they perceive or believe this be the case especially within marriage or other cohabitation relationships.<sup>134</sup>

The various legal and policy frameworks that call for the protection of women's right to equality, access to justice, to property and affirmative action have exhaustively been covered in the preceding chapters. Here, the paper looks at the disadvantages that accrue to women due to infringement or denial of the aforementioned rights by referring to the functions of land and property laid out by Francis Kariuki. In *Property Law*. They include economic, human flourishing, personality, power, politics, social, spiritual and cultural functions.<sup>135</sup> Through this analysis of the first four functions, it will be evident that the right to property and secure land rights are gateways for the full enjoyment of other constitutionally protected rights. This further analysis buttresses the significance of this study by showing the opportunity cost.

First, land performs an economic function. Property rights underlie the language and working of economics.<sup>136</sup> As a result of the intersection of property and economics, prosperity and property rights are inextricably linked.<sup>137</sup> When proprietary rights are recognised and registered, they act as a catalyst for economic growth by enhancing investment opportunities through access to capital

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<sup>132</sup> Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 184.

<sup>133</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 47.

<sup>134</sup> Women and Law in East Africa, 'Inheritance laws and practices in Kenya', 1995.

<sup>135</sup> Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore university Press, Nairobi, 2016, 75-97.

<sup>136</sup> Cole D and Grossman P, 'The meaning of property rights: Law versus economics' 78 *Land economics* 3, 2002, 317.

<sup>137</sup> O'Driscoll and Hoskins L, 'Property rights: the key to economic development' 428 *Policy Analysis* 1, 2003, 1.

and low cost credit.<sup>138</sup> Therefore, when women's land rights are infringed upon, there is a direct negative effect on their prosperity and financial freedom.<sup>139</sup>

The moral foundation of property is human flourishing.<sup>140</sup> Some commentators have observed property is an extension of oneself and provides a material substratum for constructing one's identity and expressing moral commitments.<sup>141</sup> Denying women their full enjoyment of land rights hampers their human flourishing.

As a political tool, secure property rights can lead to the guarantee of other moral and political rights. Therefore, a denial of property rights occasions violations of many other rights.<sup>142</sup>

As a tool for power, the fate of those who own nothing lies in the hands of those who have property rights. Great differences in property holdings can produce great imbalances in power, which in turn can thrust those who have little into dire straits.<sup>143</sup>

## **3.2 Case studies of TDRMs in practice in Kenyan selected Kenyan communities**

### **3.2.1 Kisii**

The Kisii are a patrilineal and agricultural community that depend on the land for their livelihood.<sup>144</sup> Women of the Kisii community only have usufruct rights over their fathers' land and get the same rights over their husbands' land upon marriage.<sup>145</sup> They have expressed their disdain over these secondary rights that make them dependent on their relationship to men and being at the mercy of the whims of these men.<sup>146</sup> Most title deeds are in the names of the male members of the family thus women cannot lay any claim to the land or sell it.

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<sup>138</sup> Besley T, 'Property rights and investment incentives: Theory and evidence from Ghana' *103 The journal of political economy* 5, 1995, 907.

<sup>139</sup> This is goes against the equality clause in article 27(3) of the 2010 Constitution of Kenya as their economic opportunities are unlawfully hindered.

<sup>140</sup> Alexander G, 'Ownership and obligations: The human flourishing theory of property' *653 Cornell Law Faculty Publications 1*, 2013, 1.

<sup>141</sup> Bloom L, 'People and property: A psychoanalytic view' in Rudmin F (ed), 'To have possessions: A handbook on ownership and property' *6 Journal of social behaviour and personality* 6, 1991, 427.

<sup>142</sup> Munzer S, *A theory of property*, Cambridge University Press, Cambridge, 1990, 81-82.

<sup>143</sup> Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore university Press, Nairobi, 2016, 84.

<sup>144</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' *43 Law & Society Review* 2, 2009, 47.

<sup>145</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' *43 Law & Society Review* 2, 2009, 48.

<sup>146</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' *43 Law & Society Review* 2, 2009, 48.

Among the Kisii, women's access to land is pegged on their relationship to a man- whether a father, son or husband. The probability of a woman getting access to land after the death of the owner of the land, even just for use, is determined by factors *inter alia* the age and gender of her children (and whether she has any), payment of bride price, how respectable she is considered to be and her HIV status.<sup>147</sup> A women who got widowed before bearing any children (or just girls) would face stigmatization and her rights to inherit her husband's land would diminish. It is a well-grounded custom among the Kisii that women are not supposed to inherit property, especially land, from their fathers since they would eventually get married and be taken care of by their husbands.<sup>148</sup>

Various institutions among the Kisii have the jurisdiction to settle land disputes. These include the household, surrounding households then at the highest level, the council of elders.<sup>149</sup> Traditionally, the elders would meet where the disputes happened and the women in the households would prepare a meal for them which was to be eaten during the deliberations.<sup>150</sup> Today, however, instead of the meals the elders are given money by the disputing parties.<sup>151</sup> The amount to be paid to the elders is not fixed but the disputants were asked to pay as much as they could afford, thus skewing the ruling towards that who could pay the most. Normally, the community takes the ruling of the council of elders to be conclusive. However, the chief's court was an avenue for appeal, but more expenses are incurred at this level as well.<sup>152</sup>

### 3.2.2 Luhya

Research carried out by the Kenya Demographic and Health Survey (KDHS) in 2009 showed that 66.1% of families among the Luhya's were headed by men.<sup>153</sup> Ownership of land was based on clans. Individual families, however, had exclusive and inalienable rights to certain parcels of

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<sup>147</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 47.

<sup>148</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 47.

<sup>149</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 48.

<sup>150</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 48.

<sup>151</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 49.

<sup>152</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009, 48.

<sup>153</sup> Kenya National Bureau of Statistics: Kenya Demographic and Health Survey: Kenya National Bureau of Statistics (2009).

land.<sup>154</sup> These parcels of land were passed down from one generation to the other. Inheritance among the Luhya was a preserve of the men, premised on the assumption that upon marriage, it was the husband's family's responsibility to take care of the woman.<sup>155</sup> As such, only the sons could inherit the family land.<sup>156</sup> Further research shows that up to date there is a bit of skepticism on the issue of women's land rights. Generally, in the community, only 11.8% of the community members thought of women's land ownership rights as acceptable.<sup>157</sup> 49% view it as completely unacceptable while 21.6% think of it as a taboo. 17.6% consider women's land ownership rights as partially acceptable.<sup>158</sup> Among the elders, only about 6% view land ownership by women as acceptable. 94% still think of it as unacceptable with 31.4% considering such occurrences a taboo.<sup>159</sup> It is arguable, therefore, that cases brought before the elders on issues of land ownership between a man and a woman from the Luhya community is likely to be decided in favour of the man. An elder, for example, who thinks that for a woman to own land is a taboo, cannot be trusted to uphold women's rights to ownership in land. In this community, as in most Kenyan communities, women who get favorable results are still not assured of full enjoyment of their rights. According to K. Izumi,<sup>160</sup> the women are generally redispensed to threats of dispossession. The women also face ridicule, abuse and violence.<sup>161</sup> Most women would therefore refer to sell the land rather than keep it.<sup>162</sup>

### 3.2.3 Pokot

The principal conflict resolution institution among the Pokot community is the council of elders, known as the Kokwo. It constitutes of respected old men from each village among the Pokot, and

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<sup>154</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>155</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>156</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>157</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>158</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>159</sup> Mwangae E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>160</sup> Kaori I, 'Report of the Regional Workshop on HIV and AIDS and Children's Property Rights and Livelihoods in Southern and East Africa.' Report prepared for FAOSAFR (7-8March).

<sup>161</sup> Kaori I, 'Report of the Regional Workshop on HIV and AIDS and Children's Property Rights and Livelihoods in Southern and East Africa.' Report prepared for FAOSAFR (7-8March).

<sup>162</sup> Kaori I, 'Report of the Regional Workshop on HIV and AIDS and Children's Property Rights and Livelihoods in Southern and East Africa.' Report prepared for FAOSAFR (7-8March).

these men act as representatives of their villages in the Council.<sup>163</sup> Like many communities in the country, elderly Pokot women are allowed to comment and contribute to proceedings in the Kokwo.<sup>164</sup> To address the Kokwo, however, these women have to do so while sitting on the ground. The contribution of women is taken as advice and can either be considered or discarded.<sup>165</sup> They use prior occurrences and cultural beliefs and practices to back the advice given to the Kokwo. The most common position held by women in these meetings is documentalists,<sup>166</sup> tasked with noting down the proceedings for future reference<sup>167</sup>. Being the highest dispute resolution institution, the verdict of the Kokwo is final and binding. As concerns land disputes, these have until recently been uncommon due to the fact that the Pokot are nomadic pastoralists. Their way of life dictates that land be held communally and managed by the community elders. The discovery that some areas in Pokot are high potential areas where Agriculture can be carried out has led to an increase in land disputes among people living in such areas. In such areas, land has been adjudicated to individuals thus introducing the concept of private property in the community.<sup>168</sup> Resolution of land disputes begin at the family level, then to the extended family, to the immediate neighbours and finally to the Kokwo.<sup>169</sup>

### **3.3 Government initiatives currently in place**

Even from the pre-2010 Constitution times, there has been active government involvement in resolution of land disputes through TDRM avenues.<sup>170</sup> Due to the importance of TDRMs (that have been exhaustively discussed in the paper), the government created institutions to apply TDRMs to resolve specific land disputes. Some, like the Land Dispute Tribunals, have since become obsolete. The interactions of these institutions (which are typically considered as formal institutions) with customary law have been increasingly questioned over the years.<sup>171</sup>

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<sup>163</sup> Mwangi E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>164</sup> Mwangi E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>165</sup> Kaori I, 'Report of the Regional Workshop on HIV and AIDS and Children's Property Rights and Livelihoods in Southern and East Africa.' Report prepared for FAOSAFR (7-8 March).

<sup>166</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 Mich. J. Race & L. 57, 2007, 61.

<sup>167</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 Mich. J. Race & L. 57, 2007, 61.

<sup>168</sup> Mwangi E, 'Factors hindering realization of women's land rights: A case of the Luhya community in Kakamega County, Kenya.' University of Nairobi, Nairobi, 2013 (unpublished).

<sup>169</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 Mich. J. Race & L. 57, 2007, 61.

<sup>170</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 Mich. J. Race & L. 57, 2007, 63.

<sup>171</sup> Fletcher M, 'Rethinking Customary Law in Tribal Court Jurisprudence,' 13 Mich. J. Race & L. 57, 2007, 63.

### 3.3.1 The Land Adjudication Committee (LAC)

This committee is a creature of the *Land Adjudication Act*.<sup>172</sup> The committee's mandate relates to the adjudication of trust land areas and should constitute of at least ten people appointed after consultation with the District Commissioners, now no longer there.<sup>173</sup> Other duties of the committee include adjudicating land issues using customary law. The issues coming up from adjudication are to be lodged with the LAC which consequently addresses the disputes. Customary law together with circumstantial evidence is used to come up with decisions. Decisions of the committee can be appealed to an arbitration board created under the Act and further to the High Court.<sup>174</sup>

### 3.3.2 The Land Control Boards (LCB)

This is a creature of the *Land Control Act*.<sup>175</sup> The main mandate of the LCB is to address complaints about land, especially regarding the consent for the sale of agricultural land.<sup>176</sup> According to the Act, consent of the family is required before the disposal of agricultural land. However, since there is no express inclusion of wives and daughters as among those to be consulted, their consent is mostly overlooked in favour of the consent of other male family members. Even worse, as noted by Dick and Anyango, since the LCB is made up of elders, most of whom are men hailing from patriarchal upbringings, consideration of wives' and daughters' consent is most likely to be overlooked since in most traditional and customary settings, women do not have a weighted say on the alienation rights of land. As a consequence, in practice, this guideline is rarely adhered to, full family units are not consulted, and sales continue to adversely impact women. In fact, women are frequently excluded entirely.<sup>177</sup> Additionally, the LCB consults chiefs who ask elders. Considering that a lot of communities still do not believe women should own land or have secure land rights, the result is women's consent not being sought at all.<sup>178</sup>

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<sup>172</sup> Section 6, *Land Adjudication Act* (Cap 284 Laws of Kenya).

<sup>173</sup> *Land Adjudication Act* (Cap 284 Laws of Kenya).

<sup>174</sup> *Land Adjudication Act* (Cap 284 Laws of Kenya).

<sup>175</sup> Section 5, *Land Control Act* (Act No 34 of 1967).

<sup>176</sup> *Land Control Act* (Act No 34 of 1967).

<sup>177</sup> Dick J and Anyango S, 'The role and efficacy of the land adjudication committee as an Alternative Land Dispute Resolution Mechanism in Narok County', University of Nairobi, 2013.

<sup>178</sup> Dick J and Anyango S, 'The role and efficacy of the land adjudication committee as an Alternative Land Dispute Resolution Mechanism in Narok County', University of Nairobi, 2013.

### 3.4 Findings of the study and their analysis

The right to access justice is fundamental in any democracy guided by the rule of law.<sup>179</sup> The United Nations Development Programme defines access to justice as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.<sup>180</sup> Access to justice is one of the most critical human rights since it also acts as the basis for the enjoyment of other rights and it requires an enabling framework for its realisation.<sup>181</sup> Access to justice by majority of citizenry has been hampered by many unfavourable factors which include inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow. This makes access to justice through litigation a preserve of select few.<sup>182</sup>

Arguably, a strong legal system based on a fusion of formal and informal justice systems improves the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves.<sup>183</sup>

At a global level, TDRMs provide access to justice under the United Nation's Sustainable Development Goal 16, which obliges its signatories to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'

Asking the woman question operates on the assumption that certain laws are not only neutral but may also be biased towards women by entrenching patriarchal traditions. Thus, the woman

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<sup>179</sup> Louis Schetzer, et. al., 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', p.7, Background Paper, August 2002, Available at [www.lawfoundation.net.au/ljf/site/articleIDs/.../\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf) [Accessed on 6th February 2019]

<sup>180</sup> UNDP, (2004) "Access to Justice."

<sup>181</sup> Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework', July 2015, 3.

<sup>182</sup> Ojwang, J 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,' *I Kenya Law Review Journal* 19,2007, 29.

<sup>183</sup> See Venerando K, et al, United Nations Development Programme, 'Access to Justice in Asia and the Pacific: A DGTTF Comparative Experience Note Covering Projects in Cambodia, India, Indonesia and Sri Lanka,' The DGTTF Lessons Learned Series, 2009, 11.

question aims at exposing the lacuna in the law with regard to women's needs, and how this might be corrected.<sup>184</sup>

### 3.4.1 There is minimum to no participation of women in TDRMs

As illustrated in the background of the study and the case studies, the structure of the council of elders of most Kenyan communities either excludes women from meaningful participation or gives them peripheral opportunities to participate.<sup>185</sup> For instance, women's participation and jurisdiction in the council of elders are limited to areas of women's sexuality.<sup>186</sup> In these rare circumstances where women are allowed to participate, they are placed lower in rank than the men of Kokwo. Further, these women are also only allowed to give advice citing previous occurrences and cultural norms.<sup>187</sup>

In the coast region, it came out that most councils are composed of more women than men. Despite this majority, it was revealed that most of these women preferred not to attend council meetings. Janine Ubink, and Thomas McInerney contend that; "Customary gender perspectives may even be so deeply inculcated that they leave many women ... *resigned to being treated as inferior as a matter of fate, with no alternative but to accept their situation.*"<sup>188</sup>

This appears to be the situation in communities where women are allowed to participate in TDR proceedings. Despite the presence of women in such councils, therefore, issues pertaining to the upholding of their right are left entirely in the hands of the more outspoken male elders and to the operation of customary law which dictates principles that are often gendered, to the disadvantage of women. Women's participation is dictated and limited by the norms, roles, values and perceptions embedded in their culture.

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<sup>184</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016, 19.

<sup>185</sup> FIDA Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008.

<sup>186</sup> FIDA Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008.

<sup>187</sup> Patricia Kameri-Mbote, 'The Land has its Owners!' UNDP -International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action Nairobi, October 31 – November 3, 2005, 1.

<sup>188</sup> Ubink J and Van Rooij B 'Toward customary legal empowerment; An Introduction,' International Development Law Organization, 2011.

### 3.4.2 Existence of gender bias

From the study, it is clear that the institution of TDRMs as it is currently constituted, is greatly marred with gender bias. Land in most Kenya communities is seen as a masculine asset and as such majority of community elders, who are tasked with leading the dispute resolution process, are unable to appreciate women's property rights. The Land Control Board (and the done away with Land Dispute Tribunals, LDTs) has not done much to change this situation as they fail to expressly cater to the disadvantaged position of women in society. These have been stated to be failing over time due to the fact that complaints of alienation of women's land by male relatives have not been dispensed with.<sup>189</sup> As Safari, as cited by Henrysson, states, "*In practice, LDTs have a dubious record protecting women's access to land, not least because their rulings are based on local informal concepts and practice. On the one hand, this allows them to grant locally legitimate decisions, legitimate because they represent communal norms and values; on the other hand, LDTs tend to root those decisions in local, male-dominated power structures and thereby perpetuate a symmetric power arrangement that exclude women from accessing land.*"<sup>190</sup>

According to a study by Women and Children Legal Research Foundation (WCLRF) 2008, traditional gender biases, cultural values, and customs obstruct the capability of women to put forward legal claims. Strict practices of these traditional norms and values weaken women's confidence in claiming their rights. The justice system also falls short of promoting a strong commitment to serve the rights, needs, and interests of women. Gender inequality therefore looms large as women experience violations of their basic rights in the face of pervasive traditional customs and cultural norms which destabilize their standing and legitimize violations of rights. Although there have been some noticeable achievements in promoting women's rights in the last few years, especially after the promulgation of the Constitution 2010, women still face serious impediments in realizing their basic rights.

### 3.4.3 Distrust of government initiatives

The shortcomings of a weak plural legal system have been highlighted through the various questions raised with regard to the efficiency of the interaction of formal institutions with

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<sup>189</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009,48.

<sup>190</sup> Henrysson E and Jareman S, 'On the edge of the law: Women's property rights and the dispute resolution in Kisii, Kenya' 43 *Law & Society Review* 2, 2009,48.

customary law. Without a viable framework to guide the interpretation and application of customary law, living customary law is bound to be replaced by judicial customary law.<sup>191</sup> Judicial customary law, according to Dr. Kamau is static. Looking at the effect of interpretation of customary law by formal courts, she states that “*The interpretation of customary law by formal courts has led to the application of static versions of customary law as defined by scholars or by precedents that belie the social realities of people who interact with these customary systems.*”<sup>192</sup>

The members of these institutions, such as the Land Adjudication Committee, were to be chosen pursuant to consultation with the District Commissioner, were considered to be government officials. These officials to a great extent, lacked respect from the community members. In such circumstances, these institutions lack legitimacy in the eyes of the community members.<sup>193</sup> It has been argued, thus, that customary law is best left to the interpretation of customary courts to ensure preservation of cultural values present in traditional systems and the legitimacy and trust of the people.<sup>194</sup>

#### **3.4.4 Corruption hinders access to TDRMs for a lot of women**

TDRMs have been hailed for being relatively cheaper than formal justice systems.<sup>195</sup> The council of elders or the practitioners of TDRMs may sometimes ask a bribe from the parties to a land dispute. More often than not, the parties are asked to give only what they can. However, in a society where women have little to no control over land and other economic resources, coming up with a fee to pay the council of elders hinders their access to justice. Their opponents, being men most times, are able to pay more money due to their higher economic standing, thereby skewing the council of elder’s decisions towards them.<sup>196</sup>

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<sup>191</sup> Kamau W, ‘Law, Pluralism and the Family in Kenya: Bifurcation of Formal Law and Custom,’ *23 International Journal of Law, Policy and the Family* 2, 2009, 133.

<sup>192</sup> Kamau W, ‘Law, Pluralism and the Family in Kenya: Bifurcation of Formal Law and Custom,’ *23 International Journal of Law, Policy and the Family* 2, 2009, 134.

<sup>193</sup> Musembi C, ‘Review of experience in engaging with non-State justice systems in East Africa’, Governance Division DfID, 2003, 18.

<sup>194</sup> Pimentel D, ‘Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique,’ *14 Yale Human Rights and Development Law Journal* 1, January 2011, 3.

<sup>195</sup> The Judiciary of Kenya, ‘Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)’ August 2020, 3.

<sup>196</sup> Henrysson E and Jareman S, ‘On the edge of the law: Women’s property rights and the dispute resolution in Kisii, Kenya’ *43 Law & Society Review* 2, 2009, 47.

### **3.5 Conclusion**

In conclusion, this chapter has achieved the second objective of the study, which was to analyse the effectiveness of TDRMs in improving access to justice for women with regard to safeguarding their land rights by asking the African woman question. It did so by painting a picture of women's rights, proceeded to lay out the injustices they face, gave three case studies from the Kisii, Luhya and Pokot communities then outlines the findings therefrom. It concluded by using the African woman question to analyse the findings, proving that though the application of TDRMs seems neutral, they have discriminatory undertones by virtue of some customary law and practices on which they are based. This in turn hampers women's access to justice and consequently prevents the full enjoyment of many other rights.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.0 Introduction

This chapter wraps up the paper by summarising the findings of the study, confirming the state of the hypothesis in a conclusion and most importantly, offering recommendations for a way forward.

#### 4.1 Conclusion

This study's main aim was to debunk the assumption that the mere presence and use of socially and legally embedded systems of dispute resolution are enough to guarantee easier access to justice for women regarding land rights in Kenya. From the discussions this far, it has been established that:

- a. TDRMs, used correctly and within the human rights framework, offer great advantages. Though their application seems neutral, they have discriminatory undertones by virtue of some customary law and practices on which they are based. This in turn hampers women's access to justice and consequently prevents the full enjoyment of many other rights.
- b. State and non-state actors in positions to make laws, policies and decisions that directly or indirectly affect the rights and fundamental freedoms of women should always ask the African woman question. That ensure that cases that border on the violation of women's rights are not just treated as one of those cases but are decided in such a way that they accommodate and contextualize the suffering of women in the region.<sup>197</sup>

The conclusions thereby confirm the initial hypothesis- that women seeking redress on land rights indeed have difficulties accessing justice through TDRMs.

#### 4.2 Recommendations

Stakeholder interaction is paramount for sustainable solutions to problems that are multi-sectoral or multidisciplinary. Thus, both state and non-state actors should actively engage in order to facilitate the effective collaboration in the implementation of the recommendations below:<sup>198</sup>

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<sup>197</sup> Durojaye E and Oluduro O, 'The African Commission on Human and People's Rights and the woman question' *Feminist Legal Studies* 24, 2016, 19.

<sup>198</sup> State actors include the Judiciary, office of the Director of Public Prosecutions and institutions for public service such as the Kenya National Human Rights Commission, National Land Commission, Independent Electoral and

#### 4.2.1 Doing away with retrogressive customary laws

The State, most importantly, and non-state actors must take a proactive stance in ensuring all the customary laws and practices applying to women and other users pass the constitutionality and human rights test in order to remove impediments to access to justice.<sup>199</sup> Examples of State commitment to doing away with retrogressive customary laws can be seen when the Court of Appeal of Botswana did away with the primogeniture customary practice that denied female children the right to inheritance. The Court contended that the customary practice was not harmonious with the country's commitment to human rights standards set in its constitution and also as signatories of various regional and international human rights instruments championing gender equality.<sup>200</sup> State and non-state actors, in their interaction with TDRMs, should always ask the African woman question when assessing the various customary laws to ensure they neither directly nor indirectly burden women and compromise their enjoyment of their human rights and fundamental freedoms.

#### 4.2.2 Awareness campaigns and active participation of women

Knowledge is power, or as the Bible puts it, "My people die because of lack of knowledge."<sup>201</sup> Many injustices on the grounds of gender equity occur because the victims and other women in the communities do not know their rights, the obligations of TDRMs and ways they can get redress when their rights have been infringed upon. Further, as seen from the case studies, some TDRM

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Boundaries Commission, Public Service Commission, Judicial Service Commission, Commission on Revenue Allocation, Salaries Remuneration Commission and the National Police Service Commission. They, in general, will facilitate capacity building for effective planning, implementation, monitoring and management of TDRMs, Provide leadership, oversight and policy direction; provide proper legal, policy and institutional frameworks; spearhead the enforcement and implementation of the policy and guidelines in a coordinated and integrated manner; create checks and balances; provide feedback loops and lastly, set, maintain and ensure standards and professionalism in TDRMs.

<sup>199</sup> This is a requirement under articles 1 and 2 of the Declaration on the Elimination of Discrimination Against Women, which is an important precursor to the legally binding CEDAW of 1979 that Kenya is a signatory of. The articles aver that discrimination against women is "fundamentally unjust and constitutes an offence against human dignity and therefore calls for the abolition of laws and customs which discriminate against women, for equality under the law to be recognised, and for states to ratify and implement existing UN human rights instruments against discrimination.

<sup>200</sup> *Ramantele v. Mmusi and Others* (2013) Court of Appeal of Botswana. See also, *Bhe & Others v. Magistrate Khayelitsha* (2005) Constitutional Court of South Africa where the Court rejected and declared as unconstitutional the primogeniture customary practice, which tends to favour male children over female in inheritance matters. According to the court, this practice is discriminatory and violates the equality clause in the South African Constitution .

<sup>201</sup> Hosea Chapter 4 Verse 6, King James Version Bible available at -< [Hosea 4:6 My people are destroyed for lack of knowledge. Because you have rejected knowledge, I will also reject you as My priests. Since you have forgotten the law of your God, I will also forget your children. \(biblehub.com\)](http://biblehub.com)> on 30 October 2020.

practitioners are not aware of their bias, terming it as custom, and the basic constitutional principles requiring gender equity application.

State and non-state actors therefore must uphold the Constitutional right to access information<sup>202</sup> by collaborating to create awareness campaigns for both the women and the TDRM practitioners in order to bring them at par with constitutional and human rights standards. This knowledge lets women know when, where, and how to get help whenever they are championing for their land rights. This knowledge also helps the TDRM practitioners be aware of their bias, to know understand the importance of empowering women in the society and also deter them, through the penalties and procedural safeguards, from intentionally prejudicing women.

Awareness also enables the active participation of women in the TDRMs. As the late US Supreme Court Judge, Ruth Bader Ginsberg said, “Women belong in all places where decisions are being made. It shouldn’t be that women are the exception.”<sup>203</sup> Knowledge of their rights enables women to step away from the shadows and secondary participation and thus more fiercely advocate for themselves in TDRMs and also offer themselves to be part of the TDRMs.

#### **4.2.3 Supporting effective intermediary interventions by relevant stakeholders**

The Taskforce on Alternative Justice Systems to evaluate various Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems) appointed by the then Chief Justice, Hon. (Dr) Willy Mutunga, proposes four ways for the Judiciary and TDRMs to interact: deference, monism, recognition and enforcement, and facilitative interaction.<sup>204</sup> Deference is when the Court screens previous awards from TDRMs to ensure compliance only on proportionality and procedural grounds. Recognition and enforcement happen when an award from the TDRMs is taken as an order of the Court. Facilitative interaction is when the award from TDRMs is admitted in evidence for an on-going court process. Lastly, monism refers to making

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<sup>202</sup> Article 35, *Constitution of Kenya* (2010).

<sup>203</sup> Mothership, ‘Full text of Shanmugam’s speech women, development and gender equality’ 20 September 2020 -< [Full text of Shanmugam's speech on women development & gender equality - Mothership.SG - News from Singapore, Asia and around the world](#)>- on 23 October 2020. Also, this is in line with the Protocol to the African Charter on the Rights of Women in Africa (the Maputo Protocol) which provides important procedural rights to ensure that women have a voice in the on-going examination and reformulation of cultural practices and customary law.

<sup>204</sup> The Judiciary of Kenya, ‘Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)’ August 2020, 9.

the Court an appellate instrument where an award of the TDRMs can be checked by the Court for both substance and procedure.

All these interventions provide an avenue for the formal justice system to step in when there are instances of gender bias or other human rights violations or threats of violations, thus acting as an extra check and balance for the TDRMs. This in turn improves the access to justice of women since they know there is redress in case they are faced with a prejudiced process or panel. The Judiciary and relevant actors can buttress this by ensuring the avenues are easy to understand, unmarked by bureaucracies and easily available to women and other users of TDRMs.

#### **4.2.4 Formal recognition of TDRMs and the subject matters admissible to them**

Even though the Constitution advocates for TDRMs in explicit terms, they are yet to be institutionalised or given adequate policy and legal guidelines.<sup>205</sup> The Judiciary and related actors must then make a formal recognition of TDRMs and provide clear and comprehensive directions on their procedural and human rights aspects in order to attain social justice, gender equality and redressing of the historical and current injustices faced by women, and be in line with the transformative nature of the 2010 Constitution. Being institutionalised also communicates the seriousness of the State to improve access to justice and improve the trust that women and other users have for TDRMs.

This can be done through gazetting and public sensitisation on the guidelines; having a framework that provides for the full spectrum of access to justice through the TDRMs and the matters admissible to them; encouraging the screening of cases by courts that can be taken through TDRMs first before going through the litigation process (just like how Court-Annexed Mediation has improved the use of mediation in the family and commercial division),<sup>206</sup> and sensitising the public on the jurisdiction, powers and obligations of the TDRMs.<sup>207</sup>

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<sup>205</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020, 3.

<sup>206</sup> The Judiciary of Kenya, 'Court-Annexed Mediation' April 2016.

<sup>207</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020, 11.

#### **4.2.5 Fortifying and securing the process for selection, election, appointment and removal of TDRM practitioners**

In order to fasten the reins on accountability and competence of practitioners of TDRMs, the judiciary and related actors should strengthen the process for their selection, election, appointment and removal. This supervisory role is not intended to unnecessarily interfere with the traditional values of the various communities, rather, to ensure that women and other users of the system have their rights respected and protected by the practitioners. As part of the right to a fair hearing, it is only right that the panel one appears in front of is free from bias and is capable of recognising the social and legal climate within which the dispute exists. Further, women and other users should be able to file complaints against practitioners whom they feel were unlawfully prejudiced against them.

The Judiciary and the related actors can strengthen these processes by ensuring the panels are representative and inclusive; require an application process that gauges the suitability of proposed practitioners; have a Code of Conduct for the practitioners; ensure continuous capacity training on women's rights and relevant human rights principles and finally having an institution or avenue to receive, investigate and redress complaints against practitioners.<sup>208</sup>

#### **4.2.6 Fortified and perpetual resource allocation**

To help curb the problem of corruption at the council of elders level that may have arisen due to the fact that they are currently unpaid practitioners, the State should, in collaboration with other actors, mobilize resources and allocate a budget to manage and sustain TDRMs. This philosophy of self-sustenance will reduce, if not eliminate, the need for women to pay bribes in order to access justice when dealing with their land rights

In conclusion, this last chapter has achieved the third objective which is to recommend practical ways that state and non-state actors can apply substantive equality to remove impediments to women accessing justice using TDRMs to secure their land rights by first summarising the findings of the study, confirming the state of the hypothesis in a conclusion and most importantly, offering recommendations for a way forward.

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<sup>208</sup> The Judiciary of Kenya, 'Alternative justice systems framework policy: Traditional, informal and other mechanisms used to access justice in Kenya (Alternative justice systems)' August 2020, 13.

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