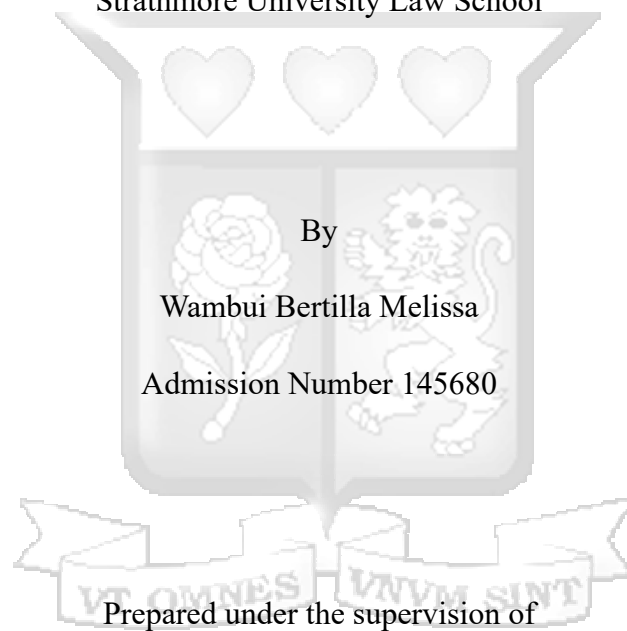


Navigating digital legacies: A case for a legal framework governing the inheritance of social digital assets in Kenya

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
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Prepared under the supervision of
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Declaration

I, WAMBUI BERTILLA MELISSA, 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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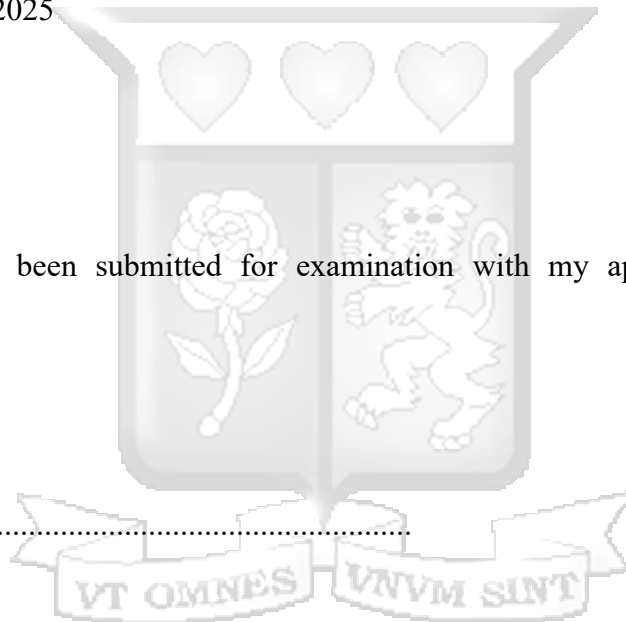
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Date: 15th February 2025



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List of Legal Instruments

Computer Fraud and Abuse Act 1030 18 USC (1986)

Constitution of Kenya (2010)

Constitution of the United States (1789)

Data Protection Act (Act No 24 of 2019)

Finance Act (Act No 4 of 2023)

General Data Protection Regulation of the European Union (GDPR)

Income Tax Act, Cap 470

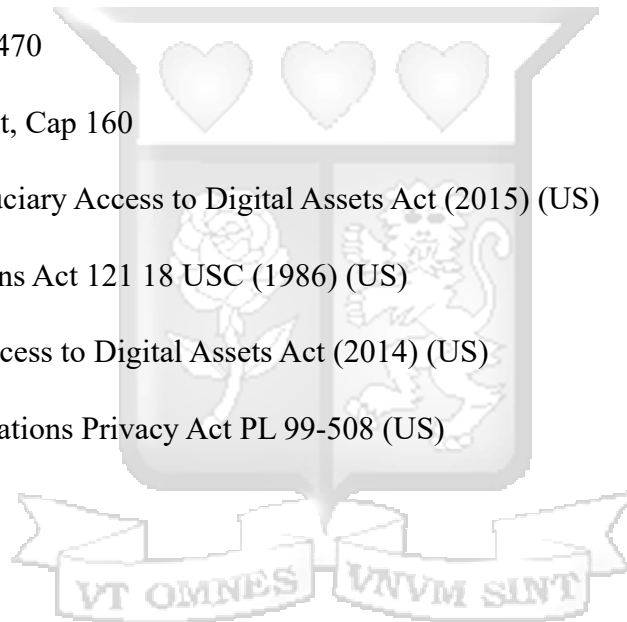
Law of Succession Act, Cap 160

Revised Uniform Fiduciary Access to Digital Assets Act (2015) (US)

Stored Communications Act 121 18 USC (1986) (US)

Uniform Fiduciary Access to Digital Assets Act (2014) (US)

Electronic Communications Privacy Act PL 99-508 (US)



List of Cases

Ajemain v Yahoo (2017), Massachusetts Supreme Judicial Court

Fairstar Heavy Transport NV v Adkins & Another (2013), England and Wales Court of Appeal

Case no. III ZR 183/17 (2018), German Federal Supreme Court

Re Ellsworth (2005), Michigan Probate Court

Tulip Trading Limited v Wladimir Jasper van der Laan (2023), The United Kingdom Court of Appeal



List of Abbreviations

| | |
|---------|--|
| CFAA | Computer Fraud and Abuse Act |
| EU | European Union |
| GDPR | General Data Protection Regulation |
| ICOs | Initial coin offerings |
| NFT | Non-fungible token |
| RUFADAA | Revised Uniform Fiduciary Access to Digital Assets Act |
| SCA | Stored Communications Act |
| UFADAA | Uniform Fiduciary Access to Digital Assets Act |
| US | United States of America |
| UK | United Kingdom |
| LLB | Bachelor of Laws |
| ODPC | Office of the Data Protection Commissioner |
| ECPA | Electronic Communications Privacy Act |
| ULC | Uniform Law Commission |
| TOSA | Terms of Service Agreement |

Abstract

The digital age has redefined the concept of property, with social media accounts emerging as a significant form of digital assets. However, Kenyan succession law does not provide a clear legal framework for their inheritance, creating legal uncertainty for families and fiduciaries. This study aims to explore the legal complexities of social digital asset inheritance in Kenya, assess the gaps in the existing legal framework, and propose solutions by drawing insights from the US legal framework, particularly the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).

The study is guided by the personhood theory of property, which argues that social digital assets are an extension of an individual's identity and should be inheritable. Using a doctrinal legal research approach, the study examines Kenyan succession and data protection laws, the impact of restrictive terms of service agreements, and US legislative developments. It finds that the lack of a legal framework in Kenya results in denied access to heirs, privacy concerns, and conflicts with social media service providers.

The study recommends the enactment of a comprehensive legal framework that recognises social digital assets as property, integrates user consent mechanisms, and ensures coherence with data protection laws. Amendments to the Data Protection Act 2019 are proposed to balance fiduciary access and posthumous privacy rights. Public awareness on digital estate planning is also encouraged. By adopting these measures, Kenya can establish a clear and fair legal framework that comprehensively provides for the inheritance of social digital assets.

Keywords: social digital assets, succession law, fiduciaries, terms of service agreements, social media service providers, posthumous privacy rights.

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CHAPTER 1

INTRODUCTION

1.1. Background

Technological innovations and widespread internet access has seen the emergence of a new lifestyle: the digital lifestyle, which has influenced the digitisation of nearly all aspects of life; business, wealth, and even our social lives.¹ This evolution has created a series of unprecedented legal challenges, among them being the regulation of digital assets, a territory that Kenyan law is still in the process of charting. Digital assets are broadly defined as “intangible information goods associated with the online or digital world”.² They include social media profiles, emails, passwords to various accounts associated with provisions of digital goods and services (e.g. Amazon, eBay), domain names, cryptocurrencies, and non-fungible tokens.³

In a report drafted by the Family Division of the High Court of Kenya in 2018, the Judiciary recognised inheritance of digital assets as an important emerging issue in the inheritance practice in Kenya.⁴ There is no law addressing this matter, and this legislative gap raises questions about the scope, management, access, transfer, and disposal of digital assets.⁵ This lack of a legal framework may lead to the potential loss of a person’s digital estate. The Court was not specific about the category of digital assets that the report was alluding to. The term “digital assets” in this case can thus be interpreted broadly to include both social and financial digital assets.

The concerns of the court are justified because at the start of 2024, the internet penetration in Kenya stood at 40.8 percent of the population, which equated to 22.71 million internet users.⁶ Out of that number, 13.05 million people equating to 23.5 percent of the total population were

¹ Hopkins J, 'Afterlife in the cloud: Managing a digital estate' 209 (5) *University of California Law Science and Technology Journal*, 2013, 210.

² Harbinja E and Edwards L., 'What happens to my Facebook profile when I die?: Legal issues around transmission of digital assets on death' CREATE, CREATE Working Paper Number 2013/5, 1.

³ Harbinja E and Edwards L, 'What happens to my Facebook profile when I die?' 1.

⁴ Family Division of the High Court, *Simplified resource tool on inheritance and related family law practice in Kenya* 14 June 2018, 32.

⁵ Family Division of the High Court, *Simplified resource tool on inheritance and related family law practice in Kenya* 14 June 2018, 32.

⁶ Kemp S 'Digital 2024: Kenya' Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 August 2024.

social media users.⁷ That means that 57.5 percent of internet users have social media accounts. As for financial digital assets such as cryptocurrencies, according to a report from the United Nations, 4.25 million people in Kenya, equating to 8.5% of the population, own cryptocurrencies.⁸ Despite financial digital assets being less popular than financial digital assets, Kenyan lawmakers have made strides towards making laws that to some extent, address the former while leaving out the latter. An example is the introduction of the digital asset tax.

There has been a recent attempt by the Finance Act 2023 to provide a definition, albeit limited, of digital assets for purposes of the digital asset tax.⁹ The defined scope of digital assets is limited because it focuses on digital assets of a financial nature and makes no reference to other kinds of digital assets such as social media accounts. The Finance Act 2023 defines digital assets as “anything of value that is not tangible, and cryptocurrencies, token code, number held in digital form and generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value exchanged with consideration transferred, stored or exchanged electronically; and a non-fungible token or any other token of similar nature, by whatever name called”.¹⁰ The tax was introduced so as to expand Kenya’s tax base given the sharp growth of the digital assets economy.¹¹

Owing to this gap, the main focus of this research is digital assets in the social space, otherwise referred to as social digital assets. In the social space, digital assets refer to various forms of digital content and accounts that individuals create, own, or manage on online platforms. This study aims to fill the gap surrounding the inheritance of social media accounts and the user-generated content therein.

One of the factors that has contributed to the research problem at hand is the complexity introduced by terms of service agreements of social media companies, who are also the custodians of the social digital assets. Access to social digital accounts is governed by terms of service agreements rather than traditional estate laws.¹² These agreements often times contain rules that restrict account access after the account owner’s death. The social media service

⁷ Kemp S ‘Digital 2024: Kenya’ Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 August 2024.

⁸ Team Ripple, ‘5 Digital asset trends in Africa’ 8 July 2024 <https://ripple.com/insights/5-digital-asset-trends-in-africa/> on 28 August 2024.

⁹ Section 10, *Finance Act* (No 4 of 2023).

¹⁰ Section 12F, *Income Tax Act* (Cap. 470).

¹¹ Ambani B, ‘Tax pain as Kenyans to pay 3 percent on sale of digital assets’ Nation Media Group, 1 August 2023 <https://nation.africa/kenya/business/tax-pain-as-kenyans-to-pay-3pc-on-sale-of-digital-assets-4353210> on 1 July 2024.

¹² Hopkins J, ‘Afterlife in the cloud: Managing a digital estate’, 224.

providers are able to unilaterally decide what happens to a deceased's digital assets to the detriment of the heirs, leading to loss of valuable digital possessions. For example, Yahoo! in their terms of service restrict the transferability of data upon the death of a user. This means that one cannot access the data of a deceased Yahoo! user regardless of their relationship to them. The company states that this is their way of protecting the privacy and safety of the data of the deceased. In response, some scholars posit that such restrictive clauses should be void as a matter of public policy because they undermine the fundamental principles of property ownership and testamentary freedom.¹³ They contend that persons should have the same control over all their digital assets as they would with their physical assets and properties.¹⁴

Facebook, on the other hand, has a less stringent approach. In the account ownership and control settings, Facebook allows users to choose between memorialisation with the appointment of a legacy contact, or deletion of their account in the event of their passing. If a user selects memorialisation, then they are required to select a legacy contact, who will manage the user's account upon their death. However, the legacy contact will neither be able to post as the deceased nor view the messages in their inbox. In the alternative, a user can request the permanent deletion of their Facebook account upon their demise. Where a user does not explicitly select either, the immediate family members or executors of the deceased's estate are allowed to request the deletion or memorialisation of the account.

As a matter of company policy, Facebook does not share the passwords to a deceased user's account. This was challenged in a case in Germany where Facebook denied parents access to their 15-year-old child's Facebook account, after she passed on due to being run over by a train in 2012. To the parents, it was unclear whether their child had died by suicide or if it was just an accident. Facebook's refusal was based upon privacy concerns of other users who may have been in communication with the child. The Federal Court of Justice ruled that one's online data should be treated in a way similar to private diaries or letters and thus can be inherited.¹⁵ This ruling demonstrated the delicate balance that courts have to strike between privacy of third parties, and the legitimate interests of heirs. Despite this case being from a foreign jurisdiction, it is still relevant to this study owing to the global nature of the social media service providers.

¹³ Banta N, 'Inherit the cloud: The role of private contracts in distributing or deleting digital assets at death' 83 *Fordham Law Review* 799, 2014, 5.

¹⁴ Banta N and Jacob B, 'Inherit the cloud' 6.

¹⁵ Kozłowska H, 'A German court ruled you can inherit Facebook content like a letter or a diary' Quartz, 12 July 2018 <https://qz.com/1327106/a-german-court-ruled-that-the-parents-of-a-teenager-who-died-tragically-could-inherit-her-facebook-content> on 1 July 2024.

Companies such as Yahoo! and Facebook operate globally, meaning that their terms of service apply in the same way to all of their users worldwide regardless of what country they come from. It is likely that if the same case arose in a jurisdiction that does not have digital asset inheritance laws, the legal dilemma would be similar.

Consequently, a concern raised by legal scholars is the lack of transparency regarding the terms and conditions governing social media accounts.¹⁶ These terms play a role in determining whether the user's social digital assets are inheritable or if they will revert to the control of the service provider. The terms of service are often presented in the form of clickwrap agreements, which require users to click a box indicating their acceptance of the terms and conditions before being given access to the service.¹⁷ Although they are legally enforceable, these clickwrap agreements or online contracts leave no room for negotiation on the part of the user, therefore the user cannot express their preferences regarding inheritance.¹⁸ This is exacerbated by the fact that the jargon used in the terms of service is too complex for users to understand, leaving many users unaware of the terms' implications on post-mortem control. It has been argued that in so doing, social media service providers' interests trump over users' testamentary freedom.¹⁹

Another issue is that social digital assets present unique challenges that render traditional estate planning impracticable, thereby placing an individual's privacy and estate at risk.²⁰ Use of a will for the disposal of social digital assets has been stated to be an improper and unsafe tool due to privacy concerns.²¹ Given that wills become public information, placing digital access information such as passwords in the will endangers the privacy and security of the assets.²² The use of a schedule in the will, for purposes of facilitating the management of the digital estate does not solve the problem because the executor could have access to sensitive information that they do not need.

From the above, it is evident that digitisation of assets and property challenges the existing traditional legal framework of estate planning. Expanding the current legal framework will give individuals the agency and freedom to dictate how their social digital assets may pass to their

¹⁶ Conway H and Grattan S, 'The 'New' new property: Dealing with digital assets on death' 9 *Modern Studies in Property Law* 1, 2017, 3.

¹⁷ Banta N and Jacob B, 'Inherit the cloud' 7.

¹⁸ Banta N and Jacob B, 'Inherit the cloud' 8.

¹⁹ Banta N and Jacob B, 'Inherit the cloud' 8.

²⁰ Roy M, 'Beyond the digital asset dilemma: Will online services revolutionize estate planning?', 24 *Quinnipiac Probate Law Journal* 376, 2011, 379.

²¹ Hopkins J, 'Afterlife in the cloud: Managing a digital estate', 230.

²² Carroll E, Romano J and Carter J, 'Helping clients reach their great digital beyond: Estate planning for electronic assets', 150 *Trustees and Estates*, 2011, 66.

heirs. Failure to legislate on this area would leave individuals vulnerable to the risk of unauthorised access of their accounts, post-mortem identity theft and loss of valuable digital possessions, among others. The families of the deceased may also be faced with prolonged legal battles with third parties and social media service providers, in an attempt to seek access to the digital property of their deceased's loved ones.²³

By drawing best practices from the digital asset inheritance framework of the US, this dissertation makes a case for a new legal framework in Kenya that caters solely for inheritance of social digital assets. The US jurisdiction is the most suitable for Kenya to draw lessons from because it is the only country in the world with a comprehensive legal approach to digital asset inheritance that includes social media accounts, which will be the key focus of this study.

1.2. Statement of the problem

The absence of a clear legal framework in Kenya governing the inheritance of digital assets in the social space presents a significant gap in the law of succession, raising complex issues around the management, distribution, and ownership of such digital estates. Despite the pervasiveness of social digital assets, Kenyan law remains silent on their treatment upon death, creating uncertainties for executors, beneficiaries, and social media service providers. This legal uncertainty poses challenges in ensuring that social digital assets are effectively integrated into estate planning and succession, potentially leading to disputes and the loss of valuable assets. Addressing this gap is essential to align the law with modern realities and protect the interests of all parties involved.

1.3. Research objectives

1. To assess whether social digital assets can be considered objects of property rights.
2. To demonstrate the need for laws relating to the inheritance of social digital assets in Kenya.
3. To assess the legal framework governing the inheritance of social digital assets in the US with a view of drawing lessons for the Kenyan jurisdiction.
4. To present findings and propose recommendations for a legal framework on inheritance of social digital assets in Kenya.

1.4. Research questions

1. Can social digital assets be considered objects of property rights?

²³ The Associated Press, 'Yahoo gives dead marine's family e-mail info' NBC News, 21 April 2005 <https://www.nbcnews.com/id/wbna7581686> on 10 July 2024.

2. What factors demonstrate the need for laws relating to the inheritance of social digital assets in Kenya?
3. What lessons can Kenya draw from the legal framework governing the inheritance of social digital assets in the US?
4. What findings and recommendations can be made for a legal framework for the inheritance of social digital assets in Kenya?

1.5. Hypothesis

The lack of a legal framework for social digital asset inheritance in Kenya leads to significant uncertainties and disputes, undermining the principles of justice, fairness, and equitable estate distribution. Establishing clear legal provisions will uphold these principles, ensuring that the social digital assets of every person are distributed according to their wishes and needs. It will also protect the rights of all stakeholders, namely the heirs, the deceased, and the social media service providers.

1.6. Justification of the study

Kenya's legal framework does not currently address the inheritance of digital assets in the social space. This lacuna in the law has made the management of social digital estates particularly challenging as there is no clear procedure that can be followed. Summarily, the current approaches in the area of succession law are inadequately equipped to deal with questions of digital assets in the social space. This study will benefit legislators, as it will help them understand why it is important to develop a legal framework for social digital assets. It will also benefit the growing number of social digital asset holders, raising awareness about the importance of planning for their social digital estates.

1.7. Theoretical framework

The personhood theory of property

The theory, as conceptualised by Georg Hegel and built upon by Margaret Radin, emphasises the intrinsic link between personal identity and property.²⁴ Hegel views property as an essential extension of the self, allowing individuals to externalise their will or personhood into an object in order to create a claim in property.²⁵ Radin expands on this, arguing that certain property, particularly that which is "personal" (such as a home or heirlooms), is integral to an individual's

²⁴ Kariuki F, Ouma S and Ng'etich R, *Property law*, Strathmore University Press, Nairobi, 2016, 38.

²⁵ Banta N, 'Property interests in digital assets: The rise of digital feudalism' 38 *Cardozo Law Review* 3, 2017, 1146.

sense of self and autonomy.²⁶ Both theorists suggest that property serves not merely as a commodity but as a vital aspect of human flourishing and personhood. Radin proceeds to make a distinction between personal property and fungible property, where she defines them as theoretical opposites. Personal property is closely intertwined with personhood because it forms “part of the way we constitute ourselves as continuing personal entities in the world”.²⁷ Such objects are irreplaceable and once lost, the owner is bound to experience immense emotional pain. They are of high sentimental value to the owner. Fungible property, on the other hand, is held for “purely instrumental reasons”, and can easily be replaced.²⁸ In summary, the personhood theory posits that property gives people the ability to demonstrate their individuality and to fully express themselves.

Scholars have argued that this theory of property justifies the existence of a property interest in personal digital assets that are of non-financial nature, such as social media and email accounts, and consequently, the right to devise them upon death.²⁹ These platforms are seen as an extension of ourselves into the digital realm, because we use them to express our personhood to our friends and the public at large.³⁰ They serve as a demonstration of “how we constitute ourselves as continuing personal entities in the world”.³¹ It is argued that self-development occurs when individuals write posts or upload pictures on their account.³² Natalie M. Banta is of the view that “if the contents of e-mail and social networking accounts are not devisable at death, family members lose an irreplaceable form of property that reveals more about the life and personhood of the deceased than any other form of tangible property”.³³

The personhood theory supports justifying e-mail and social networking accounts as devisable property because of the unique and intimate ties these accounts have with personal self-development and identity”.³⁴ This dissertation agrees with Natalia M. Banta’s position. These accounts often contain irreplaceable memories and insights that reflect who the individual was, making them invaluable to family members seeking to understand and remember their loved one. Denying the ability to inherit these accounts upon death would mean losing access to a significant part of a person's legacy, which is fundamentally tied to their self-development and

²⁶ Radin M, ‘Property and personhood’ 34 *Stanford Law Review* 5, 1982, 957.

²⁷ Radin M, ‘Property and personhood’ 949.

²⁸ Radin M, ‘Property and personhood’ 950.

²⁹ Banta N, ‘Property interests in digital assets: The rise of digital feudalism’ 1146.

³⁰ Banta N, ‘Property interests in digital assets: The rise of digital feudalism’ 1147.

³¹ Radin M, ‘Property and personhood’ 959.

³² Banta N, ‘Property interests in digital assets: The rise of digital feudalism’ 1148.

³³ Banta N, ‘Property interests in digital assets: The rise of digital feudalism’ 1148.

³⁴ Banta N, ‘Property interests in digital assets: The rise of digital feudalism’ 1148.

personal narrative. Recognising these accounts as devisable property respects the emotional and personal connections that individuals have with their digital lives.

1.8. Literature review

1.8.1 Introduction

The emergence of the concept of digital assets dates back to the 1990's, when the second stage of the digital revolution began.³⁵ Assets were once only considered to take up a physical form, for example livestock, land, buildings, cash, and machinery.³⁶ Technological developments saw the emergence of intellectual property, trade secrets, goodwill, patents, and copyrights, which are now considered intangible/non-physical assets.³⁷ The concept of inheritance of digital assets is therefore relatively new and Kenyan law makers are yet to legislate on this area, particularly on digital assets in the social space.

1.8.2 On whether digital assets can be considered objects of property rights

Natalie M. Banta in her paper, 'Property Interests in Digital Assets: The Rise of Digital Feudalism', examines the property interests inherent in digital assets, arguing they should be devisable despite contractual limitations.³⁸ She posits that while these assets seem like property, their transfer is often restricted by contracts through the terms of service agreements between the users and the social media companies. This creates a "digital feudalism" characterised by a concentration of power in the hands of social media companies.³⁹

To support her claim that social media accounts should be considered property, Banta analyses digital assets through the lens of labor, utilitarian, and personhood theories. She emphasises the rights to use, control, exclude, and transfer as key incidents of ownership that are often limited by terms of service agreements, denying an account holder the ability to decide what happens to their account after death.⁴⁰

Banta further argues that the incidents of ownership are key to defining property interests and that digital assets have enough of these incidents to justify the expectation that they are devisable upon death.⁴¹ She advocates that the law should allow users to devise their digital

³⁵ Konurbayeva, D, 'Importance of intangible assets in digitalization' 29 *Deutsche internationale Zeitschrift für zeitgenössische Wissenschaft* 18, 2022, 19.

³⁶ Alp T, Rohm C, Taipei Jr and Zhu J, 'A new asset type: Digital assets' 22 *Journal of International Technology and Information Management* 4, 2013, 113-114.

³⁷ Alp T, Rohm C, Taipei Jr and Zhu J, 'A new asset type: Digital assets', 114.

³⁸ Banta N, 'Property interests in digital assets' 1099.

³⁹ Banta N, 'Property interests in digital assets' 1099.

⁴⁰ Banta N, 'Property interests in digital assets' 1099.

⁴¹ Banta N, 'Property interests in digital assets' 1108.

media collections, just as they have historically devised their physical collections, and protect the emotional or sentimental value that digital assets may hold.⁴² However, Banta does not fully explore the practical difficulties of transferring digital assets given the variety of service providers and their terms of service.

In their working paper titled ‘ “What happens to my Facebook profile when I die?”: Legal Issues Around Transmission of Digital Assets on Death’, Lilian Edwards and Edina Harbinja investigate the legal complexities surrounding digital assets after death. They briefly highlight the tension between post-mortem privacy and the rights of heirs to access information about their deceased.⁴³ They state that some scholars have argued that privacy rights cease upon death, while others contend for the continued protection of the deceased’s personal data.⁴⁴

They also note the resultant conflict that arises between freedom of contract and consumer protection, noting the lack of an opportunity for users to renegotiate terms when entering into service agreements with social media companies.⁴⁵

On the question of whether digital assets can be considered property that can be transmitted upon death, they discuss the English case of *Fairstar Heavy Transport NV v Adkins & Another (2013)*.⁴⁶ The United Kingdom Court of Appeal made a distinction between physical containers and the information they carry, and rejected the idea of a proprietary right in the content of an email.⁴⁷ According to Harbinja and Edwards, this ruling creates problems for the transmission of emails on death since it suggests that neither senders nor recipients have property rights in email content. From that, it follows that heirs cannot request copies of emails from the mail host, that were sent and received by the deceased during their lifetime.⁴⁸

The authors, however, note that the legal position on digital assets in the US seems to differ from the UK. In the US case of *Re Ellsworth*, a court ordered a webmail provider to give the family of a deceased individual access to his emails.⁴⁹ This suggests a greater willingness in the US to recognise a property interest in digital assets, which contrasts with the English

⁴² Banta N, ‘Property interests in digital assets’ 1118.

⁴³ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 11.

⁴⁴ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 11.

⁴⁵ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 9.

⁴⁶ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 5.

⁴⁷ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 6.

⁴⁸ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 7.

⁴⁹ Harbinja E and Edwards L, ‘What happens to my Facebook profile when I die?’ 7.

position as shown in *Fairstar*. Aside from pushing for education and global harmonisation of digital asset inheritance laws, Harbinja and Edwards do not provide concrete legal solutions.

Kateryna Nekit in her article titled ‘Social Media Account as an Object of Virtual Property’, focuses on the concept of virtual property and the legal nature of social media accounts to determine if they can be considered objects of property rights. Nekit argues that the legal regulation of social media accounts involves contract law, intellectual property rights, data protection, privacy, and property rights.⁵⁰ She, therefore, suggests distinguishing between the legal regime of separate elements of the account and the legal regime of the account in general.⁵¹

To support her claim that social media accounts can constitute property, she looks at the works of Joshua Fairfield and Charles Blazer, who both posit that social digital assets share the same traits with physical property. Fairfield states that just like physical property, digital accounts are rivalrous, persistent and interconnected.⁵² Blazer supplements this list with two more traits, namely, secondary markets and value added by users.⁵³

Another justification Nekit puts forward for recognition of property rights in social media accounts is economic value and how courts have recognised that social media connections can amount to assets and business goodwill.⁵⁴ She also highlights that even if some social digital assets do not have objective monetary value, they may have emotional value and should be considered as property.⁵⁵

While, Nekit’s research acknowledges the various elements of a social media account and their different legal regimes, it falls short of clearly outlining how these various elements can be divided and transferred in practice, especially given service provider agreements and diverse international laws.

⁵⁰ Nekit K, ‘Social media account as an object of virtual property’ 14 *Masaryk University Journal of Law and Technology* 2, 2020, 213.

⁵¹ Nekit K, ‘Social media account as an object of virtual property’ 213.

⁵² Nekit K, ‘Social media account as an object of virtual property’ 203.

⁵³ Nekit K, ‘Social media account as an object of virtual property’ 203.

⁵⁴ Nekit K, ‘Social media account as an object of virtual property’ 216.

⁵⁵ Nekit K, ‘Social media account as an object of virtual property’ 222.

1.8.3 On factors demonstrating the need for laws relating to the inheritance of social digital assets in Kenya

Current academic literature revolves around the regulation of financial digital assets such as cryptocurrencies and Non Fungible Tokens (NFTs) in Kenya. There is also limited literature on the inheritance of digital assets.

Dennis Sifuna, in his LLB thesis titled 'Digital Legacy: Exploring The Inheritance of Digital Assets, Bridging the Legal Gap' argues that digital assets should be recognised as a distinct class of property termed as data objects.⁵⁶ To protect the privacy of the deceased, he proposed that the Kenyan Data Protection Act should be amended to incorporate the concept of lawful consent, which would grant fiduciaries access to the digital assets of the deceased for legitimate purposes.⁵⁷ Given the international nature of digital services, Sifuna recommends that Kenya should consider the complexities presented by cross-border enforcement, and therefore liaise with other countries across the world to develop a consistent legal framework for digital inheritance.⁵⁸ The research however falls short in that it uses the term 'digital asset' too broadly. It is not particular about the kind of digital asset for which inheritance laws should be made.

1.8.4 On the legal framework governing the inheritance of social digital assets in the US

David Horton in his article 'The Stored Communications Act and Digital Assets', primarily critiques the Stored Communications Act (SCA), a federal law in the US, and advocates for the Fiduciary Access to Digital Assets Act. Horton frames the problem around the difficulties fiduciaries face when attempting to access a deceased person's digital assets. He argues that the SCA, a 1986 law, is ill-equipped to deal with modern digital assets.

Horton explains that Section 2701 of the SCA that criminalises unauthorised access to electronic communications should not apply to fiduciaries because the term "authorisation" is narrow, and a will or trust that grants a fiduciary control over digital assets constitutes authorisation under this section.⁵⁹ Horton argues that because a fiduciary "steps into the decedent's shoes", they should have the authority to manage their online accounts.⁶⁰ He further

⁵⁶ Sifuna D, 'Digital legacy: Exploring the inheritance of digital assets, bridging the legal gap' Unpublished LLB Thesis. Strathmore University, Nairobi, 2023, 15.

⁵⁷ Sifuna D, 'Digital legacy: Exploring the inheritance of digital assets, bridging the legal gap' Unpublished LLB Thesis. Strathmore University, Nairobi, 2023, 55.

⁵⁸ Sifuna D, 'Digital legacy: Exploring the inheritance of digital assets, bridging the legal gap' Unpublished LLB Thesis. Strathmore University, Nairobi, 2023, 55.

⁵⁹ Horton D, 'The stored communications act and digital assets' 67 *Vanderbilt Law Review* 1697, 2014, 1731.

⁶⁰ Horton D, 'The stored communications act and digital assets' 1732.

explains that authorisation need not only come from the deceased, but also any legitimate conferral of rights such as a probate court order.⁶¹ Horton notes that even if Section 2701 does apply, it is limited because it governs access to a service provider's server and not an individual's personal device.⁶²

He finds Section 2702 of the SCA more challenging because it prohibits service providers from disclosing digital content without "lawful consent".⁶³ According to him, terms of service agreements have more weight under Section 2702, potentially overriding a deceased person's wishes.⁶⁴ Inheritance of digital assets is frequently governed by contracts between the account holder and service provider (service provider being the platform on which the digital assets are hosted).⁶⁵ The terms stipulated in the contract may sometimes conflict with traditional succession laws.⁶⁶ A significant issue that this presents is the potential for contractual provisions to severely restrict, or even worse off, prohibit the transfer of digital assets upon the owner's death.⁶⁷

He critiques the SCA for allowing terms of service agreements to override a will and for choosing the wrong default rule of presuming digital assets to be not inheritable.⁶⁸ Horton therefore supports the Fiduciary Access to Digital Assets Act because it makes digital assets presumptively inheritable by authorising fiduciaries under Section 2701 and providing "lawful consent" under Section 2702.⁶⁹ Despite noting that the SCA is outdated, Horton does not give practical recommendations on how it can be amended so as to better complement the Fiduciary Access to Digital Assets Act.

Michael Walker in 'The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age' provides a more practical analysis through his discussion of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). He describes the law as a compromise between the Uniform Law Commission of the US as a legislative body, and the custodians or social media companies.⁷⁰ Walker also recognises that RUFADAA allows a

⁶¹ Horton D, 'The stored communications act and digital assets' 1731.

⁶² Horton D, 'The stored communications act and digital assets' 1733.

⁶³ Horton D, 'The stored communications act and digital assets' 1730.

⁶⁴ Horton D, 'The stored communications act and digital assets' 1737.

⁶⁵ Conway H and Grattan S, 'The 'new' new property: Dealing with digital assets on death' 9 *Modern Studies in Property Law* 1, 2017, 2.

⁶⁶ Banta N, 'Inherit the cloud,' 3.

⁶⁷ Conway H and Grattan S, 'The 'new' new property' 10.

⁶⁸ Horton D, 'The stored communications act and digital assets' 1736.

⁶⁹ Horton D, 'The stored communications act and digital assets' 1737.

⁷⁰ Walker M, 'The new uniform digital assets law: Estate planning and administration in the information age' 1 *Real Property, Trust and Estate Law Journal* 52, 2017, 59.

user to expressly consent to the disclosure of their social digital assets by way of an online tool, or in their estate planning documents.⁷¹ In his estate planning recommendations, Walker emphasises the importance of obtaining "lawful consent" in estate planning documents, like wills, trusts and powers of attorney.⁷² His research offers a useful analysis of the primary laws that shaped the emergence of RUFADAA.

1.8.5 On proposed recommendations

A recurring recommendation given by scholars is the need of internationally harmonised digital inheritance rules.⁷³ Local legislations are stated to be unsuitable because jurisdictional clashes may occur when the laws of the deceased's domicile differ from those governing the terms of service.⁷⁴ International cooperation is posited to be key in establishing clear and consistent rules governing access, control, and transfer of digital assets upon death of the user. Banta proposes that legislative reforms should be made to address any legal uncertainties regarding digital asset inheritance.⁷⁵ The goal is to ensure the smooth and equitable distribution of digital assets while respecting the wishes of the deceased and the rights of beneficiaries.⁷⁶

1.8.6 Conclusion

This literature reviewed has highlighted the growing significance of digital assets in succession law and the legal uncertainties surrounding their inheritance. While scholars support the classification of social digital assets as property, restrictive terms of service agreements and privacy concerns create challenges for heirs. Laws from the US, particularly RUFADAA, offer a structured approach that balances fiduciary access with data protection. However, existing Kenyan literature primarily focuses on financial digital assets, leaving a gap in the regulation of social digital assets.

This research seeks to fill this gap by making a case for the inheritance of social digital assets in particular. It also examines social media penetration in Kenya to justify the need for a legal framework governing their succession. By addressing this emerging issue, the study aims to contribute to legislative reforms that ensure clarity, testamentary freedom, and the protection of social digital legacies.

⁷¹ Walker M, 'The new uniform digital assets law' 60.

⁷² Walker M, 'The new uniform digital assets law' 68.

⁷³ Conway H and Grattan S, 'The 'new' new property' 13.

⁷⁴ Banta N, 'Inherit the cloud,' 15.

⁷⁵ Banta N, 'Inherit the cloud,' 17.

⁷⁶ Beyer G and Cahn N, 'When you pass on, don't leave the passwords behind: Planning for digital assets' 26 (1) *Probate and Property*, 2012, 40.

1.9. Research methodology

This study utilises doctrinal legal research methodology, which encompasses primary and secondary sources of literature. The primary sources include Kenyan laws, as well as state and federal laws from the US jurisdiction. The secondary sources consist of literature in textbooks, journal articles, institutional reports, online resources, and theses written on the subject matter from both local and foreign universities.

1.10. Limitations

A notable limitation of this research is the limited number of resources touching on social digital asset inheritance, particularly those written by Kenyan legal scholars. More research is yet to be done, and legislators are yet to be sensitised about the urgency with which legislation on this matter is required.

Another limitation is the absence of Kenyan case law touching on succession of social digital assets. This issue is yet to be brought within the purview of the courts.

1.11. Chapter breakdown

Chapter 1: Introduction to the study: This is an introduction and foundation of the research. It contains the background, problem statement, research objectives and questions, as well as the hypothesis and preliminary literature review.

Chapter 2: An analysis of the characteristics of digital assets: This chapter will look into the characteristics of digital assets that make them qualified to be categorised as property.

Chapter 3: A demonstration of the need for a social digital asset inheritance framework: This chapter will look into the prevailing social media landscape in Kenya and illustrate why it is important to have inheritance laws for such digital assets.

Chapter 4: Analysis of the digital asset inheritance framework in the US: This chapter looks at what lessons Kenya can draw from the US laws governing inheritance of social digital assets.

Chapter 5: Findings, recommendations and conclusion: The final chapter will serve as a conclusion to the dissertation. It will also present findings and propose recommendations for a legal framework that Kenya can put in place to address inheritance of social digital assets.

CHAPTER 2

SOCIAL DIGITAL ASSETS AS OBJECTS OF PROPERTY

2.1 Introduction

Digital assets in the social space possess similar characteristics to traditional property: namely rivalrousness, persistence, interconnectivity, secondary markets, and user-added value, thereby justifying their legal protection and recognition.⁷⁷ This chapter aims to examine the characteristics that social media accounts have in common with property. This is important because whether social digital assets constitute property or not, will determine how they are recognised and treated in probate.⁷⁸

2.2 Characteristics of property

Social digital assets should be considered property in the traditional legal sense. Their popularity, coupled with gaps in their legislative regulation, bring about a series of practical issues including those of inheritance.⁷⁹ In the age of social media marketing and online “influencing”, it is important to categorise social media platforms as property, because not only do they act as a source of income for many people today, but they also are an extension of their personal lives and a representation of their personality.⁸⁰

Digital assets share three legally relevant characteristics in common with physical real-world property: rivalrousness, persistence, and interconnectivity.⁸¹ Charles Blazer has broadened this list to include two more attributes: secondary markets and value added by users.⁸² Nonetheless, he notes that these two traits are supplemental and their absence should not prevent the digital asset in question from being recognised as property.⁸³ Altogether, these traits form a framework that courts and law makers can use in identifying protectable property.⁸⁴

⁷⁷ Fairfield J, ‘Virtual property’ Maurer School of Law, Research Paper Number 35, 2005, 1056 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=807966# on 1 November 2024.

⁷⁸ Fairfield J, ‘Virtual property’ Maurer School of Law, Research Paper Number 35, 2005, 1056 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=807966# on 1 November 2024.

⁷⁹ Nekit K, ‘Social media account as an object of virtual property’ 202.

⁸⁰ Nekit K, ‘Social media account as an object of virtual property’ 202.

⁸¹ Fairfield J, ‘Virtual property’ Maurer School of Law, Research Paper Number 35, 2005, 1056 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=807966# on 1 November 2024.

⁸² Blazer C, ‘The five indicia of virtual property’ 5 *Pierce Law Review* 1, 2007, 147.

⁸³ Blazer C, ‘The five indicia of virtual property’ 147.

⁸⁴ Blazer C, ‘The five indicia of virtual property’ 143.

2.2.1 Rivalrousness

This element is the *sine qua non* of property rights.⁸⁵ Rivalrousness means that the owner of the property can exclude others from using it. It gives the owner the security and certainty of investing in their property without the fear of other people taking it.⁸⁶ This power to exclude others from using one's property also extends to the digital space. Fairfield uses the example of an email address, where if one person has a given email address, no one else can receive emails on that same address.⁸⁷ The same would extend to social media accounts. If one opens an account on Facebook, no one else can use that same account for their own purposes. The aspect of having a password to prohibit others from logging into the account can demonstrate rivalrousness.

2.2.2 Persistence

Physical property is persistent.⁸⁸ Taking the example of a building, it only needs to be constructed once, after which it continues to exist in the same state for years to come. It does not become diminished after each use.⁸⁹ Persistence protects one's property by ensuring that it lasts.⁹⁰ Similarly, the computer code that is behind social media accounts does not diminish every time it is used, and neither does it run on only a single device.⁹¹ For example, a Facebook account can be accessed on a laptop, desktop, or a smartphone. Additionally, when the account owner turns off the device, the information in the Facebook account does not cease to exist but persists on the Facebook servers.⁹²

2.2.3 Interconnectivity

Real world objects are also naturally interconnected in that two people in the same space experience the exact same objects.⁹³ Similarly, the code behind social media accounts is interconnected, in the sense that, even though one person is controlling the account, others may still experience it.⁹⁴ For example, even though the owner of a Facebook account has exclusive control over the account, other people can still interact with the account by sending friend

⁸⁵ Merrill T, 'Property and the right to exclude' 77 *Nebraska Law Review* 4, 1998, 730.

⁸⁶ Fairfield J, 'Virtual property' 1055.

⁸⁷ Fairfield J, 'Virtual property' 1054.

⁸⁸ Fairfield J, 'Virtual property' 1054.

⁸⁹ Fairfield J, 'Virtual property' 1054.

⁹⁰ Fairfield J, 'Virtual property' 1055.

⁹¹ Fairfield J, 'Virtual property' 1054.

⁹² Fairfield J, 'Virtual property' 1054.

⁹³ Fairfield J, 'Virtual property' 1054.

⁹⁴ Fairfield J, 'Virtual property' 1054.

requests, liking and commenting on the Facebook posts, and sending messages to the account owner's inbox.

2.2.4 Secondary Markets

Possible property interests could arise when users develop secondary markets to trade control and access to a remotely hosted digital asset, regardless of whether the service provider has sanctioned those trades.⁹⁵ A practical example would be the sale of social media accounts that have accumulated a high number of followers. People buy these accounts so as to gain markets for their businesses or build platforms for advertising other businesses to the followers. As a matter of public policy, where there exists a free market that cultivates value, courts have a duty to protect that value so long as there is no infringement of other substantive rights in the process.⁹⁶ A failure to protect this value would lead to destructive practices such as hacking.⁹⁷

2.2.5 Value Added by Users

Users may improve a social digital asset by customising it to reflect their creativity and using it consistently over time.⁹⁸ This characteristic should however be distinguished from the Lockean theory of property.⁹⁹ Contributing to the value of an intangible resource does not inherently grant the contributor a property interest in it—much like creating graffiti on a building does not grant the graffiti artist ownership of the building. Instead, when an intangible resource merits legal protection, it is often because the user has at some stage, enhanced its value.¹⁰⁰ In essence, individuals are inclined to invest effort and personalise property they perceive as exclusively their own. By acknowledging and fostering such behaviour, property law serves the broader public good. Therefore, the value added by a user indicates, rather than creates protectable property interests.¹⁰¹

2.3 The impact of property rights on digital asset inheritance

When establishing property rights in the social digital space, two kinds of legal relationships arise. The first one is the relationship between the owner of the social digital asset and other third parties. In this context, the owner's rights are absolute.¹⁰² Second is the legal relationship between the social digital asset owner and the service provider, whereby the scope of the

⁹⁵ Blazer C, 'The five indicia of virtual property' 146.

⁹⁶ Blazer C, 'The five indicia of virtual property' 146.

⁹⁷ Blazer C, 'The five indicia of virtual property' 147.

⁹⁸ Blazer C, 'The five indicia of virtual property' 148.

⁹⁹ Lastowka G and Hunter D, 'The laws of the virtual worlds' 92 *California Law Review* 1, 2004, 47.

¹⁰⁰ Blazer C, 'The five indicia of virtual property' 148.

¹⁰¹ Blazer C, 'The five indicia of virtual property' 147.

¹⁰² Nekt K, 'Social media account as an object of virtual property' 208.

owner's rights are limited by the terms of service of the social media service providers.¹⁰³ This study is concerned with the impact of the latter legal relationship.

Social media service providers are notorious for opposing legal recognition of property interests in social digital assets because they fear losing control over their products and services, as well as being sued by various dissatisfied users.¹⁰⁴ This explains why in a majority of lawsuits regarding inheritance of digital assets, the social media service providers decline giving access to the beneficiaries. To secure their own interests, the social media service providers usurp the property rights of the users by drafting restrictive terms of service agreements.¹⁰⁵ However, the social media service providers fail to acknowledge that the economic reality of property in social digital assets may take precedence over the formalities of the terms of service agreements. As evidenced in cases and legislation, courts and lawmakers respectively are taking this economic reality approach in making determinations and laws regarding digital asset inheritance.¹⁰⁶

Recognising social media accounts as objects of property rights has significant implications for inheritance, fundamentally changing how these digital assets are managed after death. By shifting the perspective from accounts being merely licensed to being treated as owned property, heirs can inherit full ownership rights, including control over content and potential monetisation opportunities. This clarity simplifies access for heirs, reducing reliance on platform-specific policies like memorialisation or account deletion, and ensures legal entitlement to manage and retrieve the account's contents. Moreover, recognising these accounts as inheritable assets underscores their dual nature, possessing both sentimental and economic value. For influencers, business accounts, or those with valuable content, the inclusion of these assets in the estate allows for equitable distribution among heirs, though it necessitates developing standard methods for valuation.

This recognition also emphasises the importance of proactive estate planning. Individuals should explicitly include social media accounts in wills, specifying the access credentials so as to allow seamless management of the account by the heirs.

¹⁰³ Nekit K, 'Social media account as an object of virtual property' 208.

¹⁰⁴ Blazer C, 'The five indicia of virtual property' 147.

¹⁰⁵ Blazer C, 'The five indicia of virtual property' 150.

¹⁰⁶ Blazer C, 'The five indicia of virtual property' 150.

2.4 Conclusion

In conclusion, the recognition of social media accounts as property has far-reaching implications on succession law. Their rivalrous, persistent, and interconnected nature, as well as their potential for secondary market value and user-added value, demonstrates that these digital assets should be treated with the same legal respect as traditional forms of property. This recognition would empower individuals to safeguard their digital legacies, enabling heirs to inherit and manage these valuable assets.



CHAPTER 3

DEMONSTRATING THE NEED FOR LAWS RELATING TO THE INHERITANCE OF SOCIAL DIGITAL ASSETS IN KENYA

3.1 Introduction

The digital era has taken the world by storm, and Kenya has not been left behind. Social digital assets, including social media accounts, have become integral to personal and commercial value creation in Kenya's digital economy.

While Kenya has made significant strides in data protection through the Data Protection Act 2019 (DPA 2019) and maintains traditional succession laws, neither framework adequately addresses the posthumous management of social digital assets. The intersection of personal data rights, platform policies, and inheritance laws creates complex legal challenges that affect individuals and the broader digital economy.

This chapter therefore makes a justification for social digital asset inheritance laws by looking at the prevailing internet and social media penetration in Kenya. The chapter also looks at the importance of personal data protection for deceased persons. The shortfalls of the Data Protection Act 2019 as regarding inheritance of users' social media data, and the impact of this legal vacuum will also be discussed.

3.2 Current status of social digital asset penetration in Kenya

In recent years, Kenya has experienced significant growth in digital adoption and social media usage, fundamentally transforming how citizens interact and conduct business. In the beginning of 2024, the internet penetration in Kenya was 40.8, equating to 22.71 million internet users.¹⁰⁷ Social media penetration has also shown remarkable growth, with 13.05 million social media users, totalling to 23.5 percent of the country's population.¹⁰⁸ This indicates that 57.5 percent of internet users are on social media. The majority of these users, approximately 84%, access the internet through mobile devices, highlighting the mobile-first nature of Kenya's digital landscape.¹⁰⁹

¹⁰⁷ International Telecommunication Union ICT Indicators Database 'Individuals using the internet (% of population) – Kenya' <https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=KE&view=chart> on 28 December 2024.

¹⁰⁸ Kemp S 'Digital 2024: Kenya' Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 December 2024.

¹⁰⁹ Kemp S 'Digital 2024: Kenya' Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 December 2024.

Additionally, Kenyans spend an average of 3 hours and 43 minutes daily on social media platforms.¹¹⁰ Platform preferences show WhatsApp leading with 93% adoption among internet users, followed by Facebook at 81%, Instagram at 52%, and an emerging strong presence of TikTok at 44%.¹¹¹

The business sector has particularly embraced social media, as it is reported that 67% of Kenyan businesses actively use social media for marketing purposes, while 45% conduct direct business transactions through these platforms.¹¹² The digital commerce value has reached approximately KES 150 billion annually, demonstrating the significant economic impact of digital assets.¹¹³

With a 20.7% annual growth in social media users and projections indicating that 51% of the population will be active on social media by 2025, the value and importance of digital assets continue to rise substantially.¹¹⁴

As for financial digital assets such as cryptocurrencies, according to a report from the United Nations, 4.25 million people in Kenya, equating to 8.5% of the population, own cryptocurrencies.¹¹⁵

Despite financial digital assets being less popular than social digital assets, Kenyan lawmakers have made strides towards making laws that to some extent, address the former while leaving out the latter. The substantial financial and social value embedded in social digital assets necessitates clear succession laws to protect both individual and business interests in the digital age.

3.4 The Data Protection Act 2019

The Data Protection Act 2019 was enacted to give effect to Article 31(c) and (d) of the Constitution of Kenya.¹¹⁶ It states that “Every person has the right to privacy, which includes

¹¹⁰ Kemp S ‘Digital 2024: Kenya’ Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 December 2024.

¹¹¹ Kemp S ‘Digital 2024: Kenya’ Datareportal, 23 February 2024 <https://datareportal.com/reports/digital-2024-kenya> on 28 December 2024.

¹¹² Social Media Lab Africa, *Kenya social media landscape report: Trends and emerging narratives*, 2020, 19.

¹¹³ Statista, ‘Digital Commerce – Kenya’ March 2024 <https://www.statista.com/outlook/dmo/fintech/digital-payments/digital-commerce/kenya> on 28 December 2024.

¹¹⁴ Statista, ‘Digital Commerce – Kenya’ March 2024 <https://www.statista.com/outlook/dmo/fintech/digital-payments/digital-commerce/kenya> on 28 December 2024.

¹¹⁵ Team Ripple, ‘5 Digital asset trends in Africa’ 8 July 2024 <https://ripple.com/insights/5-digital-asset-trends-in-africa/> on 28 December 2024.

¹¹⁶ Preamble, *Data Protection Act* (No 24 of 2019).

the right not to have... (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed”.¹¹⁷ Another reason why the Data Protection Act 2019 was enacted, was to protect Kenyans from unchecked data collection by companies. The Act gives data subjects the right to know how their personal data is being used, to access their personal data, and to object to the processing of their personal data.¹¹⁸ The Data Protection Act 2019 therefore established the Office of the Data Protection Commissioner (ODPC), which is tasked with investigating complaints and infringements of data subjects’ rights.¹¹⁹ The ODPC also oversees data processing operations, on its own motion or upon request by a data subject, to ensure that the processing of data is done in accordance with the Act.¹²⁰

The Data Protection Act 2019 focuses on protecting the data of natural persons.¹²¹ However, most people have an active digital presence, and their digital identity persists even after their biological death. Even though the Law of Succession Act recognises the concept of testamentary freedom, Kenyan courts are yet to determine whether personal data should automatically transfer to legal heirs or whether explicit consent for posthumous data management must be secured beforehand. The Data Protection Act 2019 makes no mention of issuing such consent; thus this area remains fraught with legal uncertainty. The Data Protection Act 2019 should complement the Law of Succession Act by allowing data subjects to set directives for the preservation, deletion, and disclosure of their personal data after death.¹²²

Similarly, the European General Data Protection Regulation (GDPR) focuses on protecting the data of natural persons or living data subjects. Recital 27 of the GDPR states “this Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons”.¹²³ Following this provision, several member states have established regulations for posthumous data protection. Some of these states include Estonia, Italy, France, Spain, and Denmark, to mention but a few.¹²⁴

¹¹⁷ Article 31(c) and (d), Constitution of Kenya (2010).

¹¹⁸ Section 26, *Data Protection Act* (No 24 of 2019).

¹¹⁹ Section 8(1)(f), *Data Protection Act* (No 24 of 2019).

¹²⁰ Section 8(1)(c), *Data Protection Act* (No 24 of 2019).

¹²¹ Section 2, *Data Protection Act* (No 24 of 2019).

¹²² Malgieri G, ‘R.I.P.: Rest in privacy or rest in (quasi-)property? personal data protection of deceased data subjects between theoretical scenarios and national solutions’ in Leenes R, Brakel R, Gurtwirth S and De Hert P (eds) *Data protection and privacy : the internet of bodies*, Bloomsbury Publishing, Oxford, 2018, 15.

¹²³ Recital 27, *General Data Protection Regulation* (2018).

¹²⁴ Malgieri G, ‘R.I.P.: Rest in privacy or rest in (quasi-)property?’ 12.

France has the most advanced form of data protection for deceased persons, and their framework is worth emulating.¹²⁵ Despite acknowledging that data protection rights terminate upon the death of a data subject, French data protection laws allow for those rights to be maintained temporarily for a period of time after the data subject's passing.¹²⁶ Their law lays heavy emphasis on specific consent, stating that mere approval of terms and conditions on social media platforms is not sufficient.¹²⁷ Where the directives issued by the data subject requires communication of data which also contains personal data relating to third parties, the communication must be in accordance with this Act.¹²⁸

All in all, the communication of one's personal data to their heirs should not only be in accordance with their wishes, but also with the law. The rights of third parties should also be protected to an extent, and a balance be struck between the interests of all the parties.

3.5 Conclusion

The rapid digital transformation in Kenya has significantly increased the value and prevalence of social digital assets, yet the legal framework remains ill-equipped to address their inheritance. Despite the existence of the Data Protection Act 2019 and the Law of Succession Act, gaps persist in regulating the posthumous management of digital identities and assets. This inadequacy leaves bereaved families, businesses, and the broader digital economy vulnerable to uncertainties and potential exploitation.

The analysis of social media penetration and digital commerce growth underscores the economic and personal importance of social digital assets. With more than half of internet users in Kenya active on social media, and businesses increasingly reliant on these platforms, the need for laws governing the inheritance of these assets becomes evident. The experiences of jurisdictions like France demonstrate the feasibility and importance of implementing legal provisions that balance the rights of deceased persons, their heirs, and third parties.

To protect the interests of all stakeholders, Kenya must consider adopting clear legal directives for managing social digital assets posthumously. Such laws should provide a framework for individuals to dictate the fate of their digital presence, ensure compliance with data protection principles, and promote equitable outcomes. By addressing these gaps, Kenya can not only

¹²⁵ Malgieri G, 'R.I.P.: Rest in privacy or rest in (quasi-)property?' 15.

¹²⁶ Malgieri G, 'R.I.P.: Rest in privacy or rest in (quasi-)property?' 15.

¹²⁷ Malgieri G, 'R.I.P.: Rest in privacy or rest in (quasi-)property?' 15.

¹²⁸ Malgieri G, 'R.I.P.: Rest in privacy or rest in (quasi-)property?' 15.

safeguard personal and economic interests but also position itself as a leader in the digital economy.



CHAPTER 4

DRAWING LESSONS FOR KENYA FROM THE US LEGAL FRAMEWORK FOR DIGITAL ASSET INHERITANCE

4.1 Introduction

The US adopts a multi-layered framework for digital asset inheritance, which consists of federal laws, a uniform state law, and individual estate planning practices. This chapter looks at the Revised Uniform Fiduciary Access to Digital Access Act (RUFADAA), the guiding legal framework for digital asset inheritance in the US. The United States provides a valuable case study due to its well-developed legal infrastructure, the widespread adoption of social digital assets, and the presence of a comprehensive statutory framework that balances privacy concerns with fiduciary access. The aim is to lay the foundation for an analysis of whether a similar legal framework could be adopted in the Kenyan context.

4.2 Evolution of digital asset inheritance legal framework in the USA

4.2.1 Federal Laws

The early legal framework guiding digital asset inheritance was characterised by two federal laws: the Stored Communications Act 1986 (SCA) and the Computer Fraud and Abuse Act 1986 (CFAA). The key focus of these laws was privacy and security, which indirectly had serious implications on digital asset inheritance.

4.2.1.1 The Stored Communications Act 1986

Section 2701 of the SCA levies criminal penalties against any person who “intentionally accesses without authorization a facility through which an electronic communication service is provided” or who “exceeds an authorization to access ... and thereby obtains, alters, or prevents authorized access to an . . . electronic communication while it is in electronic storage.”¹²⁹ The legislators intended for this provision to provide protection against hackers.¹³⁰ However, a concern raised by scholars was that this provision would place fiduciaries at risk of criminal liability by taking control over the deceased’s electronic accounts forming part of their digital assets.¹³¹

¹²⁹ Section 2701, *Stored Communications Act* (United States of America).

¹³⁰ Horton D, ‘The Stored Communications Act and digital assets,’ 1731.

¹³¹ Lamm J, ‘The digital death conundrum: How federal and state laws prevent fiduciaries from managing digital property’ 68 *University of Miami Law Review* 385, 2014, 399.

Section 2702 of the SCA on the other hand, bars social media service providers from disclosing the contents of users' digital accounts, such as emails, images, or instant messages, without them having given "lawful consent".¹³² This provision was problematic because even if a user died having given consent to fiduciaries to manage their digital assets, if the terms of service of the service provider barred posthumous transfer of digital assets, then the consent given by the user would be termed as unlawful.¹³³ Therefore a fiduciary seeking access would have to convince a court of law that the non-inheritability clause in the terms of service agreement is invalid under black-letter contract law.¹³⁴ Even if the court finds that there was lawful consent, the language in Section 2702 is discretionary. It states that the provider "may divulge the content of the communication", thereby leaving the social media service provider with the ultimate decision.¹³⁵

An example of this law in action is the case of *Ajemian v Yahoo*, which was an eight-year legal battle concluded in 2017.¹³⁶ The administrators of John Ajemian's estate filed a complaint at the probate court, asking for unfettered access to John's Yahoo! email account. Yahoo refused to provide access on the ground that the 'lawful consent exception' provided for in the Stored Communications Act is limited to the express consent of the deceased. However, upon appeal, the Massachusetts Supreme Judicial Court rejected this view, reasoning that nothing in the statute explicitly prohibited personal representatives from providing lawful consent on behalf of the deceased.¹³⁷ The court emphasized that fiduciaries have long been recognized as standing in the shoes of the deceased for purposes of managing their affairs, including accessing their digital assets.¹³⁸

4.2.1.2 The Computer Fraud and Abuse Act 1986

Almost similar to the SCA, the CFAA imposes criminal and civil liability on any person who "intentionally accesses a computer without authorization or exceeds authorised access".¹³⁹ The CFAA poses the same challenge as the SCA when it comes to fiduciary access of a deceased's digital estate. An heir who is legally authorised to access the deceased's digital assets may

¹³² Section 2702, *Stored Communications Act* (United States of America).

¹³³ Horton D, 'The stored communications act and digital assets,' 1736.

¹³⁴ Horton D, 'The stored communications act and digital assets,' 1736.

¹³⁵ Section 2702 (b), *Stored Communications Act* (United States of America).

¹³⁶ *Ajemian v Yahoo* (2017), Massachusetts Supreme Judicial Court.

¹³⁷ *Ajemian v Yahoo* (2017), Massachusetts Supreme Judicial Court.

¹³⁸ *Ajemian v Yahoo* (2017), Massachusetts Supreme Judicial Court.

¹³⁹ Section 1030 (a)(2)(C), *Computer Fraud and Abuse Act* (United States of America).

violate the CFAA if their access goes against the terms of service agreement on inheritability, as provided by the service provider.¹⁴⁰

4.2.2 State laws

4.2.2.1 The Uniform Fiduciary Access to Digital Assets Act (UFADAA)

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, is a non-profit organization in the US that drafts and promotes uniform state laws to bring consistency across different state legal systems. Its role is to create model legislation that states can choose to adopt, helping to harmonise laws on complex legal issues while respecting the sovereignty of states within the US.

The ULC approved UFADAA in 2014, and it was proposed in 27 states thereafter. UFADAA introduced a provision that gave lawful authority to heirs to administer the digital assets of a deceased person in the same manner prescribed by state law with respect to other non-digital assets.¹⁴¹ It further stated that the fiduciary had “for the purpose of applicable electronic privacy laws, the *lawful consent* of the account holder for the custodian” or service provider “to divulge the content of an electronic communication to the fiduciary”.¹⁴²

These provisions caused a lot of uproar from online social media service providers. They stated that first and foremost, the default rule was that the digital assets of a deceased person should not be disclosed to any person, including the heirs, for post-mortem privacy reasons.¹⁴³ They also argued that UFADAA was overridden by federal law, particularly the SCA. Since federal law takes precedence over state law under the Supremacy Clause of the US Constitution, any state law that conflicts with federal law is unenforceable.¹⁴⁴ The social media service providers’ argument was that the SCA already set strict limits on who could access a deceased person’s digital assets, and UFADAA could not create a legal assumption of consent that contradicted or expanded those limits.¹⁴⁵ Not only that, but the UFADAA also seemed to override the terms of service agreements of the social media service providers because it implied mandatory access to be given to heirs even if the terms of service agreements prohibited it.¹⁴⁶ Due to these lobbying efforts, no state in the US passed UFADAA except the state of Delaware.

¹⁴⁰ Walker M, ‘The new uniform digital assets law,’ 57.

¹⁴¹ Section 3 and 7, *Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁴² Section 8(a)(2), *Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁴³ Klein S and Parthemer M, ‘Who will delete the digital you? Understanding fiduciary access to digital assets’ 30 *Probate and Property Magazine* 4, 2016, 4.

¹⁴⁴ Article VI:2, *Constitution of the United States*.

¹⁴⁵ Walker M, ‘The new uniform digital assets law,’ 58.

¹⁴⁶ Walker M, ‘The new uniform digital assets law,’ 58.

4.2.2.2 The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

Representatives from the ULC and the digital services sector engaged in talks to explore a solution after UFADAA's near-complete failure, the outcome of which was the RUFADAA. In July 2015, the ULC formally approved the RUFADAA final draft. RUFADAA places a lot of emphasis on whether the deceased or incapacitated user expressly consented to the disclosure of the content of their digital assets, either through what RUFADAA refers to as an "online tool" or an express grant of authority in the deceased user's will.¹⁴⁷ This is in contrast to the UFADAA, which gave fiduciaries presumptive authority to access digital assets. As a result, RUFADAA recognises the SCA's definition of "lawful consent" and, in contrast to UFADAA, does not seek to impute such lawful consent to the fiduciary.¹⁴⁸

RUFADAA is applicable to custodians of digital assets, fiduciaries acting under a will, personal representatives and trustees acting under a trust.¹⁴⁹

Section 4 of RUFADAA establishes a three-tier priority system for determining a user's intent with respect to disposition of their digital assets. The first priority is given to the user's wishes as expressed using an online tool.¹⁵⁰ Most of the online tools allow a user to decide what will happen to their social media accounts, the options being deletion, memorialisation, or choosing a legacy contact who will manage the account. If the user does not give directions using an online tool, the next step is to look at whether they gave any instructions by means of a will.¹⁵¹ If the user gave instructions about the access or prohibition thereof to their digital account, those instructions will be given legal effect.¹⁵² The fiduciary will, however, be required to render copies of the relevant documents to the social media service provider while requesting access. Lastly, where the user provides no instructions on the disposal of their digital assets, the terms of service governing the account will apply.¹⁵³ If the terms of service agreements do not address the rights of fiduciaries when it comes to accessing the digital assets, then the default rules provided in the Act are applicable.¹⁵⁴

The RUFADAA specifies that when a social media service provider grants fiduciary access to a user's account, the platform's terms of service agreement (TOSA) applies equally to both the

¹⁴⁷ Section 9, *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁴⁸ Walker M, 'The new uniform digital assets law,' 59.

¹⁴⁹ Section 3 (a)(1-4), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵⁰ Section 4(a), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵¹ Section 4(b), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵² Walker M, 'The new uniform digital assets law,' 60.

¹⁵³ Section 4(c), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵⁴ Section 4(c), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

fiduciary and the user.¹⁵⁵ Fiduciaries do not receive any additional rights beyond those of the user. The legislation does not alter the rights of either the social media service provider or the user under the TOSA regarding the use and access of digital assets.¹⁵⁶ A fiduciary's access to digital assets can be adjusted or revoked by the user, federal law, or the TOSA if the user has not provided specific instructions for disclosure thereunder.¹⁵⁷ However, if the social media service provider's TOSA includes a procedure for disclosing digital assets, the social media service provider is not required to have the fiduciary assume the rights under the TOSA.

When disclosing the digital assets, the social media service provider is allowed to exercise full discretion in granting a fiduciary full or partial access to the user's account.¹⁵⁸

As of 2024, RUFADAA has been enacted in 47 out of 50 US states.¹⁵⁹ This widespread adoption reflects a significant shift in state-level approaches to digital asset inheritance, as RUFADAA aligns with federal privacy laws such as the SCA by requiring express user consent for disclosure. However, because RUFADAA is a state law and not a federal law, its enforceability is still subject to federal laws. This means that if a conflict arises between RUFADAA and federal statutes such as the SCA, federal law takes precedence. Additionally, RUFADAA's reliance on terms of service agreements means that social media platforms retain a degree of control over digital asset disclosure, potentially limiting fiduciary access in cases where users have not explicitly granted consent. Despite these limitations, RUFADAA provides a structured legal framework for handling digital assets after death, ensuring that users have a clear mechanism for controlling their post-mortem digital legacy while also addressing privacy concerns raised by service providers.

4.3 Lessons for Kenya

In light of the foregoing, there are multiple lessons that Kenya can draw from the US legal framework governing social digital asset inheritance. The proposed social digital asset inheritance law in Kenya would serve the purpose of governing the three-way relationship that exists between account owners, fiduciaries, and social media service providers. The experiences from the US highlight the need for a balanced legal framework that recognises

¹⁵⁵ Section 5, *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵⁶ Walker M, 'The new uniform digital assets law,' 61.

¹⁵⁷ Walker M, 'The new uniform digital assets law,' 61.

¹⁵⁸ Section 6(a), *Revised Uniform Fiduciary Access to Digital Assets Act* (United States of America).

¹⁵⁹ <https://www.stifelmichiganregion.com/iplanning.htm> on 14 February 2024.

fiduciary access while upholding the deceased's privacy rights and respecting the contractual autonomy of service providers.

4.3.1 Ensuring coherence between the proposed law and the Data Protection Act 2019

One of the key strengths of the US approach is the coherence between federal laws such as the SCA, and the RUFADAA at the state level. This balance ensures that fiduciary access to social digital assets does not compromise data privacy laws or cybersecurity protections. Kenya can learn from this structured approach by ensuring that any proposed social digital asset inheritance law aligns with the Data Protection Act 2019. The law should specify that fiduciaries can access a deceased person's digital assets without violating cybersecurity or privacy laws, provided they have obtained proper authorisation through a will, an online tool, or another legally recognised directive.

Currently, Kenya's legal framework does not provide clarity on whether fiduciaries can lawfully access a deceased's digital assets without contravening data protection laws. A well-structured law, similar to RUFADAA, should ensure that privacy and security concerns do not create an insurmountable barrier for heirs who have a legitimate legal right to manage the deceased's digital estate.

4.3.2 Recognizing online tools as an estate planning mechanism

A fundamental principle of succession law is to respect testamentary freedom, ensuring that an individual's wishes regarding their estate, including social digital assets, are honoured after their passing. In this regard, Kenya can draw a valuable lesson from RUFADAA's tiered approach, which prioritises the deceased's explicit instructions via an online tool over general fiduciary access.

Online social media tools—such as Facebook's legacy contact feature allow users to state what should happen to their accounts after death. This method ensures that the user's intent and lawful consent are expressly recorded. Kenya should incorporate a similar hierarchical approach in its legal framework.

In the hierarchical approach, first priority should be given to a user's stated preferences in an online tool that specifies whether their account should be memorialised, deleted, or transferred to a designated person. Second priority should be given to instructions left in a will, specifying who should manage or inherit the user's social digital assets. The third priority would then be

given to the social media platform's terms of service agreement, which would dictate what happens to the account.

This approach ensures that a user's intent is respected as far as possible, while also preventing automatic access by heirs, which could pose as a privacy risk to third parties who were in communication with the deceased user on the social media platforms. It further prevents social media service providers from unilaterally controlling access to a deceased user's account, especially in cases where the user may have wanted their heirs to take over their digital presence.

4.3.3 Recognising social media digital assets as property

For the proposed Kenyan law to be effective, it must align with existing succession laws by formally recognizing social digital assets as property. As demonstrated in Chapter 2, social media accounts share key characteristics of property, including rivalrousness, persistence, and value addition by users. This recognition is crucial because succession laws primarily govern the transfer of property. If digital assets are not classified as property, they risk being left in a legal vacuum, making inheritance unclear.

The U.S. experience has demonstrated that failing to classify digital assets as property creates legal uncertainty, forcing courts to rely on contractual terms of service rather than well-established inheritance principles. By making this legislative clarification, Kenya can provide certainty and ensure that social digital assets receive the same level of protection as traditional property.

4.3.4 Avoiding the shortfalls of UFADAA: Requiring explicit consent for access

Kenya can also learn from the failures of the UFADAA, which was widely rejected in the US due to its overly broad presumptive access provisions. UFADAA granted fiduciaries automatic access to digital assets upon a user's death, which raised significant privacy concerns, particularly regarding post-mortem data protection.

The revised RUFADAA framework instead introduced explicit consent requirements. These requirements ensured that fiduciaries cannot access private digital communications unless the deceased had expressly granted permission via an online tool or provided documented instructions allowing fiduciaries to access their digital estate.

This revision addressed the privacy concerns raised by social media service providers, as it prevented automatic disclosure of sensitive information that may involve third parties. Kenya's

legal framework should mirror this approach, ensuring that fiduciaries do not receive unrestricted access to a deceased person's social media accounts unless explicit consent has been given. Additionally Social media service providers should be allowed to retain a reasonable degree of control to ensure compliance with privacy obligations.

This approach protects post-mortem privacy, prevents unauthorised access to sensitive data, and respects the rights of both the deceased and third parties who may have communicated with them on the social platforms.

4.3.5 Addressing the role of terms of service agreements

Another takeaway from the US experience is the significant role that terms of service agreements (TOSAs) play in social digital asset inheritance disputes. Many service providers override traditional inheritance laws by including non-transferability clauses in their user agreements. For example, as highlighted in Chapter 1, platforms like Yahoo! strictly prohibit account transfers, meaning that even if a deceased person wanted their heirs to inherit their email account, Yahoo!'s TOSA could block this access.

Kenya's proposed legal framework should ensure that TOSAs do not unreasonably restrict social digital asset inheritance by allowing fiduciaries to challenge overly restrictive TOSAs in court if they contradict testamentary freedom. Where no explicit instructions exist, courts can determine whether heirs should receive access on a case-by-case basis.

By addressing the limitations imposed by TOSAs, Kenya can ensure that digital asset inheritance is not solely dictated by private contracts, but rather by national legislation that protects user rights.

4.4 Conclusion

Kenya has an opportunity to learn from both the successes and failures of the US legal framework in crafting its own social digital asset inheritance laws. By adopting a structured, tiered approach, ensuring alignment with data protection laws, and recognizing social digital assets as property, Kenya can create a balanced system that respects testamentary freedom, privacy, and the interests of service providers. Additionally, ensuring that fiduciary access is based on explicit consent, rather than presumptive authority, will help protect post-mortem privacy while allowing legitimate heirs to manage the deceased's digital estate. A well-drafted law will provide clarity, fairness, and legal certainty in the evolving digital landscape.

CHAPTER 5

FINDINGS, RECOMMENDATIONS AND CONCLUSIONS

5.1 Introduction

This chapter presents the key findings of the study and evaluates whether the research objectives have been met. It also assesses the validity of the hypothesis and provides recommendations for a legal framework governing the inheritance of social digital assets in Kenya.

5.2 Findings

5.2.1 Legal gap in Kenya

The study finds that Kenyan law does not recognise social digital assets as part of a deceased person's estate. The Law of Succession Act is silent on the inheritance of digital assets, leaving them in a legal grey area. The Data Protection Act 2019, while providing safeguards for data privacy, does not address the posthumous management of digital assets, creating further ambiguity.

5.2.2 Social digital assets as property

The study confirms that social digital assets, including social media accounts, exhibit characteristics of property. These include rivalrousness, persistence, interconnectivity, secondary markets, and user-added value. Given these traits, the recognition of digital assets as inheritable property is both legally justifiable and necessary to safeguard the succession of a person's social digital legacy.

5.2.3 Challenges posed by terms of service agreements

Social media platforms operate under restrictive terms of service agreements that limit posthumous access to accounts. These agreements often prevent heirs and fiduciaries from accessing or managing the deceased's digital assets, prioritising the platform's privacy policies over succession rights. This legal barrier leads to loss of sentimental and commercially valuable social digital assets.

5.2.4 International best practices: The US model

The study finds that the U.S. has implemented a structured approach to social digital asset inheritance through RUFADAA. This law establishes a three-tier priority system that grants fiduciaries access based on the express consent of the deceased, instructions in a will, or, in the

absence of directives, the terms of service agreement. The study identifies this model as a potential blueprint for Kenya's legal framework.

5.2.5 Need for digital estate planning

Estate planning for digital assets is an emerging necessity. The study finds that public awareness regarding the importance of digital estate planning remains low in Kenya. Without explicit instructions in wills or designated online tools, most social digital assets risk being lost upon the owner's death.

5.3 Recommendations

5.3.1 Enactment of a legal framework for digital asset inheritance

Kenya should adopt a law similar to RUFADAA that recognises digital assets as inheritable property and provides clear guidelines for fiduciary access. This framework should establish a priority system where user preferences take precedence, followed by directives in a will, and finally, applicable terms of service agreements. The proposed law should also balance privacy rights and fiduciary access.

5.3.2 Amendments to the Law of Succession Act Cap 160 and Data Protection Act 2019

The Law of Succession Act should be amended to explicitly classify social digital assets as part of a deceased's estate. Similarly, the Data Protection Act should include provisions on posthumous data management, ensuring that users can dictate the fate of their digital assets.

5.3.3 Integration of online tools in estate planning

Social media platforms should be encouraged to enhance user options for posthumous account management. Awareness should be raised on the use of legacy contacts, digital wills, and account directives to ensure seamless succession of digital assets.

5.3.4 Public awareness and education

Legal practitioners should integrate digital asset planning into conventional estate planning practices. Awareness campaigns should educate the public on the importance of including digital assets in their wills.

5.4 Fulfilment of research objectives

The first objective of this study was to assess whether digital assets can be considered objects of property rights. This objective has been achieved, as the study establishes that social digital

assets exhibit traditional property characteristics, including rivalrousness, persistence, and interconnectivity.

The second objective was to demonstrate the need for laws relating to the inheritance of social digital assets in Kenya. This has been accomplished through an analysis of the pervasiveness of social media in Kenya. Statistics have shown that there is a high number of social media users, and this number is projected to increase in 2025 and subsequent years.

The third objective was to assess the legal framework governing the inheritance of social digital assets in the U.S. and draw lessons for Kenya. This has been achieved by analysing the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) and identifying its applicability to the Kenyan context.

The final objective was to propose recommendations for a Kenyan legal framework on digital asset inheritance. This has been achieved by providing specific legislative recommendations that Kenya can adopt to ensure the effective management and inheritance of digital assets.

5.5 Evaluation of the hypothesis

The study tested the hypothesis that the lack of a legal framework for social digital asset inheritance in Kenya leads to significant uncertainties and disputes, undermining justice and testamentary freedom. Based on the findings, this hypothesis is confirmed. The study demonstrates that legal uncertainties create obstacles for heirs and fiduciaries, leading to the potential loss of sentimental and valuable social digital assets.

5.6 Conclusions

Based on the findings, the study concludes that the absence of a legal framework governing social digital asset inheritance in Kenya creates significant uncertainty for heirs, fiduciaries, and social media service providers. Recognising social digital assets as inheritable property would protect the rights of heirs and ensure the deceased's digital legacy is preserved. Furthermore, terms of service agreements should not override testamentary freedom, and the law should provide a structured mechanism for fiduciary access while balancing privacy concerns.

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