



Strathmore University
Law School

**DIGITAL LEGACY: EXPLORING THE INHERITANCE OF DIGITAL
ASSETS, BRIDGING THE LEGAL GAP.**

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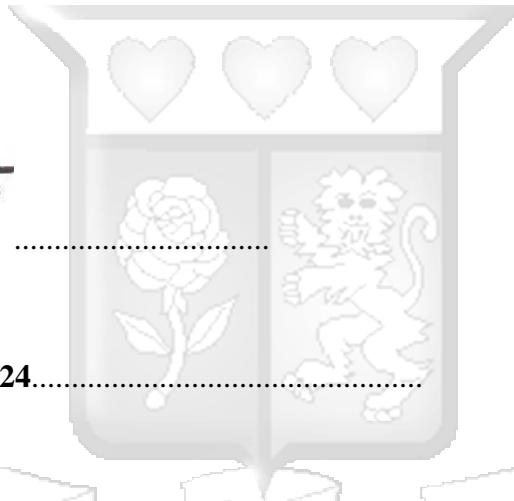
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DECLARATION

I, DENNIS MASIKA 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.

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

Signed..... 

MR. James Nyiha

DEDICATION

I express my deepest gratitude to everyone who has been part of this journey. Firstly, I am thankful for the opportunity to embark on this journey. It has been truly remarkable and eye-opening. Secondly, I extend my formal appreciation to my supervisor, M. James Nyiha, for his exceptional guidance throughout the research process. Your leadership has been invaluable. May you be blessed abundantly, sir. I also want to acknowledge all individuals who have played a significant role in shaping this research endeavor. To my family and friends, your support, ideas, and encouragement have been indispensable to the completion of this work. Thank you all sincerely.



ABSTRACT

This study intends to look at a rapidly developing area shaped by technology in the modern digital era. Digital assets have garnered attention due to the intrinsic value it holds yet they cannot be classified as physical assets due to their intangible nature. This disparity raises questions on how to deal with this asset when it comes to its transferability and transmission. The locus classicus case, National Provincial Bank v Ainsworth, established that for a thing to be classified as property, it must be definable, identifiable, and possess a degree of permanence. Applying these principles to digital assets, exemplified in AA v Persons Unknown, affirmed their classification as property. However, challenges arise in the devolution of such assets upon the owner's demise.

With digital assets, there comes privacy and terms of conditions. These aspects are key and crucial to the existence of such assets. This means that the assets cannot be classified as traditional assets when it comes to transferability and transmission. An independent specific provision is required to give guidance on how to transmit such assets. This is where the problem lies. In my scope of study, Kenya has no laws regarding digital assets inheritance. My study intends to investigate whether the legislators should come up with new legislation that encompasses the inheritance of digital assets. In the study, I do propose that in addition to the formulation of digital inheritance-specific laws, there should be an amendment in the Data Protection Act to provide for a legal

provision for access to digital assets to create a balance between privacy and terms of conditions and the right of a beneficiary to inherit the property of their kin.

LIST OF ABBREVIATIONS

Revised Uniform Fiduciary Access to Digital Act – RUFADAA

Uniform Fiduciary Access to Digital Asset Act – UFADAA

Terms of service – TOS

Internet service providers- ISPs

Initial Coin Offering- ICOs



LEGAL INSTRUMENTS

Law of Succession Act, (1982).

Communication Authority of Kenya Report

Finance Bill, (2023)

Digital Data Law (2023)

Data Protection Act (2019).

Finance Act (2023)

Revised Uniform Fiduciary Access to Digital Act (2016)

Uniform Fiduciary Access to Digital Asset Act (2014)

Judicial Reports

Stored Communication Act

Capital Market Authority Act

LIST OF CASES

Folsom v Marsh

National Provincial Bank v Ainsworth (1965)

AA v persons unknown 2019] EWHC 3556 (comm)

Marianne Ajemian, coadministration and another v YAHOO Inc. (2012),

Wiseman Talent Ventures v Capital Markets Authority (2019) eKLR

Security Exchange Commission v W.J Howey

Tulip Trading Limited (a Seychelles company) v Wladimir Jasper van der laan and 14 other

Bristok and Wet Building Society v Mothew (1998)

Children's Investment Fund Foundation(UK) v Attorney General and others

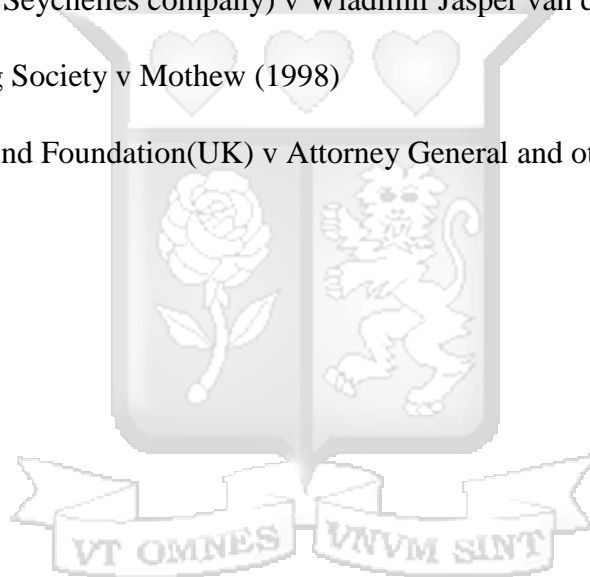


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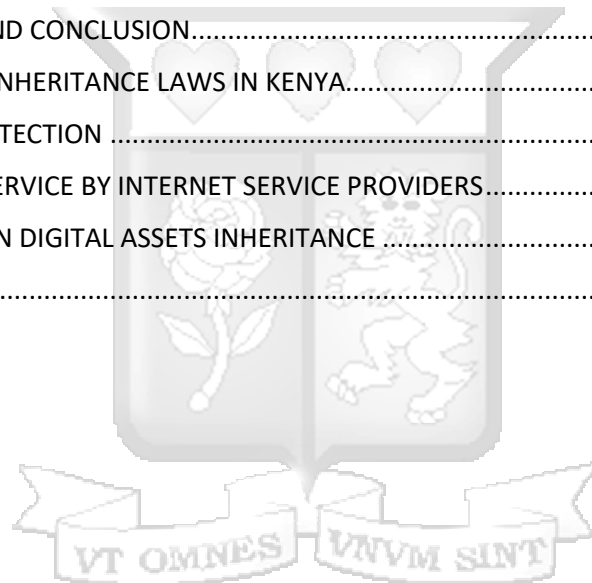
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DIGITAL LEGACY: EXPLORING THE INHERITANCE OF DIGITAL ASSETS, BRIDGING THE LEGAL GAP

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

The Black's Law Dictionary defines an asset as anything capable of servicing debt.¹ Conclusively, assets hold a value that is transferred from one person to another. According to article 2(10) of the Revised Uniform Fiduciary Access to Digital Act (RUFADAA) passed by the Uniform Law Commission that comprises each state commission of the United States of America, A digital asset is characterized as an electronic documentation representing a person's entitlement or stake, except for instances where the asset or liability is intrinsically an electronic record.² In Kenya, under the Finance Act 2023, digital assets have been defined as anything valuable and can be exchanged electronically, stored, or transferred.³

In a newly released white paper update by the American Bar Association Derivate and Future Law Committee on issues associated with digital products, digital assets have experienced rapid volatile growth.⁴ In 2019, the total estimated market capitalization of virtual currency, a subset of digital assets, was \$194.9 billion.⁵ In **Folsom v Marsh**, Judge William recognized that the unpublished letter of President George Washington had monetary value and was to be treated like other items

¹ Black's Law Dictionary, 4th ed.

² Article 2(10), *Revised Uniform Fiduciary Access to Digital Act* (2015).

³ Section 12F, Finance Act(2023).

⁴ Jonathan L, 'Digital and digitized Asset: federal and state jurisdictional issues' American Bar Association, 2019-<https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/committees/CL620000pub/digital_assets.pdf> on 11 December 2023.

⁵ Jonathan L, 'Digital and digitized Asset: federal and state jurisdictional issues' American Bar Association, 2019-<https://www.americanbar.org/content/dam/aba/administrative/business_law/buslaw/committees/CL620000pub/digital_assets.pdf> on 11 December 2023.

of personal property in that they could be owned and transferred.⁶ Advancements in technology, including the use of electronic signatures have broadened the realm of creation, access, utilization, and transferability of these digital assets.⁷

Digital assets are distinguished from physical assets because they do not exist in physical form. In the classification of property, the English law of property classifies property into tangible things (choses in possession and) Personal property rights that can solely be asserted or enforced through legal action rather than physical possession (as opposed to tangible possessions, which are capable of physical possession), known as choses in action.⁸ However, the said definition becomes less clear when digital assets are considered. In **National Provincial Bank v Ainsworth (1965)** Lord Wilberforce provided the criteria for the definition of property. In his judgment, he outlined that property must be definable, identifiable by third parties, and possess some degree of permanence.⁹ However, the said definition becomes less clear if digital assets are considered. In the case **AA v persons unknown**²⁰¹⁹] **EWHC 3556(comm)**, the applicant sought an injunction to an account that habit coins that were illegally obtained from him. Judge Bryan noted that the definition of property under the English laws on property created difficulty for cryptocurrencies (Such as bitcoin) since they are not tangible, nor do their ownership create legally enforceable rights.¹⁰

The need to formulate new laws to secure the interest of all assets is informed by the limitations posed by treating digital property as physical property.¹¹ The unique characteristics of digital assets make it difficult for physical assets to comprehensively provide for the law of their inheritance. The debate surrounding why digital assets cannot be categorized similarly to traditional assets and distributed like other forms of property gained significant attention during the formation of a committee on fiduciary access to digital assets by the Uniform Law Commission in 2012. The committee came up with the Uniform Fiduciary Access to Digital Asset Act (UFADAA) which

⁶*Folsom v Marsh* (1841), United States district court.

⁷ The Law Commission, Digital Asset Consultation Paper, 28 July 2022,1.

⁸ -<[Definition & Classification of Property - The Law of Real Property I Definition and Classification - Studocu](#)> on 12 December 2022.

⁹ *National provincial Bank v Ainsworth* (1965), England and Wales High Court.

¹⁰*AA v Person's unknown* (2019), England and Wales High Court.

¹¹ Elizabeth H, 'Conflict and solution in Delaware's fiduciary access to digital assets and digital accounts act', *Berkeley technology law journal*, vol. 30, no 4 p 1215.

treated digital assets as traditional assets authorizing fiduciaries to control digital assets¹². The act received immense opposition from technology companies and privacy advocacy groups who argued that the elements of UFADAA were contrary to privacy law and federal company fraud law having them violating one law while applying the other.¹³

Further, the UFADAA had them overwrite the terms of service agreement accepted by customers entering the account.¹⁴ The commission amended the act and came up with the Revised Uniform Fiduciary Access to Digital Asset Act (RUFADAA) which restricted executors' access to digital assets.¹⁵ In the case of **Marianne Ajemian, Coadministration, And Another v Yahoo** the judge recognized the fact the RUFADAA addresses the issue of digital inheritance and has been enacted by most states including a dozen that did so in 2017 and eight states that were considering doing so.¹⁶ With the terms of service which encompass privacy of these assets, digital assets following the inheritance procedure of the physical assets that encompasses publication of assets in a codicil is a direct infringement of the rights stipulated in the agreement between the contracting parties. The need for legislation governing access to digital accounts after the death or incapacitation is highlighted by legal battles to gain access to an account where the service provider does not cooperate.¹⁷

As the Kenyan economy expands, inheritance is becoming increasingly intricate due to new types of property emerging. Digital inheritance is an important issue for the Kenyan jurisdiction as the Kenyan population has largely gone digital with mobile penetration being at over 90%; mobile subscriptions up to 39.7 million and smartphone uptake to 40%.¹⁸ With the limitations posed by the lack of provisions that cater to digital assets inheritance by the law of succession, there is a

¹²Uniform fiduciary Access to digital Act (2014< <http://www.digitalpassing.com/wordpress/wp-content/uploads/2014/07/UFADAA-7-17-2014.pdf..>> on 12 December 2022.

¹³Jim L, Uniform fiduciary Access to Digital Act (2014), digital passing, 2014-<<http://www.digitalpassing.com/2014/07/16/uniform-fiduciary-access-digital-assets-act-ufadaa/>> on 12 December 2022.

¹⁴ Jim L, Uniform fiduciary Access to digital Act (2014), digital passing, 2014-<<http://www.digitalpassing.com/2014/07/16/uniform-fiduciary-access-digital-assets-act-ufadaa/>> on 12 December 2022.

¹⁵ Section 2(11), *Revised Uniform Fiduciary Access to Digital Assets Act* (2015).

¹⁶ Marianne Ajemian, co-administration and another v YAHOO Inc. (2012), The Supreme Court of United states.

¹⁷Capel E, 'conflict and solution in Delaware's Fiduciary access to digital assets and digital accounts act'30 *technology law journal*, 4, 2015, 1234.

¹⁸ Keli Kenya, 'Simplified Resource Tool on Inheritance and Related Family Law Practices in Kenya', 2018, 31.

need for new laws that cater to the same. The problem exists due to the lack of laws that encompass digital assets inheritance hence questions on the mode of inheritance to be taken when the owner of these assets dies arise.

1.2 PROBLEM STATEMENT

In a report released by the judiciary on inheritance and related family practice, digital assets are an emergent issue with no specific laws regulating their inheritance.¹⁹ These subjects such assets to potential risk of loss The report illustrates the risks associated with this by explaining that people often invest a substantial amount of money in purchasing music and other items for their iTunes accounts during their lifetimes. Consequently, a deceased person's iTunes account could potentially be an asset. However, iTunes files cannot be transferred upon a user's passing. The absence of direct access to this type of digital asset could lead to a loss in a person's estate, as it may not be considered real property in estate planning.²⁰ According to the report, the service agreement made between the service providers and the users has created difficulties in accessing digital assets due to the terms of service provided for in the platforms.²¹

The Law of Succession Act governs succession in Kenya giving guidelines on the distribution of the deceased property upon his or her death.²² However, the provision under the Act only provides for the inheritance of traditional property. Lack of a legal framework for digital inheritance in Kenya which raises questions about the succession of such assets when the owner dies. In 2018, mobile operators handed in over five hundred million to the government whose owners were found dead or presumed dead.²³ The legislative gap has affected the scope, management, and transfer of digital assets when succession matters arise.²⁴ The lack of legislation means that the ownership of the assets can either revert to the company that owns it or the state unless specified otherwise.

¹⁹ Keli Kenya, 'Simplified Resource Tool on Inheritance and Related Family Law Practices in Kenya', 2018, 31

²⁰ Keli Kenya, 'Simplified Resource Tool on Inheritance and Related Family Law Practices in Kenya', 2018, 33.

²¹ Keli Kenya, 'Simplified Resource Tool on Inheritance and Related Family Law Practices in Kenya', 2018, 31.

²² Section 2, *Law of Succession Act*, (1982).

²³ Kamau M, 'No law for inheritance of digital assets or property, Judiciary reveals,' 2018-<
<https://www.standardmedia.co.ke/>>on 13 December 2022.

²⁴ Keli Kenya, Simplified Resource Tool on Inheritance and Related Family Law Practices in Kenya, 2018, 32.

With the enactment of the Law of Succession Act, individuals were granted the right to determine the disposition of their property after their demise. Similar to the provisions of the United States, heirs receive by succession all transferable rights, all property possessed by the deceased.²⁵ With the growing volume of digital assets which are products of rapidly developing technology, the question of how these assets should be passed on to heirs has become a critical concern. Assets existing in digital form but can't be transferred to heirs neglect the economic and emotional considerations that are of value to the people left behind.²⁶ The majority of digital assets contain personal data and information, making them incompatible with the conventional legal and testamentary inheritance mechanisms.²⁷

The study intends to explore the complexities and challenges associated with digital asset inheritance with considerations of the economic, emotional, and privacy-related implications for the beneficiaries. This study further aims to investigate whether the legislators should come up with new legislation that encompasses digital assets inheritance which will safeguard the interest of individuals and families in the modern era.

1.3 PURPOSE OF STUDY

The existing literature on inheritance primarily focuses on the inheritance of traditional assets. Section 4 of the Law of Succession Act prescribes the succession of both movable and immovable property.²⁸ This classification broadly categorizes the property subject to inheritance into real and personal property. Immovable fall under the category of real property since they encompass anything growing on, affixed to, or built upon land. When interpreting movable property, there has

²⁵ Kharitonova Y, 'digital assets and digital inheritance' business law, the law faculty of t Lomonosov Moscow state university, February 2021
https://www.researchgate.net/publication/349678915_Digital_assets_and_digital_Inheritance on 27 September 2023.

²⁶ Capel E, 'conflict and solution in Delaware's Fiduciary access to digital assets and digital accounts act'30 *Berkeley Technology law journal*, 4, 2015, 1234.

²⁷ Kharitonova Y, 'digital assets and digital inheritance' business law, the law faculty of t Lomonosov Moscow state university, February 2021
https://www.researchgate.net/publication/349678915_Digital_assets_and_digital_Inheritance on 27 September 2023.

²⁸ Section 4, *Law of Succession Act*, (1982).

been a general presumption that such property is capable of physical possession. However, the Act does not provide specific guidance on how intangible property can be inherited.

This study intends to examine digital inheritance in Kenya, a novelty that is still developing, focusing on whether the Parliament should come up with new legislation that encompasses the inheritance of digital assets.

Furthermore, in jurisdictions where laws regarding digital asset inheritance have been implemented, the authors of the literature emphasize a rule-based approach to offer clarity and generate ideas for establishing more comprehensive regulations. In contrast, my study will employ a principle-based approach, as neither legislative provisions nor case law have offered guidance on matters of digital succession in Kenya.

1.4 HYPOTHESIS

The rapid increase in digital assets in Kenya coupled with the dearth of legislation regarding such assets necessitates an urgent review of the existing Law of Succession Act to incorporate legal mechanisms for the inheritance of these unique assets. In Kenya, the lack of a regulatory framework governing digital inheritance has opened challenges after the death of the owner on the admission of digital assets. The growth in Kenya's digital economy is supported by an increase in the number of people who have access to smartphones and internet services.²⁹ This spread provides for large volumes of digital media, and related digital assets, and accordingly questions of inheritance of those assets.³⁰ The lack of a clear legal framework of how to handle the transfer of digital assets has opened up great uncertainty about who has the right to access or manage the deceased digital assets with the risk of digital assets being lost or not properly accounted for if the deceased persons password and other security measures are not properly transferred to their heirs.

1.5 RESEARCH OBJECTIVES

1. To access the uniqueness of digital assets as a type of property, and the rights they hold, and further examine whether digital assets should be separated from traditional assets hence formulation of new laws encompassing digital inheritance.

²⁹ Omowunmi O, 'The Kenya's Growing Digital Economy', African Leadership Magazine, 2022, -< [The Kenya's Growing Digital Economy \(africanleadershipmagazine.co.uk\)](https://africanleadershipmagazine.co.uk)> on 3 March 2023.

³⁰ Communication Authority of Kenya Report, 2019, 48.

2. To investigate the legal threshold to be met by the service providers in the formulation of terms of service and whether the terms of service are considerate of the transmission of the digital asset(s) after the death of the owner.
3. To propose an amendment of the Data Protection Act to provide for lawful consent if the owner of the asset dies without providing permission for access to personal data and information stored in an electronic record.
4. To conduct a comparative analysis of the applicable law on digital asset inheritance in the United States for formulations of comprehensive laws on digital inheritance laws in Kenya.

I.6 RESEARCH QUESTIONS

1. 1 Should digital assets be treated separately from traditional assets, leading to the creation of new laws encompassing digital inheritance?
 - 1.1. Is there a scope for unlimited property rights in digital assets after the death of the owner?
2. Do the current terms of service provided by service providers in their agreements with users take into consideration and facilitate the transmission process of digital assets after the owner's death?
3. Should the Data Protection Act be amended to include provisions for lawful consent specifically related to the inheritance process of digital assets?
4. Is conducting a comparative analysis of applicable laws on digital asset inheritance in the United States sufficient for formulating comprehensive laws on digital inheritance in Kenya?

1.7 IMPORTANCE OF THE STUDY

As specified in the preceding section the underlying problem of digital inheritance in Kenya is the lack of a regulatory framework for digital asset succession. With the Kenyan digital economy propelling the country's growth the question of the disposition of the value of digital assets left when a person dies is left unanswered due to lack of laws dealing with digital inheritance. My study will be useful in so far as it will address the legal gap by assessing the existing guidelines concerning digital assets inheritance to ensure the proposed legislation relating to digital assets is practical and effective and the relevance of the proposed legislation to the existing legal framework and how it addresses the current legal gap relating to digital asset inheritance.

According to the Standard Newspaper, in case of a legal dispute arising from digital assets, the court can't help you access it.³¹ The report detailed that in 2017, Mobile service providers handed 500 million deposits belonging to untraceable owners. With this proposal, the adjudicators will be one of the central beneficiaries. The legislation of digital asset inheritance will provide clear guidelines and standards for the adjudicators to follow in such cases, ensuring consistency in the publication of the law. In the newspaper report, it was observed that the legislation would, among other things, address the definition, scope, and transfer of digital assets and facilitate especially intestate succession.³² The introduction of a safety catalog for storing private credentials under inheritance law benefits owners by allowing them to designate beneficiaries who can access these catalogs in unforeseen circumstances, facilitating a smooth transfer of assets to heirs. This law also benefits digital asset beneficiaries by striking a balance between their access rights and the terms of service imposed by digital asset providers.

For the tech companies that offer services on digital assets, the new laws on digital asset inheritance will require them to adapt and comply with the new legislation. This could involve integrating new features that will allow the users to specify what should happen to their digital

³¹ Kamau M, 'No Law for Inheritance of Digital Assets or Property, Judiciary Reveals,' 2018-<
<https://www.standardmedia.co.ke/article/20011284484/no-law-for-inheritance-of-digital-assets-or-propertyjudiciary-reveals>
>on 13 December 2022.

³² Kamau M, 'No Law for Inheritance of Digital Assets or Property, Judiciary Reveals,' 2018-<
<https://www.standardmedia.co.ke/article/20011284484/no-law-for-inheritance-of-digital-assets-or-propertyjudiciary-reveals>
>on 13 December 2022.

assets after their passing. The laws could also be a chance for some tech companies to explore new business opportunities in providing secure digital asset management solutions or services that facilitate the transfer of digital assets after death.

The proposed legislation will provide a stronger foundation for adjudicators to make decisions in line with the law and the interest of all parties involved, hence improving access to justice for individuals with disputes related to digital assets. This is because of a power imbalance between the service providers and the beneficiaries. The large pool of resources and without a guiding framework the service providers could influence decisions on digital assets inheritance to be made in a certain way. Another class of people to benefit from the implementation of this project are the policy makers since by addressing the legal gap relating to digital inheritance, policymakers can create an environment that is more supportive of innovation and investment in the digital economy.

Further, the current academic literature on digital assets inheritance is relatively sparse with limited comprehensive studies that consider the legal technological, and ethical aspects in depth. This research aims to fill the gap by providing a comprehensive examination of the subjects covering both the legal and the technological challenges associated with digital asset inheritance. The principle-based approach tends to cover the rules and principles set up in various disciplines. By researching digital assets inheritance deep considerations are placed on law and technology. This approach tends to cut across disciplines and their relationship to the real world. This approach has the potential to guide future research by encouraging scholars to explore the multifaceted nature of digital assets and their inheritance. This approach has the potential to guide future research by highlighting the multifaceted nature of digital assets and their inheritance. Scholars are encouraged to delve deeper into the complexities and emerging issues in this field, paving the way for ongoing research and development.

The case *Wiseman Talent Ventures v Capital Markets Authority* brought up a gap that exists in law on digital assets and its regulation. In the case, the Judge admitted that so far there isn't any law that encompasses regulation of digital assets inheritance. The lack of this regulation is further expanded on the report by the judiciary on digital assets where it was stated with a lack of proper laws on digital assets inheritance, the court can't assist the beneficiaries in accessing and transmission of such assets upon the death of the owner. This is a gap that not only infringes the rights of the beneficiaries but shows the problem of law lagging the reality.

Furthermore, the issue of digital asset inheritance remains unresolved across African nations, with no comprehensive legislative framework in place as this novel concept continues to evolve. The introduction of this *proposed* legislation will not only establish a solid foundation for adoption but also serve as a blueprint for other countries grappling with this challenge, offering them a viable solution to consider.

1.8 LITERATURE REVIEW

INTRODUCTION

The law of succession in Kenya comprehensively covers how the estate of the deceased person devolves upon their death. Both substantively through provisions of rules that govern succession and procedurally on steps taken for inheritance dance, the law is akin to granting the beneficiaries their right to take entitlement of the deceased property. Despite the comprehensiveness of the law, a gap is left due to its failure to capture emerging trends on property and its transmission.

Having an existing gap that raises so many questions, I intend to decipher digital assets and their inheritance through an in-depth analysis of various facets. With the scope of study being Kenya, the first section will analyze the place of digital assets existence, their regulation and inheritance in Kenya, and an unfolding gap that is taking shape.

In the second section, there will be an analysis of the concept of digital assets as property. The section provides different conflicting arguments on the classification of digital assets inheritance with an expansive elaboration as to why digital assets should be classified as property. The third section entails the dissection of the main problems that come up when on digital inheritance, the terms of service. This section brings out the main problems with terms of service, how they affect digital asset inheritance, and the possible ways of solving the existing problem.

Finally, the last section gives a general overview of property rights in society. The section gives a brief analysis of the importance of property rights and how the rights are also tied to digital assets.

DIGITAL ASSETS INHERITANCE IN KENYA

Kenya is a country that consists of diverse ethnic groups, each with a different set of rules and customs relating to succession.³³ So far, literature on inheritance in Kenya has mostly focused on whether unification and integration of the law of succession is possible,³⁴ unification having been achieved through the passing of the Laws of Succession Act in 1972 and its commencement in 1981,³⁵ and interpreting the same which provides for the inheritance of deceased free estate,³⁶ providing for general principles on the inheritance of movable assets and immovable property.³⁷ In the article on digital wealth, the author acknowledges that traditionally, the assets and liabilities of a person subject to successions laws and processes have been limited to tangible property. Further, the succession law and other statutory laws have not been expanded to foresee circumstances on the inheritance of digital assets.³⁸

With the rapidly developing concerns on the place of digital assets in Kenya, many authors have tried giving alternatives on different ways under which these assets could be deterred to the beneficiaries upon the death of the owner of the asset. In the article, Managing Access to Your Digital Asset, a Closer Look, the writers assert that with the rise in cases of digital inheritance, digital assets are an important part of a person's estate and require attention when succession planning.³⁹

Noel Namanya while dissecting the place of digital assets inheritance in Kenya stipulates that the existing laws are not sufficient to deal with the inheritance of digital assets because the law cannot facilitate the executor's access to the online account to obtain and manage the digital assets for the heirs.⁴⁰ This not only shows the law's inability to catch up with current trends but also the effects

³³ Musyoka M, *The Law of Succession*, Law Africa publishing (k) limited, ProQuest eBooks Central 2006, 3.

³⁴ Cotran E, 'Marriage, Divorce and Succession Laws in Kenya: Is Integration or Unification Possible?', 40(2), *Journal of Africa*, 1996, 194.

³⁵ Musyoka M, *the law of succession*, Law Africa publishing (k) limited, ProQuest eBook Central 2006, 3.

³⁶ MMS Advocates, 'Review of the Law of Succession (Amendment) Act 2021 Laws of Kenya', 10 August 2020- <[REVIEW OF THE LAW OF SUCCESSION \(AMENDMENT\) ACT 2021 LAWS OF KENYA - MMS Advocates.](#)> on 22 February 2023.

³⁷ -< [Movable And Immovable Property - Meaning And Differences - Law Corner](#)> on 22 February 2023.

³⁸ San K, 'digital wealth' *San advocates Kenya* 2021- [Digital Wealth and the Challenges posed to the Administration of Estates - San Advocates Kenya](#) on 23 August 2023.

³⁹ Anjarwala A and Mona K, 'Managing access to your digital assets: a closer look' *Monday* 2018, 1-[Managing Access To Your Digital Assets: A Closer Look - Fin Tech - Kenya \(mondaq.com\)](#) on 23 August 2023.

⁴⁰ Noel N, 'the place of digital assets inheritance'< [THE PLACE OF DIGITAL ASSETS IN INHERITANCE – Noel Namanya \(wordpress.com\)](#)> on 30 September 2023.

of the lack of a comprehensive legal framework on the inheritance of digital assets. She further recommends that there should be an enactment of a new law providing access and management of digital access with consideration of the privacy of the deceased users and the internet service providers from liability.⁴¹

It is noted that so far, the court jurisprudence in Kenya focuses on how digital assets in Kenya could be regulated. In the tax regime, the enactment of the Finance Act 2023 comes with provisions that seek taxation of digital assets. Section 12F of the Finance Bill 2023 provides that digital assets tax shall be derived from the transfer and the exchange of the digital assets at three percent of the transfer or the exchange value of the digital assets.⁴² The existing court jurisprudence provides for the regulatory bodies for digital assets in Kenya. In the case of *Wiseman Talent Ventures v Capital Markets Authority*, the court established that pending a framework established by the legislature on the regulation of cryptocurrencies, regulatory measures should be implemented to safeguard public interest investment and therefore agreed that the capital market authority had authority to investigate the trading of crypt currency in so far as it is used as security.⁴³

In the article by Amrit, she contends that the Data Protection Act has not envisioned data inheritance.⁴⁴ Rwanda has in hand incorporated a provision for the succession of personal data under Article 25 of the Data Protection Law which provides that beneficiaries can inherit full or restricted rights relating to the processing of personal data if the data still needs to be used.⁴⁵

The question of transmission of these assets has been left unanswered. Currently, no literature covers my scope of study. My study will be unique through the scope and the examination of a novelty that is rapidly developing.

1.8.1 DIGITAL ASSETS AS PROPERTY

Due to the complex nature of the subject, the classification of any files generated on the digital device has brought an endless list of assets that fall under categories some with monetary worth

⁴¹ Noel N, 'the place of digital assets inheritance' < [THE PLACE OF DIGITAL ASSETS IN INHERITANCE – Noel Namanya \(wordpress.com\)](#)> on 30 September 2023.

⁴² Section 12F, Finance Bill, (2023).

⁴³ *Wiseman Talent Ventures v Capital Markets Authority* (2019) eKLR.

⁴⁴ Amrit L, 'Inheritance of personal data: the future of succession in the metaverse' *KICTANet, 2022-Inheritance of personal data: the future of succession in the metaverse | KICTANet Think Tank*- on 24 august 2023.

⁴⁵ Article 25, Digital data Law (2023).

and others with purely sentimental value to the beneficiaries.⁴⁶ Natalie M. Banta in her article gives approaches that have been taken in the classification of digital assets. She propounds that the legal classification of digital assets as property interest is questionable.⁴⁷

In the article, the underlying question of whether digital assets should be classified as property has been conflicted by two notions. On one hand, since digital assets are created by private contracts, they do not form property but rather a creature of private contract that can be shaped according to the needs and policies of the company that created the assets.⁴⁸ On the other hand, digital assets are some forms of a thing with property-like characteristics raising expectations of protection.⁴⁹

The adherents to the second notion assert that digital assets have all the indicia of property and therefore should be treated as property. Their argument is tied to Lord Wilberforce's conceptualization of property.

Digital assets being subjects of private contracts informs the unique nature of their existence but does not declassify it as a form of property. Further, the first notion justifies the reason why there is a conflicting interest between the service provider and the beneficiaries in the transmission of digital assets. The terms of service that are contained in the contracts restrict the transmission of digital assets to beneficiaries reverting them to the service provider or having them left unattended to.

Dan Bindman In the article Digital Assets are property under English law posits that digital assets have all the characteristics of property and their novel features such as intangibility don't disqualify them from being property.⁵⁰ Further, Dr. Heather and Sheena, in the research paper 'the 'new 'new property': dealing with digital assets on death, set forth that in the classification of digital assets, the most fundamental distinction is what constitutes property and what does not.⁵¹

⁴⁶ Heather C, Sheena G, 'the 'New' New Property: Dealing with Digital Assets on death' Queen's University Belfast School of Law, Research paper number 12, 2012, 4-<https://ssrn.com/abstract=3289171> on 22 February 2023.

⁴⁷ Natalie M, 'Property Interests in Digital Assets: the rise of digital feudalism', 38(1099), 10 February 2017, 1101.

⁴⁸ Natalie M, 'Property Interests in Digital Assets: the rise of digital feudalism', 1101.

⁴⁹ Natalie M, 'Property interests in Digital Assets: the rise of digital feudalism' 1101.

⁵⁰ Dan B, 'Digital Assets "Are Property" Under English Law' legal features, 19 November 2019, 1-<[Digital assets "are property" under English law - Legal Futures](#)> on 1 March 2023.

⁵¹ Heather C, Sheena G, 'The 'New' New Property: Dealing with Digital Assets on Death', 5.

The writers argue that the original contractual agreement between the service provider and the owner of the asset may generate a digital piece of property that is transferable or a licensing agreement that expires on the death of the individual.⁵² Their argument dismisses the first notion given by Natalie introducing the concept of personal autonomy in controlling the digital assets that are formed through the contractual agreement between the service providers and the owner of the assets.

It is worth noting that the precedent cases and theories of property were limited to the type of property that existed at the time hence the failure of encompassing digital assets as property. Elizabeth in her article in interpreting Casner and Pennell's useful treatise on estate planning on the definition of gross estate identifies some aspects of resonance for digital property. This is important in giving the interpretation of the core texts that identified the aspects of property that were being published and case rulings a while back. The outstanding similarity of digital assets as property with the precise definition of property that was done a while back subjects it to the same category.⁵³

Additionally, the law commission's consultation paper on digital assets moved a notch higher by proposing a third category of property, that is distinct from things in possession and things in action, with the newly emergent and individual object of property rights having a factual concept of control rather than possession in the description of their relationship with human beings.⁵⁴ Their recommendation is plausible since through the classification of property into *choses in possession* which are things that can be touched and *choses in action* which are groups of rights that can be enforced, inclusivity of digital assets as a type of property becomes less clear since they are not tangible, nor their ownership creates legally enforceable rights.⁵⁵

The new category, data objects, dismisses the argument brought up by the opponents of digital assets i.e., digital assets are not tangible and do not have the same characteristics as traditional forms of property by clearly outlining the tests that are used for categorizing assets as digital

⁵² Heather C, Sheena G, 'The 'New' New Property: Dealing with Digital Assets on Death', 4.

⁵³ Capel E, 'conflict and solution in Delaware's Fiduciary access to digital assets and digital accounts act'30 *Berkeley Technology law journal*, 4, 2015, 1234.

⁵⁴ The law commission, digital asset consultation paper, 28 July 2022, 3.

⁵⁵ AA v Person's unknown (2019), England and Wales High Court (commercial court).

assets.⁵⁶ While the question of whether digital assets should be considered property is complex and continues to be debated, there is a growing recognition that digital assets have value and should be protected under the law.

1.8.2 THE NATURE OF TERMS OF SERVICE IN DIGITAL INHERITANCE: LAWFUL CONSENT AS A POSTMORTEM PRIVACY PROVISION WHERE THERE IS NO EXPRESS CONSENT

The term of service has been seen as an obstacle to the inheritance of digital assets when the owner of the digital asset dies.⁵⁷ The author of postmortem privacy defines the concept of postmortem as autonomy that should in principle transcend death, allowing individuals to control their privacy through the concept of testamentary freedom.⁵⁸

Mashes in his articles establishes that the reason why the general terms and conditions provided by the internet service providers on digital data transfer have provisions that limit the transmission of digital assets is that the main service providers are based in the United States and consequently the conditions imposed to the users are based on the US laws.⁵⁹ The term of service is akin to the laws that apply in the jurisdiction. This becomes problematic when applying the same provisions of the terms of service to other jurisdictions with different laws on access to data and privacy. Further, it's impossible to establish rules or practices that meet the requirements of the inheritance law of each jurisdiction.⁶⁰

His conclusion was based on an interpretation of two Italian court decisions on the rights of the heirs to access the deceased user's account and non-transferability clauses. It is commendable that he identifies the source of terms of service, but he fails to consider the possibility of a unified

⁵⁶ The law commission, digital asset consultation paper, 28 July 2022, 3.

⁵⁷ Alp T, Taipe R, Jake Z, 'A New Asset Type: Digital Assets' 22(4) *Journal of international technology and information management*, 2013, 115.

⁵⁸ Edina H, 'Postmortem privacy 2.0: theory, law, and technology' *International review of law, computer and technology*, 2017, 31-< <http://dx.doi.org/10.1080/13600869.2017.1275116> > on 28 February 2023.

⁵⁹ Maspes I, 'Digital Inheritance, Right of The Heirs to Access to The Deceased User's Account, Non-Transferability Clauses: An Overview In Light of Two Judgments Issued By Italian Courts', 2022, 11, -< <https://heinonline.org/HOL/P?h=hein.journals/italj8&i=417> > on 27 February 2023.

⁶⁰ Maspes I, 'Digital Inheritance, Right of The Heirs to Access to The Deceased User's Account, Non-Transferability Clauses: An Overview In Light of Two Judgments Issued By Italian Courts', 2022, 11.

international law on regulation of the assets based on the wide societal practice on digital assets regulation and inheritance.

The critics of terms of service used by end users expound on the formation of a contract between the service provider and the owner of the digital assets. They put forward that In the digital society, individuals who own digital assets are customers of digital service providers, and these customers are regarded as “end users”.⁶¹ As captured by Alp Toyger and Jake Zhu in A New Asset Type: Digital Asset, digital citizens who are the end users of digital services do not own the services.⁶² The contract entered by the end users and the digital service providers lacks negotiation powers which grant the service providers absolute powers to dictate rules via the terms of service and the end users accept them with no choice violating and ignoring consumers' rights.⁶³ The writers assert that the legal concept of the Terms of service that are in place is questionable and should not be legally binding on the end users.

Further what sets digital assets apart from other types of property is the fact that the owner of the asset does not necessarily control their fate. This is due to the contract entered by the owner of the digital assets with the service provider which limits or barred the transferability to the third party.⁶⁴ In 2014, Natalie Banta noted that digital assets have striking similarities and their freedom is controlled by the terms of service which limits the capability to be inherited and the divisibility of such assets.⁶⁵ To her, the limitation from the terms of service threatens the very nature of succession law by allowing parties to opt out of the fundamental rights of property.⁶⁶

She suggests a solution that prioritizes the right of the owner of the digital assets to the service provider's terms and conditions. She rightly does so by arguing that in as much as the transmission of digital assets results from full disclosure of the terms of service in the contract and the user's express agreement when signing up, the contracts that bar an individual's rights to transfer his/her

⁶¹ Alp T, Taipe R, Jake Z, 'A new Asset Type: Digital Assets', 115.

⁶² Alp T, Taipe R, Jake Z, 'A new Asset Type: Digital Assets', 115.

⁶³ Alp T, Taipe R, Jake Z, 'A new Asset Type: Digital Assets', 115.

⁶⁴ Natalie B, 'Inherit the cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets At Death', Stetson University College of law, Research Paper Number 7, 2015, 799- [delivery.php \(ssrn.com\)](https://ssrn.com/abstract=2688888) on 28 February 2023.

⁶⁵ Natalie B, 'Inherit the cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' 802.

⁶⁶ Natalie B, 'Inherit the cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' 803.

digital asset should be void as a matter of public policy because the contracts tend to divest the ability of the user to control digital property and redefine the property interest in digital assets.⁶⁷

Her argument is critical in this research because of the nature of the terms of service that are presented to an individual when entering a contract. In most cases, people end up signing contracts with no idea what some of the provisions imply. Ignorance of the law not being a limiting factor I agree with her to the extent that it is upon the service provider to make clear the provisions that may be costly to the owner upon signing the agreement.

In addition with the absence of a legislative framework, a fundamental role is played by the court.⁶⁸ In the commentaries of the cases on digital inheritance by Ilaria Maspes, he noted that the reason why the Apple company, which had denied the parents of the deceased to obtain their son's cloud account, accepted access to the specific items was due to legal order from the court which required apple to aid in accessing the deceased's account data.⁶⁹ In the article, 'Stored Communication Act and Digital Assets', the writer, interpreting the provision of the Stored Communications Act on consent, gives a scenario where the owner of such assets does not sign for their disclosure and dies without a testamentary instrument mentioning the digital assets.⁷⁰ In such a scenario where express consent, which stems from the user, isn't granted, the parties seeking disclosure of the assets may seek legal authorization from a probate court.⁷¹

The fundamental rights of an individual are essential when it comes to the inheritance of digital assets. Without the consent of the owner of the owner upon the demise should not be misused by the service providers by conferring to themselves an absolute right to handle and restrict such assets. There should be a provision for lawful consent sought from the court which makes it easier for the beneficiary to procedurally get access to the Digital assets.

In 2019, Kenya enacted the Data Protection Act (DPA), serving as the main law overseeing the collection and handling of personal data within the country. The DPA governs the processing of

⁶⁷Natalie B, 'Inherit the cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death' 826.

⁶⁸Maspes I, 'Digital Inheritance, Right of The Heirs to Access to The Deceased User's Account, Non-Transferability Clauses: An Overview In Light of Two Judgments Issued By Italian Courts',2022,11.

⁶⁹Maspes I, 'Digital Inheritance, Right of The Heirs to Access to The Deceased User's Account, Non-Transferability Clauses: An Overview In Light of Two Judgements Issued By Italian Courts',2022,4.

⁷⁰ Horton D, 'The Stored Communication Act and digital assets' *Vandel Law Review*, 2014, 1735.

⁷¹ Horton D, 'The Stored Communication Act and digital assets' *Vandel Law Review*, 2014, 1735.

personal data, defines the rights of data subjects, delineates the duties of data controllers, and establishes the Office of the Data Protection Commissioner (ODPC). However, The Data Protection Act provides for express consent from the owner as the only way through which a person may access the private materials of the owner.⁷² It does not envisage consent where a person dies without providing access to digital materials. To be considerate of the transmission of the digital asset after the death of the owner, lawful consent is essential and should be included to remedy such circumstances.

1.8.3 IMPORTANCE OF PROPERTY RIGHTS IN THE SOCIETY

With the classification of digital assets as property the rights vested in property unequivocally apply. A right refers to a legally acknowledged interest held in, towards, or against a person or object. Property rights grant the owner of an asset the authority to utilize its benefits, exclude others from its use, and transfer ownership.⁷³ According to the legal statement on crypto assets and smart contracts, the term property does not elaborate on a thing itself but the legal relationship formed that gives rise to ownership. Ownership in the sense of a fundamental proprietary relationship with the owner which forms part of property rights.⁷⁴

Under the concept of property, Francis Kariuki explains the critical role of property rights in society. He avows that property can be understood to manifest itself as rights to control over things recognized in the society which is the basis of the relationship between members of the society.⁷⁵ In addition, property regimes in performing the mediation function between an individual, property, and the state explain why the rights held in a property are jealously guarded by the legislation and judicial bodies since it explains the way persons can transact proprietary entitlement.⁷⁶ Further property rights are interlinked with other rights hence an infringement of property rights amounts to violation and interference of other rights.⁷⁷

Since most digital assets are products of human creativity, they are subject to intellectual property laws for their safeguarding. In an example given on copyright protection for digital assets, the right

⁷² Section 2, *Data Protection Act (2019)*.

⁷³ Francis K, 'The Concept of Property', in Francis K (Ed) 1st Ed, *Property Law*, 1st Ed, Strathmore University, 2016, 4.

⁷⁴ UK jurisdiction Taskforce, legal statement on crypto assets and smart contracts, November 2019, 11.

⁷⁵ Francis K, 'the concept of property', 4.

⁷⁶ Waldron J, 'Property Law' in Patterson D(ed), *A companion to philosophy of law and legal theory*, 2nd ed, Blackwell Publishing, Oxford, 2010, 9.

⁷⁷ Francis K, 'the concept of property', 4.

from the creation of a copyright is an automatic right and it results in the breach of a copyright when the digital assets are used by someone without permission.⁷⁸

Moreover, proprietary rights are fundamentally crucial in insolvency scenarios, typically being prioritized over creditor claims and in situations involving the retrieval of stolen, lost, or unlawfully taken assets.⁷⁹ This is because proprietary rights are acknowledged universally, whereas personal rights are only acknowledged against individuals who have taken on specific legal responsibilities.⁸⁰

Property rights play a crucial role in the realm of digital assets. When digital assets are classified as property, these rights become applicable, granting owners the authority to control, benefit from, exclude others, and transfer their assets. Just as in traditional property, infringement on these rights in the digital domain can lead to legal consequences.

FUTURE RESEARCH INDICATORS

With cross-border transactions between states and limited terms of service, there have been questions as to whether there can be consolidation and harmonization of existing digital assets inheritance laws and adopt a standard digital assets inheritance law across the continent. This is due to the emerging discussions on sovereignty, economization, and digital assets inheritance law. This is a space that needs further exploration and research due to the integrities of coming up with international law and the procedure of adoption of the same laws by states. The research could also focus on the practicability of this international law on digital assets inheritance.

1.9 SCOPE OF STUDY

The study focuses on a subject of law that dictates the transmission of the estate of a deceased to the beneficiaries, The Law of Succession. With rapid technological advancements, new forms of intangible property have emerged. The study seeks to determine how such properties could devolve to the beneficiaries upon the death of the owner.

⁷⁸ [Using other people's digital assets | nibusinessinfo.co.uk](https://nibusinessinfo.co.uk)

⁷⁹ UK jurisdiction Taskforce, Legal Statement on Crypto Assets and Smart Contracts, November 2019, 11.

⁸⁰ The Law Commission, Digital Asset Consultation Paper, 28 July 2022, 1.

Historically, the Law of Succession was enacted in 1982 after undergoing various changes and amendments. With it coming into force, the focus was on the devolution of property to beneficiaries after the death of the owner of the property. The focus being traditional assets, the drafters did not perceive the emergence of digital assets and hence didn't create a provision that accommodates new forms of property. With technological advancement, various ways of formulation of property have emerged some of which have been formed in a digital platform. This has in hand created a lacuna in law since the scope of coverage doesn't in any way outline the procedures that are required for the devolution of these kinds of properties. The focus of this study is whether the enactment of separate laws will fill the gap left by the succession laws.

Geographically, this study focuses on a comparative analysis of the applicable laws on digital assets inheritance in the United States to determine whether the current laws on digital assets inheritance in the United States are sufficient to come up with comprehensive laws on digital inheritance in Kenya. United States under the Revised Uniform Fiduciary Access to Digital Asset Act (RUFADAA) gives a comprehensive procedure for access to digital assets. With the evolution of the laws applicable to digital assets, the United States has experienced changes in the formulation and execution of current laws on digital assets. The relevant laws will serve as a foundation for conducting a comparative analysis which will in turn inform the development of key recommendations for new legislation that addresses the inheritance of digital assets.

Comparative analysis will be based on a thorough analysis of the recently enacted **Revised Uniform Fiduciary Access to Digital Asset Act (RUFADAA)** which entails the procedures for inheritance of digital assets in the United States. There will be also reviews of case laws that have ruled on matters of inheritance of digital assets, documents, and paper reviews i.e., the consultation paper which outlines what entails digital assets, their classification, procedures for inheritance, and the different reactions on different provisions in the paper.

1.9.1 LIMITATION OF STUDY

Digital asset inheritance is a nascent and rapidly evolving field in Kenya. With no laws addressing the inheritance of such assets, there is a legal gap that exists. So far, there are limited materials that

have explained how digital assets can be devolved. With no framework on digital asset inheritance, it may be challenging to directly apply my recommendations in a real-world scenario. This may also lead to uncertainty in practice due to a lack of legal clarity and guidance.

The materials available focus on alternatives for the transmission of these assets with the owner of the asset advising them to plan ways in which his or her beneficiaries will receive the assets. There is no material covering how the assets could be transmitted to the beneficiary if the owner has not provided consent before he or she dies. This gap in knowledge limits my ability to provide a comprehensive analysis of digital asset inheritance procedures and their potential implications.

To mitigate this, I intend to focus on other countries' developed jurisprudence on the subject as a basis for answering the research questions that I seek to answer.

I.10 DEFINITION OF TERMS

1. **Beneficiary-** A person who is designated to benefit from an appointment, disposition, or assignment (as in a will, insurance policy, etc.); one designated to receive something as a result of a legal arrangement or instrument.
2. **Choses in Action-** Personal property owned by one individual but held by another, with the owner having the option to reclaim it through legal action, also known as a "thing in action.
3. **Choses in Possession-** Personal property for which title and possession unite in the same person. - Also termed thing in possession.
5. **Consent-** Agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.
6. **Devolution-** The action or occurrence of transferring one's rights, duties, or powers to another party; the conveyance of such rights, duties, or powers through transfer or succession.
7. **Estate-** The estate, encompassing all assets and debts left behind by a deceased individual.
8. **Inheritance-** Property received from an ancestor under the laws of intestacy/Property that a person receives by bequest or devise
9. **Intangible Property -** Property that lacks a physical existence E.G., bank accounts, stock options, and business goodwill.

10. **Revised Uniform Fiduciary Access to Digital Asset Act (RUFADAA)**- Revised Uniform Fiduciary Access to Digital Act
11. **Tangible Property**- Property that has physical form and characteristics.
12. **Digital asset** - Anything created and stored digitally, which is identifiable, discoverable, and holds or provides value.
13. **Transmission**- The transfer of land, a lease, or a charge from one individual to another through legal means such as inheritance, insolvency, or other circumstances, encompasses the compulsory acquisition of land under any statutory regulation.
14. **Succession**- devolution of an estate to the beneficiaries upon the death of the owner
15. **Property**- An item or items owned by an individual; possessions as a whole.
16. **Cryptocurrencies**- digital currencies designed to operate as a medium of exchange through a computer network without relying on any central authority, such as a government or bank, for its upkeep or management.
17. **Terms of service**- Legal provisions delineating the essence, extent, and constraints of a service (e.g., provided via a website or an app), along with the regulations users of the service must consent to adhere to.
18. **End users** - An end user is the person who ultimately uses a piece of software or hardware after it has been designed, developed, tested, and delivered
19. **Internet Service Providers (ISPs)** - A company that gives businesses and people access to the Internet. They might also offer other services like email, domain registration, web hosting, and browsers.
20. **Movable property** - Property that can be physically moved or transferred from one place to another. Examples include vehicles, furniture, jewelry, and cash.
21. **Immovable property**- a property that cannot be moved or transferred easily, typically referring to real estate or land and the buildings or structures permanently attached to it.
22. **Rule-based approach** - A method of decision-making or regulation where specific rules and guidelines dictate actions or outcomes.
23. **Principle-based approach** - A method of decision-making or regulation where broad principles or values guide actions or outcomes, allowing for more flexibility and interpretation.

24. **Private contract**- An agreement between two or more parties that is not intended to involve or benefit the public at large. Private contracts typically outline the rights and duties of the parties involved and are legally binding Personal autonomy
25. **Data transfer**- The process of moving or transmitting data from one location or system to another, often involving the exchange of information between computers, networks, or devices.
26. **Data objects**- Units of data that are treated as discrete entities and can be manipulated or processed by a computer program. Data objects can include text, numbers, images, files, and other types of information.
27. **Block chain**- A decentralized, distributed ledger technology that records transactions across multiple computers in a way that is secure, transparent, and resistant to tampering. Each block in the chain contains a cryptographic hash of the previous block, creating a chain of blocks linked together.
28. **Initial coin offerings** - A fundraising method used by cryptocurrency startups to raise capital by issuing digital tokens or coins to investors in exchange for investment. These tokens typically represent a stake in the project or platform being developed.
29. **Lawful consent** – consent by power of attorney or through the courts
30. **Fiduciary** - A person or entity entrusted with the responsibility to act in the best interest of another party, typically referred to as the beneficiary. Fiduciaries are bound by legal and ethical obligations to prioritize the interests of the beneficiary above their own.
31. **Private keys** - In cryptography and cryptocurrency, a private key is a secret cryptographic key that is used to sign transactions and prove ownership of digital assets. It is paired with a public key to enable secure communication and transactions on blockchain networks.
32. **Post-mortem digital data**- Digital information or assets that belong to an individual and are left behind after their death. This can include social media accounts, email accounts, digital files, cryptocurrency holdings, and other forms of digital property.
33. **Online tool** - A software application or service that is accessed and used over the internet via a web browser or other online interface. Online tools can serve various purposes, such as productivity, communication, collaboration, entertainment, and more.

1.11 OUTLINE OF DISSERTATION

This paper outlines a lacuna in the law of inheritance in accommodating a rapidly development area due to technological advancements. Digital assets are products of private contracts that exist in electronic forms. With the value that is inscribed in it, questions on how the owner can pass it on to the beneficiary arise. Being a feature of private contracts, the service providers tend to use the terms of service to control digital assets even after the owner dies.

The paper begins by classifying digital assets as a type of property hence implying that property rights in traditional assets apply *mutatis mutandis*. It then outlines the unique characteristics of digital assets and how they are distinguished from physical assets. This provides a basis for why the current law can't sufficiently provide for procedures for the inheritance of digital assets. The paper then dives into the key provisions that are essential for new laws on digital assets inheritance in Kenya i.e., the terms of service-by-service providers, provision of lawful consent in the case where the owner of digital assets doesn't expressly provide access to digital assets before he or she dies and the postmortem privacy. The paper concludes by giving recommendations on the key provisions of a new law on digital assets inheritance.

1.12 SUMMARY OF OVERALL RESULTS AND CONCLUSION

- Digital assets are a form of property and just like any other property, they entail property rights.
- The current laws of traditional assets inheritance cannot accommodate the inheritance of digital assets due to the unique nature of the assets hence the need for new laws on digital assets inheritance.
- The terms of service by the service providers should include a provision for the devolution of digital assets if the owner of the digital asset dies.
- Without express consent on the passing of digital assets, there should be a provision for lawful consent to be drawn from the courts so that the beneficiaries can exercise their rights of inheritance.
- The Kenya Law on Data Protection should create a balance between the beneficiaries' right to access the estate of a deceased i.e., digital assets without violating the owner's right to privacy.

1.13 CHAPTER BREAKDOWN

CHAPTER ONE

The first chapter of my dissertation will outline various components such as the study objectives, conceptual framework, and justification, which will lay a groundwork for the ensuing chapters. The chapter comprehensively discusses the subject matter, digital assets inheritance, in question with citations from different studies and jurisprudence. It also gives differing opinions on the identity of digital assets as property and further suggests why the arguments on classification as a type of property have gained broader acceptance compared to the opposing perspectives.

CHAPTER TWO

The second chapter will assess in detail the concept of digital assets as property. The primary objective will be to explore the need for new laws that encompass digital inheritance. The chapter will examine the fundamental differences between digital and traditional assets highlighting the unique character of digital assets that necessitate their separation. The chapter aims to provide a comprehensive overview of the need for new laws that account for the unique characteristics of digital assets through an examination of the current legal landscape surrounding digital assets and the issues that arise when attempting to distribute these assets through traditional inheritance laws, and the potential benefits that could be realized through their separation from traditional assets.

CHAPTER THREE

The primary objective of the third chapter is to provide a comprehensive analysis of the current legal framework and challenges related to the scope of unlimited property rights in digital assets after the death of the owner. The chapter will look into the overview of property rights, their legal basis, and a comparison of traditional assets and digital assets in terms of property rights. Further, the chapter will delve into an examination of the implications of limited property rights in digital inheritance. There will be a detailed analysis of; the discussion of the potential impact of limited property rights on the value and utility of digital assets, consideration of broader societal implications, such as wealth distribution and innovation, and the potential for legal strategies to address these challenges.

CHAPTER FOUR

The chapter aims to investigate the legal threshold to be met by the service providers in the formulation of terms of service and whether the terms of service are considerate of the transmission of the digital asset(s) after the death of the owner. This will be conducted through a comparative analysis of the applicable laws on digital assets inheritance in the United States to determine whether the current laws on digital assets inheritance in the United States are sufficient to come up with comprehensive laws on digital inheritance in Kenya.

It will begin by explaining the role of service providers in digital asset transmission through an analysis of the legal obligations and responsibilities of service providers. The chapter delves into briefly explaining the formulation of terms of service for service providers examining the legal threshold that should be met by the service providers when formulating terms of service. Further, the chapter will examine how the term of service addresses the transmission of digital assets after the owner's death, identifying the potential gaps in terms of service and exploring potential solutions to address these challenges.

In addition, chapter four will investigate the current provisions in the Data Protection Act concerning consent from the owner in Kenya. This will provide an overview of how the act currently addresses digital inheritance and access to personal data after death. Further, the chapter will provide a detailed analysis of lawful consent citing its importance in accessing and transferring digital assets after death, the current limitations of the Data Protection Act in addressing digital inheritance through the provision of express consent as the sole condition for access of private digital content and how lack of lawful consent affects the process of digital inheritance. The chapter will then examine how the proposed amendment aligns with the legal framework for digital inheritance and access to personal data.

CHAPTER FIVE

Lastly, under chapter five, there will be a conclusion and recommendations from the analysis of the applicable laws on digital assets inheritance. The chapter aims to synthesize all findings and discussion into a coherent conclusion offering actionable recommendations for potential amendments to new regulations concerning digital assets. The chapter provides insights to address the overarching research questions.

CHAPTER TWO

CONCEPTUAL FRAMEWORK AND METHODOLOGY “DIGITAL ASSETS, WHERE UNIQUENESS MEETS PROPERTY”

INTRODUCTION

As our lives become increasingly intertwined with digital realms, the question of how to legally classify and manage digital assets has emerged as a pressing concern. Unlike traditional property, digital assets pose unique challenges due to the intangible nature of their existence and the rapid evolution of technology. This section delves into the complex landscape of digital assets, exploring the intricacies of their legal standing and the ongoing efforts to categorize them within existing legal frameworks.

The journey begins by examining why digital assets are not conventionally regarded as traditional form property, acknowledging the limitations of traditional law in accommodating these novel forms of value. Subsequently, I explore pivotal legal cases and the implications they carry for the classification of digital assets. The Law Commission's proposal of a new category, "data objects," as a comprehensive solution to cover digital assets is scrutinized, accompanied by a discussion on the three limb tests that define this proposed classification. As I navigate through these legal intricacies, I also consider criticisms and alternative viewpoints, aiming to foster a comprehensive understanding of the challenges and opportunities in classifying and managing digital assets within the contemporary legal landscape.

In my research, I will be using three methods to tackle questions about digital asset inheritance. First, I will dig into legal documents and doctrines to connect theory with real-world situations. Second, I will explore how historical developments, like the Laws of Succession, created gaps in dealing with digital assets. Third, I will compare how different countries, starting with the United States, handle digital asset inheritance. This will entail a mix-up of qualitative research, case studies, and deductive reasoning for a comprehensive view. The five chapters will cover principles

of property, property rights in digital assets, the importance of lawful consent, and a breakdown of existing laws and rulings. The final chapter will tie everything together for a clear analysis of the research.

THE NOTION OF DIGITAL ASSETS ABOUT TRADITIONAL ASSETS

The reason why digital assets are not considered property is because traditional law only recognizes personal property to exist in physical possession.⁸¹ This directly implies that the rules in place for the transmission of physical assets cannot sufficiently cover digital assets.⁸² The Law inability to keep pace with emerging trends cannot by itself dismiss a novelty that is rapidly evolving. The existence of property is protected by property rights that give the owner of the property the power to take control and exclude non-owners from the property. This is because, whenever and wherever there is ownership, there is an owner, there is a thing owned and there are non-owners.⁸³

As a type of property that recognizes the existence of an asset, a thing, or a resource to which the rights granted give the owner the power to exclude or allow access by another person.⁸⁴ Digital assets are the existence of a private contract. Once in existence, the owner acquires private keys that exclusively grant him or her the power to either permit or exclude other people from accessing the assets. After the acquisition of property, most theorists claim that property rights become a property right through the notion of excludability, i.e., the power of a person to either exclude or permit access to or resource by other persons to a particular asset.⁸⁵

Given the characteristics that directly link digital assets to the property based on property rights, the question arises: to which specific category of property does this unique asset belong?

⁸¹ Chan T, 'The nature of property in crypto assets', *legal studies*, 2022, 480 -<[doi:10.1017/lst.2022.53](https://doi.org/10.1017/lst.2022.53)> on 30 September 2023.

⁸² Chan T, 'The nature of property in crypto assets', *legal studies*, 2022, 480 -<[doi:10.1017/lst.2022.53](https://doi.org/10.1017/lst.2022.53)> on 30 September 2023.

⁸³Rostill L, 'possession, relative tittle, and ownership in English law' Oxford university press, 2021, [156doi:10.1017/S0008197321000635](https://doi.org/10.1017/S0008197321000635) on 30 September 2023.

⁸⁴ The law commission, digital asset consultation paper, 28 July 2022,18.

⁸⁵Victoria Park Racing and Recreation Grounds Co Ltd v Taylor (1937), high court of Australia.

The connection between digital assets and the property was attested in two cases. In **National Provincial Bank v Ainsworth**, the locus classicus case on the definition of property, Lord Wilberforce in giving the ruling of the court gave the criteria for a right or interest to qualify as property. He stated that for something to be considered property, it must be clearly defined, recognizable by others, able to be assumed by others, and possess some level of permanence or stability.⁸⁶ The case provided a foundational framework for the classification of a traditional property. With the emergence of digital assets, there wasn't clarity as to whether they fall under the said category. This was not until 2019 when the court in the case **AA v persons unknown**²⁰¹⁹ **EWHC 3556(comm)** made a direct relation of digital assets to the characteristics of traditional property. Justice Bryan J in giving an injunction for the bitcoin, relied on the case, **National Provincial Bank v Ainsworth** from which he characterized digital assets as property.⁸⁷

The ruling in this case has raised concerns because it relies solely on the four criteria as the basis for characterizing digital assets as property. This approach has been criticized for potentially creating legal loopholes and ambiguities in the classification of digital assets, as it may not address the unique nature and challenges associated with these assets adequately.⁸⁸ The law seems not to have comprehensively developed especially as the two cases that ruled on digital assets as a type of property were uncontested with the defendant not appearing or appearing without representation.⁸⁹ From the two cases, it is seen that the foundations of the judicial aims in classifying crypto assets as property seem to protect the victims of assets of this nature from theft and fraud. The common perception is that the basis of the classification of the digital assets as property was to grant preliminary injunctions to the victims, which could not have been granted if the digital assets weren't classified as property.

In the case presided over by Judge Bryan, the questions arose because he did not provide a detailed explanation regarding the classification of digital assets as property. Instead, he simply equated

⁸⁶ National provincial Bank v Ainsworth (1965), England and Wales High Court.

⁸⁷ National provincial Bank v Ainsworth (1965), England and Wales High Court. On 20 September 2023.

⁸⁸ Albert T and Alexander W, 'Classifying digital assets as property- does the law have it right?' *Floodgate* 2022, 3-
<[Classifying digital assets as property – does the law have it right? - Floodgate](#)> On 30 September 2023.

⁸⁹ Albert T and Alexander W, 'Classifying digital assets as property- does the law have it right?' *Fladgate* 2022, 3-
<[Classifying digital assets as property – does the law have it right? - Fladgate](#)> On 30 September 2023.

digital assets with meeting the criteria for property, drawing on established legal principles without specifying the exact category of property to which these assets would belong.

Trying to answer the existing questions from the two cases on the classification of digital assets as property, the Law Commission on Data Objects outlined a new category of property that comprehensively covers digital assets. The paper posits that while the courts have treated Lord Wilberforce's characteristics as a guideline to the classification of property, the characteristics themselves are not capable of precise definition nor are they exhaustive in the elaboration of digital assets.⁹⁰ This is because the categorization of property fails to accommodate digital assets. Since digital assets do not fit into either of the existing common law categories of personal property, i.e., things in possession and things in action, the law commission in its consultation paper recognized digital assets to fall under the third category which is data objects.⁹¹

In justifying the basis of the third category, the paper outlines three limb tests for a thing to be classified as a digital asset. The first test provides that there should be an establishment of

Whether the asset consists of data presented in electronic format, including computer code, and electronic signals, whether digital or analog. This test directly differentiates digital assets from physical assets based on tangibility since physical assets are not composed of data represented in an electronic medium.⁹² The test is also used to acknowledge that an important constituent part of data objects is that they have an informational quality and are represented in an electronic medium which in general is optimized for processing by computer.⁹³ This broadens the proposed definition of digital assets by widening the scope of categorization by directly separating the traditional assets that exist in physical form from digital assets that are products of electronic medium.

The second test involves digital assets existing independently of a person and the legal system. Digital assets existing independently of a person require that an object of property is definable, identifiable, stable, and capable in its nature of being factually transferred to another.⁹⁴ The asset existing independently from a legal system expressly excludes choses in action that wholly rely on

⁹⁰ The law commission, digital asset consultation paper, 28 July 2022,3.

⁹¹ The law commission, digital asset consultation paper, 28 July 2022,3.

⁹² The law commission, digital asset consultation paper, 28 July 2022,79.

⁹³ The law commission, digital asset consultation paper, 28 July 2022,80.

⁹⁴ The law commission, digital asset consultation paper, 28 July 2022,84.

the legal system for their continued existence and enforceability.⁹⁵ In the paper, the test is justified by cryptocurrency's ability to exist regardless of its ownership or recognition by a legal system. This test distinguishes digital assets from the second category of property i.e., choses in action. In a way, the test posits one of the unique features of digital assets in its existence. The test closely ties the existence of digital assets to the labor theory of property, in which the legitimacy of digital asset ownership isn't based on legal or personal claims rather, individuals acquire digital assets solely through their labor and efforts invested in them. It subsequently sets them apart from physical assets, thereby affirming the distinct attributes that establish digital assets as a legitimate form of property.

The final test requires the thing in question to be rivalrous in the sense that its use is not unlimited. This test expounds on a person's ability to exclude the rest⁹⁶ when he or she is in control of the digital assets. In the consultation paper, it is stated that when an object is rivalrous then it's likely to be excludable. In the consultation paper, physical possession comes with an exclusion, and obtaining a legal right prevents another person from obtaining the same.⁹⁷ The final test links the concept of control of digital assets to the common laws concept of possession.

The third category of property, data objects, brought up a series of reactions as the critics disapproved of the basis of categorization claiming that the best approach to achieve legal certainty is to introduce enabling legislation with principles that confirm digital assets as property. Alternatively, they suggest that there should be a specified general characteristic of what is composed of data. A consensus was arrived that for a thing to be categorized as a digital asset, it must be represented in an electronic medium.⁹⁸

In the article, *The Nature of Property in Crypto Assets*, the author acknowledges the long ongoing discussions as to whether crypto assets, a type of digital asset, constitute property for common law hence its ability to be held on trust, devolve by will and vest on bankruptcy or insolvency.⁹⁹ His paper focuses on justifying why some rules of title originally developed in the context of tangible

⁹⁵ The law commission, digital asset consultation paper, 28 July 2022,85.

⁹⁶The law commission, digital asset consultation paper, 28 July 2022, 210.

⁹⁷The law commission, responses to the consultation paper, 28 July 2022,581.

⁹⁸ The law commission, digital asset consultation paper, 28 July 2022, 211.

⁹⁹Timothy C, 'the nature of property in crypto assets', Faculty of law, national university of Singapore, research on paper number 43, 2022,480-[The nature of property in crypto assets | Legal Studies | Cambridge Core](#) 30 September 2023.

property should apply to digital assets.¹⁰⁰ The direct connection between his paper and the consultation paper is on the identity of the subject matter in digital assets. The author agrees with the classification of digital assets into data objects and only tries to expound on the subject matter that fulfills the criteria of transferability, excludability, and eligibility.¹⁰¹

The author uniquely takes a different approach by diving into an ignored sphere of these assets, i.e., the nature of property in these assets and how property rules operate concerning them.¹⁰² He acknowledges the recent developments in the classification of these assets as property type and tries to break its vagueness by focusing on several foundation questions that must be answered to determine how property rights in these assets operate i.e., the subject matter of property rights and when and how title vested in digital assets pass.

This fully sets the definition of what a digital asset is. Uniquely the consultation paper with the article has classified digital assets as a unique form of property existing under data objects with similar but distinct features to property rights in traditional assets.

METHODOLOGY

My research comprises different approaches synchronized in one form or another to give answers to the research questions at hand. I will in hand elaborate on the research objectives through three main forms of analysis i.e., hard resources and doctrinal analysis, historical analysis, and comparative analysis. Hard resources analysis will involve legal statutes, court decisions, and other legal documents. This will enable me to bring real-world scenarios into focus which will resonate with the theoretical underpinnings of my research. The doctrinal analysis will come in handy in the interpretation of legal doctrines, principles, and theories. It will focus on how legal rules and principles apply to each topic. Under this, there will be a combination of the deductive approach which will provide a structured framework for my study and in hand, it will form a basis of

¹⁰⁰ Timothy C, 'the nature of property in crypto assets' 481.

¹⁰¹ Sara J and Gulliver L, 'crypto-claimants and bit coin bankruptcy: challenges for recognition and realization' international solvency review, 2020, 233.

¹⁰² Timothy C, 'the nature of property in crypto assets' 481.

logically derived conclusions and implications, and inductive reasoning which will complement the deductive method since it will form a basis of synthesis of diverse perspectives.

The second method applied will be historical analysis. This will involve examining historical legal developments and how they have shaped the current legal framework. Regarding my research, I aim to have a historical analysis of the coming up of the Laws of Succession and the lacuna created due to a lack of anticipation of the development of digital assets. Through this, there will be provision of insights into the origins and evolution of legal concepts regarding inheritance and the place of digital assets in succession law upon the death of the owner. This will give the current legal framework by uncovering the historical factors that have contributed to its development.

The third method applied will be comparative analysis. I intend to compare legal systems across different jurisdictions or periods. The focus will be on the already developed sphere of digital assets inheritance law in the United States of America. This will expound on the understanding of how different legal systems approach the same or similar issues giving insights into best practices, potential shortcomings, and alternative approaches. The three methods of analysis will comprise a mix-up of qualitative research, deductive approach, case studies, and use of inductive method to have a conclusion.

In the first chapter, I intend to use two main cases to outline the major principles that define what a property is and the application of the said principles in the classification of digital assets as property. In the separate notion of classification of digital assets as property, with arguments that seek to address whether digital assets should be classified as property, there will be critical analysis with evidential support on why digital assets are classified as property. Further to answering the question of why there should be new laws on digital assets inheritance, the main primary source I intend to are the preparatory documents for the first draft used in coming up with the UFADAA. I will also use books, articles, and replies to the enactment of the UFADAA to outline the harsh effects that were met when the act classified digital assets as traditional assets.

Chapter two intends to analyze the existence of property rights in digital assets through inductive methods. My primary sources for this study will be drawn from the consultation paper on digital assets inheritance as it gives a deep analysis of the definition, classification, and procedures for inheritance. It also contains mixed reactions from different scholars on different provisions in the paper. In addition, I will refer to the statutes of digital asset inheritance that have already been

passed which recognize digital assets as property i.e., the United States, specifically the enactment of RUFADAA, and the European Union countries' approaches to digital inheritance focusing on the Netherlands civil code provision on property inheritance including digital assets to substantiate the existence property rights in digital assets. I will use books and journal articles written to substantiate the existence of property assets as my secondary sources.

Case study analysis will also be used in the third chapter to justify the basis of my claims. The case shall conclusively show the existence of lawful consent and its importance in matters of inheritance of digital assets justifying the need to have the current Data Protection Act Amended to provide for lawful consent as a remedy for lack of express consent for the inheritance of digital assets by the decedent. In addition, the cases shall form a basis for a comprehensive analysis of the current legal framework and challenges related to the scope of unlimited property rights in digital assets after the death of the owner.

In chapter four I intend to present any qualitative data gathered in a descriptive form. This will entail breaking down existing legislation, court rulings, and other legal instruments related to digital assets. Finally, chapter five will be based on the analysis of the antecedent chapters.

CONCLUSION

In this chapter, I have delved into the uniqueness of digital assets in comparison to traditional assets. The chapter aimed to establish whether digital assets should be treated separately from traditional assets hence requiring a new law that encompasses digital assets inheritance. The chapter has in hand established that digital assets are different from traditional assets solely because it does not fall under the categories of property. The chapter has extended to establish its uniqueness through a fourth categorization of property i.e., data object which suits the characteristics of digital assets. In addition, the chapter has also expounded on why traditional property laws are insufficient in dealing with deal assets hence the need for formulation of new laws encompassing digital inheritance.

CHAPTER THREE

NAVIGATING LEGAL TERRAIN: DIGITAL ASSET INHERITANCE AND REGULATORY FRAMEWORKS

INTRODUCTION

In case studies regarding the regulatory hurdles posed by innovation and corresponding regulatory actions, the speed, breadth, and intricacy of the transformations brought about by innovation significantly impact various sectors of both the economy and society. This raises a key challenge in designing governance and regulatory approaches that prevent or mitigate the potential unintended negative consequences of technological developments while reaping the opportunities provided by innovation.¹⁰³ Digital assets, products of technological advancement and innovation, have brought changes that have a far-reaching impact on society's rules and regulations. Its unique nature has led to challenges to the design of a regulatory framework since in comparison, traditional regulation is designed on a sector-sector basis which limits the scope of regulation of such assets which cuts across multiple sectors.¹⁰⁴ In addition to the digitization of data, there is a more pervasive collection of data which carries risk in terms of data privacy and security.¹⁰⁵ This complexity is a result of the lack of a clear regulatory framework that tackles issues leading to the existence of such assets.

¹⁰³ OECD i Library, Case studies on the regulatory challenges raised by innovation and the regulatory responses, 14 December 2021 <https://doi.org/10.1787/8fa190b5-en> on 14 November 2023.

¹⁰⁴ <https://doi.org/10.1787/8fa190b5-en> on 14 November 2023.

¹⁰⁵ <https://doi.org/10.1787/8fa190b5-en> on 14 November 2023.

current Data Protection Act and how the proposal to amend it for the inclusion of lawful consent for the beneficiaries to be able to access the digital assets of the deceased in the instance when the deceased has died without instructions on access of the contents of digital assets with value.

THE CURRENT LEGAL FRAMEWORK RELATED TO THE SCOPE OF UNLIMITED PROPERTY RIGHTS IN DIGITAL ASSETS AFTER THE DEATH OF THE OWNER

The court in *Wiseman Talent Ventures v Capital Markets Authority* established that pending a framework to be established by the legislature on the regulation of cryptocurrencies, the investing public ought to be protected through regulatory measures. In the case, the applicant/plaintiff who was engaged in the business of trading cryptocurrency in Kencoin sought a temporary injunction against the defendant from interfering with his trade because the nature of his business involves transactions within a blockchain hence impossible to retrieve subscribers' information. The defendant's action of requesting the subscriber's information and further publication of the information that led to Safaricom closing the pay bill for his customers was not mandated. Kencoin operated through issuing initial coin offerings that enabled the selling of the coin to investment in exchange for cryptocurrencies.

The respondent on the other hand is a statutory body established under section 5(1) of the Capital Market Authority Act. Section 11(1) (3) (d) and Section 12 of the Act give the respondent the mandate to issue notices on all matters relating to securities in its jurisdiction. By this mandate, the respondent issued a cautionary notice on the risk associated with the Initial coin offer in February 2018 to clarify information asymmetry contradiction and misrepresentation after complaints by members of the public. The respondent relied on the *Security Exchange Commission v W.J. Howey* in answering the question of whether an asset is a security. The Howey test gave four criteria that should be met for an asset to be classified as security i.e., there has been an investment of money, there is profit from investment, investment is done in a common enterprise and the office has to come from the effort of the third party. The four tests in this case were answered in the affirmative.

The court, in addressing the Capital Market Authority's (CMA's) mandate, examined whether the

Kenyan legal system oversees emerging markets in cryptocurrency. The court concluded that, according to Howey's Test, which outlines criteria for classifying cryptocurrencies as securities, the plaintiff's Kencoin is categorized as a security and falls under CMA regulation. Although there is no comprehensive legal framework for regulating emerging cryptocurrency markets, the court held that the absence of specific laws does not preclude the application of the general legal regime. Furthermore, the court affirmed the validity of CMA's approach in using the classification of a digital asset as a security. It emphasized that the lack of specific regulations does not impede the jurisdiction of the general legal framework. Additionally, the court acknowledged that since the Central Bank of Kenya oversees national payment systems, including the regulation of payment systems, cryptocurrencies treated as currencies would be subject to regulation by the Central Bank. This implies that any digital asset with value is within the purview of this regulatory scope.

The legal case highlighted a pre-existing loophole in the regulation of digital assets in Kenya. The court referenced a circular notice issued by the Central Bank of Kenya, cautioning citizens about the risks associated with digital assets. According to research conducted by Bowman Law, Kenyan regulations are typically broad and inclusive rather than narrow and specific. This approach has resulted in the creation of licensing and regulatory categories that accommodate most fintech innovations.¹¹⁰ The court also identified a regulatory body, implicitly tasked with overseeing digital assets in the absence of specific legislation. In Kenya, the regulation of digital assets is limited to the context presented in the mentioned case. The jurisdiction lacks comprehensive legislation addressing the inheritance of digital assets, as affirmed in a report presented by the judiciary on this subject.

In the realm of digital inheritance, several countries have recently implemented laws to provide direction on the matter. These legal developments have been prompted by court cases that highlighted significant challenges in inheriting digital assets.

In the case of **Marriane Ajemian Co Admission and another V Yahoo Inc.**, the court dealt with the aforementioned issue. The case was brought by the personal representative of an estate

¹¹⁰ David G, Irene M and Brian K, 'Unscrambling block chain: regulatory frameworks in cryptocurrency' BOWMANS, 14 [Cryptocurrency in Kenya \(bowmanslaw.com\)](https://www.bowmanslaw.com) on 16 November 2023.

concerning an email that the court termed as a digital asset. In 2006 August, 43-year-old Ajemian died in a bicycle accident leaving no will nor instructions on treatment of his accounts. The deceased had opened an email account for years ago with his brother Robert. When he died his siblings Marriane and Robert were appointed as personal representatives of his estate. The two sought access to the contents from Yahoo but Yahoo refused with the contention that it was prohibited by the Stored Communications Act (SCA) and further, the Terms of Service (TOS) provided it with discretion to grant or reject personal representatives' requests.

The Personal representatives took the matter to the family and probate court challenging Yahoo's refusal. The court allowed Yahoo's motion for summary judgment and stated that the disclosure was prohibited by SCA. On appeal, the appellate court dealt with whether the SCA prohibited Yahoo from voluntarily disclosing the contents of the Email. The court ruled that Yahoo is under the obligation to divulge contents of email when personal representatives legally consent to the disclosure hence rejecting summary judgment of the probate court for Yahoo. When the case was brought back to family and probate court for actual proceedings the court allowed Yahoo's motion based on SCA prohibition but denied the motion of summary judgment based on Terms of Service since it was insufficient to prove that the TOS limited such interest. On appeal by the personal representatives, the Supreme Court transferred the case on its initiative. In the Supreme Court, the judgment was delivered by two judges.

Justice Lenk dealt with two contentious issues. The first issue was whether the SCA prohibits Yahoo from disclosing the contents of the email account. This issue revolved around privacy and data protection of Stored Communications and in-hand access to the contents of Stored Communications. The SCA was enacted to update and clarify federal privacy protection policy protections and standards. It in hand protects the privacy of the users of electronic communication by criminalizing unauthorized access while providing law enforcement entities with avenues to compel service providers to disclose contents. This has been achieved through a tripartite framework i.e., third parties unauthorized access, service providers voluntarily disclosure, and government compelling the service providers to disclose it.

Through the tripartite framework, there is a balance between express consent by the owner of the digital asset and lawful consent that could be granted by the court if the user of the contents dies

without the provision of a will or instructions on the treatment of their account. In this case, the applicant's issues resulted from the exceptions provided by the act on the general rule that the service provider shall prohibit voluntary access to the contents of the stored communication unless certain limitations apply. The personal representatives on reliance to the exceptions claimed that under the Agency exception where the service provider is to disclose such information to an agent of the principal or lawful consent which can be drawn by the originator, addressee or the intended recipient stated that they fall under the two categories. The court in its ruling stated that the plaintiffs cannot fall under the agency exception since it's a requirement that an agent is controlled by a principal and in this case, the court doesn't act as a principal. On the lawful consent exception, Yahoo claimed that lawful consent requires users' actual consent. The court ruled that interpreting lawful consent to be subject to the express consent of a living user precludes the personal representatives from accessing the contents hence preemption of common law. The court ruled that there was no intention of Congress to interpret lawful consent as actual consent from the living owner hence personal representative may provide lawful consent on the decedent's behalf to access to contents of Yahoo's email.

The ruling of the court on the matter gives a comprehensive requirement of lawful consent in the event an owner of the digital assets dies. As stated lawful consent is a statutory limitation that is provided by the court to the personal representatives to access contents of digital assets upon the death of the user without will. This implies that the service provider is only under the discretion to restrict access to contents of the deceased digital asset when they are not subject to liability when the deceased estate requires access to it.

It is my proposal following the Supreme Court interpretation of that issue that the Kenyan laws on Data protection in addition to the express consent requirement for access to electronic communications including digital assets include the tripartite framework provided in the SCA which gives the court discretion to grant lawful consent for the estate of the deceased to access the contents and protect the service providers through the provision of the general rule that prohibits access to the contents unless provided by statute if there is lack of express consent. Through this, the digital assets left by the owner will be properly accounted for and the correct procedures for them to be granted will be followed when there is no valid will.

The second issue that Justice Lenk dealt with involves the contents of terms of service and its hindrance to the process of inheritance of digital assets. In this issue, Yahoo argued that allowance of summary judgment was appropriate because the TOS conferred its right to refuse access to the account. Yahoo further stated that the termination provision offered it unlimited rights over the contents of the email account. The court thought that the terms of the service agreement constituted an enforceable contract. In this case, there was no meeting of mind since it was unclear whether the terms were communicated to and accepted by the defendant. Justice Lenk overruled the judgment of the family and remanded the case back to the family court for proceeding in consideration with its judgment. Chief Justice Gants in his dissenting opinion disagreed with the remand of the case back to the family court because it was evident that the termination clause only gave discretion to the service provider to discard contents of the email where there were no issues arising from the matter but did not grant it perpetual succession of the email to the service providers hence should be reverted to the personal representatives.

In regards to the transfer of digital assets from the owner to another person, section 40(1) of the Data Protection Act of France has provided a solution barring any general contractual clause in the general terms and conditions restricting prerogatives granted to the person and further, any service provider is under the obligation to inform the user the fate of the data upon his or her death.¹¹¹

Terms of Service have been seen as a major hindrance factor in the transmission of the assets to the beneficiaries. This is because of the unilateral conditions that are put by the service providers to the personal representatives to access the assets granting them unequivocal power by the contents. The ruling of the court was in hand protecting the beneficiaries' rights to subsequent ownership of the digital assets. Through the classification of the TOS as a contract, it was clear that there have to be elements of the formation of a contract present for it to be valid. In this case, a meeting of mind requires communication of the terms to the end user and acceptance by the user of the asset for the TOS to be binding upon the demise of the owner. The court is under the duty to determine whether the elements of a valid contract are met in its entirety for it to be binding to the beneficiaries. This provides the legal threshold to be met by the service providers for the terms of service to be binding i.e., whether all the elements of the formation of a contract have been met

¹¹¹ Section 40(1) Data Protection Act (France).

in the formation of an agreement based on terms of services.

With entry into an agreement with the end user, the service provider should in hand acquire fiduciary responsibility. The aspect of fiduciary duty was well factored in in the case, ***Tulip Trading Limited (a Seychelles company) v Wladimir Jasper van der Laan and 14 others***. This case is tied to the Marriane Ajemian case in so far as the principal-agent relationship is concerned. In this case, the main question of the appeal was whether the developers responsible for managing Bitcoin have fiduciary obligations in tort to the cryptocurrency owner.¹¹² In this case, the owner of the bit coins worth 4 billion dollars had lost the private keys in a hack. Tulip contended that the defendants who are the developers controlled and ran the Bitcoin network and it would have been a simple matter for them to secure Tulip's assets by moving them to another address that Tulip can control. Tulip contended that the role the developers played about his bitcoin automatically imposed on their fiduciary duties, an argument which the developers denied. In the trial court, the Tulip case was overruled with the decision that no such duties arose in law hence setting aside the contention.¹¹³

Upon appeal, the learned judge expounded on the categorization of digital assets and the fiduciary relationship arising from the relationship between owners of a digital asset with the developer i.e., the service provider. Under the law on the incidence of fiduciary duty, the classic definition of a fiduciary was set out by Justice Millet LJ in the case of ***Bristol and Wet Building Society v Mothew (1998)*** It was mentioned that a fiduciary must act in good faith, refrain from profiting from their trust, avoid situations where their duties conflict with their interests, and not act for their own or a third party's benefit without the principal's consent. The judge ruled that owners have a legitimate expectation that developers won't prioritize their self-interest over the owners' welfare. Additionally, developers, when acting in their capacity, owe fiduciary duties to the actual property

¹¹²*Tulip tradin limited (a Seychelles company) v Wladimir Jasper van der laan and 14* court urt of appeal civil division.

¹¹³ *Tulip Tradin limited (a Seychelles company) v Wladimir Jasper van der laan and 14 others*, court of appeal civil division.

owners.¹¹⁴

The Tulips case in hand tries to bring very important aspects under the relationship fostered when an owner of a digital asset agrees with a service provider. In the case focusing on bitcoins, the developers were in charge of the coins. After losing private keys which acts as how the bit coins are dealt with, the developers of the bitcoins were under the obligation to make sure that the bitcoins were transferred to another account that could be managed by the owner. In addition to the terms of service being treated as a contract, it must be established that the service providers are under a fiduciary relationship with the owner of the asset.

In *Children's Investment Fund Foundation (UK) v Attorney General and others* lady Arden established that in as much as there has been considerable debate as to how to define a fiduciary, the key principle is that a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, meaning that he cannot exercise any power to benefit himself. In inheritance, the same principle ought to apply. In comparison with what is provided for under the France Data Protection Act i.e., the service provider is under the obligation to inform the user of the fate of the data upon his or her death, the same duties should apply in Kenyan legislation regarding digital assets. Further, it must be clearly stated the position of the service provider under a contract entered with the owner. In this case, the fiduciary relationship between the service provider and the end user exists in perpetuity of the contract.

POSSIBLE COMPLICATIONS ARISING FROM THE ABSENCE OF A CLEAR REGULATORY FRAMEWORK

In the paper, Predict Your Digital Death, the Fate of digital data post-mortem, the writer in expounding on the persistence of the difficulties posed by the management of post-mortem digital data expounds on the various hypotheses that may be somewhat complex for the heirs to the person designated to intervene in the management of the deceased data.¹¹⁵

¹¹⁴ *Bristok and Wet Building Society v Mothew (1998)* United Kingdom Court of appeal.

¹¹⁵ Candice B, 'Predict your digital death. The fate of digital data post mortem' *revenue des droit*, 2013 ,40 <https://revuedlf.com/> on 17 November 2023.

The first scenario given assumes that the deceased left general or specific instructions on how the digital assets should be managed but the question remaining is how to enforce them. The procedures to be followed in this case may be complex to implement or even sometimes unknown to the executors.¹¹⁶The second scenario assumes that the deceased did not leave any instructions so the heirs can act even though the deceased might not wanted them to. The lack of unity and centralization in the digital realm makes it difficult for executors to efficiently manage and control the digital footprint left behind by the deceased.¹¹⁷

The absence of a well-defined regulatory framework regarding the handling of digital assets poses more challenges than resolutions. A comprehensive framework should provide clarity on both procedural and substantive aspects.

CONCLUSION

The purpose of this chapter was to expound on the terms of service provided to the end users and how data comes into play when digital assets are under question. The chapter entailed a case study and scenario analysis on the complications that may be caused by the lack of a clear regulatory framework on digital assets inheritance. Under the terms of service, the aim was to establish the legal threshold to be met by the service providers in the formulation of terms of service and whether the terms of service are considerate of the transmission of the digital asset(s) after the death of the owner. The chapter concludes that the terms of service clause should be treated as a contract clause and mutuality is key in the execution of the contract. Further, the service provider is under a fiduciary duty to act in the best interest of the owner.

To tackle the issue of data protection and to clarify the hypothesis underlying the lack of a clear

¹¹⁶ <https://revuedlf.com/> on 17 November 2023.

¹¹⁷ <https://revuedlf.com/> on 17 November 2023.

regulatory framework, if the owner of the assets hasn't provided clear instructions on how he or she would like his or her digital assets to be managed, a lawful consent is required to be obtained in the court for the digital assets to be transmitted to the beneficiary.



CHAPTER FOUR

BALANCING DIGITAL LEGACIES: A CROSSROADS OF LAWS - USA VS KENYA

INTRODUCTION

In the preceding chapters, the main issues being addressed revolve around the position of end users when it comes to the terms and conditions of digital assets inheritance, privacy rights, and the availability of laws regarding digital assets inheritance. In coming up with the Revised Fiduciary Access to Digital Assets for the United States of America, the Uniform Law Commission considered the same issues many American citizens faced regarding digital assets and their inheritance.

In this chapter, there will be a comparative analysis of the applicable laws on digital assets inheritance in the United States to determine whether the current laws on digital assets inheritance in the United States are sufficient to come up with comprehensive laws on digital inheritance in Kenya. This chapter aims to rely on an established law on digital assets inheritance in making proposals on the key provisions within new legislation addressing digital assets inheritance.

In the national conference of commissioners on uniform state laws, it was clear that with the advancement of technology, the terms of service that govern the relationship between the companies that store the assets on their servers, the “custodians”, and the end users who are the owners of the stored transmission there have been problems when internet users die or otherwise lose the ability to manage their digital assets.¹¹⁸ In coming up with the Revised Fiduciary Access to Digital Assets, the commission paid keen attention to privacy and data protection of Stored

¹¹⁸[Fiduciary Access to Digital Assets Act - Uniform Law Commission \(uniformlaws.org\)](https://www.uniformlaws.org/) on 10 January 2024.

Communications and in-hand access to contents of Stored Communications, the contents of terms of service and its hindrance to the process of inheritance of digital assets and the availability of uniform applicable laws on digital assets inheritance.

PRIVACY AND DATA PROTECTION OF STORED COMMUNICATIONS AND ACCESS TO CONTENTS OF STORED COMMUNICATIONS.

In the United States of America, congress passed the SCA in 1986 as part of the Electronic Commerce Privacy Act to deal with the impact of Internet communications on privacy protection.¹¹⁹ Under the act, it is provided that the electronic communications service may not knowingly divulge to any person or entity the contents of a communication that is carried or maintained by that service. Notably, the Act provides that a provider may disclose content information with the lawful consent of the originator or the addressee to the intended recipient of such communication. Due to varied interpretations of these provisions, there has been a tendency to automatically authorize fiduciaries to handle the digital assets of the owner in the event of their death or incapacity. This raised concerns about privacy and confidentiality of information related to digital assets. The main question that has been raised is whether the fiduciary has clear legal authority to access the computer or digital assets of the decedent.¹²⁰

In addressing the concerns on privacy, the RUFADAA provisions entail lawful consent, the three tier priority systems for devolution of digital assets, the catalog of electronic communications Vis a Vis the contents of electronic communications, and the rights and duties of both parties.

1. LAWFUL CONSENT

The Uniform Law Commission approved the original Uniform Fiduciary Access to Digital Asset Act (UFADAA) in 2014.¹²¹ One of the key components of UFADAA was that fiduciaries were

¹¹⁹Legal information institute, 'new uniform digital asset law estate planning and administration in information age' *rpte-journal*, 2017, 52- [18 U.S. Code § 2701 - Unlawful access to stored communications](#) on 11 January 2024.

¹²⁰Michael D, 'The new uniform digital assets Law: estate planning and administration in the information Age' *American bar*, 2015, 56- [The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age \(americanbar.org\)](#) on 11 January 2024.

¹²¹Uniform Fiduciary Access to Digital Asset Act (UFADAA), 2014. - <http://www.uniformlawcommission.org/Committee.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets>, [hereinafter *Original UFADAA*]. On 12 January 2024.

legally imputed with lawful authority to administer digital assets in the same manner as any other assets.¹²² The provision stipulated that the fiduciary for the applicable electronic law the lawful consent of the account holder to have the custodian devolve the contents of electronic communications to the fiduciary.

This received immense opposition from the lobby groups and online providers who claimed that the act could not create a legal presumption of lawful consent with assertions that the Stored Communication Act had preempted the act through the general provision giving the SCA power to or not to divulge the contents of digital assets.

In tackling these issues, RUFADAA places significant importance on determining whether the deceased or incapacitated user explicitly granted consent for disclosing the content of their digital assets, either through an online tool or a clear authorization in the user's estate planning documents or power of attorney.¹²³ This implies that priority is primarily given to the user's explicit consent or lawful consent obtained through a clear grant of authority by the user or the power of attorney rather than direct imposition to the fiduciary as a right.

2. TOP-THREE TIER PRIORITY

Section 4 of the Revised Uniform Fiduciary Access to Digital Assets (RUFADAA) establishes the three-tier priority system.¹²⁴ RUFADAA has developed this system for determining a user's intent concerning any digital asset. First, through an online tool, the user may direct the custodian to disclose the content of the digital asset. This directly gives priority express consent of the user of the digital asset to do as they wish in regards to the devolution of their assets to a third party.

Second, if an online tool is not utilized, then the user's directions in a will, trust, power of attorney, or "other record" will control whether the content of a digital asset may be disclosed to a fiduciary.¹²⁵ The concept of lawful consent is visible in this provision.

¹²²Section 3, *Uniform Fiduciary Access to Digital Asset Act* (2015).

¹²³Section 3, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

¹²⁴Section 4, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

¹²⁵Section 4(a), *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

Finally, if the user does not give any directions at all, then the terms of service controlling the digital asset will govern the rights of the fiduciary. Through these provisions, when the end user dictates what happens to his or her digital assets, their privacy is protected. The provision also creates a balance that is inclusive of the terms of service but with the criteria, it only applies to the lack of first and second provisions.

3. FIDUCIARY ACCESS TO DIGITAL ASSETS

The revised act distinguishes between catalogs of electronic communications Vis the Vis content of electronic communications. The content of electronic communications includes the subject line and body of a user's email messages, text messages, and other messages between private parties. This is in hand a body of an electronic message that is not readily accessible to the public i.e., Person P uses a Twitter account to send a message. If the tweet is sent only to other people who have been granted access to P's tweets, then the tweet falls under this category of communications but if the tweet is completely public with no access restrictions, then it doesn't fall under the category.

A catalog means each person with whom a user has had electronic communications including a list of communications showing the addresses of the sender and recipient, and the date and time the message was sent.¹²⁶ Generally, a fiduciary will have access to a catalog of the user information but not the content unless the user consents to the disclosure of it. Under the Act, the fiduciary may never access the content of electronic communications without the user's consent.

KENYAN CONTEXT

In Kenya, the challenges that keep arising on digital assets inheritance are due to a lack of specific laws that provide rules and regulations to govern the process. I am of the view that the data protection laws should be amended to provide for lawful consent that is to be granted by the court through the power of the attorney or through the formal legal procedures which enable the fiduciary to have access to digital assets upon application.

¹²⁶Section 2(4), *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

Further, in its definition, the Kenyan Act on Digital Assets should set a distinction between the materials that could be accessed by the fiduciary or the administrator as provided by the American Act i.e., catalog for communication from the materials that could only be accessed either through express consent from the owner or lawful consent through the power of the attorney. This could solve the potential breach of privacy if any other person accesses the information after the end user's death or incapacity by being an administrator or fiduciary.

Further, the Kenyan Act should refer to the RUFADAA in coming up with a list of priorities in descending order that enables the fiduciary to access digital assets right from express consent from the owner to the applicability of terms of service of the service provider. The provision should take into account the priorities given to the owner of the assets who is the end user to give directions on how they want their digital assets to be distributed upon their death before considering de facto control that the terms and conditions of the service provider to be used as a guide.

TERMS OF SERVICE AND ITS HINDRANCE TO THE PROCESS OF INHERITANCE OF DIGITAL ASSETS

From the case analysis and literature review in the previous chapters, one of the main hindrances to digital asset inheritance is the terms of service provided by digital service providers. In regards to the terms of service, the question raised was whether the fiduciary's access to digital assets violates the terms and conditions of a service provider.

This was addressed in the enactment of the RUFADAA. Section 5 of that act provides that if the fiduciary obtains access to a digital asset, then the TOSA continues to apply to the fiduciary in the same manner as the original user.¹²⁷ Further, the section provides that the custodian is not required to permit with fiduciary to assume the rights under the Terms of Service if the custodian can comply with section 6.¹²⁸ Section 6 of the act provides the procedure by which the custodian may comply with RUFADAA'S disclosure principles. The section stipulates that the custodian is under

¹²⁷Section 5, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

¹²⁸Section 6, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

sole discretion to grant the fiduciary either full or partial access or seek guidance from the court if the custodian feels the fiduciary would impose an undue burden on them.¹²⁹

Further, section 6 introduces a deviation from section 5 of the act, where section 5 generally grants the fiduciary access to digital assets. The first part of section 6 gives the custodian the power to grant the fiduciary full access to partial access that is sufficient to perform the task required. The other part grants the custodian the discretion to withhold information if its disclosure would pose an undue burden, allowing them to seek a court order for disclosure.

Section Seven gives the procedure under which the fiduciary may access digital assets from online providers.¹³⁰ The right to access digital assets in this instance is not absolute since the custodian may request additional information that they deem relevant before granting them access.

In comparison, the sections mentioned earlier are unique since they abolish absolute powers that the custodian may have from the terms of service provisions by establishing the procedure under which the custodian may take control in restricting the fiduciary from accessing the contents of digital assets. The sections in hand create a balance between the custodian who is the internet service provider and the fiduciary or the personal representative who ought to access the digital assets upon the death of the end user as part of their right to inheritance.

KENYAN CONTEXT

Kenya should consider the balancing act that ought to be formulated between the internet service providers and the end user under the terms of service. Further, the act should provide clear rules that guide the internet service providers in enforcing their terms and conditions to the end users. This is important to facilitate the rule of succession to be executed as far as digital assets are concerned. Priority should be given to the end users to decide how they want their digital assets to be distributed. Further, the internet providers should provide guidelines on how the end users should transfer digital assets through online tools or legally through the power of attorney.

There should be specifications on what is to be accessed without permission and what ought to be accessed either by the permission of the end user, internet service provider or by lawful means.

¹²⁹Section 6, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

¹³⁰Section 7, *Revised Uniform Fiduciary Access to Digital Asset Act* (2015).

The distinction between the catalog of communication and the contents of electronic communication.

WHY SPECIFIC LAWS ON DIGITAL ASSETS

The need for similar laws to the Revised Fiduciary Access to Digital Assets is informed by the concept of digital assets as a unique set of property. The new laws tend to address privacy matters which is a right enshrined in a constitution while granting access to digital assets enabling the execution of succession rules.

As stated in the previous chapters, digital assets cannot be placed under the normal laws of succession due to their uniqueness. The conflicts have to arise in two scenarios: Firstly, granting the fiduciary or administrator rights to access digital assets upon the death of the owner as they do under the laws of succession creates a conflict with the laws on privacy. Secondly, without rules and regulations on digital assets inheritance, most internet service providers tend to explore the end users with terms and conditions that are ambiguous and give them immense power to decide on how the digital assets may be transmitted.

With the laws on digital assets inheritance, there is a balance created between the internet service providers and the end users on how digital assets are to be handled upon the end users' demise with power granted to the end user to decide what they want to do with their assets.

LIMITATION OF THIS STUDY

The rules that are provided under the RUFADAA apply to both the end users and internet service providers who in the majority are situated in the implementing states. In Kenya, most end users agree with internet providers who have no parent or subsidiary company situated in the region.

This makes it difficult for the rules formulated to be followed due to the lack of a unified set of rules and regulations that ought to be followed by these international internet providers.

By this, it is also clearly evident that when the rules are broken, the legal procedure to be taken could be quite lengthy and time-consuming due to the lack of physical presence of the service providers. This may result in financial losses and even loss of the digital asset before an international court makes a ruling.



CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

In this thesis, the overarching objective was to determine whether there can be formulating new laws that cover digital assets inheritance. In my research, it has been evident that with the unique nature of these assets, it is crucial for separate laws that details and dictates how they can be transmitted upon the death of the owner. From my research, the following are my recommendations akin to the enactment of the new laws covering the inheritance of such assets.

1. DIGITAL ASSETS INHERITANCE LAWS IN KENYA

Categorization of digital assets as a unique set of properties

The current legal framework in Kenya lacks provisions recognizing digital assets as a distinct form of property. To rectify this, it's imperative to amend the property laws, acknowledging digital assets' unique characteristics. Drawing from the precedent set by the Provincial Bank v Ainsworth case, we propose incorporating criteria that aptly categorize digital assets within the realm of property law.

This entails establishing a third category specifically tailored for digital assets, distinct from traditional forms like choses in action and choses in possession. By doing so, we can provide a clear and comprehensive definition of digital assets as property, aligning with their distinct nature. To inform this categorization, it's prudent to refer to resources such as the Uniform Law Commission's guidelines on data, which offer a structured approach to defining this emerging category.

Digital Inheritance Laws in Kenya

The existing laws governing inheritance in Kenya are not sufficient to handle the complexities of digital assets. Unlike tangible properties, digital assets pose unique challenges in transmission upon the owner's demise. Therefore, it's imperative to develop separate and specialized laws specifically addressing the inheritance of digital assets.

These laws should outline the procedures and protocols necessary for the smooth transfer of digital assets to beneficiaries upon the owner's passing. By establishing clear guidelines tailored to the digital landscape, we can ensure the seamless succession of digital assets and safeguard the interests of both owners and beneficiaries.

PRIVACY AND DATA PROTECTION

On the subject of privacy and data protection, lawful consent has been a key concept in my research. I recommend that the Data Protection Act (2023) be amended to include a provision on lawful consent regarding access to digital assets. This will enhance privacy since digital assets can only be accessed through formal channels if the owner of the assets doesn't leave instructions on how the assets could be accessed. Further, this will ensure that digital assets are transmitted to the beneficiaries upon the death of the owner.

Further, the Data Protection Act on the subject matter should stipulate the instances in which lawful consent could be executed. I recommend that the legislators in amending should refer to the Revised Uniform Fiduciary Access to Digital Assets in clearly distinguishing lawful consent that can be gotten through written will where the end user who is the owner instructs who to access the Digital Asset or the lawful consent that is by power of attorney through the courts.

Additionally, in signing in for the terms and conditions of digital assets, I recommend that the act require the internet service providers to have an express provision requiring the end users to directly and clearly distinguish between the assets that ought to be transmitted to the beneficiaries upon his or her death from the assets that should be permanently deleted upon their demise.

2. THE TERMS OF SERVICE BY INTERNET SERVICE PROVIDERS

With varied terms and conditions that apply to digital assets, it is my proposal that legislators come up with a provision under the Digital Assets Inheritance Act that expressly provides for the rights and duties of the internet service providers, the fiduciary or personal representative, and the beneficiaries of the digital assets. The act in consideration of the subject matter should be drafted

with special attention to the owner of the asset, the internet service providers, fiduciaries, and beneficiaries.

For the owner of the assets, I recommend that in drafting the act, the legislator ought to give the owner of the property the right to decide on how these digital assets should be distributed upon his or her death. Without such express provision, there should be steps to be followed for a fiduciary or a personal representative to access digital assets without violating the terms and conditions provided by the internet service provider. This will give the owner of the assets the right to own a transfer the assets as part of his or her property.

For the Internet service providers, I recommend under the role of the Internet service provider, the recommended act should clearly and expressly state the scope and the powers of Internet service providers in digital assets which will enable them to guard the privacy of the deceased while enforcing the rights of the decedent s to access such properties upon the death of the owner without express provision. I recommend that the drafter refer to the Revised Uniform Fiduciary Access to Digital Assets on the provisions that the internet service providers have the power to grant full or partial access to the digital assets upon the death, any disagreement between the service provider and the fiduciary or the personal representative should be channeled to court to make a decision rather than leaving it for the service provider to make a decision which may result to denial to grant access which ought to be granted

For the fiduciary or the personal representative, the act should clearly state which forms of digital assets are to be accessed by the fiduciary or personal representative upon the death of the owner freely and which forms of digital assets should not be accessed without the express permission of the owner or lawful consent that is derived from the court. I recommend the legislative arm come up with a draft to refer to the Revised Uniform Fiduciary Access to Digital Assets distinction between a catalog of communication and contents of communication.

Further, upon grant of access to the contents of communications either by the owner through express intent or lawful consent through the power of the attorney, I recommend that the fiduciary should be granted full access to the digital asset as the owner was for the transmission process.

In addition, the drafted act should clearly distinguish between the rights and obligations of the owner of the assets, the internet service providers, the fiduciary, or the personal representative of the deceased estate in matters of inheritance of such assets.

3. UNIFIED LAWS ON DIGITAL ASSETS INHERITANCE

The legislator should also have a keen eye on the international stance on digital assets and their inheritance due to the cross-border transactions that frequently take place in its formation and expansion.

CONCLUSION

In my thesis, I have been able to access the uniqueness of digital assets as a type of property, and the rights they hold, and further examine whether digital assets should be separated from traditional assets hence formulation of new laws encompassing digital inheritance. Further, I have investigated the legal threshold to be met by the service providers in the formulation of terms of service and whether the terms of service are considerate of the transmission of the digital asset(s) after the death of the owner. Moreover, I've put forth a recommendation for amending the Data Protection Act to address situations where the asset owner passes away without granting permission for access to personal data stored in electronic records. Lastly, I've conducted a comparative analysis of the legal framework governing digital asset inheritance in the United States, to inform the development of comprehensive digital inheritance laws in Kenya

