

**Equality under the Succession Act Cap 160.**

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## DECLARATION

I, DETHO JESSICA NABUIRE, 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: .....

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

Signed:.....

[Supervisor's Name]

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## **ABSTRACT**

The revised Succession Act has done a good job in trying to harmonize the customary succession laws, with that of the current succession laws, however quite a number of gaps have been left out and in particular with regard to equality in the laws. This will be my focus throughout my paper, I will show the specific laws that are contradictory to the equality provision upheld by article 27 of the Constitution of Kenya, article 1 of the UDHR among others.

This thesis urges the society to depart from such laws that are discriminatory on the basis of gender or race etc. and takes qualitative kind of research methodology to show the dangers of inequality in the law.

## **LIST OF ABBREVIATIONS.**

1. CEDAW- Covenant for the Elimination of Discrimination against Women.
2. ICCPR- International Covenant on Civil and Political Rights.
3. UDHR- Universal Declaration of Human Rights.

## **LISTS OF CASES.**

1. Re Ruenji, civil case No. 136 of 1975.
2. Re Ogola, [1978] eKLR.
3. Bessan Kaur v. Rattan Singh 25 KLR.
4. Benjawa Jembe vs. Priscilla Nyondo 1912 EALR.
5. In the Matter of the Estate of Charles Muigai Ndung'u (deceased) of Karinde Kiambu District Nairobi HCP&A 2398 of 2002.
6. VMK v Catholic University of Eastern Africa [2010] eKLR.
7. Minister of Education v Syfrets Trust Ltd, 2006 (4) SA 205 (C).
8. Mmusi and Others v. Ramantele and Another, [2012] BWHC 1.

## **LIST OF STATUTES.**

1. Law of Succession Act 2012.
2. Marriage Act, 2014.
3. Children's Act.
4. Matrimonial Property Act.
5. Land Registration Act No. 3 of 2012.
6. Land Act No. 6 of 2012.
7. Native Courts Regulations Ordinance 1897.
8. Independence constitution of Kenya.
9. Divorce and Succession Ordinance No. 43 of 1946.
10. East Africa Order in Council.
11. Constitution of Kenya 2010.
12. Constitution of South Africa 1996.

## **LIST OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS.**

1. The Universal Declaration of Human Rights. (UDHR).
2. The International Convention on Economic Social and Cultural Rights (ICESCR).
3. The Convention on the Elimination of Forms of Discrimination Against Women (CEDAW).
4. The International Covenant on Civil and Political Rights. (ICCPR).

## CHAPTER ONE.

### 1. BACKGROUND OF THE PROBLEM.

Succession is defined as “the passing of property under the laws of inheritance by way of a will and to the exclusion of grants, gifts or by purchase”<sup>1</sup> and thus is the branch of law that addresses matters on inheritance.<sup>2</sup> This concept of inheritance is universal to all societies irrespective of their legal system, ideology or religion<sup>3</sup> and it applies to both testate and intestate succession<sup>4</sup>. A system of passing of property from the deceased to his survivors is recognised by the Law of Succession (Cap 160).<sup>5</sup>

The Law of Succession Act in an attempt to promulgate the inheritance laws of Kenya it has solved a number of issues arising from inheritance conflicts. However there are still a few anomalies such as the inequality of the Law of Succession Act, or even questions of equity versus equality of the same that have arisen due to the recent developments of the Constitution of Kenya; the Marriage Act<sup>6</sup>; precedence<sup>7</sup>; the Children’s Act<sup>8</sup> and the Matrimonial Property Act<sup>9</sup> (and other property and Land laws<sup>10</sup>). In addition, when applied together with international instruments ratified by Kenya such as Covenant for the Elimination of Discrimination against Women <sup>11</sup>(hereinafter referred to as CEDAW), the Universal Declaration of Human Rights <sup>12</sup>(hereinafter referred to as UDHR) among others, there are some discrepancies that arise from their interpretation.

The succession laws in Kenya can be traced to as far back as the 1880s. It began with regulating the Indians, to be more specific, those who practised the Hindu faith. However, the Indian

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<sup>1</sup> Campbell H, *Black’s law dictionary: Definitions of the terms and phrases of American and English jurisprudence, ancient and modern*, West Publishing Company, 1979, 1297.

<sup>2</sup> Musyoka W, *Law of succession*, Law Africa Publishing Ltd, Nairobi, 2006, 2.

<sup>3</sup> Section 2(1), *Law of Succession Act 2012*.

<sup>4</sup> *Law of Succession Act 2012*.

<sup>5</sup> *Law of Succession Act 2012*.

<sup>6</sup> *Marriage Act, 2014*.

<sup>7</sup> Re Ruenji, civil case No. 136 of 1975. Re Ogola, [1978] eKLR.

<sup>8</sup> (Act No. 8 of 2001).

<sup>9</sup> (Act No. 49 of 2013).

<sup>10</sup> *Land Registration Act* (Act No. 3 of 2012); *Land Act* (Act No. 6 of 2012).

<sup>11</sup> Adopted, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>12</sup> Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

succession Act was made no longer applicable in Kenya.<sup>13</sup> These laws developed through significant stages which will be discussed below.<sup>14</sup>

In the first period, the Hindu Wills Act<sup>15</sup> was what governed the Hindu inheritance but testate succession only.<sup>16</sup> Testate succession to mean, succession where the deceased has left a will which will be used to determine who inherits in his or her estate and in what particular proportions.

The second period the Hindu Marriage, Divorce and Succession Ordinance<sup>17</sup> was applicable to Hindus who domiciled and got married in Kenya,<sup>18</sup> and also to Hindus who died in the country.<sup>19</sup> This was enforced in the case of *Bessan Kaur v. Rattan Singh*<sup>20</sup> where the deceased's wife made a claim for the estate that was all left to the deceased's son and was held that she could not establish a right of succession under the ordinance owing to the fact that her marriage was not contracted in in Kenya.<sup>21</sup>

Lastly the period after 1960 which basically amended the previous ordinance, separated between the marriage and divorce from the succession of Hindus.<sup>22</sup> In 1981, the Law of Succession Act repealed the Hindu Wills Act, and the Hindu Succession Ordinance.<sup>23</sup>

Pursuant to this was the law applicable to Africans, Muslims and lastly the Europeans. For the Africans, according to the 1897 Order-in-council, the African customary law was applicable in so far as it was not repugnant to justice and morality<sup>24</sup> (though there is no record of what exactly constitutes morality and justice). It failed to shed light on the Africans who converted to Christianity and did not want to be governed by the customary way of life<sup>25</sup> however, the case,

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<sup>13</sup> Musyoka W, *Law of succession*, Law Africa Publishing Ltd, Nairobi, 2006, 5.

<sup>14</sup> Kameri P, *The law of succession in Kenya: Gender Perspectives in Property Management Control*, Women and law in East Africa, Nairobi, 1995, 11.

<sup>15</sup> (Act XXI of 1870).

<sup>16</sup> Musyoka, *Law of succession*, 5.

<sup>17</sup> (Ordinance No. 43 of 1946).

<sup>18</sup> Musyoka, *Law of succession*, 6.

<sup>19</sup> Kameri, *The law of succession in Kenya*, 11.

<sup>20</sup> 25 KLR 24.

<sup>21</sup> Musyoka, *Law of succession*, 6.

<sup>22</sup> Kameri, *The law of succession in Kenya*, 11.

<sup>23</sup> Musyoka, *Law of succession*, 6.

<sup>24</sup> Musyoka, *Law of succession*, 4

<sup>25</sup> Musyoka, *Law of succession*, 4

*Benjawa Jembe vs. Priscilla Nyondo*<sup>26</sup> shed light on the matter where Barth J stated,<sup>27</sup> “The fact that the deceased married a wife according to the rules of the Anglican Church does not affect the succession to his property. Such succession must be regulated by native law or custom”.<sup>28</sup> In 1961, the African Wills Act was passed so that the Africans could now die testate. The statute was repealed in 1981 by the Law of Succession Act.<sup>29</sup>

In the case of Muslims, the laws provided in the Quran was what governed the law of Muslims,<sup>30</sup> thus the establishment of the Kadhi’s courts<sup>31</sup> mandated to decide matters on Islamic law. When the Law of Succession Act came into operation, it repealed all existing succession laws, and was applicable to all Kenyans regardless of their religion, which the Muslims were upset by, and they pressured the government to have this looked into.<sup>32</sup> They later dis-applied the Act to “every Muslim dying before, on or after the 1st January, 1991”.<sup>33</sup>

English inheritance laws were codified in the Indian Succession Act, which allowed the testator to dispose of his property the way he or she wanted, but with keen focus on the issue of immediate family and dependants,<sup>34</sup> held so dear in the current Law of Succession Act. This Act was amended a number of times, a gift need not be made 12 months prior to death in order to be valid, as was held previously, the will need be proven and a cause of action for or against the deceased survived the testator.<sup>35</sup>

## **2. STATEMENT OF THE PROBLEM.**

The problem arising is that the Law of Succession Act Cap 160 (herein after referred to as the Succession Act) governing laws of inheritance in Kenya are intertwined with the aforementioned statutes, constitution and international instruments and thus need to speak one language-so to speak- however, this is not case. Take for example section 3(5)<sup>36</sup> with regards to the meaning of a

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<sup>26</sup> [1912] EALR.

<sup>27</sup> Musyoka, *Law of succession*, 6.

<sup>28</sup> *Benjawa Jembe v Priscilla Nyondo* [1912] EALR.

<sup>29</sup> Musyoka, *Law of succession*, 5.

<sup>30</sup> Article 57, *Native Courts Regulations Ordinance* (1897).

<sup>31</sup> Section 66, *Independence constitution of Kenya*.

<sup>32</sup> Musyoka, *Law of succession*, 7.

<sup>33</sup> Section 2(4), *Law of Succession Act* (cap 160).

<sup>34</sup> Article 11(b) *East Africa Order in Council*.

<sup>35</sup> Kamari, *The law of succession in Kenya*, 12.

<sup>36</sup> *Succession Act*, 2012.

wife. It states that “Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act”. However we know in marriage laws, a man cannot contract another marriage if they currently are in a monogamous marriage, the subsequent marriage is void and thus the woman under the subsequent marriage is not recognised as a wife. This is clearly brought in various case law, just to name a few, *Re: Ruenji*<sup>37</sup> and *Re: Ogola*.<sup>38</sup> However Aluoch J, in response to this stated that “section 3(5) of the Law of Succession Act caters for women under customary by men who had previously or subsequently contracted statutory marriages, and who have been abandoned or neglected , and such women are entitled to be provided for of the estate of the deceased”.<sup>39</sup> This was later overturned in the court of Appeal.

With regards to equality, under the Succession Act, a "dependant" means -where the deceased was a woman- her husband if he was being maintained by her immediately prior to the date of her death. In addition to this, widowers have to prove dependency while widows do not have to prove dependency<sup>40</sup>, the status of the widows and the widowers is unequal in regard to this.

“Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”<sup>41</sup> This provision purports that upon the re-marriage of a widow, she will lose the life interest that she gained from the previous marriage, which has also been applied in a case where the court found that the widow was not entitled to a life interest as she remarried after the demise of the deceased, but her child with the deceased was found to be the sole heir to the estate of the deceased.<sup>42</sup> The status of widows and widowers is unequal in regard to this as the widowers do not in fact lose their life interest upon remarriage.

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<sup>37</sup> Civil case No. 136 of 1975.

<sup>38</sup> [1978] eKLR.

<sup>39</sup> In the matter of the Estate of Reuben Nzioka Mutua(deceased)

<sup>40</sup> Section 29(c), *Law of Succession Act* (cap 160).

<sup>41</sup> Section 35(5), *Law of Succession Act* (cap 160).

<sup>42</sup> In the Matter of the Estate of Charles Muigai Ndung’u (deceased) of Karinde Kiambu District Nairobi HCP&A 2398 of 2002.

What then happens to the traditional customs of levirate unions popular among the Luo community where a wife to a deceased is re-married to the deceased's brother, as part of custom<sup>43</sup>, and has little to no say of whether she indeed does want to re-marry due to fear of ex-communication,<sup>44</sup> should her life interest be snatched from her? What of the children? In such a custom, the children born to the deceased or born to the deceased's brother are seen to be children of the deceased regardless of parentage in a bid to continue the deceased's family line. Can the children born to the deceased's brother claim title of the deceased estate?

Where the intestate was polygamous his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.<sup>45</sup> The issue with this is that it does not take into consideration the situation in each family, for example the health status of the children, their ages among others, therefore the division is not equitable.

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.<sup>46</sup> This equal division pays no mind to the situations of the children, such as the age, health status, family status among others and thus not equitable as well.

These variances under the Law of Succession and intertwining statutes need to be addressed through proper codification and consideration.

### **3. PURPOSE OF THE STUDY OR GENERAL OBJECTIVE.**

This study intends to show the meaning of equality as well as equity, their position in the law and which among the two is a better approach for a more reliable interpretation. In addition to this, where equality is favoured, the study seeks to establish the better between substantive and procedural equality, and how its application affects the current law that is the Succession Act.

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<sup>43</sup> Nyarwath, O, 'The Luo care for widows (Lako) and contemporary challenges' 4 *Africa Journals Online* (2012), 94

<sup>44</sup> Miruka P, Nathan J, Jack O, 'The Cultural View of the Luo People of Western (Kenya) on Widow Care and the Biblical Approach' 3 *Sociology and Anthropology* (2015), 242

<sup>45</sup> Section 40, *Law of Succession Act* (cap 160).

<sup>46</sup> Section 38, *Law of Succession Act*, 2012.

Where equity is favoured, the study seeks to find out what are some of the considerations that should be made in applying the equity principle as a better alternative, and its sustainability in law as well.

#### **4. RESEARCH QUESTIONS OR SPECIFIC OBJECTIVES.**

This thesis will look into the following research questions in order to bring out the justification of the study.

1. What is equality?
2. What is equity?
3. What is the meaning of section 3(5), 29 (c), 35(5), 38, 39, 40 of the Succession Act? There will be a need to show the literal meaning of the section as well as the meaning taken up by the courts in making decisions.
4. What are the issues that arise as a result of the above provisions?
5. What is the place of equality and equity in the above provisions?
6. What are the possible recommendations that can be made to rectify the above provisions?

To make these recommendations, it is important that a comparative analysis be made with other jurisdictions such as Botswana and South Africa.

#### **5. HYPOTHESIS.**

This research proceeds on the presumption that the Succession Act is in conflict with other laws such as marriage laws, the Constitution of Kenya, international instruments such as the UDHR, CEDAW and the ICCPR and laws in Botswana and South Africa especially because they are keen to ensure that their customary laws are not repugnant to justice and morality as will be seen in later chapters. Thus moving forward on the assumption that the Law of Succession Act is misinformed in part, and needs to take into consideration other existing laws and jurisdictions to make a proper inference in order to fill in the gaps currently present, such as the lack of equality in the law between both men and women. This inequality are in respect to only particular provisions of the Succession Act as will be seen in later chapters.

#### **6. IMPORTANCE OR JUSTIFICATION OR RATIONALE OF THE STUDY.**

This study is justified on the basis that, although the Law of Succession Act has resolved a lot of issues that were there in the past, a few discrepancies here and there need to be looked into in order to ensure lack of contradiction in cases of disputes or claims. This study will also touch on the

different laws aforementioned and the rectification of the dissimilarities will be a step forward to the perfection of these laws. A study into different jurisdictions will also shed light in trying to put forth solutions for our flawed Succession laws.

## **7. SCOPE AND LIMITATIONS OF THE STUDY.**

This area of law (succession law) is not well developed, and there is very little that has been written and researched on, so far in Kenya the only reliable sources available are, to begin with, precedence from decisions in past cases, secondly, the Law of Succession Act Cap 160.

Another source is the 'Law of succession Instruction notes' by Mr William Musyoka which point out a few disparities among them being the ambiguity of section 3(5) of the Succession Act, and as a result, inequality is also clearly brought out when applying this section of the Act.

Lastly, 'The law of succession in Kenya: Gender Perspectives in Property Management Control, Women and law in East Africa' by Dr Patricia Kamari Mbote where, she gives an analysis on the multiplicity of the laws governing succession despite the promulgation of the Succession Act, certain challenges that face the institution of succession being; modernizing the law, its practices and procedures<sup>47</sup> and goes ahead to give an example of the *Ruenji case* and the *Ogola case* where the monogamy concept of marriage put in a bind, the subsequent wives and children who had no claim on inheritance for deceased husbands and fathers contrary to the first wives under civil and Christian marriages.<sup>48</sup> The second challenge being in relation to the Kenyan state in property management and succession while the third is the contrast between the Traditional African and Western approaches to succession<sup>49</sup>. She also looks into levirate unions, cohabitation which is a result of section 3(5).

Botswana and South Africa have also made an attempt towards the development of this law through their precedence and statutes, therefore my study is limited to the above sources, together with international instruments ratified in Kenya such as the UDHR and CEDAW.

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<sup>47</sup> Kamari, *The law of succession in Kenya*.

<sup>48</sup> Kamari, *The law of succession in Kenya*.

<sup>49</sup> Kamari, *The law of succession in Kenya*.

## **8. DEFINITION OF TERMS.**

1. *Obiter Dicta*- A judges opinion when delivering judgement. Usually essential to understand the rational of the judge when making a decision but it does not form precedence.
2. *Iniusta non est lex*- unjust laws are not laws.

## **9. CHAPTER SUMMARY.**

Succession laws were primarily customary in Kenya until colonisation, after this the development of succession laws governed by race and religion, such as whether Muslim or Hindu etc. This constant change in this particular law has brought forth contradictions and challenges especially among special classes such as the women who cohabit with the deceased, children born out of wedlock where the deceased father dies without acknowledging that he is indeed the father, some pastoral communities such as those in West Pokot, Samburu, and Isiolo among others.

The Constitution of Kenya strives for equality of all persons under the law<sup>50</sup> so does the UDHR and thus in a bid to make this so under the law of Succession, it needs to be done in a sustainable manner, where factors affecting division of property is taken into consideration so as to prevent a procedural reform in the law, causing more harm than good.

The fine-tuning of the law of succession has been long overdue and societal changes should be incorporated into the law in a substantive manner as opposed to a procedural one.

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

## **CHAPTER TWO**

### **THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY.**

#### **INTRODUCTION.**

The known primary schools of thought in jurisprudence are, Natural Law; Legal Positivism and Legal Realism. In my dissertation natural law will be the focus of my theoretical framework in a bid to explain the plight of equality and better yet equity during law making and also in application of the law. This paper will limit the use of legal positivism to particular articles of the Constitution of Kenya, local legislations the laws of other jurisdictions mainly South Africa and Botswana, the UDHR the CEDAW and precedence. In addition, my choice of relying on natural law as the basis of my thesis to a greater extent than legal positivism is due to the substantive nature of natural law. Legal positivism tends to be too much of a tunnel vision on the law, and thus the development of unjust laws that oppress specific groups of people in society.

#### **1. NATURAL LAW JURISPRUDENCE.**

Natural law can be defined as the set of moral principles seen through reason, stemming from immanent truths about human nature which constitute the rational foundation for moral judgement. More simply, it is seen as the participation of eternal law in the rational creature. It originated in Greek philosophy, developed best by Aristotle and is concerned with the state and its order as the sphere of morality, as the realization of all virtue. In this view, actions correspond to nature and thus naturally good, and those that are against or repugnant to nature are naturally bad.<sup>51</sup> It was then adopted in Roman law by Cicero influenced by the Stoics.<sup>52</sup>

##### **1.1 THOMAS AQUINAS.**

Thomas Aquinas being the most influential writer in the traditional approach to natural law opined that there are four different kinds of natural law. The first is eternal law related to the rules given by God, and used to govern all creatures; second, natural law being a part of eternal law experienced through the use of human reason; third, divine law which is law revealed to man through the scriptures and lastly, the man made laws which are enacted for common good meant to supplement

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<sup>51</sup> Bix B, 'Natural law Theory' in Paterson D (2ed), *A comparison to philosophy of law and legal theory*, Wiley Blackwell, 2010, 211-212.

<sup>52</sup> Rommen H, *The Natural Law: A Study in Legal and Social History and Philosophy*, Liberty Fund, Indianapolis, 1988, 38.

natural law and if they fail to conform to natural or divine law, then, they are not be considered law (unjust laws-*iniusta non est lex*). This brings forth some contradiction because it is then assumed that any law considered “unjust” should not be followed. However, according to Aquinas, this is not the case, he says that there are moral reasons for obeying an unjust law and lack thereof the system is thus undermined. Lastly, he developed some principles of Natural law, with the first principle of practical reason being, good is to be done and evil is to be avoided.<sup>53</sup> With this only we can see that the procedural laws of succession should primarily complement the natural and divine laws of what is naturally or divinely good.

## 1.2 HUGO GROTIUS.

In the efforts to ensure that natural law was not only seen as a law coming from God, (which would imply that atheists were not bound by natural law) Hugo Grotius brought about the ‘secular natural law’<sup>54</sup> where he states that “Even if we were to concede that which cannot be conceded without the utmost wickedness, that there is no God or that He is not concerned with human affairs, there would still be natural law. ... Just as God cannot cause two times two not to make four, so He cannot cause that which is intrinsically evil not to be evil.”<sup>55</sup> This ensured that there was no human being who would be exempt from natural law.

## 1.3 EARLY MODERN EUROPE.

In early modern Europe the discussion of natural law was tied in with natural rights developed in the social contract theory by John Locke, Thomas Hobbes and Jean-Jacques Rousseau. I will further discuss this social contract theory in the next few pages in my thesis.

## 1.4 JOHN FINNIS.

John Finnis develops on what Thomas Aquinas has over the years and this is particularly important to the basis of my argument of substantive equality because he focuses on two particular areas. The first being rejection of his work pegged on a deduction of what ought to be from what actually is. Natural law comes from an intrinsic knowledge and needs no external justification and because

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<sup>53</sup> Bix B, ‘Natural law’, 213-215.

<sup>54</sup> Gitahi J, *Jurisprudence* (PowerPoint slides).

<sup>55</sup> Gitahi J, *Jurisprudence* (PowerPoint slides).

the consensus on ultimate values is difficult to realise does not mean that they actually do not exist.<sup>56</sup>

Secondly, he avoids confrontation with positive law. It was the mistaken interpretation that, natural law does not recognise a law as a law if it is in contradiction with natural law itself. However even though the interpretation really meant that one should obey the law of God rather than human law, he still went on to say that where a law was rendered unjust merely because it offends the common good, then it might be better to simply obey. In addition to this, even the laws do not cut through matters of conscience, laws should be obeyed wherever possible in order to prevent civil order from being undermined as mentioned above.<sup>57</sup> Therefore this paper although is trying to put forth an argument for substantive equality under the law, it does not in any way encourage the disobedience of current laws that have no regard to equality, but is rather trying to show the need for equality and its philosophical basis.

### 1.5 LON FULLER

The traditional natural law was faced with multiple criticisms from legal positivists such as John Austin, Hans Kelsen among many others. This led to the development -so to speak- of the modern natural law theory by Lon Fuller, Ronald Dworkin among other influential English writers that I will mention later on. This modern approach to natural law brings more focus to the true understanding of the law as a “social institution” without contradicting the traditional natural law theory. This modern theory also argued against the sharp separation of law and morality that the legal positivists based their entire argument on, and opined for a moral evaluation of some sort in describing the law.<sup>58</sup>

Legal positivism had a one-way projection of authority where the law making process is one way and fed to the citizens to obey without due consideration nor the cooperation among the authority and the citizens who have the obligation to follow the law.<sup>59</sup>

The law is a process as opposed to an object. In order to understand the law, one needs to understand the moral concept to which it is trying to work towards. It is “the enterprise of

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<sup>56</sup> Finnis J, *Natural law and natural rights*, Oxford University Press, 1980, 24.

<sup>57</sup> Finnis J, *Natural law and natural rights*, 360-364.

<sup>58</sup> Bix B, ‘Natural law’, 218-219.

<sup>59</sup> Bix B, ‘Natural law’, 219.

subjecting human conduct to the governance of rules” and as such should be a guidance to the people it governs, to lead the citizens to a common good or end, as opposed to making rules that confuse the citizens. <sup>60</sup>

To live quality life, a society needs a structure provided by a sound legal system and thus effectuating moral goods and thus the eight principles of legality serving as a criteria for testing the level of excellence in which a government should strive. These principles bring out the internal morality of the law. They are: these laws should be general; they should be promulgated so that the citizens know the standards to which they are being held; retroactive rulemaking and application should be minimized; the laws should be understandable; they should not be contradictory; they should not require conduct beyond the abilities of those affected; they should remain relatively constant through time and lastly, there should be a congruence between the laws as announced and their actual administration.<sup>61</sup> These eight principles are key in law making and its application today with special regard to ensuring that laws are not contradictory; (which is my main problem with the succession Act in relation to other legislations) ensuring that they remain relatively constant in that some laws of the succession Act too rigid which is again unfair and lastly ensuring that the laws are understandable, which points straight to Section 3(5) of the Succession Act, however these will be discussed in later chapters.

## **2. JEREMY BENTHAM.**

Jeremy Bentham was an English philosopher, who was associated with the utilitarianism principle and also based his argument on the same train of thought with that of Beccaria. His main reasoning was that, the greatest happiness for the greatest number of people is the foundation of morals as well as law. In his view, it is the obligation of the state to promote the greatest happiness by using a criminal justice system that deters offenders.<sup>62</sup> This can only be achieved where the criminal punishment provided is practical and useful to the people. This is relevant to equality as according to specific legislation for example article 27 of the Constitution of Kenya 2010, the provision for equality amongst all people is a great happiness for the greatest number of people, as both men and women get to enjoy the same rights and freedoms.

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<sup>60</sup> Fuller L, *The Morality of Law*, Yale University Press, New Haven, 1969, 96.

<sup>61</sup> Fuller L, *The Morality of Law*, 33-91.

<sup>62</sup> Burns J, *Happiness and Utility: Jeremy Bentham's Equation*, Cambridge University Press, 2005.

### **3. IMMANUEL KANT.**

The philosopher Immanuel Kant argued for the theory of retribution or just deserts as a justification for the punishment of criminal offences. The act of retribution or the retributive justice system is where punishment is administered in return for a wrong committed whereas the main precept under the just desert theory is derived from the word itself, whereby a person who commits a crime is deserving of punishment.<sup>63</sup> Kant was of the view that punishment can never be administered merely as a means of promoting another good but rather it should be pronounced to all criminals proportionate to their internal wickedness. This is to mean that punishment should not be given to serve any other purpose but should only be administered because an individual has violated the provisions of a certain law. Unlike Bentham who was concerned that the deterrence theory in regards to punishment is for the purpose of preventing other wrongdoers from repeating the same actions, Kant maintains that the only justification for administering punishment is retribution.<sup>64</sup> The case of VMK and Catholic University of Eastern Africa is a stellar case in the development of the right to equality coupled with non-discrimination. In this case, the claimant had been an employee of the respondent since the year 2000, earning seven thousand shillings without benefits and there were two male employees in the same position who were employed on permanent pensionable terms, yet she was not. She later responded to internal job advertisement where a HIV test was conducted without the knowledge, consent or authority of the claimant. In addition to this, HIV was not among the tests that was to be conducted based on the Medical Examination form which she was given by the Personnel department. Over the years she got shorter and shorter contracts, due to her HIV status as her salary also got less, refusing her paid maternity leave followed by an immediate termination of employment upon return from the unpaid maternity leave. The court, having found that the termination of the employment of the claimant was a culmination of various discriminatory actions against the claimant which was unlawful and in violation of human rights of the claimant, the court found that the termination did not meet the threshold provided under Section 45 (2) (a) and (c). Thus she was awarded 6,971,346 Shillings.<sup>65</sup>

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<sup>63</sup> Carlsmith K, 'Why do we punish?' Deterrence and just deserts as motives for punishment, 83 *Journal of Personality and Social Psychology*, (2002).

<sup>64</sup> Dodson C, *The role of harm, detectability and knowledge of HIV Non-Disclosure Laws in Affecting Punishment Recommendations for HIV Law Violators*, Old Dominion University, 2016.

<sup>65</sup> VMK v Catholic University of Eastern Africa [2010] eKLR.

Such decisions are what Immanuel Kant stood for, that there must be punishment for disobedience of the law, and the punishment must also fit the crime.

#### **4. FEMINIST LEGAL THEORY.**

The Oxford Dictionary defines feminism as the advocacy of women's rights on the grounds of political, social and economic equality to men. The concept of feminism or the feminist theory therefore advocates for equal opportunities for both men and women. Kenya is a state party to the CEDAW by virtue of article 2(6) of the Constitution of Kenya which is a convention that obligates state parties to take all appropriate measures including legislations to ensure that the rights of women are protected. It further requires that state parties get rid of any laws that would hinder the enjoyment of the rights under the convention.<sup>66</sup> In addition, the Constitution of Kenya appreciates the concept of feminism for it provides that women and men are to be afforded equal treatment and the right to equal opportunities. The aforementioned succession laws pose a difficulty to the feminist legal movement because widows under the Succession Act lose their life interest when they re-marry however, this is not the same for the men, they get to keep their life interest even after they re-marry. This provision among others is oppressive to the women in the society as they do not get to enjoy rights and freedoms (being right to marry, freedom of association and right to equality under the law) conferred upon them by the constitution and international legal instruments in the same way that the men do.

#### **5. SOCIAL CONTRACT THEORY.**

##### **5.1 THOMAS HOBBS.**

Thomas Hobbes put forth a theory named the social contract theory where according to him, prior to Social Contract, man lived in the State of Nature. Man's life in the State of nature was one of fear and selfishness. Man lived in chaotic condition of constant fear. Life in the State of Nature was 'solitary', 'poor', 'nasty', 'brutish', and 'short'. Man has a natural desire for self-protection, self-preservation and to avoid misery and pain and therefore entered into a contract where the society all surrendered all their rights and freedoms to an authority. This led to the development of a monarch who would be the absolute head and the subjects had no rights against this authority, but Hobbes put some moral obligations on the sovereign who shall be bound by natural law. He also argues that human beings are rational and are capable of pursuing their desires as efficiently

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<sup>66</sup> Article 2(6) *Constitution of Kenya*, 2010.

as possible.<sup>67</sup> Since the subjects surrender all their rights to the sovereign, then natural law steps in to act as a moral guide to the sovereign for the preservation of the natural rights of the subjects, such as equality as established by article 27 of the Constitution of Kenya.

## 5.2 JOHN LOCKE.

The social contract theory by John Locke departed from that of Thomas Hobbes in that, according to Locke, life was reasonably good and enjoyable, but the property was not secure. He considered State of Nature as a “Golden Age”. It was a state of “peace, goodwill, mutual assistance, and preservation” and men had all the rights which nature could give them. The state of nature lacked an authority to punish people from their wrongdoing but, it was not a state without morality. All persons were equal and independent, it was a ‘state of liberty’ where all people were free to pursue their interests free from interference.<sup>68</sup>

Property played an important role in Locke’s theory where it was inherent in the moral order encouraging people to tend to their affairs. It arose from the labour that a particular person expended on it, or rather derived from the toil and trouble experienced in creating it. There was thus a need to protect it, and hence the social contract, however here, a person didn’t surrender all the rights to single “ruler”, each person maintained their rights as they were considered natural and inalienable rights of men. The government was only meant to uphold and protect the natural rights of men. So long as the Government fulfils this purpose, the laws given by it are valid and binding but, when it ceases to fulfil it, then the laws would have no validity and the Government can be thrown out of power.<sup>69</sup>

This is important to the current succession laws in that in addition to each person being treated equally under the law, the treatment needed to be merited. This is seen throughout the entire succession act where those eligible to inheritance of an estate from a deceased were those who were, dependants<sup>70</sup>, wives<sup>71</sup>, people expressly stated in the deceased’s will<sup>72</sup> among others. The

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<sup>67</sup> Email from Elahi M on 3 October 2016.

<sup>68</sup> Tuckness A, *Locke’s political philosophy: The Stanford encyclopedia of philosophy*, Metaphysics Research Lab, Stanford University, 2016, <https://plato.stanford.edu/entries/locke-political/> accessed 10 October 2016.

<sup>69</sup> Email from Elahi M on 3 October 2016.

<sup>70</sup> Section 29, *Succession Act, Cap 160*.

<sup>71</sup> Section 3(5), *Succession Act, Cap 160*

<sup>72</sup> Section 3(1), *Succession Act, Cap 160*

division of this property especially where the deceased died intestate is what needs to be given more attention, and if this theory is anything to go by, the property should be divided according to proportions of who has most merited the inheritance.

### 5.3 JEAN-JACQUES ROUSSEAU.

Jean-Jacques Rousseau's social contract theory on the other hand opined the humanity's "fall from grace" with the invention of property, and thus surrendered their rights to the whole community as a whole termed the "general will" which was probably the reason behind having particular pastoral lands in Kenya not subject to intestacy rules, but to customary law only. However in the next chapter I will show how this goes against equality contradicting local legislations.<sup>73</sup>

Through Social Contract, a new form of social organisation- the state was formed to assure and guarantee rights, liberties freedom and equality. The essence of the Rousseau's theory of General Will is that state and law were the product of General Will of the people. State and the laws are made by it and if the government and laws do not conform to 'general will', they would be discarded. The individual traded his natural rights, for civil liberties such as freedom of speech, equality, assembly, among others.<sup>74</sup>

This social contract theory by these philosophers evidently supports the notion of equality among the people in relation to their rights, and substantive equality at that.

## **6. LEGAL POSITIVISM.**

In as much as my argument for equality heavily relies on the notion of natural law, legal positivism also has a role to play in my thesis in part with regards to article 27 of the Constitution of Kenya, article 1 of the UDHR among other legal instruments provide for the equality of all people under the law, and the Legal Positivism school of thought should be interpreted and followed *strictu sensu*.

## **RESEARCH METHODOLOGY.**

The method to be used to gather information for this paper will be through the use of the library. The library research will seek to analyse and interpret the Constitution of Kenya, the UDHR, the

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<sup>73</sup> Rousseau J, *The social contract: Or, Principles of political right*. New American Library, New York, 1974.

<sup>74</sup> Tumising R, *Constitutional law: Social Contract* (PowerPoint slides), 2013.

CEDAW, the International Covenant on Civil and Political Rights (ICCPR) and judicial decisions, recommendations of international fora, and scholarly writings on the application of equality to the succession laws. This research paper will be based on the case study as well as the comparative methods of inquiry in order to prove or disprove the hypothesis.

### **CONCLUSION.**

Succession laws should be promulgated with the use of reason opined by natural law, so as to ensure the presence of just laws in the society. This will reduce the resistance to the law and elevate a peaceful society.

## CHAPTER THREE.

### CASE STUDY.

#### 1. UNDERSTANDING EQUALITY.

The term equality is a correspondence between a group of different living or non-living things, processes or situations that have the same qualities in at least one way or the other, but not necessarily all aspects, and therefore the need to distinguish between a similarity or things being identical to each other. In this regard once this is understood, then when a particular law states that are people are equal, we understand that it does not mean that all people are identical or similar. Equality can be used in a descriptive manner to show that a group of people are of the same age, and also in a prescriptive manner to show the presence of equality when a prescriptive standard is applied, and this is what my thesis is focused on, for example that all people are or rather ought to be equal before the law.<sup>75</sup>

Equality on its own is incomplete because then one would wonder, in what respect is one equal to another. It is understood as an issue of social justice, not as a single principle, but as a complex group of principles forming the basic core of today's egalitarianism.<sup>76</sup>

Equality has a close link with morality and justice more so, distributive and general justice.<sup>77</sup> In my previous chapter I put forth a framework in support of the place of equality in a just system and the following principles of equality that were supported by the aforementioned philosophies and will be a main focus for the case study.

The first principle is known as formal equality where two people have equal status in a particular respect and must be so treated,<sup>78</sup> for example, if there is an amusement park ride that only allows people of 6ft and above, then it means that, two people who are 6ft want to ride then, they must be granted the access, all matters held constant.

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<sup>75</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>76</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>77</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>78</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

The second principle is known as the proportional equality, (which throughout my thesis I have been calling the substantive equality) where treatment to people in a society is related to their due.<sup>79</sup> For example, in a work environment, a person who is working daily from Monday to Friday morning to evening is paid more than another individual who is working three days a week and during morning hours only (all matters held constant). This kind of equality is proportional to their due, and the basis of this paper.

Thirdly, the moral equality developed by the stoics (more controversial in nature) where the natural equality of all rational beings is emphasized. This just meant that there should be equal dignity and respect among the human race. However this principle was held to be controversial due to its abstract nature.<sup>80</sup>

Lastly, the principle of presumption of equality is a formal, procedural principle of construction located on a higher formal and argumentative level. It is justified by the principle of equal respect together with the requirement of universal and reciprocal justification; that requirement is linked to the morality of equal respect granting each individual equal consideration in every justification and distribution.<sup>81</sup>

## **2. SUCCESSION LAWS IN SOUTH AFRICA.**

South Africa in a bid to harmonize their common and customary laws, has formed committees over the years seeking to pass a harmonized act. The South African Law Reform Commission commenced with its investigation into the harmonisation of the common and customary law.<sup>82</sup> They published various Issue Papers<sup>83</sup> in this regard to illicit responses from the general public. Issue Paper 1214 dealing with the customary law of succession posed various questions concerning the substance of customary law in the area of succession which was regarded as being important.

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<sup>79</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>80</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>81</sup> 'Gosepath Stefan: Equality' *Stanford Encyclopedia of Philosophy*, 27 June 2007 <https://plato.stanford.edu/entries/equality/> on 6 Dec 2016.

<sup>82</sup> Waithaka C, 'Implications of the new Constitution on the law of succession' Unpublished LLB thesis, Kenya, 2008.

<sup>83</sup> Mahomed I, "The Harmonisation of the Common Law and the Indigenous Law", Report on Conflicts of Law, September 1999.

With all these efforts being put in place, the Constitution of South Africa of 1996 is the bedrock of South Africa. It has reshaped the legal landscape over the past years and thus led to the decrease in the reliance of the courts on common law authority.<sup>84</sup>

The Bill of Rights established by article 2 of the Constitution applies to all law in South Africa,<sup>85</sup> also to private law and, thus, to the law of succession. It is therefore not a new concept that the Bill of Rights, especially its directives on equality and anti-discrimination,<sup>86</sup> has been invoked on a number of occasions during the post-constitutional era to challenge testamentary dispositions.

In a particular case, the issue in question was a bursary bequest made under a charitable trust established by a will and codicil executed in 1920 limiting beneficiaries to university students of European descent only and expressly excluded females of all nationalities and Jews as well. The people challenging this argued that it amounted to unfair discrimination, and they prayed that the aforementioned limitations imposed by the testator be struck from the will. The grounds for the challenge were pegged on the direct application of the Constitution's equality and anti-discriminatory provisions as well as the common law, which prohibits testamentary bequests that are illegal, immoral or contrary to public policy. Judge Griesel chose to decide the matter 'on the basis of the existing principles of the common law, having proper regard to "the spirit, purport and objects of the Bill of Rights"'. Although there is freedom of testation, this is has never been absolute. Judge Griesel therefore ordered that the offending provisions from the will be struck out. He followed this decision with a caution in *obiter dicta*, that he does not negate the freedom of testation but enforces the limitation on such freedom, a concept that has existed since time immemorial.<sup>87</sup>

This has been the norm in South Africa with dealing with cases of succession law, they ensure, that even in the face of testation, public policy must be applied, through ensuring that it does not go against the Bill of rights established by the Constitution with particular attention to equality and non-discrimination in the society.

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<sup>84</sup> [www.jutalaw.co.za](http://www.jutalaw.co.za) on 10 December 2016

<sup>85</sup> Article 8(1), *Constitution of South Africa*, 1996

<sup>86</sup> Article 9, *Constitution of South Africa*, 1996

<sup>87</sup> *Minister of Education v Syfrets Trust Ltd*, 2006 (4) SA 205 (C).

### **3. SUCCESSION LAWS IN BOTSWANA.**

The customary laws in Botswana provided for the patriarchal inheritance system where women were not allowed to inherit property from their beloved deceased, and if they did, it was on approval of the men in the family. Inheritance belonged to the men.

However a landmark case brought a change to all this as it was keen to apply gender equality as provided by their Constitution. In this case, a nephew was in battle with his aunties over the inheritance left to his father by his uncle but the father died before the inheritance was distributed. The lower customary court ruled in favour of the nephew, which the higher customary court was in favour of the aunties, but the customary court of appeal overthrew this ruling and ruled in favour of the nephew. They were not satisfied by this outcome and therefore appealed to the High Court of Botswana arguing that they had a right to that family home as they were the ones involved in the upkeep and maintenance of that house. The High Court agreed, based on article 3 of the Constitution of Botswana, and overturned the customary law of the Ngwaketse people that had prevented women from inheriting family homes.<sup>88</sup>

This case brought the abolishment of this sort of discrimination on women, and thus should be used also as a reference point to Succession laws in Kenya.

### **4. CONSTITUTION OF KENYA.**

Our Constitution provides for the equality of all people under the law and thus no person should be discriminated against on basis of race, gender, religion etc. This equality includes the full enjoyment of all rights and freedoms where women and men have the right to equal treatment including opportunities in political, economic, cultural and social spheres.<sup>89</sup>

It also states that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.<sup>90</sup> To mean that should there be any laws under the succession Act that does not correlate with the constitution, it is not, and should not be in effect as it is not a valid law. This will come in handy in my recommendations to the succession laws.

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<sup>88</sup> *Mmusi and Others v. Ramantele and Another*, [2012] BWHC 1.

<sup>89</sup> Article 27, *Constitution of Kenya*, 2010.

<sup>90</sup> Article 4, *Constitution of Kenya*, 2010.

Lastly, it provides for the application of ratified treaties by Kenya in Kenya<sup>91</sup> and not to forget to mention the general rules of international law being part of the Kenyan laws.<sup>92</sup>

## **5. INTERNATIONAL LEGAL INSTRUMENTS.**

The UDHR article 1 states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>93</sup> They should enjoy freedoms conferred upon them without discrimination of any kind such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICCPR states that “each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>94</sup>

Lastly, the CEDAW states that, “For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>95</sup>

## **6. CONCLUSION.**

These international legal instruments all lay emphasis on equality amongst people and one should not be discriminated upon on the basis of their gender. This is why there is need to have them as a pillar when in a bid to rectify the Succession laws in Kenya.

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<sup>91</sup> Article 6, *Constitution of Kenya*, 2010.

<sup>92</sup> Article 5, *Constitution of Kenya*, 2010.

<sup>93</sup> UNGA, *Universal Declaration of Human Rights*, UN A/Res/217/III (1948).

<sup>94</sup> UNGA, *International Covenant on Civil and Political Rights*, UN A/Res 2200A (1966).

<sup>95</sup> UNGA, *Convention on the Elimination of all Forms of Discrimination against Women*, UN A/Res 34/180 18 December 1979.

## CHAPTER FOUR

### FINDINGS.

With regard to case study comparing other jurisdictions and legal instruments to the Succession Act, it is clear that there is indeed a contradiction between the Succession Act and/or laws and the previously mentioned legislations in terms of consistency in the application of equality to the people the law governs. The specific provisions that have failed to uphold the equality principle and substantive equality at that are the following:

1. The meaning of a dependant<sup>96</sup> and the burden of proof exerted on both the man and woman.
2. Where intestate has left one surviving spouse and child or children, Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.<sup>97</sup>
3. Where the intestate was polygamous. It states that, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.<sup>98</sup>
4. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.<sup>99</sup>
5. Where intestate has left no surviving spouse or children the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority: father; or if dead; mother; or if dead; brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none; half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none; the relatives

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<sup>96</sup> Section 29, *Succession Act*, 2012.

<sup>97</sup> Section 35(5), *Succession Act*, 2012.

<sup>98</sup> Section 40, *Succession Act*, 2012.

<sup>99</sup> Section 38, *Succession Act*, 2012.

who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.<sup>100</sup>

6. The Kenyan government's 2006 report to the Committee on Economic, Social and Cultural Rights states that, 'Under the customary law of most ethnic groups in Kenya a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage.'<sup>101</sup>

## **CONCLUSION.**

The above findings will be discussed in detail in the following chapter where I will also relate them to the regulations and laws aforementioned, in order to show where they go wrong, and how they can be corrected.

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<sup>100</sup> Section 39, *Succession Act*, 2012.

<sup>101</sup> A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation, 2009.

## CHAPTER FIVE.

### DISCUSSION.

In the previous chapter, I put down specific laws which in my opinion go against the principle of equality. In this chapter I will expound on these laws, in a bid to explain the contradiction of these laws to already mentioned legal instruments and jurisdictions.

To begin with, the meaning of a dependant in the case of where the deceased was a woman, the widower must prove to the courts that he was being maintained by his wife, but in the case of the widower, all she needs to prove is that she was indeed his husband and that would be proof enough to be granted inheritance. This is without a doubt a law that pays no mind to equality whether descriptive, formal or proportional because if all persons under the law are to be considered equal, then man and woman should be equal under the Succession Act as well. So if the issue is proof of inheritance, the burden of proof in this case should be subject to both men and women equally.

Upon re-marriage, widows only, lose their life interest in their deceased's husband's property. This is blatant discrimination on the grounds of sex (because widowers do not lose their life interest upon re-marriage) and marital status. In some communities in Kenya, especially among the Luo, they practice levirate unions where the deceased's brother must inherit the widow. Therefore then, it goes to show that the women in this traditional community do not ever receive their inheritance from their late husbands as they must always re-marry and failure to would lead to ex-communication from the community. This is an overt deprivation of the women of their property rights conferred to them by the law, and therefore unjust.

The Succession Act in some aspects has tried to ensure that the division of inheritance among a polygamous family where the deceased has died intestate is proportional as seen in section 40, however such a division is still not satisfactory because in real life situations, all matters are never held constant. Here in this case for example, there is a family with two units and another family with three units, the law says the family with three units get three-fifths of the total inheritance where the family with two units gets two-fifths. This looks prima facie just, however factors need to be taken into consideration such as, the family with less units, might have a greater need for the inheritance due to the child suffering chronic illnesses and thus needs more financial support than the family, a barren woman who is the first wife and has been married to the deceased for donkey

years might need to be shown more appreciation than a wife he recently married, among others. This is where the social contract of John Locke comes into play, as the larger share of the inheritance should go to her who has expended more energy on it, which is evidently the first who has been married for many years in comparison to the second wife.

The above argument applies also to section 38 of the Act where an intestate has left no surviving spouse but has left surviving children, the same considerations should be looked into before just dividing the inheritance equally.

The Succession Act in section 39, has given preferential treatment to the man in that, where the deceased died intestate leaving no wife and no children, then the inheritance devolves in order priority with the father first, then next if the father is dead, it devolves to the mother. This particular section has nothing extra to give a rationale behind the preferential treatment, and thus can only be taken that the law is not being applied equally, and a person is being denied their property rights on the basis of gender.

The Kenyan government's 2006 report to the Committee on Economic, Social and Cultural Rights which states that, 'Under the customary law of most ethnic groups in Kenya a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage', has the popular understanding among many different groups is that daughters will marry into other families and therefore gain a home and access to land and property through their membership in the husband's family. This assumes and re-enforces patrilineal inheritance systems (i.e. inheritance through the male line, e.g., from fathers to sons), which confines most Kenyan women to secondary rights or rights of use, rather than direct proprietary rights to land and other property.

## **CHAPTER SIX.**

### **CONCLUSION AND RECOMMENDATIONS.**

#### **CONCLUSION.**

This paper has revolved around the inequality in the law which is discriminatory primarily against women and this needs to be rectified. The customary laws of various ethnic groups oppose the equal inheritance principles of the Succession Act; the Act also opposes the Bill of rights in part, and as a result, outcomes in court are often inconsistent and contradictory. Customary law within the Kenyan legal system is delineated in the Judicature Act of 1967 which states that 'African customary law' shall govern in 'civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law.' The courts in Kenya, disregard the provisions of the Act, blindly elevate customary law above the statute, often overlook the Act and apply customary law even when the Constitution and the Judicature Act is clear on the circumstances under which customary law may apply to personal law.

#### **RECOMMENDATIONS.**

I recommend that the current laws be amended or removed from the Succession Act by way of a petition<sup>102</sup> and through public participation to ensure that public policy is well considered as well. A look into the South African and Botswana jurisdictions will be a big step in the right direction, which will enable us to also make the big shift that those had and turned their succession laws around.

The invalidation of laws that contradict the Constitution should be a principle that is actively practised in all law courts in order to enhance consistency and equality, this would also keep policy makers on their toes that they do not come up with such trivial laws in the future.

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<sup>102</sup> Article 118, *Constitution of Kenya*, 2010.

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