

**UNIVERSITY OF NAIROBI
SCHOOL OF LAW**

**AN ANALYSIS OF CULTURAL PRACTICES AND THEIR IMPACT IN THE
REALIZATION OF WOMEN PROPERTY INHERITANCE RIGHTS IN KENYA**

**THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE MASTER OF LAW
(LLM) COURSE**

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DECLARATION

I, **DAMARY AYUKU-ANGULU** Registration No. **G62/69087/2013** do hereby declare that to the best of my knowledge, this thesis is my original work and has not been submitted either in part or in whole and is not currently being submitted for a degree in any other University. No part of this thesis may be reproduced without the prior permission of the author.

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APPROVAL

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DEDICATION

I dedicate the research to my late father, Mzee Jairus Epiche Otundo for his encouragement, protection of the girl child rights and for granting me an equal opportunity so that I could compete and find my space in life. His stand on women being equal citizens came to pass just before his death, in the Kenya Constitution [2010]. I miss his words of wisdom and his opposing views in a culturally patriarchal society. I also dedicate the research to my mother for her support and my children Denning, Wesley and Precious Rihanna. Last but not least, I dedicate the thesis to all men and women out there who subscribe to and can stand up against impunity of all forms of discrimination and unfair cultural practices against women.

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ABSTRACT

Effective law enforcement assumes that there is an effective and independent judiciary. It also assumes that state strength is sufficiently capable of penetrating into rural areas where conflict between statutory and customary law will be most pronounced.

Specialized divisions have been established within the High Court, including the family division, which may be a positive development in the promotion of gender-based considerations in family law cases. However, a critical issue is the representation of women in Parliament and other land decision making institutions and the community attitudes. The National Land Policy notes that women are insufficiently represented in institutions dealing with land and has directed the Kenyan government to ensure the proportionate representation of women in land institutions at all levels. This issue is also recognized in the 2010 Constitution, which confirms the principle of the elimination of gender discrimination in law, customs and practices related to land and requires implementation of the principle that no more than two-thirds of the members of elective or appointive public bodies be of the same gender.

There is an urgent need to institute approaches that harness the potentials of both men and women to work harmoniously in safeguarding each other's property rights. Key stakeholders such as government ministries, non-governmental institutions, and community-based support groups must also work in a concerted manner in policymaking and implementation. Leadership in these endeavors must of necessity include women, especially the marginalized categories such as older women and widows. Men, too, must join in resisting a culture that marginalizes any one gender and work together with women to eliminate the disenfranchisement of women in Kenya.

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LIST OF ABBREVIATION AND ACRONYMS

1. ACHPR.....The African Charter on Human and Peoples’ Rights
2. BPA.....Beijing Platform for Action
3. CEDAW.....Convention on the Elimination of All Forms of Discrimination
against Women
4. COMESA.....Common Market for Eastern and Southern Africa
5. EAC..... East Africa Community
6. FIDA.....Federation of Women Lawyers
7. ICESCR.....International Covenant on Economic, Social and Cultural Rights
8. SDGs.....Sustainable Development Goals
9. TJRC.....Truth Justice & Reconciliation Commission
10. UDHR.....The Universal Declaration of Human Rights

LIST OF STATUTES

1. The Constitution of Kenya [2010]
2. Land Act No 6 of 2012 Laws of Kenya
3. Land Registration Act No 3 of 2012 Laws of Kenya.
4. Law of Succession Act Chapter 160 Laws of Kenya
5. Marriage Act 2014
6. Matrimonial Property Act Kenya (No 49 of 2013)

LIST OF INTERNATIONAL CONVENTIONS AND FOREIGN LAWS

1. African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol)
2. Convention on the Elimination of All Forms of Discrimination against Women
3. Convention on The Protection and Promotion of The Diversity Of Cultural Expressions
4. Culture Charter for Africa
5. Recognition of Customary Marriages Act (RCMA) No 20 of 1998
6. Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009
7. The African Charter on Human and Peoples' Rights (ACHPR)
8. The Common Market for Eastern and Southern Africa (COMESA) Treaty
9. The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
10. The Universal Declaration of Human Rights (UDHR), 1948
11. The Universal Declaration on Cultural Diversity

LIST OF CASE LAWS

1. *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 580 (CC)
2. *Douglas Njuguna Muigai v John Bosco Maina Kariuki & another* [2014] Eklr
3. *Estate of Njeru Kamanga (Deceased) Succession case No. 93 of 1991* (Unreported)
4. *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another* [2018] eKLR
5. *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC)
6. *In re Estate of Njoroge Gitau (Deceased)* [2017] eKLR (Succession Cause 2270 of 2001)
7. *In Re The Estate of Mugo Wandia (Deceased)* [2009] Eklr
8. *In the Matter of the Estate of Ishmael Juma Chelanga Deceased* [2002] eKLR
9. *In The Matter Of The Estate Of The Late Joel Cheruyoit Korir -(Deceased)* Succession Cause No.297 Of 2015
10. *Mary Wanjuhi Muigai v Attorney General & another* [2015] eKLR
11. *Mithembu v Letsela and Another* (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000)
12. *Nonkululeko Letta Bhe & Others V Magistrate, Khayelitsha, Case CCT43/03*
13. *re Estate of CCBH (Deceased)* [2018] eKLR
14. *re Estate of Francis Mwangi Mbaria (Deceased)* [2018] Eklr

15. *re estate of G K (Deceased)* [2017] eKLR

16. *re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased)* [2015] eKLR

17. *ST v CT (1224/16)* [2018] ZASCA 73 (30 May 2018)

18. *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

CHAPTER 1

1.10 Background

This chapter will give a brief of the study. It will contain the Background, Statement of Problem, Justification of the Study, Statement of Objectives, Research Questions, Hypothesis, Research Methodology, Literature Review and Limitations of Study.

1.101 Definition of Culture

Culture has been differently characterized; it is comprehended as a lifestyle of a people.¹ In this manner, culture is made up of the traditions, conventions, convictions, conduct, dress, dialect, masterpieces and specialty, demeanor to life among others, which fluctuates from society to society and recommends that social qualities are to a great extent relative.²

Culture is defined to mean the intricate entire, which includes learning, craftsmanship, ethics, conviction, law, custom and some other abilities and propensity obtained by man in his society set up.³

Culture is an arrangement of convictions, demeanors, lifestyle, craftsmanship and traditions that are shared and acknowledged by individuals in a specific culture.⁴

¹O Familusi, *African Culture and the Status of Women: The Yoruba Example* <[http://www.jpanafrican.org/docs/vol5_n0_1/5.1 African Culture.pdf](http://www.jpanafrican.org/docs/vol5_n0_1/5.1_African_Culture.pdf)> accessed 12/7/2018

²*ibid*

³*ibid*

⁴Stephen Bullon et al, *Longman Dictionary of Contemporary English* (4th edn London Pearson Education Ltd 2003) pg 382

Culture can also be defined as a form of lifestyle that incorporates a social code of conduct, dress, dialect, religion, custom, a certain set of conduct and frameworks of conviction.⁵The American Heritage Dictionary initially characterized culture as "the totality of socially transmitted standards of conduct, expressions, convictions, establishments, and every single other result of work and thought." ⁶

1.102 Recognition of Cultural practices and their impact on women

The hardship of women of a social voting demographic base because of their being seldom heads of networks, clans or family relationship bunches has extensive ramifications in their entitlement to live in a positive social setting.⁷ The prevailing cultural and social norms of male dominance play a key role in entrenching gender inequality and impunity among women. ⁸

In spite of a conspicuous presence as citizens, women remain under-represented in governing structures.⁹With just a couple of special cases, there is a stamped non-appearance of women in nearby basic leadership forms.¹⁰ Despite the fact that women are key players at the neighborhood level in household vocation techniques and private associations, they are liable to rejection from basic leadership gatherings.¹¹

⁵K Njogu & G Oluoch, *Cultural Production and Social Change in Kenya Building Bridges*(Nairobi Twaweza Communications 2007) pg 132

⁶K Mulcahy, *Public Culture, Culture Identity, Cultural Policy*(Newyork Palgrave Macmillan 2017) pg xxii

⁷C Creighton et al, *Gender Inequalities in Kenya*(Paris UNESCO 2006)<<http://unesdoc.unesco.org/images/0014/001458/145887e.pdf>>accessed 13/7/2018

⁸*ibid*

⁹*ibid*

¹⁰*ibid*

¹¹*ibid*

Effectiveness is imperiled when women and the poor are not engaged in basic leadership and strategic decision making process.¹²A noteworthy test confronting women property inheritance rights in Kenya is social biases and practices and separation in basic leadership in the women's social setting. Most women feel that a large number of cultural believes were social and gender related.¹³

It is a delicate balance for women to defy patriarchal structures of culture and tradition as well as maintain their dignity amongst their indigenous communities. Women's will generally bring issues up in an "emotional" way.¹⁴They will spotlight on one issue and when that particular issue is resolved, they vanish.¹⁵ Women keep on supporting the woman's rights cause, but that is frustrated in light of the fact that they would lose their validity.¹⁶It sounds a reality rather than a mere theory that culture can't be changed in one night.¹⁷

1.103 The Origins of Culture and how cultural practices are conveyed

Culture began from changes in the motivational framework. Subsequently, another, unmistakably human arrangement of inspirations could acquire self-maintained properties from the motivational arrangement of non-human creatures.¹⁸The progressions affected the reasoning framework, offering ascend to new, theoretical

¹² *ibid*

¹³C Creighton et al, *Gender Inequalities in Kenya* (Paris UNESCO 2006)<<http://unesdoc.unesco.org/images/0014/001458/145887e.pdf>>accessed 13/7/2018

¹⁴A Ngoma, *The Impact of Women's Struggle for Equal Rights in Botswana*(Newyork Routledge 2006)pg 121

¹⁵*ibid*

¹⁶*ibid*

¹⁷*ibid*

¹⁸P Prudkov, *Origin of Culture:Evolution Applied Another Mechanism Commentary on Gabora on Origin-Culture*

<<https://www.researchgate.net/publication/259396692>>accessed 12/7/2018

types of reasoning.¹⁹After numerous ages, the later people developed in order to maintain a various leveled arrangement of scholarly inspirations which could initiate one another and the arrangement of educated inspirations wound up self-supported.²⁰Prior to the presentation of western instruction, customary Yoruba individuals for example, had constantly transmitted their social qualities starting with one age then onto the next.²¹

1.104 Efforts made by The Birth of International & Regional Instruments in Protection of Rights

The adverse effect of cultural practices and general lack of regard of individuals' rights prompted the worldwide network activity to participate in conscious talks that would for the most part report assurance of individuals' rights all inclusive. That activity brought forth The Universal Declaration of Human Rights (**UDHR**).²²

The African Charter on Human and Peoples' Rights (**ACHPR/the Maputo Protocol**) was the next convention after UDHR, adopted by The organization of African Unity (**OAU**) (as it then was) in 1981. OAU was later renamed the African Union (**AU**).

¹⁹*ibid*

²⁰P Prudkov, *Origin of Culture: Evolution Applied Another Mechanism Commentary on Gabora on Origin- Culture* <<https://www.researchgate.net/publication/259396692>>accessed 12/7/2018

²¹O Familusi, *African Culture and the Status of Women: The Yoruba Example* <[http://www.jpanafrican .org/docs/vol 5 n0 1/5.1 African Culture.pdf](http://www.jpanafrican.org/docs/vol%205%20n0%201/5.1%20African%20Culture.pdf)>accessed 12/7/2018

²²*Federation of Women Lawyers, Women's Land And Property Rights In Kenya A Training Handbook* <<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

OAU is a human rights framework for Africa that was constituted and adopted to look into the peculiar circumstances of the African Continent.²³

Kenya as a state party has committed itself on the protection of the rights of women by ratification of the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**) and ACHPR.²⁴ The Constitution of Kenya 2010 in its Article 2(6) provides that “*any treaty or convention ratified by Kenya shall form part of the laws of Kenya under this Constitution*”. Implementation of the Maputo Protocol in relation to women’s rights to property is the basis of this study.

The Beijing Platform for Action 1995 (**BPA**), came in as an agenda plan for women’s empowerment that goes for fastening exclusion of the considerable number of snags to women’s dynamic interest in social life. The Agenda aimed at women having an equal opportunity in financial, social and political life and leadership among others.²⁵

The primary goal of The Common Market for Eastern and Southern Africa (**COMESA**) gender orientation arrangement is to encourage the consideration of points of view into all strategies, structures and frameworks.²⁶ The gender orientation approach perceives female and male in their diverse jobs, have disproportionate access to assets and gains, and that women have constrained platform to get them.²⁷ Article 6 (d) of East Africa Community Treaty (**EAC**) appreciates gender proportionality as one of its essential rules that shall guide the society. The Kenya

²³*ibid*

²⁴*ibid*

²⁵Federation of Women Lawyers, *Women’s Land And Property Rights In Kenya A Training Handbook*<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

²⁶*ibid*

²⁷*ibid*

Constitution 2010 in Article 10 (2) (b) sets out the key values, principles and guidelines of governance, that promote gender equality. This has been reflected in efforts for gender mainstreaming as will be seen in later Chapters of this works.

The Kenya Courts as the custodian of the Constitution are expected to uphold, respect the rule of law and protect the rights of women to property in the context of the Maputo Protocol. The Courts have a key role to interpret statutory laws to promote the rights of women to property as provided for in the statutes, regional and international instruments.²⁸

1.11 Statement of the Problem

Despite the existence of a proper legal framework, women in Kenya still experience challenges in realization of property inheritance rights as a result of discriminatory cultural practices.

In African indigenous law, it is not easy for women to enjoy any rights over property. Traditional cultural practices are significantly segregated towards women on the question of matrimonial property when the subject is divorce.²⁹ Customary law denies women the entitlement to have or dispose matrimonial property.³⁰ At the point when women are divorced under African law, they are typically denied possession of any real assets.³¹

²⁸ *ibid*

²⁹ C Creighton et al, *Gender Inequalities in Kenya* (Paris UNESCO 2006) <<http://unesdoc.unesco.org/images/0014/001458/145887e.pdf>> accessed 13/7/2018

³⁰ *ibid*

³¹ *ibid*

1.12 Statement of Objectives

- A. To examine the Court's interpretation of realization of women property inheritance rights in the context of the Maputo Protocol *vis a vis* cultural practices in Kenya.
 - a. To examine, establish and document the nature of cultural practices in relation to women property inheritance rights in Kenya.
 - b. To analyze the legal framework on gender equality and find out, how cultural practices affect the realization of women property inheritance rights in Kenya.
 - c. To evaluate the courts' interpretation of women property inheritance rights in Kenya in the context of the Maputo Protocol *vis a vis* cultural practices.
 - d. To draw a comparison between Kenya and South Africa as a best practice where women property inheritance rights have been appreciated more.

1.13 Research Questions

- A. How have the Kenyan courts interpreted and addressed realisation of women property inheritance rights in the context of the Maputo Protocol *vis a vis* the various cultural practices?
 - a. What is the nature of cultural practices in relation to women property inheritance rights in Kenya?
 - b. What is the legal framework on gender equality and how have cultural practices affected the realization of women property inheritance rights in Kenya?

- c. How have the Courts applied and interpreted the Maputo Protocol to protect women property inheritance rights in Kenya?
- d. What is it that Kenya can learn and adopt from South Africa as a best practice where women property inheritance rights have been appreciated more?

1.14 Justification of the Study

- i. Findings of the study will help enhance application of law to protect women's property inheritance rights in Kenya and if there will be any need for legal reforms, then this study will form a good basis for reforms. The existing laws in Kenya have not efficiently addressed cultural barriers that are the main hindrance to women's exercise of their property inheritance rights.
- ii. Findings of the study will help protect women property inheritance rights in Kenya. In majority of Kenyan cultures, women have been inactive due to the notion of their inferior status, unfair treatment and negation of basic human rights. The inactivity of women has been blamed in part on traditional practices, and man-made barriers that have been fronted in the governance and financial fields³²
- iii. Findings of the study will generate knowledge in the sphere of protection of women property inheritance rights in Kenya. Widespread ignorance of the law by women in Kenya renders the critical provisions of the Law meaningless, and allows for the continued use of cultural practices and customary law to determine sensitive matters at the detriment of women.

³²C Creighton et al, *Gender Inequalities in Kenya* (Paris UNESCO 2006) <<http://unesdoc.unesco.org/images/0014/001458/145887e.pdf>> accessed 13/7/2018

- iv. Findings of the study will be recommended to help women in Kenya where there are gaps in the law. Current family laws are largely gender insensitive and have led to the entrenched segregation between women and men on the issue of land and property rights. The Kenya Law of Succession Act for example, allows proportionate inheritance rights for spouses, and at the same time does not include specific gazetted districts in which customary law reigns.
- v. Findings of the study will enhance achievement of the Social Pillar of the Kenya Vision 2030 in enhancing a just and cohesive society where women enjoy equitable social development with men in a clean and secure environment.
- vi. Findings of the study will shape the debate and consideration of the passing of the Gender Bill sponsored by the Majority Leader in Parliament Honourable Aden Duale, whose deliberations begun on 20th November 2018 to promote representation of women in both appointive and elective positions.

1.15 Hypothesis

Whereas the Maputo Protocol has provided extensively on protection of women property rights, cultural practices have continued to negatively impact realization of women property inheritance rights in Kenya.

1.16 Theoretical Framework

According to **Catharine Mackinnon** in her book *Towards a Feminist Theory of the State*, she observes that the Feminists see the family as a unit of male dominance, is a bed of male violence and reproductive exploitation, and therefore a primary source of

women oppression.³³ Her theory has attempted to persuade that women have been unjustly been branded unequal to men because of gender difference.³⁴ Feminist theory has criticized the notion of gender being a determinant of life chances especially from the notion that women differ by the distinction of sex.³⁵ That consequently, women lack control over their social life. Women contribution to the society and accomplishments are generally restricted and seen to add little or no value. Women dignity is consequently disregarded and their physical security violated.³⁶ The reasons for this vary although believed to be unfair and predominantly social and unjust.³⁷

It is no doubt that women and men are divided by gender and this results in women subservient role and male sexual dominance.³⁸ The feminist make it simple, that men are women's material conditions.³⁹ Women have attempted to find ways to resist and disentangle themselves from the male supremacy with little.⁴⁰

Feminist theorists have wondered and asked several questions about the role of the state in legitimization or otherwise of male dominance and what it has done to protect women status.⁴¹ In the absence of answers, feminist practice has oscillated between a liberal theory of the state on the one hand and a left theory of the state on the other.⁴²

³³C MacKinnon, *Toward a feminist theory of the state* (New York Harvard University Press 1991)pg 61

³⁴C MacKinnon, *Toward a feminist theory of the state* (New York Harvard University Press 1991)pg 37

³⁵*ibid*

³⁶*ibid*

³⁷*ibid*

³⁸*ibid* 113

³⁹*ibid* 138

⁴⁰*ibid*

⁴¹C MacKinnon, *Toward a feminist theory of the state* (New York Harvard University Press 1991)Pg 159

⁴²*ibid*

Both theories look at law as the society's mind and disembodied reason in liberal theory.⁴³

In Nancy's Baraza paper titled *Lost between Rhetoric and Reality*, she observes that explanations of gender inequality are all about materialist theories that use cross-cultural data on the status of women and men.⁴⁴ Materialist theories are more concerned and explain how gender inequality is a result of the male and female connection to the economic structure of society.⁴⁵ Such theories stress control and distribution of valued resources are the resultant stratification of men and women.⁴⁶ The theory point out to the fact that the women's roles as mothers and wives, although valuable in the society, are devalued and women are in the end denied access to desirable resources.⁴⁷ Nancy has argued that gender stratification is greater where women's work is localized to the family and men's work is perceived to be an outward, to trade and the marketplace.⁴⁸

Gender is a social and political system that divides power.⁴⁹ That, over time, women have been economically exploited, reduced to domestic slavery and physical abuse, occasionally forced into motherhood, sexually objectified and a form of entertainment, deprived of a voice, disenfranchised and suffered exclusion from

⁴³C MacKinnon, *Toward a feminist theory of the state* (New York Harvard University Press 1991)Pg 159

⁴⁴Nancy Baraza, *Lost Between Rhetoric and Reality:What Role for the Law and Human Rights in Redressing Gender Inequality?*<<http://www.kenyalaw.org/kl/index.php?id=1917>>accessed on 10/11/2018 2109hrs

⁴⁵*ibid*

⁴⁶*ibid*

⁴⁷*ibid*

⁴⁸*ibid*

⁴⁹C MacKinnon, *Toward a feminist theory of the state*(New York Harvard University Press 1991)Pg 160

public life.⁵⁰ In contrast to their male counterparts, women have been subjected to physical insecurity and deprived of most social amenities and deprived proper representation of their interests.⁵¹ Mackinnon has postulated that the state takes character of a male in the sense that it looks at women and treat them the same way men treat women.⁵² The liberal state coercively and authoritatively legitimizes subjective social order that is male dominated⁵³and hence male jurisprudentially, meaning the state aims at promoting male power.⁵⁴This has been reflected in aggressive constitutional adjudication, which should be legitimate to the degree it is neutral on the policy content of legislation.⁵⁵Neutrality ought to be the pervasive assumption that conditions will affect both men and women. The assumption of sex inequality should not exist in the society.⁵⁶

The Constitution of a state society and its interpretation assumes free and equal opportunities to all citizens and that the laws take into account the Government needs and more so, corrects what Government has previously wronged.⁵⁷

Equality law assumes gender equality.⁵⁸ The laws related to women rights, that is to say, laws of rape, abortion, obscenity, and sex discrimination are a clear picture of

⁵⁰C MacKinnon, *Toward a feminist theory of the state*(New York Harvard University Press 1991)Pg 160

⁵¹*ibid*

⁵²*ibid* 162

⁵³*ibid*

⁵⁴*ibid* 163

⁵⁵*ibid*

⁵⁶*ibid*

⁵⁷C MacKinnon, *Toward a feminist theory of the state*(New York Harvard University Press 1991)pg 163

⁵⁸*ibid* 169

subordination of women.⁵⁹ These laws are however not political because the state is taken as the sphere of politics.⁶⁰ They form an integral part of sexual politics for the reason that the state, through law, endorses male power by institutionalizing the male views in law.⁶¹

The primary political and social distinctions are distinguished mainly by sex.⁶² Culture is fundamentally recognized as the basis of patriarchy.⁶³ The family is often seen as the main structure for perpetrating patriarchy, the model authoritarian rule, the origin of social relations that encourages differentiation of social functions on a gender basis.⁶⁴ The communal family was gradually replaced with the modern nuclear family at the point when private property ceased to be generalized.⁶⁵ The nuclear family is monogamous by nature but for the sole purpose of "making the man supreme in the family and to propagate, as the case maybe, future heirs to his wealth and children."⁶⁶

That law that presupposes the fact that women and men will forever remain social unequals is a fallacy to me⁶⁷. I do not agree with MacKinnon's view that the state is jurisprudentially male, to mean that it adopts the standpoint of unquestionable male power. I would like to point out that as a nation, Kenya has come a long way on

⁵⁹*ibid* 163

⁶⁰*ibid*

⁶¹*ibid*

⁶²*ibid* 48

⁶³*ibid*

⁶⁴*ibid*

⁶⁵C MacKinnon, *Toward a feminist theory of the state*(New York Harvard University Press 1991) pg 28

⁶⁶*ibid*

⁶⁷*ibid* 239

matters of gender discrimination. Women have been seen to move fast in claiming their space in all spheres.

With the aggressive campaigns against male dominance, violence and discrimination on sexual lines, MacKinnon views are perhaps destitute of women progression towards power and economic equality. Look for example at Justice Mumbi's respected judgments, the upcoming pro-women legislation and women participation in the legislative process. These are a clear indication that the male counterparts will soon concede to a number of issues that shall eliminate male dominance. The aggressiveness towards implementation of the two thirds gender rule according to our Kenya Constitution has not come to pass in the appointive and all elective positions, however, the amount of pressure that has been exerted to realize the rule will no doubt yield a positive move.

Family is a social catalyst of patriarchy but notable is that family the family set up is now very dynamic. Mothers spend more time with children and in the process teach girls empowerment. We have seen a number of families where men play the passive role and the wives are the authoritarians, changing the traditional role of parents. I must point out that the influence of urban living, modern culture and western influence has played a major role in diluting the cultural values and practices. In a number of urban and modern families, gender discrimination will eventually be declared redundant because children are ignorant of the cultural practices and this therefore falls short of the real definition of culture.

In Nancy Baraza's works, the women's inward efforts are all dependent on the woman in the house. She pointed out that economic divide will soon fade as women are aggressively becoming independent. A review of Mackinnon's work lays a good basis for my study given her very strong views on male dominance and the fact that women remain vulnerable due to their many unanswered questions.

1.17 Conceptual Framework

Culture, as per Raymond Williams, is one of the few most entangled words in the English dialect.⁶⁸ It is significant that the base of the word is from the Latin *colere*, to till.⁶⁹ There is the development of a field as there is the development of scholarly and stylish sensibilities.⁷⁰ Culture is the way towards getting to be taught, cleaned, refined, that is, the condition of being socialized.⁷¹ In this sense, culture proposes a procedure for the purposeful and efficient procurement of a scholarly sensibility.⁷²

The Oxford English Dictionary additionally first characterizes culture with reference to culturing.⁷³ Culture is the development and refinement of the psyche; "the masterful and scholarly side of human progress"; and, culture includes "the particular traditions, accomplishments, creation, standpoints, and so on, of a general public or gathering; the lifestyle of a general public or gathering."⁷⁴ The last approach can be described as

⁶⁸K Mulcahy, *Public Culture, Culture Identity, Cultural Policy* (New York Palgrave Macmillan 2017) pg xxi

⁶⁹*ibid*

⁷⁰*ibid*

⁷¹*ibid*

⁷²*ibid*

⁷³*ibid* xxiii

⁷⁴K Mulcahy, *Public Culture, Culture Identity, Cultural Policy* (New York Palgrave Macmillan 2017) pg xxii

the "anthropological" feeling of culture. The previous is the idea of culture as the expressive arts.⁷⁵

As far as political theory is concerned, 'culture' tends to be characterized in particular molds as opposed to the general terms utilized in social examinations.⁷⁶ A straightforward refinement would be between 'culture' as a societal setting where Governmental issues are in place. Culture as a sub-set of societal settings comprises of assessments, learning and emotions about political action and organizations.⁷⁷

Sociological investigations of 'culture', gives the impression that culture is a division between 'the human science of culture' and 'social human science'.⁷⁸ This division of title reflects methodological level contracts, however, it includes diverse ideas of what 'social' really comprises of.⁷⁹ One variant of this is worried about 'culture' as an arrangement of implications, images and structures; it includes a specific type of sociological (if not semiotic) investigation.⁸⁰ A second form is that 'culture' comprises of specific fields of activity related with specific products or potentially exercises that are restricted to, for instance, 'expressions of the human experience, social enterprises and media parts'.⁸¹

Culture as enunciated by the United Nations Educational Scientific and Cultural Organization (**UNESCO**) and Universal Declaration on Cultural Diversity (**UNCD**)

⁷⁵*ibid*

⁷⁶*ibid* 13

⁷⁷*ibid*

⁷⁸*National Policy on Culture And Heritage*(Printed by The Government Printer Nairobi 2009) pg 1

⁷⁹*ibid*

⁸⁰*ibid*

⁸¹*ibid*

takes differing frames. It refers to typical uniqueness and the majority of gatherings and social orders of a given mankind.⁸²

Kenya has adopted UNESCO's meaning of culture as "that entire complex of unmistakable, otherworldly, material, scholarly and enthusiastic highlights describing a general public or social gathering."⁸³This definition envelops, notwithstanding craftsmanship and writing, ways of life, methods for living respectively, esteem acknowledged frameworks, conventions and convictions".⁸⁴Culture gives a people their personality, which is passed on from one generation to another.⁸⁵

Culture is along these lines the totality of a people's lifestyle. Be that as it may, culture changes and might be improved by a steady and imaginative change process.⁸⁶ Since culture gives the ideological and philosophical establishment for national advancement, which is fundamental to all improvement programs, the Kenyan social arrangement will help in evaluating and choosing thoughts before adjusting them to improvement programs.⁸⁷In addition, this approach perceives culture as a store of 'learning' which is showed in all parts of life as a manual for development of ethics, states of mind, convictions and qualities in the public arena.⁸⁸

⁸²*National Policy on Culture And Heritage*(Printed by The Government Printer Nairobi 2009) pg 1

⁸³*ibid* 3-4

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸*ibid*

Culture is described by consistent change.⁸⁹Even with globalization, culture gains new patterns and in the process acclimatizes new and outside qualities. This makes between reliance and a need to share data among global bodies, countries and individuals.⁹⁰

1.18 Research Methodology

The methodology for information gathering will be through the use of the library materials and internet research. The library research will trace the context of cultural practices in Kenya.

To have an in depth insight, this research proposal will analyse judicial decisions in the application and interpretation of the Maputo Protocol in relation to the protection of women property inheritance rights in Kenya, scholarly writings, commentaries and editorials.

This research will attempt to examine how other jurisdictions have explored and addressed realization of women property inheritance rights. Two decades ago, the question need for independent rights in land for women was not allowed for discussion in public policy discourse in most parts of South Asia, for example.⁹¹Today, the same question can be tabled for discussion but limited in scope and responses.⁹²

⁸⁹*National Policy on Culture And Heritage*(Printed by The Government Printer Nairobi 2009)pg 3-4

⁹⁰*ibid*

⁹¹B Agarwal,*A Field Of One's Own,Gender And Land Rights In South Asia*(NewYork Cambridge University Press 2003)pg 3

⁹²*ibid*

This research will focus on South Africa which is progressive in terms of observance of the Maputo Protocol in the protection of women property inheritance rights, bearing in mind that Kenya made reference to the South Africa Constitution during its constitutional making process, in so far as it affected the culture of the Kenyan people.

1.19 Literature Review

Despite the existence of literature pertaining to cultural prejudices and perceptions, and how they are an impediment to the protection of women property inheritance rights, cultural practices in Kenya remain relatively unexamined. Historically, practices of the communities in Kenya discriminated against women as was tradition in the colonial times.⁹³ Thus, women are considered to be inferior to men.⁹⁴ Women were ascribed to roles that traditionally made them inferior.⁹⁵ In some cultures, women and children were regarded as equals, whereas in some, women were taken as objects that could only be used and owned by men and therefore capable of being exchanged.⁹⁶ Decision on harmful cultural practices such as female genital mutilation, wife inheritance and chastisement were based on male dominance to make decisions.⁹⁷

⁹³R Aura & M Oduor, *Gender Equality In The New Constitutional Dispensation of Kenya* <[https://www.academia.edu/3050883/Gender in the new constitutional dispensation of Kenya?auto=download](https://www.academia.edu/3050883/Gender_in_the_new_constitutional_dispensation_of_Kenya?auto=download)> accessed 24/11/2018

⁹⁴*ibid*

⁹⁵*ibid*

⁹⁶*ibid*

⁹⁷*ibid*

Gender hierarchy is the social system of male dominance over the females where men considered women inferior in all capacities.⁹⁸ Equality would appear to be a relative and comparative term. Under gender hierarchy, women in this sense are not what the standard equality approach imagines them to be: a demographic with shared biological features.⁹⁹ Women have been perceived as a social group formed to be unequal from a sexual and economic domain.¹⁰⁰ The inequalities that affect the women are linked to disparity in their numbers compared to men. The range of inequality is however very subjective in the sense that it is not exhausted by head-counting.¹⁰¹

Substantive inequality, it is said, can be visited on a single person, provided that it is grounded on the historical and discriminatory social reality of belonging to a social group.¹⁰² The real question that one seeks to address is the dimensions for comparison for example, what is the substance of each of the inequality?¹⁰³ When taking such approach, the question of equality takes a comparative angle and seeks to address materiality instead of ideological issues.¹⁰⁴ Since acting and failure to take action are equally potent, one can't draw the distinction between negative and positive rights.¹⁰⁵

H.E. Paul Kagame, President of Rwanda once had this to say:

⁹⁸C MacKinnon, *Substantive Equality: A Perspective* <<http://www.feministes-radicales.org/wp-content/uploads/2012/06/Catharine-MacKinnon-Substantive-Equality-A-Perspective-Copie.pdf>> accessed 10/11/2018

⁹⁹*ibid*

¹⁰⁰*ibid*

¹⁰¹C MacKinnon, *Substantive Equality: A Perspective* <<http://www.feministes-radicales.org/wp-content/uploads/2012/06/Catharine-MacKinnon-Substantive-Equality-A-Perspective-Copie.pdf>> accessed 10/11/2018

¹⁰²*ibid*

¹⁰³*ibid*

¹⁰⁴*ibid*

¹⁰⁵*ibid*

“The question you have to ponder is simply this: How does a society hope to transform itself in the foot by squandering more than half its capital investment? The truth of the matter is that, societies that recognize the real and untapped socio economic, cultural, and political power of women thrive. Those that refuse to value and leverage women’s talent, energies, and unique skills remain developmental misfits. It is not difficult to demonstrate this with a growing body of evidence.”¹⁰⁶

There are a few occasions in which women have opposed straightforwardly male centric control, yet in many occurrences women have existed, but unobtrusively, on the edges of the political space as opposed to test men and the state.¹⁰⁷ Women can practically assume male jobs and be socially sorted as "male" inside the male centric heredity structure, contingent upon the unique circumstance.¹⁰⁸

Social parenthood additionally will in general rise above organic classes and can prompt the strengthening of women.¹⁰⁹ Jobs of spouses and moms, eurocentrically portrayed as having a place with the "private" circle and as debased, can have political essentialness and fill in as preparing powers for improvement.¹¹⁰ For instance, ponders have demonstrated how the status of "mother" develops gathering of spouses in Igbo society rather than gathering of "little girls" of the ancestry.¹¹¹ This can prompt

¹⁰⁶Winfred Lichuma, 'Key Note Address' *Gender Equality Challenges In Kenya And Africa* (International Challenges And Strategies For Success Organized By Australian Federal Police At The Australian High Commission In London Offices On 28th June 2017)pg 11

¹⁰⁷F Steady, *Women and Collective Action in Africa*(Newyork Palgrave Macmillan 2006)pg 5

¹⁰⁸*ibid* 7

¹⁰⁹*ibid*

¹¹⁰*ibid*

¹¹¹*ibid*

moving for power between the two gatherings.¹¹²Quite a bit of this power is inferred, not from their alliance to men, but rather from women's very own financial jobs and commitments to the advancement of their general public.¹¹³

The sort of women's liberation created inside this institutional setting was all the more enabling to women. Imperialism undermined women through the presentation of male-ruled political, monetary, and religious organizations that depreciated the engaging conventional establishments of women. Imperialism implemented strict divisions of individuals into organic classifications of "male" and "female" that were unequal, without setting up institutional components for redressing and rising above these classifications.¹¹⁴

A relationship by the name ABANTU for improvement works in 19 African nations and spotlights on advancement issues by building associations among women and men to defeat these issues.¹¹⁵It plans to dispose of gender disparity by killing the social, lawful, and political hindrances to women's fulfillment of balance and financial autonomy under the watchful eye of the law and in the public arena.¹¹⁶Among its significant exercises are preparing in the region of strategy examination, financial aspects, wellbeing care, leadership, the media, and natural protection.¹¹⁷

¹¹²*ibid*

¹¹³*ibid*

¹¹⁴F Steady, *Women and Collective Action in Africa* (Newyork Palgrave Macmillan 2006)pg 7

¹¹⁵*ibid*

¹¹⁶*ibid* 158

¹¹⁷*ibid*

Women establish in excess of 50 percent of the population and are ineffectively spoken to in the formal areas of the economy particularly in official, administrative, and basic leadership positions.¹¹⁸Subsequently, an endeavor was made to discover the level of their support and the gender orientation related issues filling in as deterrents to their headway.¹¹⁹One vital finding was that women did not have a minimum amount of good examples in administrative and basic leadership positions.¹²⁰The investigation reasoned that, more women ought to be incorporated into best administration positions, with the goal that they could likewise fill in as good examples to enable separate the limiting social and conventional gender orientations based on convictions and practice.¹²¹

The distinctive manners by which the female and male take an interest in, coupled with the advantage from municipal administration are essentially molded through winning developments of gender orientation, whose standards, desires and institutional articulations oblige women' entrance to the communal and economic, and consequently governance assets of the municipal region.¹²²

Social mentalities towards women and gender orientation inclination likewise will in general obstruct their work, particularly when managing settled in organizations and the military.¹²³A few affiliations are tormented with auxiliary shortcomings that come

¹¹⁸ *ibid* 61

¹¹⁹ *ibid*

¹²⁰ *ibid*

¹²¹ *ibid* 61

¹²²C Creighton et al, *Gender Inequalities in Kenya*(Paris UNESCO 2006)<<http://unesdoc.unesco.org/images/0014/001458/145887e.pdf>>accessed 13/7/2018

¹²³ *ibid*

from job clashes between the administration and the majority, and identity clashes among the authority.¹²⁴

The experience and stories that women tell radiate from their past, and are regularly generally organized to limit their cooperation in regular daily existence.¹²⁵ It isn't abnormal for women to be distinguished as wayward, devilish, and "awful" or even slaughtered for declining to fit into jobs encapsulated as "ordinary" or "refined" in the public arena.¹²⁶

Despite the eloquence of the writer Ngugi's words or the new refinement of ongoing sociology examination, nobody has started to deal with the situation of women in Kenyan culture amid Mau.¹²⁷ All through these medicines of Mau, women remain a couple of scattered commentaries.¹²⁸ They show up as members in dissent developments before Mau; as co-schemers with their spouses; as issues for the men endeavoring to run the timberland camps. Nowhere however are they given immediate and genuine treatment and recognition as performing artists with reasons for their own.¹²⁹

¹²⁴ *ibid*

¹²⁵ D Meredyth & J Minson, *Citizenship & Cultural Policy* (London Sage Publication 2001) pg 3

¹²⁶ E Swai, *Beyond Women's Empowerment in Africa Exploiting Dislocation and Agency* (Newyork Palgrave Macmillan 2010) pg 3-4

¹²⁷ M Likimani, *Passbook Number F.4792: Women and Maumau in Kenya* (London Macmillan 1985) pg 8

¹²⁸ *ibid*

¹²⁹ M Likimani, *Passbook Number F.4792: Women and Maumau in Kenya* (London Macmillan 1985) pg 8

While men are specified by name and position, women are more often than not alluded to as just 'a young lady'.¹³⁰ Women are once in a while stratified in places of administration.¹³¹ One lady is made reference to as an incredible female pioneer, however, the way that the author hitched her may clarify the perception in his book.¹³²

African women in pre-provincial Kenya did not discuss whether marriage and parenthood ought to be the standard for them.¹³³ Inside marriage, they completed the full scope of human duties.¹³⁴ They didn't consider marriage to be taking out social support; they considered it to be the road into it.¹³⁵

1.20 Scope/Limitation of the Study

This study limits itself on how cultural practices have impacted realization of women property inheritance rights in Kenya in the context of the Maputo Protocol. The question of equality and equity in relation to property inheritance will be addressed in more detail by way of a critique of a few court decisions in light of how the respective courts confronted the questions before them.

1.21 CHAPTER BREAKDOWN

CHAPTER 2

Chapter 2 illustrates what constitutes property and the access of women to property rights in Kenya.

¹³⁰*ibid* 10

¹³¹*ibid*

¹³²*ibid*

¹³³ *ibid* 17

¹³⁴ *ibid*

¹³⁵*ibid*

CHAPTER 3

Chapter 3 analyses the existing legal framework and how it affects the acquisition of women property rights in Kenya.

CHAPTER 4

Chapter 4 examines the role of the courts and looks at judicial decisions in realization of women property rights in Kenya.

CHAPTER 5

Chapter 5 draws a comparison between Kenya and South Africa in the observance and promotion of women property rights.

CHAPTER 6

Chapter 6 gives a summary of the Chapters and a way forward on how women property rights can be protected and better realized in Kenya.

CHAPTER 2

AN EXAMINATION OF THE NATURE OF CULTURAL PRACTICES IN RELATION TO WOMEN'S PROPERTY INHERITANCE RIGHT IN KENYA.

This Chapter will define property and attempt to examine the perception of women property and property inheritance rights in the context of cultural practices. The Chapter will further analyse the connection between women, their status in the society and legitimacy to access property.

2.1 Definition of Property

Property incorporates land, houses, structures, animals, family merchandise and individual assets.¹³⁶Property alludes to land and houses or different structures, known as "relentless property". Under standard law, property rights are for the most part public instead of individual, as land is shared by individuals from a particular network as opposed to claimed secretly by one individual.¹³⁷ In customary law, land is communally owned while the family owns livestock, and personal belongings are owned individually.¹³⁸ However, customary law varies from one community to another and every community therefore has different notions of land and property ownership rights.¹³⁹

2.2 Kenya as a Patriarchal Society

Whereas women appear to form a majority of the population in Kenya and play a key role in development, Kenya is seen as a very patriarchal society where status of

¹³⁶C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law*(Cape Town Women's Legal Centre 2010)pg 6

¹³⁷*ibid*

¹³⁸*ibid*

¹³⁹C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law*(CapeTown Women's Legal Centre 2010)pg 6

women remains unaddressed and are rated below the bar on issues of equality and in relation to the supposed equitable distribution of resources.¹⁴⁰ Women are largely marginalized and still discriminated against. This is made worse by the existing laws and policies, as well as the socio-cultural factors that have done little to protect women in all social aspects.¹⁴¹

The very narrow view taken with regards to land rights during the legislative process has made it almost impossible to walk away from all forms of discriminatory customary law.¹⁴² In most communities, public grazing lands for example, became extinct when individuals took land for own interest under the presence of past cultivation.¹⁴³ This changed the structure of accessibility to land in the family set up and rights vested and attributed to adult male heads of families without considering potential rights of women and their children or other beneficiaries who had access rights to the land.¹⁴⁴ Looking at general land ownership, other than Central and Coast Provinces (as they then were), less than 5 per cent only of women and children under

¹⁴⁰Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women's Human Rights Clinic, *Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights*, A Supplementary Submission to the Kenyan Government's Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3-21, 2008) pg 3-4

¹⁴¹*ibid*

¹⁴²H Ogendo, *The perils of land tenure reform: the case of Kenya* <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/35689/059_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya .pdf?>](http://erepository.uonbi.ac.ke/bitstream/handle/11295/35689/059_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya.pdf?>) accessed 15/7/2018

¹⁴³*ibid*

¹⁴⁴H Ogendo, *The perils of land tenure reform: the case of Kenya* <http://erepository.uonbi.ac.ke/bitstream/handle/11295/35689/059_The%20perils%20of%20land%20tenure%20reform-%20the%20case%20of%20Kenya .pdf?> accessed 15/7/2018

18 were registered proprietors of land.¹⁴⁵ Land ownership among women is worse in pastoral or semi-pastoral societies.¹⁴⁶ Adjudication for land in these areas was carried out based on clan claims and the respective clans were assigned individual rights to their members.¹⁴⁷ The respective clans used the lineage principle in customary succession. This was a vicarious position that excluded women because they were not regarded as permanent members of societies.¹⁴⁸

Women in Sub-Saharan Africa face a similar and distinctive social dilemma.¹⁴⁹ They are not co-owners of matrimonial property neither are they included in family lineage despite their key role in agricultural economies. Women lack the ability to protect themselves upon their husbands' death and are dispossessed of all the property on the death or divorce of their husbands¹⁵⁰ because women's property rights are largely connected to customary inheritance rights.¹⁵¹ Traditionally, daughters inherit less than sons and sometimes they are not given anything not to mention the injustices caused by customs to the surviving spouses.¹⁵²

Customary law, describes women property rights as derived and secondary. The fact that inheritance rights is subjective to the relations the women have with the male in

¹⁴⁵ *ibid*

¹⁴⁶ *ibid*

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ S. Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law* <<https://scholarship.richmond.edu/cgi/viewcontext=polisci-faculty-publications>> accessed 13/7/2018

¹⁵⁰ *ibid*

¹⁵¹ *ibid*

¹⁵² *ibid*

their families has been criticized for eroding women's interests in land.¹⁵³The above notion means that the women either have no inheritance rights or the same can only be admitted if inferior to men. Some authors have alluded to the fact that women might as well be inherited when their husbands' die.¹⁵⁴

Findings on studies on women's inheritance rights in Africa is varied.¹⁵⁵Examining the Kenyan case, Aliber et al. noted that most women are able to retain land after the death only if the action is legitimized by the community.¹⁵⁶In their study, for a widow to retain property is the exception rather than the rule.¹⁵⁷This would be consistent with the findings of Rose and Khadiagala that women retain usufruct rights to land only through social networking.¹⁵⁸ However, the weight of evidence seems to underline the precarious state of women's property inheritance rights after the death of a spouse.¹⁵⁹ Human Rights Watch has documented its findings that in Kenya spousal loss of property is the norm and a frequent occurrence.¹⁶⁰This is supported by Verma study among the Maragoli. The Federation of Women Lawyers (**FIDA**), reported in 1995, that 40% of the cases they handled detailed unfair practices against widows by their husbands relatives, where the relatives harassed and forcefully took away their deceased male relative's property.¹⁶¹

¹⁵³A Whitehead & D Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary* <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/1471-0366.00051>>accessed 15/7/2018

¹⁵⁴*ibid*

¹⁵⁵*ibid*

¹⁵⁶*ibid*

¹⁵⁷*ibid*

¹⁵⁸ *ibid*

¹⁵⁹*ibid*

¹⁶⁰*ibid*

¹⁶¹S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and*

Examination as to whether land is subject to hierarchically ordered claims and that it creates a formal meaning of being socially embedded would be important in understanding the gender discrimination to land access.¹⁶² Women have not had identical claims to land in Sub-Sahara Africa, largely because the genders have very differentiated positions in the designated kinship systems which define land rights.¹⁶³ Notably, there is no recognition of particular character of women's land access rights.¹⁶⁴

Marriage is the institution that would lay a basis for and recognize women's claims to land; many authors have reported that husbands devolve land to their wives for farming.¹⁶⁵ Some other authors, however, have found that the husband's kin groups are the right class to offer and protect women claims.¹⁶⁶ Women will often retain some residual land claims in their own kin groups and most times obtain land through loan or even gifts.¹⁶⁷ Women acquisition of land through other social relations is key as it strengthens the policy decisions that women do not necessarily have access to property through inheritance¹⁶⁸ because customarily women generally have rights to

Customary law <<https://scholarship.richmond.edu/cgi/viewcontext=polisci-faculty-publications>> accessed 13/7/2018

¹⁶²A Whitehead & D Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary* <<https://online.library.wiley.com/doi/pdf/10.1111/1471-0366.00051>> accessed 15/7/2018

¹⁶³ *ibid*

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ *ibid*

cultivate land as well as rights to control income from the resulting crop production.¹⁶⁹They are rarely granted rights to allocate or alienate land.¹⁷⁰

Under customary laws in Kenya, independent land rights for women are not culturally legitimate.¹⁷¹Customary norms, principles and rules of different communities relate succession rights to marriage and a woman's relationship with a male.¹⁷²Most if not all communities in Kenya are patrilineal in nature. That means that lineage is determined through the male blood line and women would rarely inherit customary land rights from either their husbands or fathers.¹⁷³Women's rights to land are of a secondary nature and the male have the primary rights.¹⁷⁴

2.3 Diversity of Laws Governing ownership of Property in Kenya

Women's property ownership rights in Kenya is governed by statute law, customary laws, religious beliefs and law ¹⁷⁵ and the Constitution of Kenya 2010.The general marital status of women plays a role in owning or accessing property.¹⁷⁶Women and Law in East Africa Research group carried out a research on inheritance laws and

¹⁶⁹M Kevane, *Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan*

Africa<<https://scholarcommons.scu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1026&context=econ?>>accessed on 12/7/2018

¹⁷⁰*ibid*

¹⁷¹R Gaafar, *Women's Land and Property Rights in Kenya*<<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>>accessed

14/7/2018

¹⁷² *ibid*

¹⁷³ *ibid*

¹⁷⁴*ibid*

¹⁷⁵P Mbote, *Women Land Rights and the Environment, the Kenyan Experience*<<http://www.ierlc.org/content/a0605.pdf>>accessed 13/7/2018

¹⁷⁶*ibid*

practices, and found that women tended to own immovable property or chattels only.¹⁷⁷ Most women have only access only and possession rights to land and not legal right to property in general.¹⁷⁸ Such access remains a preserve of the mutual relationship of the woman to the male legal owner.¹⁷⁹ Unmarried women are perceived to be in a transition stage and whilst there are no legal barriers to stop them from ownership of property, they do not own property in their own right.¹⁸⁰ Religious laws more often than not qualifies women to inheriting property, yet the offer of legacy is perpetually low, and there is an accentuation on access as opposed to proprietorship rights.¹⁸¹ While there remains ambiguities about the permanence or other of men's rights in land in the resettlement areas, the major problems as far as women are concerned has been their exclusion from access to land in their own right.¹⁸² With the exception of widows who, unable to gain access to land through husbands, may be granted half the amount of land due to a married man, the resettlement of families has perpetuated women's customary lack of land rights.¹⁸³ For women, access to land has remained conditional upon their marital status.¹⁸⁴

¹⁷⁷*ibid*

¹⁷⁸P Mbote, *Women Land Rights and the Environment, the Kenyan Experience* <<http://www.ierlc.org/content/a0605.pdf>> accessed 13/7/2018

¹⁷⁹*ibid*

¹⁸⁰*ibid*

¹⁸¹UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 8

¹⁸²S Jacobs, *Women and Land Resettlement in Zimbabwe* <http://mokoro.co.uk/wpcontent/uploads/land_reform_worth_pursuing.pdf> accessed 15/7/2018

¹⁸³*ibid*

¹⁸⁴*ibid*

Access to property in many societies is predicated on membership to a society, functional aspects of the related property and the performance of reciprocal obligations by the other members of the society.¹⁸⁵The social structure and constructive roles of men and women on the one hand remain important to the question of land ownership and access rights.¹⁸⁶Control on the other entails the power to distribute and redistribute access rights to individuals of a given community.¹⁸⁷In light of the principle of equality, women and men should own land equally, unfortunately, land is a colonized system of patriarchal norms.¹⁸⁸

The notion of predominant patriarchy ensures in law and in practice that the land is owned by none other than men.¹⁸⁹Surprisingly, even where law guarantees equal rights to property as is the case in the Law of Succession Act 1981, the realization of these rights is contested as is evident from the many legal cases.¹⁹⁰The question women's rights to land were among the nine most contentious issues in the Proposed Constitution of Kenya that failed in the national referendum held in 2005.¹⁹¹

On legal rights, women in many countries still lack independent rights to own land, manage property, conduct business, or even travel without their husband's consent.¹⁹²

¹⁸⁵P Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses* <<http://www.ielrc.org/content/w1301.pdf>>accessed 14/7/2018

¹⁸⁶*ibid*

¹⁸⁷*ibid*

¹⁸⁸*ibid*

¹⁸⁹*ibid*

¹⁹⁰*ibid*

¹⁹¹*ibid*

¹⁹²D Esther, *Women Empowerment and Economic Development*. *Journal of Economic Literature* 50, no. 4 (December 2012): 1051-1079 <<https://www.aeaweb.org/articles?id=10.1257/jel.50.4.1051pdf>>accessed on 13/7/2018

Twenty-one of the 63 countries studied by Htun and Weldon have unequal inheritance rights for men and women.¹⁹³

A Woman not blessed with sons has numerous cultural options to get inheritors and thereon gaining legitimacy on the land she resides. She may choose to adopt children or “marry” a woman having children through payment of dowry for the wife of an “imaginary son” whose “children” become her grandchildren.¹⁹⁴ Women’s groups have adopted a unified position that a widow devoid of sons does not have resources or the will and she would be “chased” from her husband’s land.¹⁹⁵ In most traditional tenure systems, women hold usufruct rights as wives in their husband’s clan. Platteau’s argument is principally drawn on studies of titling as was the case in Kenya in the 1950s, and that includes that of Fiona Mackenzie.¹⁹⁶

In Fiona Mackenzie’s study of land in Central Province of Kenya, debates over what constitutes “custom” were discussed at length and shaped colonial attempts to codify the then “customary law” in the 1920s.¹⁹⁷ In the codification process, male rights to allocate land “pre-empted the previous visibility and legal significance of rights to

¹⁹³D Esther, *Women Empowerment and Economic Development*. *Journal of Economic Literature* 50, no. 4 (December 2012): 1051-1079 <<https://www.aeaweb.org/articles?id=10.1257/jel.50.4.1051pdf>> accessed on 13/7/2018

¹⁹⁴S Joireman & E Henrysso, *On the Edge of the Law: Women’s Property Rights and Dispute Resolution in Kisii, Kenya* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>> accessed 13/7/2018

¹⁹⁵*ibid*

¹⁹⁶I Yngstrom, *Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems* <<https://pdf.semanticscholar.org/2922/19213d88f2d6297ca32e71f487bffeeb771c.pdf> pdf> accessed on 13/7/2018

¹⁹⁷*ibid*

usufruct” held by women.¹⁹⁸ From this historical precedents of custom, men found manipulated custom in order to take control over land to the disadvantage of women.¹⁹⁹Notions of a woman’s attribute determine her vulnerability to land entitlement.²⁰⁰A woman can be alleged of having ‘bad attributes’ for practicing witchcraft, promiscuity or being indifferent, specifically towards her in-laws.²⁰¹

Women are found to be vulnerable, because of systematic discrimination.²⁰² The level of vulnerability varies and relates to protection of legal land rights towards socio-cultural and political rights, productive resources and physical capability.²⁰³ Men take advantage of their customary dominance to deny women their rights to land.²⁰⁴ Women, consequently lose their rights and have limited access to land and hence exposed to economic and social insecurity.²⁰⁵The literature on women’s access to land is unenticing with cases of dramatic reductions in rights.²⁰⁶

¹⁹⁸*ibid*

¹⁹⁹*ibid*

²⁰⁰S Joireman & E Henrysso, *On the Edge of the Law: Women ’s Property Rights and Dispute Resolution in Kisii, Kenya* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>>accessed 13/7/2018

²⁰¹*ibid*

²⁰²L Wily et al, *Land Rights and The Rush For Land* <https://scholar.google.com/scholar?start=20&q=women+land+rights+in+kenya&hl=en&as_sdt=0,5>accessed on 12/7/2018

²⁰³*ibid*

²⁰⁴M Kevane, *Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa* <<https://scholarcommons.scu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1026&context=econ?>>accessed 12/7/2018

²⁰⁵*ibid*

²⁰⁶*ibid*

Women at times cite custom when faced with challenges to their traditional rights of access to land.²⁰⁷In Kenya, land titling and registration have reduced women's usufruct rights without compensating for this loss by granting formal rights, women circumvent male authority and gain or maintain control over land through the institution of female husbands.²⁰⁸

“A childless widow and in some cases a widow without sons would ideally take a wife and give her some land as bride price so as to protect her accessibility to her late husband's land.²⁰⁹The woman to woman marriage results give the older 'female husband' a heir; according to Glazier the child of the young women (fathered perhaps by an agnate of the older woman) would be considered to be “a descendant of [the]... fictitious son” the widow never had.²¹⁰

Property rights have a wide impact to the right of use, regulations, or management of resources, which may still be grounded on a range of customary institutions or local norms as well as state law.²¹¹These interests often play a key role in social relations and ecological set ups.²¹²More common today, as it is in much of Africa, is for the eldest son to inherit his father's wealth and provide for his mother and his brothers and sisters.²¹³Land law and custom penalize women not only as daughters at the time

²⁰⁷*ibid*

²⁰⁸*ibid*

²⁰⁹ *ibid*

²¹⁰*ibid*

²¹¹R Meinzen & E Mwangi, *Cutting the web of interests: Pitfalls of formalizing property rights* <<https://s3.amazonaws.com/academia.edu.documents/45692092/j.landusepol.2007.06.00320160516-12353-16vrf50.pdf?>>accessed 13/7/2018

²¹²*ibid*

²¹³ N Sobania, *Culture and Customs of Kenya* (New York Greenwood Press 2001) pg 145

of inheritance, but also on death of the spouse.²¹⁴Widows', as well as daughters', land rights usually take second place in practice to those of sons.²¹⁵

Religious and other traditional groups sometimes press successfully for laws and even constitutions giving preference to sons over daughters, or otherwise discriminating against women, as inheritors of land.²¹⁶Even where land law is gender-neutral, or explicitly forbids discrimination, custom and practice are biased and take precedence over land inheritance by daughters.²¹⁷

Nearly every Kenyan society is patrilineal (inheritance as well as succession to social position is transferred from father to son), and children are understood to belong to the man's family.²¹⁸This customary rule is also the case in Kenyan law, it serves to discourage women from seeking a divorce. Ironically, a man who deserts his family is under no obligation to support his children.²¹⁹ Unfortunately, given the patriarchal dominance in Kenya, divorced women are faced with societal stigma. Professional women in an urban set up have a considerably easier time than those in more traditional set ups.²²⁰For a woman to remarry is seen as unusual whereas a man can marry and remarry as many times as he would like.²²¹

²¹⁴M Lipton, *Land Reform in Developing Property rights and property wrongs* (New York Routledge 2009) pg 17

²¹⁵*ibid*

²¹⁶ *bid*

²¹⁷*ibid*

²¹⁸N Sobania, *Culture and Customs of Kenya* (New York Greenwood Press 2001) pg 146

²¹⁹*ibid*

²²⁰*ibid*

²²¹*ibid*

Litigation is one form of fighting for women rights. Women however avoid that route because it is expensive and fear decision makers may be guided by the patriarchal thinking.²²²As a result, many outlived gender discriminatory customs find their way back to communities.²²³

Women's property rights in Kenya are seen as so fragile and this is attributed to statute and customary law.²²⁴ Women rights to Matrimonial property too remains a challenge.²²⁵ Customary law in relation to property rights does not move with the times and is therefore not a good representation of economic dynamism.²²⁶ Insufficient attention is being paid to power relationships and their impact to social groups, such as women, who are not well positioned and represented in local level power structures.²²⁷ Considerable changes in political, legal and cultural practices will be required for African states to deliver their mandate on gender justice on land matters.²²⁸

The rights of women and the marginalized groups have been rendered uncertain and in some cases extinguished altogether, while wealth, privilege and decision-making

²²²S Rohrs et al, *In Search of Equality Women, Law and Society in Africa* (Capetown UCT Press 2014) pg 214

²²³*ibid*

²²⁴S Joireman & E Henrysso, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>> accessed 13/7/2018

²²⁵*ibid*

²²⁶*ibid*

²²⁷A Whitehead & D Tsikata, *Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary* <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/1471-0366.00051>> accessed 15/7/2018

²²⁸*ibid*

powers remain concentrated in the hands of those who were able to influence the direction of change because of their wealthy status and/or political influence.²²⁹

Typically women depend on the kinship group or ownership of their children who are seen as belonging to a particular kinship group.²³⁰ Women do not receive land rights to land because they are not recognized as having autonomous membership in a particular group and therefore have only the right to till land owned by the group (a secondary right to the land).²³¹ Since women move in with their husbands when they get married, they are seen as having membership in their lineage, but rather the community they move to (their husband's lineage). In some cases they are looked at as a mere commodity.²³²

Where there is a high demand for land, migrants, divorced women, and women in general are most likely to face exclusion.²³³ Under certain circumstances it may be necessary to undermine customary law to promote an alternative understanding of customary land ownership that protects women property inheritance rights.²³⁴

²²⁹R Meinzen & E Mwangi, *Cutting the web of interests: Pitfalls of formalizing property rights* <<https://s3.amazonaws.com/academia.edu.documents/45692092/j.landusepol.2007.06.00320160516-12353-16vrf50.pdf>> accessed 13/7/2018

²³⁰S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1073&context=polisci-faculty-publications>> accessed 13/7/2018

²³¹*ibid*

²³²*ibid*

²³³*ibid*

²³⁴S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1073&context=polisci-faculty-publications>> accessed 13/7/2018

Having understood the perception of property and women property rights in the context of cultural practices, the next Chapter will attempt to analyse the legislative framework on gender equality and the impact of cultural practices on the realization of women property rights in Kenya.

CHAPTER 3

THE LEGISLATIVE FRAMEWORK ON GENDER EQUALITY AND THE IMPACT OF CULTURAL PRACTICES ON REALIZATION OF WOMEN PROPERTY RIGHTS IN KENYA.

This Chapter will highlight the legislative framework on gender equality and trace the origin of the inequality and inequities between men and women in realization of women property rights, and examine what reinforces the inequality and the effects of cultural practices in the deprivation of women property inheritance rights in Kenya.

3.1 The Legislative Framework on Gender Equality

Women have been seen to suffer human rights violations due to a less discerning legal framework that does not adequately address the inequalities caused by discriminatory patriarchal practices in the society.²³⁵ Kenya is a classic example of countries whose implementation of women property inheritance rights is inadequate since independence. Kenya has not come out strongly on the prevention of harmful cultural practices. For purposes of this research, widow inheritance and discriminatory property inheritance practices continue to discriminate against women and that increases abuse of women rights.²³⁶

Kenya's Constitutional ethos and guidelines of leadership, entails equality, equity, respect for human dignity, inclusiveness and non-discrimination, and these continue

²³⁵Scholastica Omondi et al, *The Current Situation Analysis on Gender Equality and Discrimination in Kenya* < <http://www.ijsrp.org/research-paper-0817/ijsrp-p6858.pdf>> accessed 24/11/2018

²³⁶*ibid*

to be the county's anchor and campus for realization of gender equality.²³⁷They continue to inspire legislative, policy and programmes to meet the goal of equality.²³⁸Additional benefits for the womenfolk from the Kenya Constitution 2010 are:²³⁹

- a) Proportionate leadership with a third of the positions preferred for women
- b) Equal marriage rights
- c) Equal employment rights
- d) Equal rights in access to education
- e) Prohibition of all discriminatory practices.
- f) Matrimonial property is protected
- g) Guarantee of women property & inheritance rights
- h) Equality in parental care
- i) Requirement for inclusivity irrespective of gender among other distinctions.

Indeed, Kenya has made strides in realizing gender equality but a lot more needs to be done to make the legal framework a reality.

The Kenya Constitution has been applauded as one of the most recent progressive Constitutions in the world. It has many progressive Articles that show the commitment to implement the international and regional best practices and expectations emanating from treaties and conventions and other instruments ratified

²³⁷Sicily Kariuki 'Statement' On The Occasion Of Consideration Of Kenya's 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 2

²³⁸*ibid*

²³⁹Winfred Lichuma,'Key Note Address' *Gender Equality Challenges In Kenya And Africa* (International Challenges And Strategies For Success Organized By Australian Federal Police At The Australian High Commission In London Offices On 28th June 2017) pg 2

by Government. ²⁴⁰The **CEDAW** and the **Maputo Protocol** are key treaties promoting women's rights. Kenya has ratified both. The African Call is to have 50:50 gender representation.²⁴¹

Kenya continues to put in place measures to eradicate all forms of discrimination against women. In this regard, the Government of Kenya has taken initiatives for affirmative action to redress any disadvantage of any past form of discrimination against women. More specifically, the country has put in place various legislative and other measures to ensure achievement of gender equality.²⁴²

In terms of taking legislative measures to ensure gender equality and women empowerment, various laws have been enacted in the past 6 years to protect women in the various spheres of life and the enactments include:- The National Gender and Equality Commission Act, 2011;The Matrimonial Property Act, 2013;The Marriage Act, 2014; The Protection Against Domestic Violence Act, 2015; The Land Act, 2012; The Land Registration Act; Counter-Trafficking Act - No. 8 of 2010; The Prohibition of Female Genital Mutilation (FGM) Act 2011; Amendment to the Sexual Offences Act 2006;The Kenya Citizenship and Immigration Act - NO. 12 of 2011; The Kenya National Human rights Act, 2012 which is mandated to promote and protect the human rights and fundamental freedoms of all; Fair administrative action

²⁴⁰*ibid*

²⁴¹*ibid* 3

²⁴²Sicily Kariuki 'Statement' On The Occasion Of Consideration Of Kenya's 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 3

Act-Act no 4 of 2015 and The Treaty Making and Ratification Act no. 45 of 2012 which ensures domestication of international Treaties.²⁴³

The Land Act No. 6 of 2012, Land Registration Act NO 3 of 2012, and the National Land Policy are useful instruments that add voice to protection of women property rights. An outstanding gain of the Marriage Act 2014 is that all marriages are now legislated under one Act and it introduces registration of customary marriages, which is a regime that majority of women in Kenya are married under.²⁴⁴Registration of customary marriages improves the status of women in such marriages and enhances legitimacy in case of a legal dispute.²⁴⁵

However, the Attorney General Prof. Githu Muigai (as he then was) issued a Gazette Notice No. **5345 of 2017**, that declared all customary marriages be registered effective 1st August 2017 to preserve its validity.²⁴⁶The directive was issued without providing adequate infrastructure for the same to be achieved.²⁴⁷It is not clear where rural women will register their marriages and/or assignment of officials to reach the women.²⁴⁸There is equally no mechanism to ensure that spouses register, especially male spouses whom legitimizing their union is a challenge based on the fact that customary marriages are potentially polygamous.²⁴⁹Locking out women who have not registered their marriages will place them at a more disadvantaged position than what

²⁴³*ibid* 3-4

²⁴⁴Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 4

²⁴⁵*ibid*

²⁴⁶*ibid*

²⁴⁷*ibid*

²⁴⁸*ibid*

²⁴⁹ *ibid*

the law intended.²⁵⁰ Women who do not comply with the notice risk losing entitlement to shared matrimonial property.²⁵¹ Given that 75% of the total Kenyan population lives in rural areas which are difficult to reach, often with limited access to news/information, they are likely not to be aware of legislative changes affecting their property rights.²⁵² Ms. Judy Thongori, a seasoned family lawyer, once commented: *“the recently passed Matrimonial Property Act 2013 may not be perfect to some people but it is a stride from the colonial Married Women Property Act of 1882.....We now have a law that defines matrimonial property, provides for monetary and non-monetary contribution toward acquisition of the investments.”*²⁵³

A contradiction of **Article 45(3)** of the **Kenya Constitution** is **Section 7 of *The Matrimonial Property Act 2015***, negates the gain of equality in marriage and calls on couples to show contribution.²⁵⁴ This renders an unfavorable position for a large number of women since it is not feasible to measure domestic work and/or non-monetary support.²⁵⁵ The law further leaves the Court with a free hand to determine what is due to a woman.²⁵⁶

When Land Act 2012 was enacted, spousal consent was made a requirement before approval is given for any land transactions that comprised matrimonial property.²⁵⁷

²⁵⁰*ibid*

²⁵¹ *ibid* 5

²⁵²*ibid*

²⁵³The Advocate, LSK Magazine Volume 1, Issue 1 August 2014 pg 4

²⁵⁴Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 5

²⁵⁵*ibid*

²⁵⁶*ibid*

²⁵⁷Land Act No 6 of 2012 section 79(3) Laws of Kenya

The essence of this statute was to protect spouses, and especially women from the arbitral sale of matrimonial property leaving them dispossessed with their children.²⁵⁸

The National Assembly has since passed an amendment to that law that altered the requirement of spousal consent.²⁵⁹Section 11 of the Land Laws Amendment Act amends section 28 of the Land Registration Act that made spousal consent and requirement for transfer of matrimonial land.²⁶⁰This means that spousal consent is no longer automatically deemed to be an overriding interest over registered land without their being noted on the land register.²⁶¹Parliament's action is seen to be retrogressive and to this extent places married women in a precarious position, especially in light of polygamy being potentially acceptable in Kenya.²⁶²

The Kenyan poverty levels among women is high.²⁶³Women can't access credit facilities that requires collaterals because a majority of them lack ownership rights of tangible assets.²⁶⁴There have also been judgments by judicial officers that endorse such discrimination against women. The case of **P N N v Z W N** ²⁶⁵ in a dissenting opinion, **Justice Kiage** ruled that equality in marriage does not translate to equality in

²⁵⁸Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 5

²⁵⁹Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 6

²⁶⁰ *ibid*

²⁶¹ *ibid*

²⁶² *ibid*

²⁶³Winfred Lichuma,'Key Note Address' *Gender Equality Challenges In Kenya And Africa* (International Challenges And Strategies For Success Organized By Australian Federal Police At The Australian High Commission In London Offices On 28th June 2017)pg 4

²⁶⁴ *ibid*

²⁶⁵Civil Appeal No. 128 of 2014

distribution of the matrimonial property.²⁶⁶ Though a dissenting opinion, in Kenya, this is precedent set and can apply to other cases. FIDA Kenya protested against the dissenting opinion and brought the issue to the attention of the Chief Justice for interpretation with a hope for a favorable solution.²⁶⁷

Kenya through the Kenya Law Reform Commission, is reviewing the Law of Succession Act.²⁶⁸ Suggestions for amendments to this Legislation which are meant to align the law to the Constitution of Kenya, are contained in the Miscellaneous Amendment Act of 2016 and they are pending legislation.²⁶⁹

Programmatically, the Government has strengthened the National Gender machineries.²⁷⁰ For the first time in the history of Kenya, a fully-fledged Department of Gender Affairs that is well resourced both financially and staffing has been established.²⁷¹ One can see positive measures have been taken to empower women through gender mainstreaming in the National Development goals.²⁷²

Women's economic empowerment including women's right to decent work, full and productive employment is a critical means of implementing Sustainable Development Goals (SDGs) and the targets, as vital enablers of women's economic empowerment

²⁶⁶Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 6

²⁶⁷*ibid*

²⁶⁸Sicily Kariuki 'Statement' On The Occasion Of Consideration Of Kenya's 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 4

²⁶⁹*ibid*

²⁷⁰*ibid* 5

²⁷¹*ibid*

²⁷²*ibid*

in the changing world of work.²⁷³ Kenya has recently reviewed the National Gender and Development Policy whose goal is to achieve gender proportionality and women's strengthening for the achievement of sustainable development.²⁷⁴

The Policy is informed by the Constitution of Kenya, CEDAW, various Acts of Parliament and Government policy documents and reports.²⁷⁵ The reviewed Policy marks an important step in demonstrating Kenya's commitment to give effect to gender equality and women's empowerment provisions of the Constitution which Kenyan women struggled to achieve for many years.²⁷⁶ The Policy is premised on the following principles:²⁷⁷

- a. Equality and non-discrimination;
- b. Recognition of differences and inequalities among women and men;
- c. Respect for human rights of all;
- d. The inseparability of public and private spheres of life;
- e. Equity/substantive equality;
- f. Inter-sectionality and multiple forms of discrimination;
- g. Consultation and co-operation;
- h. Participation; and
- i. Accountability

The Policy is pending cabinet approval and its adoption and operationalization will ensure comprehensive policy and legislative approach towards achievement of gender

²⁷³*ibid* 8

²⁷⁴*ibid*

²⁷⁵ *ibid*

²⁷⁶*ibid*

²⁷⁷*ibid*

equality.²⁷⁸ Given that the Policy identifies indicators for measuring its effectiveness, the Government has to make a concerted effort to allocate adequate resources to the processes of institutionalizing gender equality along the policy objectives.²⁷⁹ It is envisioned that the outcome of implementing the policy will lead to a fairer and transformed society in which women and men will benefit in the following ways:

- a. Equality as enshrined in the Constitution and enjoyment of rights contained in the Bill of Rights in the Constitution 2010 will be realized.
- b. Women and men will have equal rights and access to education, health, housing, employment, natural resources and other services and resources.
- c. Women and men will have equality of opportunity to participate in and to contribute to the political, social, economic and cultural development of Kenya.
- d. Every Kenyan's rights will be seen and respected as human rights.
- e. Respect for provisions on equality in the Bill of Rights in civil, administrative and judicial regulations and procedures and customary, cultural and religious practices.
- f. Enforcement of statutory, religious and customary laws within the framework of this policy and the Constitution;²⁸⁰
- g. Set standards and strengthen institutions advancing gender equality and women's empowerment at the National and County Government levels; and Kenya also developed the National Equality Policy in 2016 which is pending adoption by the Cabinet. The Policy seeks to give effect to the realization of

²⁷⁸Sicily Kariuki 'Statement' On The Occasion Of Consideration Of Kenya's 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 9

²⁷⁹*ibid*

²⁸⁰*ibid*

the equality provisions in our Constitution. The Government has also factored resources in the current Government budget to develop specific action plans for implementation of these policies at the National and County levels.²⁸¹

Kenya has in essence made commendable progress although some challenges remain. Even with a robust legal framework, promoting equality and non-discrimination, gender inequality power imbalance between men and women, boys and girls has persisted.²⁸²For instance, although the country took a commendable step to enact the Matrimonial Property Act, 2013 and the Marriage Act, 2014, both Acts contain some challenging provisions which negate the good spirit of these laws and our Constitution.²⁸³

The patriarchal nature of our society influenced some of these negative provisions contained in the Marriage and Matrimonial property laws.²⁸⁴These include aspects such as polygamy and inability to attain gender equality in the distribution of matrimonial property.²⁸⁵Our greatest challenge has been our unsuccessful efforts to enact legislation for the realization of the not more than two thirds gender principle in the Constitution.²⁸⁶This has not been possible despite clear provisions of Articles 27 (8) and 81(b) of Kenyan Constitution, and the Supreme Court’s Advisory of 2015 on

²⁸¹Sicily Kariuki ‘Statement’ On The Occasion Of Consideration Of Kenya’s 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 10

²⁸²*ibid* 11

²⁸³*ibid*

²⁸⁴ *ibid*

²⁸⁵*ibid*

²⁸⁶*ibid* 12

how to achieve the principle.²⁸⁷The Government has made efforts to realize the principle but due to the culture of patriarchy and male dominance, Parliament has been unable to enact the necessary legislation.²⁸⁸

The Government of Kenya is determined to put in place mechanisms to tackle negative patriarchal attitudes by a getting a tighter definition or legislation that will realize the two thirds gender representation in Parliament, in terms to come.²⁸⁹Besides, the Government has developed and is implementing a National Strategy to enhance representation of women in leadership.²⁹⁰

The UDHR, adopted by the United Nations General Assembly in 1948 entails the initial universal expression of rights that are entitled to all human beings.²⁹¹Under the UDHR, land and property concerns are addressed thus:

- a. Equality rights;²⁹²
- b. Property ownership rights;²⁹³
- c. Adequate housing rights;²⁹⁴

All party states have committed to ensure that women and men have equal rights to property and land ownership.²⁹⁵Looking at the International scene, the ACHPR appreciates the rights of women in Article 2 thus; “*Every individual shall be entitled*

²⁸⁷Sicily Kariuki ‘Statement’ On The Occasion Of Consideration Of Kenya’s 8th Periodic Report At The 68th Session Of The Convention On The Elimination Of All Forms Of Discrimination Against Women Thursday 2nd November, 2017 Nairobi, United Nations Hqs, Gigiri, Nairobi pg 12

²⁸⁸*ibid*

²⁸⁹*ibid* 13

²⁹⁰*ibid*

²⁹¹ Article 7 of The Universal Declaration of Human Rights (UDHR)

²⁹²*ibid*

²⁹³ Article 17 of The Universal Declaration of Human Rights (UDHR)

²⁹⁴*ibid* 25

²⁹⁵*ibid* 6

*to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, gender, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”*²⁹⁶

Further, Article 3 states that, “*Every individual shall be equal before the law*” and that, “*Every individual shall be entitled to equal protection of the law*”.²⁹⁷ It is evident that the Charter abhors discrimination against women on property and land rights. In Article 18, party states are obligated to eliminate every discrimination against women and ensure the protection of the rights of the woman and the child as stated in international instruments.²⁹⁸ Women and men shall have the right to inherit, in equitable shares, their parents' properties.²⁹⁹ A widow shall have the right to an equitable share in the inheritance of the property of her husband.³⁰⁰ A widow shall have the right to continue to live in the matrimonial house.³⁰¹ In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.³⁰²

State Parties to CEDAW and the Maputo Protocol are required and shall therefore take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and

²⁹⁶ *ibid* 4

²⁹⁷ *ibid* 5

²⁹⁸ *ibid*

²⁹⁹ African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) Art 21(2)

³⁰⁰ *ibid*

³⁰¹ *ibid*

³⁰² *ibid*

customary and all other practices which are based on the idea of the inferiority or the superiority of either of the genders or on stereotyped roles for men and women;³⁰³

CEDAW is peculiar among existing human rights conventions as it is geared exclusively to promoting and protecting women's human rights which operates from the basis that patriarchy is a universal challenge.³⁰⁴ It is a vital international instrument handling the women rights.³⁰⁵ CEDAW is at times referred to as "the International Bill of Rights for Women" because it provides an elaborate coverage of women's rights for both public and private spheres as it converges all conventions and treaties that protect and promote the rights of women. In Article 14 of CEDAW, parties are under obligation to ensure equal treatment of men and women in land and agricultural practices.³⁰⁶ Land rights under marriage and inheritance laws should be based on the principles of proportionality. Article 16 of CEDAW provides that, land tenure reform must ensure protection of women's property rights during marriage, at divorce and in the event of husband's death.³⁰⁷ This provision is elucidated in the Kenya Constitution 2010.³⁰⁸

The BPA, has a clarion call to Governments to "Undertake legislation and administrative reforms to give effect to equal rights to women and men in accessing

³⁰³ Convention on the Elimination of All Forms of Discrimination against Women Art 5(a)

³⁰⁴ Federation of Women Lawyers, *Women's Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

³⁰⁵ *ibid*

³⁰⁶ *ibid*

³⁰⁷ *ibid*

³⁰⁸ *ibid*

economic resources, including access to ownership and control over land and other properties, credit, inheritance, natural resources, and appropriate new technology”.³⁰⁹

The introduction of the Kenya National Land Policy, and the new statutes such as the National Land Commission Act 2011, the Land Act 2012 and the Land Registration Act 2012 are critical steps made by Kenya to achieve part of the vision of these regional and international commitments as far as women’s land and property rights are concerned.³¹⁰ Also incorporated in quick resolution of land disputes is the enactment of the Environment and Land laws and the constitution of the Environment and Land Courts. The Kenyan Judicial Service Commission plans to roll out this court in all counties in Kenya to ensure speedy resolution to land disputes.

Full and equal participation of women, men & youth is required in sustainable economic and social development of the region. The COMESA Treaty in Articles 154 and 155, appreciates the crucial and vital contribution of women to the economic and social transformation of the region.³¹¹The treaty also underscores the role of women in business especially participation in Agriculture, Industry and Trade.³¹²The COMESA treaty commits itself to promote gender equality and ensure women’s economic empowerment and equal access to and control of resources and opportunities.³¹³

³⁰⁹*ibid*

³¹⁰Federation of Women Lawyers, *Women’s Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

³¹¹*ibid*

³¹²*ibid*

³¹³*ibid*

Article 6 (d) of EAC underscores the promotion and protection of human and peoples' rights as per the provisions of the African Charter on Human and Peoples' Rights hence prohibiting gender discrimination in land and property issues.³¹⁴

The Kenya Constitution 2010 in Article 10 (2) (b) outlines the national core values and principles of governance, which include:³¹⁵

Human dignity,- women should be treated with dignity in observance of their property rights.³¹⁶

Equity- women inheritance rights of family land should be guaranteed through fair sharing and they should be part in decision making organs regulating land.³¹⁷

Social justice- women should not be victims of injustice in relation to land and property.³¹⁸The Judiciary, National & County government must ensure land and property questions are resolved in accordance with the rule of law.³¹⁹

Equality- Equality is vital in handling and deciding land and property matters between men and women (Article 27 of the Kenya Constitution).³²⁰

Human rights; Property rights are human rights.³²¹The rights of women in relation to property must be protected.³²²

³¹⁴*ibid*

³¹⁵*ibid*

³¹⁶Federation of Women Lawyers, *Women's Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

³¹⁷*ibid*

³¹⁸*ibid*

³¹⁹*ibid*

³²⁰*ibid*

³²¹*ibid*

³²²*ibid*

Non-discrimination and protection of the marginalized; women have been victims of marginalization and discrimination as far as land and property is concerned, which is prohibitive by the Kenya Constitution 2010.³²³

Article 40 (1) of the Kenya Constitution provides that,

“every person has a right, either individually or in association with, to acquire and own property

(a) of any description and

(b) in any part of Kenya”.

Article 40 (2) of the Kenya Constitution places a prohibition against Parliament from enacting any piece of legislation that allows Government or any individual to:

(a) “...deprive a person of property of any description or of any interest in, or right over, any property of any description or

(b) ...to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).”

Article 27 of the Kenya Constitution 2010 addresses equality and freedom from discrimination on the basis of gender, marital status, belief, culture, among other grounds. The provisions in Article 40 connote that women, like men, have a right to own property and land of any kind anywhere in Kenya, and cultural practices and customs cannot be used to deny them of those rights.³²⁴

³²³*ibid*

³²⁴Federation of Women Lawyers, *Women’s Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

Article 45(3) of the Kenya Constitution states that parties to a marriage will be entitled to equal rights at the time of marriage, during the marriage and at its dissolution.³²⁵This means that upon parties getting married, they become equal partners.³²⁶

One of the purposes of the Constitution of Kenya 2010 is therefore to protect all citizens and women in particular in the context of the Maputo Protocol. Special protection of women is provided for in the Constitution and all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.³²⁷ The Constitution stipulates that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.³²⁸

It further stipulates that Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principle of elimination of gender discrimination in law, customs and practices related to land and property in land;³²⁹

Despite a progressive legal framework, Kenyan women's land rights continue to lag behind. Customary law, which often discriminates against women and limits their land and property rights, governs at least 65% of land in Kenya, and the patriarchal nature of Kenyan society often limits the rights of even those women not living on

³²⁵ *ibid*

³²⁶ *ibid*

³²⁷The Constitution of Kenya [2010] Ch 4 (21)(3)

³²⁸*ibid*(27)(3)

³²⁹The Constitution of Kenya [2010] Ch 5 (60)(1)(f)

land governed by custom.³³⁰Some estimates indicate that as little as 1% of land is titled in the names of women and 5-6% is titled jointly by women and men.³³¹

3.2 The Impact of Cultural Practices on Realization of Women Property Rights in Kenya

In a report to CEDAW, the Government reportedly stated that:

*“the area in which most customary laws disadvantage women is in respect of property rights and inheritance.”³³²The Government of Kenya conceded in its 1997-2001 National Development Plan that the deprivation of women’s property rights is one of the major determinates of poverty in Kenya.³³³Women who are evicted upon their husband’s death, or after refusing to participate in widow inheritance or cleansing, often must eke out a living along with their children in urban slums”.*³³⁴

Neglect of women’s property rights also undermines their capacity to avoid risky practices and social injustices such as wife inheritance, ritual cleansing, or transactional gender and that has a direct impact on the spread of HIV/AIDS.³³⁵A Land Policy Co-ordinator in Nairobi once stated:

³³⁰R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-inKenya.pdf>> accessed 14/7/2018

³³¹ *ibid*

³³² *ibid*

³³³ *ibid*

³³⁴Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women’s Human Rights Clinic, *Kenyan Laws and Harmful Customs Curtail Women’s Equal Enjoyment of ICESCR Rights*, A Supplementary Submission to the Kenyan Government’s Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3-21, 2008) pg 19

³³⁵ *ibid*

“when women go to the slums with the children you’ll find that they will engage in prostitution.³³⁶It is the easiest thing to do to make ends meet. And even those who seem to be engaged in gainful employment like small scale traders still supplement; that income is not adequate in most cases.³³⁷The children will not go far in school and the boys become thieves.³³⁸So it really becomes a vicious cycle within that family.³³⁹”

Lack of protection for widows also exposes their children to social the dangers for social survival.³⁴⁰ It was reported that 21percent of Nairobi girls aged 15 to 19 living in slums, were prone to exchange sex for money or other gifts.³⁴¹ Impoverished life in the slums for discriminated widows and their children, and their exposure to HIV-infection, further implicates the ICESCR guarantees of housing and health.³⁴² The statistics on women’s participation in areas of land ownership and use in Kenya are as follows,³⁴³

- a) 5 percent of land title deeds in Kenya is held by women jointly with their husbands.
- b) 1 percent of land titles are held by women alone.
- c) 89 percent of women are involved in subsistence farming labour force.

³³⁶*ibid*

³³⁷Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women’s Human Rights Clinic, *Kenyan Laws and Harmful Customs Curtail Women’s Equal Enjoyment of ICESCR Rights*, A Supplementary Submission to the Kenyan Government’s Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3- 21, 2008) pg 19

³³⁸*ibid*

³³⁹*ibid*

³⁴⁰*ibid*

³⁴¹*ibid*

³⁴²*ibid*

³⁴³Federation of Women Lawyers, *Women’s Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

- d) 70 percent of labor in cash crop labor production is by women.
- e) Unlike men, only 32 percent of women head households.

Cultural discrimination has an influence on the responses to women’s property inheritance and related rights.³⁴⁴Today, women find it very difficult to pursue remedies for property rights injustices.³⁴⁵A section of leaders and Governmental authorities mostly tend to ignore women’s property claims and sometimes in may make the problem unnecessarily difficult.³⁴⁶Cultural beliefs influences of a local chiefs and Government officials disregard women who are victims of property injustice, as women are perceived to lack legal and enforceable rights in property.³⁴⁷Chiefs and Government officers who are the main decision makers and opinion leaders are mostly of male gender and tend to favour the men even where women property rights are infringed.³⁴⁸Others have the audacity to say they do not want to conflict with culture.³⁴⁹These assertions are biased and disenfranchise women empowerment in seeking their property rights’ protection.³⁵⁰

Women frequently suffer in cases where customary land ownership lies with individual households.³⁵¹ As heads of the family, men are traditionally seen as the “owners” of the family land and women regarded as lacking capacity to make any

³⁴⁴Federation of Women Lawyers,*Women’s Land And Property Rights In Kenya A Training Handbook* <<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

³⁴⁵*ibid*

³⁴⁶*ibid*

³⁴⁷*ibid*

³⁴⁸*ibid*

³⁴⁹*ibid*

³⁵⁰*ibid*

³⁵¹R Gaafar, *Women’s Land and Property Rights in Kenya*< <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>>accessed on 14/7/2018

decision involving allocation, management, and general use of land and any benefits accruing from it.³⁵²This reverts to the notion of women ownership that is relationship based. If a woman falls out with her husband, the chances of her inheriting her husband's property are minimal.³⁵³

In a traditional set up, it is perceived to be disrespectful for a woman to file a suit to enforce her constitutional property rights. In one report, interviewers found that communities frown upon women who initiate legal proceedings to enforce their rights.³⁵⁴These attitudes and inclination to linkages to male adults to gain inheritance to land has made women rely on marriage for access to land.³⁵⁵ Tradition has to that end reduced the role of women to that of child bearing and rearing.³⁵⁶

Statistics have revealed that women constitute one half of the world's population and that women do most of the work but earn only one-tenth of the world's consumable income and own one percent only of the world's property.³⁵⁷This depicts land acquisition and ownership traits as male dominated.³⁵⁸Gender inequality in property ownership is a result of giving men priority in property inheritance, making marriage

³⁵²R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>>accessed on 14/7/2018

³⁵³*ibid*

³⁵⁴*ibid*

³⁵⁵I Yngstrom, *Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in Debate Over Land Policy and Changing Tenure Systems* <<https://pdf.semanticscholar.org/2922/19213d88f2d6297ca32e71f487bffe771c.pdf>>accessed 13/7/2018

³⁵⁶C Deere & M León, *Land and Property Rights in Latin America Empowering Women* (New York University of Pittsburgh Press 2001) pg1

³⁵⁷*ibid*

³⁵⁸C Deere & M León, *Land and Property Rights in Latin America Empowering Women* (New York University of Pittsburgh Press 2001) pg 2

a privilege to women, general bias in state programs with regards to land distribution, gender inequality economic set up where women find it challenging to buy land due lack of resources.³⁵⁹

The principles excluding women from land rights are of a legal, cultural, structural, and institutional nature.³⁶⁰Such principles and mechanisms are interrelated with patriarchal ideologies distinguishing masculinity and femininity and the general gender division.³⁶¹One of these mechanisms spells out that land rights are often ceded by communities and the state only to household heads, who are dominated by the male gender.³⁶²

An examination of Latin American, for example, is explicit that land benefits to male as household heads extends to all the members.³⁶³I strongly disagree with this notion and find it misleading because the property is held on behalf of women. Lack of legal rights to land is in itself an abuse of the commitment to women's property rights. In this case, women appear to be licensees only and they can be evicted at men's will. As pointed out in this research, women utilization of the household land is subjective to maintaining good relations with males in the family and that reduces women to subordinated position.

Surprisingly, the Latin America practice was supported by civil codes in which husbands as heads of homes represent the family in all matters affecting the

³⁵⁹*ibid*

³⁶⁰*ibid*

³⁶¹*ibid*

³⁶²C Deere & M León, *Land and Property Rights in Latin America Empowering Women* (New York University of Pittsburgh Press 2001) pg 3

³⁶³*ibid*

household. The man is seen as the family representative and administrator of all the property owned by that household.³⁶⁴This practice was extended to matters of service provision where men were recognized as agriculturalists and women played the “helpers,” role despite the time they dedicated to agricultural activities.³⁶⁵ Male adults were granted plots from land already held by their families, or they could access land from the community reserve by asking ward heads who represented chiefs. Women could only access land through male relatives.³⁶⁶

In addition to the above frustrations, unmarried women, widows, or divorced women are highly vulnerable to risks of life and widows in particular suffer material deprivation of their previous social life. Children are not spared either from these social risks after their parents’ separation or divorce.³⁶⁷Therefore, the potential gains from claiming individual land rights from husbands will have a bearing on potential marital stability.³⁶⁸

Regulating land conflicts is historically crafted in favour of men.³⁶⁹That in itself does not render equal opportunities or said differently, a level playing ground for both genders. This does not however mean that these institutions are inappropriate in

³⁶⁴*ibid*

³⁶⁵*ibid*

³⁶⁶A Onoma, *The Politics of Property Rights Institutions in Africa* (New York, Cambridge University Press 2010) pg 64

³⁶⁷C Jackson, *Gender Analysis of Land: Beyond Land Rights for Women?* <https://s3.amazonaws.com/academia.edu.documents/35277861/Beyond_land_rights_for_women.pdf?> accessed 13/7/2018

³⁶⁸*ibid*

³⁶⁹I Yngstrom, *Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems* <<https://pdf.semanticscholar.org/2922/19213d88f2d6297ca32e71f487bffeeb771c.pdf> pdf> accessed 13/7/2018

regulating women property rights.³⁷⁰ Women are not allowed to sit in village “barazas” for example, where some of the disputes affect them. They are not allowed to air their views because traditionally, women should only be seen and not heard. If they must speak, they would have to do so through proxies who are the heads of their households. The end result is that women will not be therefore be able to successful and satisfactorily realize their claims in all forms of dispute settlement in such fora.

³⁷¹ This is denial of women’s constitutional rights to fair hearing and access to justice.

Land registration appears to be self-instructive. Women have not fared on well in the adjudication of titles, and land related issues because their claims are perceived to be subjective and of a secondary nature and not formally recognized due to the unequal treatment in decision making during institutional reform processes.³⁷² Men automatically gain in this process because they can exercise greater social claims in the absence of opposition from women.³⁷³

An examination of practices in KwaZulu, indicate that the only tenure rights available to communities were informal, vesting title paternalistically in the state or Trust.³⁷⁴ The land was customarily reserved for men. They were issued with a Certificate for Permission to Occupy, commonly known as the **PTO** certificates.³⁷⁵ African women were perpetually treated as minors, whose access and land inheritance

³⁷⁰ *ibid*

³⁷¹ *ibid*

³⁷² *ibid*

³⁷³ *ibid*

³⁷⁴ J Fairweather, *A Common Hunger Land Rights in Canada and South Africa* (Canada University of Calgary Press 2006) pg 151

³⁷⁵ *ibid*

rights were through the male members of their household.³⁷⁶Widows were inherited by their deceased husband's brother so as to be taken care of in the interest of the children. That meant they lose land inheritance rights to their husband's property.³⁷⁷By maintaining the PTOs land tenure system, discrimination against women was to be a continuing process.³⁷⁸

Competition between reforms that were male dominated and those that favour women represent the hotly contested thoughts and bring out the inherent dangers of final outcomes.³⁷⁹The other major problem that require to be discussed is traditional social structures.³⁸⁰It has been found variously that despite laws aimed at securing land tenure to farm workers, for example, women are still attached to the males in their households to be able to access land.³⁸¹ In their study, Catherine Cross and Michelle Friedman explain the women disadvantages due to social assumptions and the insensitive and informal land practices meaning they are not regulated by any law.³⁸²It can be deduced from the outset that informal laws would be insensitive and unpredictable and likely to be skewed.

This is guides the debate as to why support for male kin can be a critical matter in evaluating woman's claims to land.³⁸³Women have to continually rely on their social networks, successfully manage their existing relationships and avoid all forms of

³⁷⁶*ibid*

³⁷⁷*ibid*

³⁷⁸*ibid*

³⁷⁹*ibid* 121

³⁸⁰*ibid*

³⁸¹*ibid*

³⁸²J Fairweather, *A Common Hunger Land Rights in Canada and South Africa*(Canada University of Calgary Press 2006)pg 121

³⁸³*ibid*

conflicts as their main strategies for survival.³⁸⁴Women will only find ways to negotiate their property rights and claims to land and labor from the existing systems as long as the existing systems provide alternative forms of social protection.³⁸⁵

The women whose interests are not fulfilled by local institutions are likely to be those who joined the community from another community. They will generally experience challenges when making social claims.³⁸⁶They may be unable to control the land they have acquired from their husbands in the event of divorce, death of husband, or in extreme cases where husbands dispose of the household land.³⁸⁷This is where the state is expected to play important role to play to reconstitute the interests of the woman.³⁸⁸

3.3 The nexus of Constitutional and Legal Provisions with Customary Laws on Women's Right to Property

Predominant cultural and customary attitudes are an impediment to the implementation of women's property rights. Customary laws and practices will in certain instances override constitutional and legislative provisions.³⁸⁹The most affected cases are areas of family law, property inheritance and land rights, nationality and personal status.³⁹⁰ The position and status of women in sub-Saharan Africa in relation to land is highly contentious for the reason explained above.³⁹¹Women

³⁸⁴*ibid*

³⁸⁵*ibid*

³⁸⁶*ibid*

³⁸⁷*ibid*

³⁸⁸*ibid*

³⁸⁹UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect of Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 29

³⁹⁰*ibid*

³⁹¹M Kevane, *Diminished Access, Diverted Exclusion: Women and Land Tenure in Sub-Saharan Africa* <<https://>

traditional property rights appear eroded in some societies with changing relations and the forms of production.³⁹²With innovation and evolving technology, changes in the value of land, government and donor interventions, the trend is gradually changing and women secondary rights are diminishing.³⁹³ In response to these changing trends in land rights, women have started pressing for legal and customary solutions that will enforce women property inheritance laws. It is anticipated that the various initiatives and mechanisms being taken by women which include among others the use of anonymous land markets, formation of organized and cooperative groups to gain tenure rights will realize protection of women property inheritance rights.³⁹⁴ Clearly, these actions have so far enabled women to make inroads to access to land and in some cases developed new rights.³⁹⁵

In conclusion, it can be said that although there are statutory or constitutional interventions to protect women property rights, the same are ineffective in circumstances where customary law does not recognize gender equality in inheritance of property.³⁹⁶This cultural relativism, can be deduced from reservations by several State parties to CEDAW on the equality question and deference of the highly protested customary laws.³⁹⁷The persistence of customary norms in land issues represent protestations to the equality rights.³⁹⁸While recognizing that a number of

scholarcommons.scu.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1026&context=econ?> accessed 12/7/2018

³⁹² *ibid*

³⁹³ *ibid*

³⁹⁴ *ibid*

³⁹⁵ *ibid*

³⁹⁶ *ibid*

³⁹⁷UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 30

³⁹⁸ *ibid*

customary norms are marred with patriarchy, the dismissal of all customs can alienate some practices that have a positive impact women's social lives.³⁹⁹ Substitution of customary land rights with legislation has failed to provide women's security of tenure in the sense that decision makers have interpreted custom as legitimate law of a certain people and it is right to say that decision makers are influenced by custom.⁴⁰⁰

The next Chapter will focus on the interpretive role of Courts on the equality question and actual realization of women property inheritance rights in Kenya in the context of the Maputo Protocol.

³⁹⁹ *ibid*

⁴⁰⁰ *ibid*

CHAPTER 4

APPLICATION AND COURTS' INTERPRETATION OF THE MAPUTO PROTOCOL IN RELATION TO WOMEN PROPERTY INHERITANCE RIGHTS IN KENYA *VIS-A-VIS* THE CULTURAL PRACTICES IN KENYA.

This Chapter looks at the guiding constitutional provisions, statute laws, the role of the courts and the courts decisions that cut across religious and multicultural beliefs in Kenya. The Chapter will examine interviews from the bench, human rights watch reports and a critique of the Court decisions on women property and property inheritance rights in the context of the Maputo Protocol and the predominant cultural practices.

The separation of public and customary law in controlling property rights has been seen as a challenge for capital formation in the African continent.⁴⁰¹The Kenya Government efforts to re-establish formally defined property rights, land adjudication and other mechanisms for property rights protection have been affected by customary interpretations.⁴⁰²Traditional disputes resolution mechanism for example has been praised as a cheaper way of resolving disputes which also serves as an alternative to judicial settlements in what is a legally pluralistic environment.⁴⁰³

⁴⁰¹S Joireman & E Henrysso, *On the Edge of the Law: Women 's Property Rights and Dispute Resolution in Kisii, Kenya* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>>accessed 13/7/2018

⁴⁰²*ibid*

⁴⁰³*ibid*

4.1 Guiding Principles that Courts apply in the pursuit of Justice

Article 159(2) of the Kenya Constitution 2010 requires Courts to be guided by the following principles when adjudicating on matters;

(a) Justice should be seen to have been done to all irrespective of gender or social status;

(b) Justice shall not be delayed- *there is a legitimate expectation that cases will be concluded within a reasonable period.*

(c) Traditional justice mechanism as an alternative dispute resolution (**ADR**), will be applied at appropriate instances- *women sometimes get intimidated from long and public court hearings. ADR is a suitable dispute settlement mechanism that can be faster, cheap and satisfactory.*

(d) Procedural technicalities shall not be a hindrance to Justice - *women not in the know of legal technicalities can tackle their cases even in their restricted capacity.*

The significance of Article 159 (3) the Kenya Constitution has been restated by FIDA and is clear in terms that:

“Traditional dispute resolution mechanisms shall not be used in a way that-

(a) contravenes the Bill of Rights

(b) is repugnant to justice, and morality or results in outcomes that are repugnant to justice or morality

(c) or is inconsistent with this Constitution and any written law.”⁴⁰⁴

The above principles give the general direction and guidelines on elimination of gender discrimination through unfair cultural practices. The provisions apply

⁴⁰⁴Federation of Women Lawyers, *Women's Land And Property Rights In Kenya A Training Handbook*
<<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>>accessed 2/8/2018

generally and include land use, property inheritance and management.⁴⁰⁵ Additionally, gender equality has featured among the guiding principles in the National Land Policy.⁴⁰⁶

Marriage institutions in Kenya is governed by five legal systems namely Christian, civil, Hindu, Islamic, and customary.⁴⁰⁷ Each system provides for rules and regulations defining women's property rights within marriage and after marriage. Thus, women's property ownership rights are so fluid and, a dispute arising from division or inheritance of property will depend on the presiding Judge and the diversity of parties to marriage. The applicable law and the Judge's decision could either be to the advantage or disadvantage of women.⁴⁰⁸ Whereas the Constitution encourages settlement of disputes through alternative means (and this includes land cases), courts have jurisdiction to hear divorce cases, as well as property rights and land claim cases.⁴⁰⁹

Courts recognize customary law and appreciates its significance in governing citizens in countries of Sub-Saharan Africa.⁴¹⁰ Customary law of inheritance has a major

⁴⁰⁵R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 14/7/2018

⁴⁰⁶*ibid*

⁴⁰⁷D Diana & D Cheryl, *Gender And The Distribution Of Wealth In Developing Countries* <<https://www.econstor.eu/bitstream/10419/63540/1/521379504.pdf>> accessed on 13/7/2018

⁴⁰⁸*ibid*

⁴⁰⁹R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 14/7/2018

⁴¹⁰S Joireman & E Henrysso, *On the Edge of the Law: Women's Property Rights and Dispute Resolution in*

influence on people and especially those in rural areas.⁴¹¹The Kenya Constitution recognizes customary law, but does not grant it legitimacy to the extent where it is repugnant to justice and morality and contradicts the Constitution. This ought to be an express protection of Kenyan women property rights and against discriminatory customary practices.⁴¹²

Colonial influences, selfish individualization of the land tenure system, and pressure for land acquisition pressure and many customary land practices have been eroded over time.⁴¹³The forms of solidarity⁴¹⁴in Eastern and Southern Africa and parts of Asia are slowly being eroded.⁴¹⁵Despite the above progress, where statutory and national laws recognize women's property rights, it is regrettable that in certain circumstances, "traditional" values dominate the minds of the law enforcers, opinion leaders and land officials.⁴¹⁶They still interpret statutory laws in customary ways, depriving women of their statutory rights.⁴¹⁷

Kisii, Kenya<<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>>accessed 13/7/2018

⁴¹¹*ibid*

⁴¹²R Gaafar, *Women's Land and Property Rights in Kenya*<<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 14/7/2018

⁴¹³UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 8

⁴¹⁴ *ibid*

⁴¹⁵*ibid*

⁴¹⁶ *ibid*

⁴¹⁷*ibid*

Women's property rights are affirmed in various constitutions, but customary law in which they do not have equal rights usually prevails on the ground.⁴¹⁸ Whereas courts have jurisdiction to resolve land disputes, traditional leaders prefer to be the first people to attempt resolving the dispute of a customary nature. These positions are overwhelmingly held by men and that in itself points towards the possibility of patriarchal injustices.⁴¹⁹

4.2 The Interaction of Formal and Customary Systems in Kenya

The question for interrogation is whether there is any interaction between the formal justice system and customary system. There is significant interaction between the formal system of justice and informal customary systems in Kenya. The studies however indicate that the relationship between the two systems lack clarity. The law has not given an explicit distinction or applicability. The new land legislation, which is the latest on matters relating to land has not addressed treatment of customary land rights leaving it to wide interpretation.⁴²⁰ The gaps between formal laws and customary laws will arise when women's rights are undermined.⁴²¹ Formal courts have jurisdiction to hear disputes involving customary marriages, divorces petitions and

⁴¹⁸C Toulmin, *Securing Land And Property Rights In Sub-Saharan Africa: The Role of Local Institutions* <<http://pubs.iied.org/pdfs/G00460.pdf>> accessed 12/7/2018

⁴¹⁹R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 14/7/2018

⁴²⁰R Gaafar, *Women's Land and Property Rights in Kenya* <<https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf>> accessed 14/7/2018

⁴²¹*ibid*

succession causes.⁴²²As alluded to earlier, in real practice, few Kenyan women file disputes over their rights to land in formal courts of law.⁴²³Women avoid this form of dispute settlement because it is not only expensive but it can be lengthy and time-consuming.⁴²⁴

Back in independence, the only legally binding land dispute resolution mechanism was the formal court system.⁴²⁵However, it is alleged, the Kenyan judicial system has been plagued by corruption, inefficiency and expense.⁴²⁶During the Moi era, courts were not encouraged in decisions making on land allocation as it was a source of political patronage for the head of state.⁴²⁷A Kenyan lawyer once observed that, “*the justice system is expensive. ...You’ll find you require a lot of money,*⁴²⁸*in terms of filing fees and time taken to conclude the case.*”⁴²⁹ In addition, not all communities have a court and members of the communities lack understanding on its functions in land disputes.⁴³⁰

The Courts as custodian of the Constitution should uphold, respect and protect constitutional principles so that rights of Kenyans and particularly women are assured; unless the Courts intervene to protect the women’s right to property then the provisions of the Constitution will be rendered nugatory.

⁴²²*ibid*

⁴²³*ibid*

⁴²⁴*ibid*

⁴²⁵S Joireman & E Henrysso, *On the Edge of the Law: Women ’s Property Rights and Dispute Resolution in Kisii, Kenya* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1072&context=polisci-faculty-publications>>accessed 13/7/2018

⁴²⁶*ibid*

⁴²⁷*ibid*

⁴²⁸*ibid*

⁴²⁹*ibid*

⁴³⁰*ibid*

In the case of *Douglas Njuguna Muigai v John Bosco Maina Kariuki & another*⁴³¹ it was underscored courtesy to the Constitution of Kenya 2010, the rights of women cannot be derogated against for they are *jus cogens*. The yoke and burden of discrimination should not be worn by the female gender anymore, the Constitution set it apart.⁴³² This to me is in good spirit in the sense that the gender question is being addressed and emphasis is grounded on the Constitutional provisions.

In *re Estate of CCBH*⁴³³, on 18.12.12, Swauriqy died. He was survived by his children C K C and C C (the Applicants) and their mother J W N who was not a Muslim. J W N, the Applicants' mother and next friend averred in her affidavit sworn on 11.3.15 that the Hon. Kadhi's Judgment adversely affected the Applicants' inheritance of the father's portion of the estate of the deceased. The Applicants asserts that Sharia Law which is discriminative to women, children and non-Muslims from inheriting their fathers and husband's estate should therefore be declared an outright violation of the Kenyan Constitution's Article 27. To support their submissions, the applicants cited the respective Article in Maputo Protocol and the CEDAW.⁴³⁴

The Court stated that it is mindful of the provisions of Article 259 of the Constitution which requires the Court to interpret the Constitution in a manner that promotes its purposes, upholds its values and principles, advances the rule of law, and is coherent with the human rights and fundamental freedoms as provided in the Bill of

⁴³¹ *Douglas Njuguna Muigai v John Bosco Maina Kariuki & another* [2014] Eklr

⁴³² *ibid*

⁴³³ *re Estate of CCBH (Deceased)* [2018] eKLR

⁴³⁴ *ibid*

Rights.⁴³⁵The Court further observed that the Bill of Rights and Fundamental Freedoms are wide and touch on numerous aspects of human life.⁴³⁶However, these rights are not absolute and certain limitations have been imposed thereon by Article 24 of the Constitution. In particular, the provisions on equality are limited in relation to persons professing Muslim faith. Article 24 (4) provides:

“The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis’ courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.”

The Court’s understanding of the above provision was that Islamic Sharia shall be applied to Muslims in matters of personal status, marriage, divorce and inheritance notwithstanding the equality provisions in the Bill of Rights in the Constitution. Islamic Sharia is derived directly from the Quran. Any application of the law relating to the above Muslim’s rights could be interpreted as an affront to a Muslim’s freedom of religion which is guaranteed by the Constitution. Section 2(3) of the law of Succession Act Kenya provides that the applicable law in relation to a deceased Muslim shall be the Muslim law. The provision is reproduced below:

“Subject to subsection (4), the provision of this Act (i.e. law of Succession Act Kenya) shall not apply to testamentary or intestate succession to the estate of any person who at the time of his death is a Muslim to the intent that in lieu of such provisions the devolution of the estate of any such person shall be governed by Muslim law.”

⁴³⁵*re Estate of CCBH (Deceased) [2018] eKLR*

⁴³⁶*ibid*

The Court held that, as long as the estate herein belongs to a deceased Muslim and as long as Article 24(4) remains in the Kenya Constitution and Section 2(3) in the Law of Succession Act, the Court's hands are tied.

In *In the Matter of the Estate of Ishmael Juma Chelanga Deceased*⁴³⁷, Etyang, J. had this to say:

“Under Islamic Law no non-Muslim is permitted to inherit the estate of a Muslim. This was ably verified in this court by the Kadhi of Nairobi Mr. Hammat Mohammed Kassim. It follows therefore that C, who had conceded that she is a Catholic, cannot inherit a share of the estate of her deceased father, a Muslim, by reason of her being a non-Muslim.”

The law of inheritance is important in the Islamic religion and unfortunately, members not subscribing to Muslim religion will not be treated equally in succession claims where the other party is Muslim. The Holy Quran for example provides as follows:

*“Allah ordains concerning your children that, the male shall have a share equivalent to that of two females. If the children are females numbering two or more, their proportion is two thirds of the inheritance.”*⁴³⁸

This is an indication of inequality and discrimination among the Muslims. The Judges hands are indeed tied because the Law of Succession Act does not apply to Muslims.

⁴³⁷*In the Matter of the Estate of Ishmael Juma Chelanga Deceased [2002] eKLR*

⁴³⁸Sura 4 Verse 11 of the Holy Quran

The above assertion is confirmed by a Chief Kadhi who rightly and regrettably observed that customary law and application of Muslim law negates statutory inheritance rights bestowed upon women.⁴³⁹The Chief Kadhi, Kenya's top authority on Islamic law, said, "*Disinheritance of daughters is one of the biggest problems I have.*⁴⁴⁰ *I try to show this is not correct. You must allow women to have a share. It becomes acrimonious, and there is violence.*"⁴⁴¹ Farida Mohammed, whose father died when she was 34 years, said, "*I didn't inherit.*⁴⁴²*There was land that my big brother inherited none of the sisters inherited.*⁴⁴³*My brother inherited because he's a man.*"⁴⁴⁴

Her two unmarried sisters live on their late father's land, and have access rights only and no legal right to inherit the land.⁴⁴⁵ That displays the gaps in the law which is subjective in nature as opposed to the constitutional provisions of equality and equity before the law.

I agree with the learned Judges to the extent that they are constrained to follow the Constitution and statute law to the letter. I am constrained to think that if Muslim women had lobbied and perhaps made part of constitutional process making team, the

⁴³⁹Human Rights Watch interview with Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002. <<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed on 5/9/2018

⁴⁴⁰*ibid*

⁴⁴¹*ibid*

⁴⁴²Human Rights Watch interview with Human Rights Watch interview Farida Mohammed, Nairobi, November 8, 2002. <https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya> accessed on 5/9/2018

⁴⁴³ *ibid*

⁴⁴⁴ *ibid*

⁴⁴⁵*ibid*

statute law would have been different. They were represented but with male counterparts. Disparities imply that non-muslim widows can't inherit their husband's wealth while they are left with the burden of children rearing; not unless they had converted to Muslim faith which then undermines the Constitutional provisions on freedom of expression and religion. That confirms the point that women remain in a subjective position. Furthermore, two females are equated to one man or boy and that female children born to a Muslim man are also discriminated against. The Islamic law would rather have the children rendered destitute because of gender stratification. It is insightful that the Chief Kadhi has been heard to lament treatment towards women and he seems human and affected. I suppose that as a spiritual leader, good citizen and maybe a family man, he should take steps to lobby and lead Muslim men to reconsider their position. Law is not static and after realizing its weaknesses, the same law can be amended, qualified or repealed altogether so as to accommodate and protect all deserving citizens irrespective of their religion, race and gender.

In the case of *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another case*⁴⁴⁶, the Petitioner (FIDA) filed a constitutional reference to challenge **Section 7 of the Matrimonial Property Act No 49 of 2013** which provides that:

“that upon dissolution of a marriage, parties are entitled to a share of the property equal to their contribution whether monetary or non-monetary.”

FIDA's attack on the said section was on three fronts:

- i. It averred that that the section contravened Article 45(3) of the Kenya Constitution which provides that, *"parties to a marriage are entitled to equal*

⁴⁴⁶*Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR*

rights at the time of the marriage, during the marriage and at the dissolution of the marriage."

The Petitioner argued that on the face interpretation of the Article offended the rights of women to own property upon dissolution of a marriage, because it is subjective; women need must prove and also demonstrate their contribution to the matrimonial property. The definition of contribution in FIDA's view should include non-monetary contributions/support. FIDA stated that the section has tight interpretation and created a scenario where most if not all the property will pass to the spouse who put in more in monetary terms provided the spouse can proof. FIDA held the view that it disadvantaged married women who contributed to acquisition of their matrimonial properties through none tangible means which are valuable but cannot be proofed on paper.

- ii. FIDA claimed that the provision would violate women's constitutional rights provided in Articles 40, 60 and 68 of the Kenya Constitution in relation to land. FIDA had alluded to the fact that impugned provision were a complete contrast of Section 10(2) of the Matrimonial Property Act which provides that, *"any liability that was reasonably and justifiably incurred shall, if the property becomes matrimonial property be equally shared by the spouses, unless they otherwise agree"*.

Whilst Section 10(3) of the Matrimonial Property Act provides that parties to a marriage shall share equally any liabilities arising during the subsistence of the marriage and related reasonable and justifiable expenses, interpretation of the law on division of benefits accruing from matrimonial property is skewed to the party that can demonstrate actual contribution.

- iii. FIDA rightly pointed out that the impugned Section cannot override Article 27 of the Constitution in that it created unfair discrimination against women where they are unable to prove other valuable contribution. FIDA argued that research showed that women suffer most after dissolution of marriage.

The court held that the Petitioner's interpretation of the law was an open invitation to the Court to sanction a scenario where a party walks into a marriage without anything and walks out with undeserved wealth. The court said that was not acceptable.⁴⁴⁷ While dismissing the application, the court observed that whereas the law recognizes equal worth, it also looks at the parties' equal importance while still in marriage.⁴⁴⁸ The Court reasoned that, each party's beneficial share during division of matrimonial property is attributed to each party's proven respective proportions of financial contribution whether directly or indirectly during the acquisition of the respective property. The Court further observed that the Matrimonial Property Act recognizes monetary and non-monetary contribution which is clearly defined. By providing that a party walks out with his or her entitlement based on his or her contribution, the section entrenches the principle of equality in marriage.

I agree with FIDA's contention and would have expected the Judge to reason out that indeed, women contribution in marriage is invaluable and sub-division of matrimonial property should be in equal terms. Women duties may appear light and yet, they are of a strategic importance to the family. In fact, women should be compensated for "emotional stress" which is least appreciated. Many homes have "redundant" fathers and technically "widowed wives", in the sense that women literally play the role of

⁴⁴⁷ *Federation of Women Lawyers Kenya (FIDA) v Attorney General & another*
[2018] eKLR
⁴⁴⁸ *ibid*

father and mother. Such women do not speak loud about it because of the respect they owe their husbands and for purposes of maintaining mutual marital status. Such women do not certainly need economic support, however, they may need redundant fathers of their children around for emotional availability and to meet societal expectations for the man and children born out of the marriage. That notwithstanding, it is worth noting this gap and contradiction in the laws. In this case, statute law has contravened the express provisions of Constitution from which all laws emanate. Upholding statute law in my opinion is overriding the highest law in the land.

In *Re The Estate of Mugo Wandia (Deceased)*⁴⁴⁹, the petitioner's case was that the applicant was a married daughter and was denied inheritance of the estate of her father. The Petitioner quoted African Law Vol. 2 by Eugene Cotran, page 8 where the learned author had given an opinion that, "*Inheritance under Kikuyu customary law is patrilineal. The pattern of inheritance is based on the equal distribution of man's property among his sons, subject to the proviso that the eldest son may get a slightly larger share. Daughters are normally excluded, but may also receive a share if they remain unmarried.*"

The Court held that and I quote, "The petitioner had a duty to adduce expert evidence on Kikuyu customary law to establish that the applicant is not entitled to her father's estate. In the absence of such evidence I find the submissions that the applicant should be left out discriminatory and the existence of such custom and its requirement would not pass the threshold of the provisions of the Judicature Act. Besides the Judicature Act there is the Constitution of the Republic of Kenya. Under Article 82 of the

⁴⁴⁹*In Re The Estate of Mugo Wandia (Deceased) [2009] eKLR*

Constitution discrimination on the basis of gender is prohibited. Upholding and affording unsubstantiated custom that offers differential treatment to the petitioner is unconscionable.⁴⁵⁰ It would also go against the reasonable expectation by the applicant that when she comes to a court of law she will be afforded equal treatment and access to justice. Kenya amongst other countries under the United Nations is party to several human rights conventions and treaties which prohibit discrimination against women. Key among them is the UDHR especially Article 1 and CEDAW. It is for those reasons that at this day and age when the Government has made a lot of efforts to eradicate poverty and embrace equitable policies and programs of development a court of law cannot pronounce a judgment that goes against that spirit. The applicant is entitled to a share of her deceased father's estate even if he died in 1976 and his property was distributed in the year 2004."⁴⁵¹

In *Douglas Njuguna Muigai v John Bosco Maina Kariuki & another (supra)* the judges of the Court of Appeal had this to say about specific sections in the Law of Succession Act of Kenya:

"...we are of the view that the provisions of Section 35(b) and 40 are discriminatory against Jerioth and the female gender. The Legislature should consider those sections for amendment. Our findings on this issue are not at all novel as shown below the State is obligated under Article 27(b) of the Constitution to take such legislative measures. To illustrate that Section 35(1) (b) and the proviso thereto provides for a differential treatment of a widow and a widower, this is what it states;

⁴⁵⁰ *In Re The Estate of Mugo Wandia (Deceased) [2009] eKLR*

⁴⁵¹ *ibid*

“(b) a life interest in the whole residual of the net intestate: provided that if the surviving spouse is a widow, that interest shall determine upon re-marriage to any person.”

A plain reading of the above proviso is that a widower (a male) can remarry without losing the enjoyment of the ‘life interest’ of the spouse’s estate while the widow (a female) loses her life interest upon re-marriage. It goes without saying that this is against the letter and spirit of the Constitution.

I am totally in agreement with the preceding authorities as an effort to eliminate any form of discrimination and unfair cultural practices against women. Firstly, I do not think for example that, any right thinking member of the society should take away rights of a widow who is left with children to bring up. Widows should inherit all the wealth of her husband for continuity of family life. It matters not whether she remarries; she still has children out of the previous marriage to worry about. Secondly, all children are equal before the law and their parents, and therefore deserve equal treatment. There is no good reason why sons should get everything or inherit more from their parents.

The Kenya Constitution, 2010 radically changed the position, for the new law and outlawed discrimination in all its forms. Article 10 of the Constitution, 2010, has outlined the national values and principles. Article 10(2)(b) has provided for equity and equality treatment before the law, right to preservation of human dignity, access to social justice, inclusiveness and participation, non-discrimination before the law and protection of the marginalized, among the other constitutional values and principles. Article 27 of the Kenya Constitution, 2010, states the equality principle and the right to equal protection. It also provides equality opportunities for men and

in the political, economic, cultural and social spheres. Article 2(4) of the Constitution, 2010, underlines applicability of the laws and states that any law, (this includes customary law), which is inconsistent with the Constitution, 2010, lacks legitimacy and will be rendered void to the extent of the inconsistency.

The impugned section of the current family laws is gender insensitive and should if possible be amended because it is perpetuating discrimination against women in land and property rights. The Law of Succession Act proffers equality in inheritance rights but excludes certain gazetted districts in which customary laws are supreme. An interesting observation is that whereas the Law of Succession Act recognizes the gazetted rural districts, some judges and magistrates have ruled that all rural land was exempt from the Act.⁴⁵² This stand is reflected in the case where the court told the Human Rights Watch that:

*“The Law of Succession Act can’t apply [to rural land] because women are supposed to be married and go away.”*⁴⁵³

A magistrate in Siaya District as it then was (and is not a gazetted district) said, *“The Law of Succession Act is applied only by the educated.If it’s in the rural area, we don’t want to interfere with the community set-up.”*⁴⁵⁴ Therefore customary law lends special treatment to men, for instance, when a woman passes on, there are no barriers

⁴⁵²Human Rights Watch interview with Justice Richard Otieno Kwach, Court of Appeal, Nairobi, November 7, 2002<<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁴⁵³*ibid*

⁴⁵⁴Human Rights Watch interview with Francis Makori Omanta, Senior Resident Magistrate, Siaya, November 4, 2002<<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

and her husband was free and should deal with her estate as he deems fit.⁴⁵⁵ However, when a man passes on, the wife's rights to her deceased husband's estate are limited.⁴⁵⁶ In addition, the Succession Act gives an exemption to Muslim women from its provisions. In that regard, Courts have not paid much attention hence resulting in misinterpreting family property and succession laws.⁴⁵⁷

The Law of Succession Act is unfair in its application. It serves women by providing inheritance rights, but denying them the chance to inheritance rights equal to those granted to men.⁴⁵⁸ Provisions of the Act that are beneficial to women are:- Section 38, which provide for equal rights to inheritance where a parent dies intestate; and Sections 35 and 36, which guarantees the surviving spouse a life interest in the whole residue of the net intestate estate. This offers protection against widow eviction.⁴⁵⁹ However, the life interest granted in Sections 35 and 36 is subject to termination when the widow remarries.⁴⁶⁰ To the contrary, widowers, retain their interest regardless of whether they remarry or not.⁴⁶¹ In the case of an intestate who

⁴⁵⁵Federation of Women Lawyers, *Women's Land And Property Rights In Kenya A Training Handbook* <<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land- rights-Handbook.pdf>> accessed 2/8/2018

⁴⁵⁶ *ibid*

⁴⁵⁷ *ibid*

⁴⁵⁸Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women's Human Rights Clinic, *Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights*, A Supplementary Submission to the Kenyan Government's Initial Report under the ICESCR, scheduled for review by the Committee on Economic, Social, and Cultural Rights during its 41st session (Nov. 3-21, 2008) pg 20

⁴⁵⁹ *ibid*

⁴⁶⁰Human Rights Watch interview with Justice Richard Otieno Kwach, Justice, Kenya Court of Appeal, in Nairobi, Kenya (November 7, 2002)

⁴⁶¹ *ibid*

leaves no spouse or child, that person's property will pass to the father as first in line, and if no father, the estate devolves to the mother.⁴⁶²

Common misapplication of the Law of Succession further disadvantages women.⁴⁶³The law is meant to supersede customary law except in cases of specified property but in practice, this does not apply, especially in the rural areas.⁴⁶⁴ This is because rural communities "remain unaware of statutory laws relating to property" and are instead "inclined to use customary laws in matters of inheritance."⁴⁶⁵The inappropriate application of customary law is not limited to those who are uninformed.⁴⁶⁶As stated earlier, the Court of Appeal, said, "The Law of Succession Act can't apply [to rural land in general] because women are supposed to be married and go away."⁴⁶⁷

The propriety rights of Muslim women in marriage institutions in Kenya are provided for in the Koran.⁴⁶⁸A Muslim woman is allowed to change her status upon marriage.⁴⁶⁹She is subject to the Muslim law that was applicable to her before she got married.⁴⁷⁰She does not acquire any interest in the property of her husband by reason of marriage and her husband does not in equal terms acquire any interest in her

⁴⁶²*ibid*

⁴⁶³ *ibid*

⁴⁶⁴ *ibid*

⁴⁶⁵ *ibid*

⁴⁶⁶ *ibid*

⁴⁶⁷Human Rights Watch interview with Justice Richard Otieno Kwach, Justice, Kenya Court of Appeal, in Nairobi, Kenya (November 7, 2002)

⁴⁶⁸Elishiba N. Kimani & Lucy W. Maina (2010), *Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement*, Journal of Ethnic & Cultural Diversity in Social Work, 19:4, 256-271, DOI: 10.1080/15313204.2010.523647 pg 261-262

⁴⁶⁹*ibid*

⁴⁷⁰*ibid*

property.⁴⁷¹She has a right under the law to seek her husband's maintenance irrespective of her financial capability.⁴⁷²As expressly prohibits a Muslim wife to seek proprietary interest in the matrimonial property. She is however allowed access to the use of the matrimonial property during the subsistence of her marriage.⁴⁷³Muslims in Kenya are further governed by the 1920 Mohammedan, Divorce and Succession Ordinance, which applied during the pre-colonial Koranic law and the same affect personal law and succession.⁴⁷⁴

Islamic Inheritance found in the holy Quran.⁴⁷⁵A widow is entitled to receive 1/4 of her husband's property whereas women in polygamous marriages can only receive 1/8.⁴⁷⁶The remaining property is divided and shared among sons and daughters in a way that grants sons twice the share given to daughters of their father's property.⁴⁷⁷Under the Koranic law, only 1/3 of the estate can be disposed of by will; 2/3 must be dealt with in a manner provided for by Koranic principles.⁴⁷⁸

For Hindus in Kenya, the Hindu Marriage, Divorce and Succession Ordinance of 1946 applied for the Hindu customary laws of succession. This law was in force until 1961, when the Hindu Succession Act (Cap 158) was enacted.⁴⁷⁹Family property

⁴⁷¹*ibid*

⁴⁷²*ibid*

⁴⁷³*ibid*

⁴⁷⁴*ibid*

⁴⁷⁵M Harari, *Women's Inheritance Rights and Bargaining Power: evidence from Kenya* pg 7

⁴⁷⁶*ibid*

⁴⁷⁷*ibid*

⁴⁷⁸*ibid*

⁴⁷⁹Elishiba N. Kimani & Lucy W. Maina (2010), *Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement*,

among the Hindus leaving in Kenya is for use by the family members on a communal basis.⁴⁸⁰ Land is passed on from one generation to another and a preserve of the male ancestors made up to the fourth degree.⁴⁸¹ Wives are made part of the joint Hindu family and are granted rights to maintenance from the joint family property.⁴⁸² The wife is a subject of maintenance irrespective of her financial capability or ownership of private property.⁴⁸³

The Law of Succession Act applies African customary law on Estates of persons who died before the enactment of the Law of Succession Act. This assertion has been illustrated in numerous cases.

In *re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased)*⁴⁸⁴, the deceased died in 1952, the court observed that the substantive law of succession for estates of the persons who died before 1st July 1981 is not to be found in Parts II, III, IV, V and VI of the Kenya Law of Succession Act, but in the written laws and customs that applied at the date of the death of the person in question. The second part of Section 2(2) of the Law of Succession Act⁴⁸⁵ states that the administration of the estates of persons who died before 1st July 1981, should commence or proceed so far as possible in accordance with the provisions of the Law of Succession Act.

Journal of Ethnic& Cultural Diversity in Social Work, 19:4, 256-271, DOI: 10.1080/15313204.2010.523647 pg 262

⁴⁸⁰ *ibid*

⁴⁸¹ *ibid*

⁴⁸² *ibid*

⁴⁸³ *ibid*

⁴⁸⁴ *re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased)*
[2015] eKLR

⁴⁸⁵ Laws of Succession Act CAP 160 Laws of Kenya

In other words, the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the Law of Succession Act. The deceased herein is Kikuyu by ethnicity from the Nyeri County, and that the deceased was subject to the Kikuyu customs which governed devolution of the estate of a person who died intestate.⁴⁸⁶ Under the Kikuyu Customary Law of intestacy, succession is patrilineal. Devolution is in favour of the male relatives of the deceased.

Where the deceased person is survived by a widow and children of both gender, the land devolves upon the sons with the widow being entitled to life interest. Daughters are denied inheritance but are allowed to play their part in the family or clan in which they get married; it is permissible for daughters who attain the age of marriage but never marry to inherit from their parents' property. Where the deceased person has daughters only and the said daughters are all married, the property will pass to his brothers or their sons, with the widow having life interest.

*In re Estate of Njoroge Gitau (Deceased).*⁴⁸⁷ The deceased was survived by daughters only, and had no sons. All the daughters of the deceased were married. The Administrator of the estate who was a daughter to the deceased petitioned for a grant of Letters of Administration which were granted and the whole property devolved to her son. The nephew to the deceased asserted that his father's family moved to Molo, leaving the property under the care of the deceased. He complained that when the Administrator moved for succession of the deceased's estate she did not disclose that

⁴⁸⁶ *re Estate of Mwangi S/O Ngamba Alias Mwangi Ngamba (Deceased)* [2015] eKLR

⁴⁸⁷ *In re Estate of Njoroge Gitau (Deceased)* [2017] eKLR (Succession Cause 2270 of 2001)

the property was held by the deceased in trust for his father. A sister to the Administrator stated that all her sisters were married, but the administrator left her husband and went back to her home. She stated that the Administrator lived on the land as an unmarried daughter after she left her matrimonial home. She asserted that she never signed any documents relinquishing her right to a share of the estate of the deceased. Justice Margaret Muigai held as follows:

“I am cognizant of the fact that the deceased died before the Act came into force, and the law to govern devolution to his estate ought to be the law that governed the intestate estate of an African at the time. The deceased and his family are Kikuyus by ethnicity. The law that ought to govern the estate ought to be Kikuyu customary law. That law envisages a patrilineal system of inheritance, where the estate devolves upon the male side of the family, to the sons basically. Where there are no sons then to the next male relatives: uncles, male cousins, nephews and so on. The female side of the family is not entitled, save where the surviving daughter of the deceased is unmarried. That held sway then. We are in a new legal dispensation. The Constitution enjoins us to treat all equally before the law, and frowns upon discrimination based on gender or marital status. These principles would no doubt override the customary law position stated above, so that daughters of the deceased, whether married or not, would be entitled to inherit from their father’s estate in equal measure with their male relatives. The Kikuyu customs on the matter should therefore not matter in this case. The estate of the deceased herein ought to be shared out equally between all the five daughters of the deceased.”

The facts of the above case poses a serious question in that women are their own worst enemies. A sister pleaded to disinherit her sisters on the account of their being married and therefore not traditionally entitled to their father’s inheritance. She too

had been married and broke up with her husband. She then returned to her father's home to claim all the inheritance. The learned Judge's ruling restores my faith in the Judiciary, in that there is a paradigm shift from discriminative customary practices to humanity and correct interpretation of the law. There is indeed a rule of law that surpasses male dominance and unjustified demands.

In The Matter Of The Estate Of The Late Joel Cheruyoit Korir-(Deceased)⁴⁸⁸.

Rachel Cherotich Korir, with the authority of her siblings, Alice Chemutai Korir and Esther Chepkorir, protested at the mode of distribution set out in the Affidavit of Joshua Kiprono Cheruiyot. She alleged that the Administrator in the succession Cause had not involved his siblings, other than Samwel Kiplangat Cheruiyot, and had forged her signature. She had not signed any documents with respect to the succession. Further, that she had been residing on the said property since 1984, had constructed a house there, and was now on the verge of being evicted by her brothers. She further deposed that the Will relied on by the Administrator of the Estate tended to disinherit her and her siblings, and was discriminatory. Justice Mumbi Ngugi in her holding said in part:

“With the greatest respect to the petitioner and his strong belief in custom, one cannot help but notice that the alleged clan meeting, if it took place at all, was convened with the sole purpose of condemning the protestor for having the effrontery to lay a claim to her father's estate. Further, it was intended to buttress the Petitioner's position that only he and his brother had a right to inherit from their father. Interestingly, no mention of the Will allegedly left by the deceased was made at this clan meeting. Indeed, no effort has been made to prove the alleged Will as

⁴⁸⁸*In The Matter Of The Estate Of The Late Joel Cheruyoit Korir-(Deceased) Succession Cause No.297 Of 2015*

required in law. The arguments advanced by the Petitioner and his clan, assuming that such a meeting did take place, and their reliance on Kipsigis custom which essentially seems to be that daughters (women) belong nowhere until they are married must fail in light of the provisions of the Constitution and the law. Article 27 prohibits discrimination on any basis such as race, colour, ethnic origin or gender. Section 38 of the Law of Succession Act provides that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.”

One strange occurrence in the above case and which I applaud is, the advocate for the Administrator of the estate, Learned Counsel, Mr. Migiro, commented that, the Administrator’s position was “*out of step with modern thinking and the law*”. This is a development in the right direction by members of the bar. It alludes to the fact that as much as they represent clients who harbor discriminative beliefs, they help the courts develop good jurisprudence. In this case, the Administrator’s advocate’s raised the bar by supporting realization of property inheritance rights as per the law.

In re estate of G K (Deceased)⁴⁸⁹, the court noted, “The respondent however, argues that since the deceased died in 1980 before the commencement of the Law of Succession Act which commencement date was 1st July, 1981 (which was after the death of the deceased) The Law of Succession Act Section 2(2) provides that, The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the

⁴⁸⁹*re estate of G K (Deceased) [2017] eKLR*

*administration of their estates shall commence or proceed so far as possible in accordance with this Act. It is important to note that the application of customary law is only applied so far as the same is not repugnant to justice. The respondent argues that the Kikuyu customary law provides that since the late Grace deserted the deceased she and her children were not entitled to inherit anything from the deceased's estate.*⁴⁹⁰

The Judicature Act (Cap 8 Laws of Kenya) Section 3 (2) provides that *the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay. I find that seeking to disinherit the deceased's children is repugnant to justice. Also other than the respondents sentiments that the same is the custom no evidence was called to prove this. I find that the custom alleged by the respondent is repugnant to justice and as such order that the proceedings of the deceased's estate be guided by the provisions of the Law of Succession.*"

The Law of Succession Act, Section 2(2), underscores the rules of primogeniture and entrenchment of patriarchy which is discriminatory to women in the achievement of their property rights in Kenya. The Kenya Courts from the above analyzed case law have muttered courage and not risen to the moment to categorically declare Section 2(2) of the Law of Succession Act unconstitutional by dint of Article 2(4) of the Kenya Constitution, 2010, which states that any law, and that includes customary

⁴⁹⁰*re estate of G K (Deceased) [2017] eKLR*

law, which is inconsistent with the Constitution, 2010, is void and lacks the force of law to the extent of its inconsistency. The Kenya Constitution, 2010 provides that: *“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.”*⁴⁹¹

The above provision mandates the Kenya Courts to abolish or insert requisite amendments without altering the intention of the legislature on laws that do not conform to the Constitution. Sometimes, courts make decisions that fail to enforce laws that are protective of women’s property rights.

“Most laws are in writing, not in practice. The courts are far behind.... I don’t think the courts enforce the law perse,” said one Government official.⁴⁹²

This may happen if the courts think they have no jurisdiction, as per the following remarks of a magistrate who, when asked if a court could order a man on divorce matters and he commented: *“A woman can’t come to court if she wants her husband to leave rather than her.... We don’t interfere with the community setup.”*⁴⁹³

From the outset, it is not only secular courts that have problems, the Kadhis’ courts are also seen to be inept, slow, and costly. One lawyer handling property right cases

⁴⁹¹Section 7 of the sixth schedule of the Constitution, 2010.

⁴⁹²Human Rights Watch interview with Mary Njoki Njuya, principle State Counsel, Office of the Attorney General, Nairobi, November 11, 2002 <<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁴⁹³Human Rights Watch interview with Francis Makori Omanta, senior resident magistrate, Siaya, November 4, 2002 <<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

for Muslim women appreciating her space in the secular High Court for divorce cases, commented.

*“A Kadhis’ court is like a kangaroo court. It’s frustrating to litigants and lawyers....Kadhis are insensitive to women’s issues.... More often than not, Muslim lawyers go to civil courts to advocate for rights of women.”*⁴⁹⁴

It has been found that there are occasions when custom is very strong that the Kadhis find it difficult to apply the Islamic law.⁴⁹⁵ Kenya’s Chief Kadhi said:

*“Where custom is strong, it may be hard for a Kadhi because people will be hostile to him if he judges according to Islamic law, so they encourage some sort of settlement. Sometimes this may not be beneficial for women.”*⁴⁹⁶

A Muslim member of the Constitutional Review Commission commented:

*“Some Kadhis don’t apply the Koran.”*⁴⁹⁷ *The Digo [ethnic group] has their own customary laws which in practice supercede Islamic law.”*⁴⁹⁸ *Enforcing Kadhis’ court*

⁴⁹⁴Human Rights Watch interview with Human Rights Watch interview with Abida Ali-Aroni, lawyer, Nairobi, October 23, 2002. <<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁴⁹⁵Human Rights Watch interview with Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002. <<https://www..hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁴⁹⁶*ibid*

⁴⁹⁷Human Rights Watch interview with Human Rights Watch interview with Maimuna Abdallah Mwidau, program officer, Constitution of Kenya Review Commission, Nairobi, October 23, 2002. <<https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁴⁹⁸*ibid*

*judgments is also hard: “The government can enforce Kadhis’ judgments, but there is no enforcement. No one fears the Kadhis’ courts.”*⁴⁹⁹

The cost of claiming property rights is another restrictive factor to women.⁵⁰⁰ If a woman initiates a legal case, lawyers are her biggest expense. *The Chief Kadhi told Human Rights Watch: “Most women who come to the Kadhis’ courts are economically empowered. It is often impossible to reach courts because of the cost of lawyers.”*⁵⁰¹

4.3 Equality of men and women

When examining the equality provision further, Justice Mumbi attempted to answer the question as to whether men and women will ever be equal as contemplated in the Constitution and in light of a polygamous marriage institution. *In the case of **Mary Wanjuhi Muigai v Attorney General & another***⁵⁰², Justice Mumbi said:

“In my view, to talk of equality of men and women within a polygamous situation is a bit of an oxy-moronic phrase, if one may coin the term. Equality would presuppose that a woman has the same right as the man to take on a second spouse during the subsistence of the marriage, the practice defined as polyandry. This is not recognized in any of the cultures of the people of Kenya, so it must be accepted that polygamy precludes equality between men and women. Polygamy cannot therefore be said to promote equality between men

⁴⁹⁹*ibid*

⁵⁰⁰Human Rights Watch interview with Human Rights Watch interview with Sheikh Hammad Mohamed Kassim, chief Kadhi, Nairobi, November 7, 2002.< <https://www.hrw.org/report/2003/03/04/double-standards/womens-property-rights-violations-kenya>> accessed 5/9/2018

⁵⁰¹*ibid*

⁵⁰²*Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR*

and women, and if measured against the clear provisions of the Constitution and international conventions to which Kenya is a party, is clearly unconstitutional and a form of discrimination against women. However, it is a practice that has been accepted in Kenyan society. Registration of polygamous marriages appears to have been accepted, even by women, as the lesser evil, and has been recommended in various reports, including the 1968 Report of the Commission on the Law of Marriage and Divorce in Kenya. While this Court accepts that permitting polygamous marriages without the consent of a previous wife or wives is not consistent with the Constitution, and that indeed the practice of polygamy is in itself not consistent with the equality principles in the Constitution, it also recognizes that there are situations and practices that it cannot regulate, and that must be left to the wishes and dictates of the people, through their duly elected representatives, as well as to the individual choices of those adults contracting marriages, and who willingly enter into polygamous or potentially polygamous marriages. It is noteworthy that in many cultures in Kenya, polygamy was accepted. It was not, however, subject to registration, and in the event of the demise of a husband, as a perusal of many decisions in the Family Division will reveal, the Court was often required to hear evidence to establish whether the women who claimed to be wives of the deceased were indeed wives and entitled to inheritance from his estate. This, in my view, was the reason why the registration of customary marriages was necessary-to bring some degree of certainty to a system of marriage practiced by many, yet was outside the reach of the law. That the practice of polygamy and registration of polygamous marriages without the

consent of the previous wife or wives is inconsistent with the equality provisions of the Constitution.”⁵⁰³

Justice Mumbi Ngugi pointed out her contention that the Marriage Act had failed to uphold the equality provisions to be found in Article 45 of the Constitution by endorsing polygamous marriages without first seeking consent of the existing wife (wives). In her view, there exist no equality in marriage.

It is disheartening to date since the holding of the above decision that no attempt has been made to amend the Marriage Act 2014 to align with Article 45 of the Constitution. The concept of equality is a subject that I would like to pursue by conducting a proper research and unearth the many grey areas on it and give concrete recommendations. I am also left at cross roads as to the moral value of legalizing polygamy. From a very religious perspective, Christian marriage is monogamous and allowing polygamy or consent to polygamy loses Christians moral value-hence repugnant to morality provisions of the Judicature Act and the Kenya Constitution, 2010.

The above displays the gaps created by lack of awareness among the rights’holders, stakeholders, actors that include relevant professionals, policy makers, judges and magistrates who need to equip themselves with the capacity and relevant knowledge and skills to interpret the national laws and ensure their implementation with respect

⁵⁰³ *Mary Wanjuhi Muigai v Attorney General & another [2015] eKLR*

to equality.⁵⁰⁴ This can be effectively addressed through support for paralegal studies to equip people with relevant skills and services to help women pursue their social discourses. Women should be supported in the area of litigation so as to establish well-reasoned legal precedents. Training lawyers, judges, court registrars and police in women's rights, advocacy with traditional leaders, financial support for community and women's organizations and networks to provide advice and emergency assistance, and documentation and dissemination of best practices is necessary.⁵⁰⁵ Without gender, mindfulness, authorities or bodies managing land allocation, inheritance and dispute settlement being a male predisposition among these authorities is probably going to keep on hindering women's enjoyment of their rights.⁵⁰⁶

While legislatures around the world can create the laws and regulations that protect individual property rights, they do not have the responsibility of enforcing those rights.⁵⁰⁷ Enforcement is left to the courts and to the local administrative structures or police forces across the country.⁵⁰⁸ In the developed world, where local administrations are comparatively efficient, legal *dicta* are communicated to strong and accountable local authorities who enforce legislative decisions in a predictable fashion.⁵⁰⁹ Gary Libecap has noted that, "With title, the police power of the state can

⁵⁰⁴UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 29

⁵⁰⁵ *ibid*

⁵⁰⁶ *ibid*

⁵⁰⁷S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary*

law<<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1073&context=polisci-faculty-publications>>accessed on 13/7/2018

⁵⁰⁸ *ibid*

⁵⁰⁹ *ibid*

enforce private property rights to land.⁵¹⁰The courts can issue eviction notices against trespassers or arbitrate boundary disputes, and law enforcement officials can implement court orders”.⁵¹¹

Having reviewed some of the precedents relating to the courts’ interpretation of property inheritance rights in Kenya, the next Chapter will attempt to review the best practice elsewhere in Africa. The writer has picked on South Africa and drawn a parallelism with the Kenya Constitution and the law in the protection of women property inheritance rights in relation to the Maputo Protocol. South Africa will be a good comparison because like Kenya, it has many sub-tribes with different cultural beliefs and is one of the countries that has suffered intensive abuse of human rights and so one can learn many lessons from it.

⁵¹⁰S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1073&context=polisci-faculty-publications>>accessed on 13/7/2018

⁵¹¹ *ibid*

CHAPTER 5

A COMPARATIVE STUDY BETWEEN KENYA AND SOUTH AFRICA IN REALIZATION OF WOMEN PROPERTY RIGHTS.

This Chapter will endeavor to review the milestones made by South Africa which has been applauded for being progressive in terms of observing the Maputo Protocol in the protection of women in relation to property inheritance rights, bearing in mind that Kenya made reference to the South Africa Constitution during Kenya's constitutional reforms process. It should however be appreciated that the two countries have different cultural and historical backgrounds and each case will be determined on its own merits.

It is worth noting that South African human rights were violated for a long time through the Apartheid rule and after getting independence they knew that human rights and fundamental freedom were an integral part of life should be protected at all costs. South Africa's constitutional court is considered one of the most powerful in the World ensuring implementation of human rights.⁵¹²This has led the Country to include human rights in their University curriculum and that in itself is significant to the South Africans.⁵¹³

To implement its human rights, South Africa has established the Commission of Gender Equality (CGE). CGE is established and derives its powers and mandate from

⁵¹²Fareda Banda, *Women, Law and Human Rights in Southern Africa* <<https://www.tandfonline.com/doi/abs/10.1080/03057070500493720?journalCode=cjss20>> accessed on 22/11/2018

⁵¹³*ibid*

their constitution.⁵¹⁴Its mandate includes reviewing matters of inequality and discrimination of women and also deals with discrimination against persons with disabilities.⁵¹⁵It is set up as an accountability body to enforce the provisions of gender and equality in the Constitution and other enabling legislations.⁵¹⁶It also assesses and provides data on implementation.⁵¹⁷It collaborates with both public and private entities.⁵¹⁸The late H.E Nelson Mandela initiated the 50:50 rule that has become the leading principle. Currently, statistics show representation at 41% in upper house and 35.2% in lower house.⁵¹⁹ Not achieved in Kenya as yet.

Drawing comparison with Kenya, despite the constitutional provision of two thirds gender rule, Kenya is one of the countries with the lowest number of women legislators.⁵²⁰Elected women members of Parliament and other women leaders have expressed disappointment towards achievement of this rule and have been pressurizing the three arms of Government over the slow implementation of the rule.⁵²¹ The case on the Two Thirds gender rule is pending hearing in High Court after the proposal to implement it was faced several setbacks in Parliament.⁵²²

⁵¹⁴Winfred Lichuma,'Key Note Address' *Gender Equality Challenges In Kenya And Africa* (International Challenges And Strategies For Success Organized By Australian Federal Police At The Australian High Commission In London Offices On 28th June 2017) pg 12

⁵¹⁵ *ibid*

⁵¹⁶ *ibid*

⁵¹⁷Winfred Lichuma,'Key Note Address' *Gender Equality Challenges In Kenya And Africa* (International Challenges And Strategies For Success Organized By Australian Federal Police At The Australian High Commission In London Offices On 28th June 2017) pg 12

⁵¹⁸ *ibid*

⁵¹⁹*ibid*

⁵²⁰A Gitonga, *Kenya Ranked Low in Women Representation in Parliament*,<<https://www.standardmedia.co.ke/article/2001265772/kenya-ranked-low-in-women-representation-in-parliament>>accessed 11/11/2018

⁵²¹ *ibid*

⁵²² *ibid*

According to the latest statistics, Kenya stands at position six in the Eastern Africa Region, with 22 per cent and 31 per cent of women in the National Assembly and Senate respectively.⁵²³Rwanda is leading with 61 per cent women in Parliament followed by Tanzania and Burundi at 36percenty, Uganda (34) and South Sudan at 28.5percent.⁵²⁴

It is worth noting that the above statistics are not conclusive. A number of countries, have predictable legislation and enforcement mechanisms on aspects of gender discrimination.⁵²⁵However, land injustice towards women and the resultant negative effects are more often than not culturally and in some instance religiously deep-rooted, and highly localized.⁵²⁶Practical law enforcement will usually be skewed to such powerful, yet diffused, winds.⁵²⁷ Even when the existing law exists it enables women to operate as normal legally recognized economic actors, the social impediments that derail their efforts from doing so.⁵²⁸In Western cultures most married women own property jointly with their husbands.⁵²⁹In Africa, the idea of co-ownership appears alien. Women are according to many practices not supposed to own property because under customary law they are “property” themselves.⁵³⁰The imagination of a woman acquiring and owning property while in marriage is taken to

⁵²³ *ibid*

⁵²⁴ *ibid*

⁵²⁵M Lipton, *Land Reform in Developing Property rights and property wrongs*(Newy ork Routledge 2009)pg 17

⁵²⁶ *ibid*

⁵²⁷ *ibid*

⁵²⁸S Joireman,*The Mystery of Capital Formation in Sub-Saharan Africa:Women, Property rights and Customarylaw*<<https://scholarship.richmond.edu/viewcontent.cgi?article=1073&context=polisci-faculty-publications>>accessed 13/7/2018

⁵²⁹ *ibid*

⁵³⁰ *ibid*

imply that she is not committed or dedicated to her husband or his family.⁵³¹I find the thinking behind a woman not owning property to be unfortunate. Justice Mumbi's assessment of equality in polygamous marriage should in itself give any reasonable woman an idea to move away for dependence. My observation has been that in the few African countries where legislation allows co-ownership of matrimonial property, enforcement of those laws have been very difficult because of cultural practices.⁵³²

Land arrangements shifting control to women will, in general, increase total efficiency and well-being through both routes identified by empowering women and raising their access to economic resources overall.⁵³³However, land reforms and 'gender reforms' are hard enough to achieve separately. Does it help to combine them, and to fight (but also to unite) those who oppose both sorts of reform? ⁵³⁴ It is a matter for case-by-case judgment. As a rule, it seems unlikely. ⁵³⁵

5.1 The South Africa Constitution and its application on Property Rights

In South Africa, gender equality and property rights are diverse.⁵³⁶ The South Africa Constitution upholds the right to equity and recognises customary law and the establishment of conventional administration.⁵³⁷ During the South Africa

⁵³¹ *ibid*

⁵³² *ibid*

⁵³³ M Lipton, *Land Reform in Developing Property rights and property wrongs*(Newyork Routledge 2009)pg 17

⁵³⁴ *ibid*

⁵³⁵ *ibid*

⁵³⁶UN-HABITAT , *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*,Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 10

⁵³⁷A Claassens, *The Communal Land Rights Act and women: Does the Act remedy or entrench discrimination and the distortion of the customary?*<
<https://www.africaportal.org/publications/the-communal-land-rights-act-and->

Constitutional negotiations, there was a disagreement between women's representatives and traditional leaders with regards to what should take precedence between equality and custom.⁵³⁸ Traditional leaders took the standpoint that the constitution should not succeed if it relied on 'foreign concepts and institutions' and equality therefore won.⁵³⁹ The recognition of cultural rights in the Constitution is, unfortunately, the only beginning of the debate.⁵⁴⁰ Rights to culture have to be given life in the context of the day-to-day realities of contemporary South Africa.⁵⁴¹ It was argued, granting of rights are supported by the fact that these rights should be enjoyed only when they do not conflict with the Constitution as the grund norm and/or the Bill of Rights in particular.⁵⁴²

The objective of the South Africa Government was to the extent that the whole set of rights and duties be embraced by the common notion of sovereignty (citizenship) which is granted by the Constitution to all citizens of a country, including those who were deprived of any citizenship or human rights in the country of their birth.⁵⁴³ The dilemma it faces is how to acknowledge the cultural identity and traditions of African people, as represented by the institution of Traditional Leadership, on the one hand,

women-does-the-act-remedy-or-entrench-discrimination-and-the-distortion-of-the-customary/>accessed 12/7/2018

⁵³⁸ *ibid*

⁵³⁹ *ibid*

⁵⁴⁰ T Nhlapo, *The African Customary Law Of Marriage And The Rights Conundrum a* Reading For The Course: LIm (Human Rights And Democratisation In Africa) 2012 Faculty Of Law University of Pretoria pg 16

⁵⁴¹ *ibid*

⁵⁴² *ibid*

⁵⁴³ J Fairweather, *A Common Hunger Land Rights in Canada and South Africa* (Canada University of Calgary Press 2006) pg 152

while honoring the Constitutional demands of democratic governance and individual and equal human rights on the other.⁵⁴⁴

South Africa is unique because of its eleven official constitutional languages.⁵⁴⁵The South African Constitution protects the rights of cultural and other communities as long as those rights are not exercised in a manner inconsistent with any provision of the Bill of Rights.⁵⁴⁶Thus, customary law courts are ultimately bound by the Constitution's gender discrimination protections.⁵⁴⁷To put it simply, the women's groups triumphed over the customary law supporters in the Constitutional negotiations.⁵⁴⁸

Relying on the decision of the Constitutional Court of South Africa, in *Nonkululeko Letta Bhe & Others V Magistrate, Khayelitsha*⁵⁴⁹, Langa, DCJ, writing for the majority, affirmed that the Constitution of South Africa had embraced customary law, but he was also very categorical that such recognition was only as long as customary law was consistent with the Constitution. The Deputy Chief Justice expressed himself thus:

“It is important to underscore, however, that as with all law, valid rules of the the constitution and customary law principles depend on their consistency with the Constitution and the Bill of Rights.”

⁵⁴⁴*ibid*

⁵⁴⁵M Kende, *Constitutional Rights in Two Worlds South Africa and the United States* (New York Cambridge University Press 2009) pg 49

⁵⁴⁶M Kende, *Constitutional Rights in Two Worlds South Africa and the United States* (New York Cambridge University Press 2009) pg 49

⁵⁴⁷*ibid*

⁵⁴⁸*ibid*

⁵⁴⁹*Nonkululeko Letta Bhe & Others V Magistrate, Khayelitsha, Case CCT43/03*

The South Africa Constitutional Court found the succession rules under customary law to be in strife with the provisions of the Constitution on human dignity, equality and non-discrimination, in the following terms:

“[91] The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) 114 of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order. [92] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their gender and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.”

In the past, customary law prohibited women from owning property while in marriage or inheriting property upon the death of their male relatives.⁵⁵⁰ However, the law is dynamic and there have evolved several decisions by the Constitutional Courts, and

⁵⁵⁰C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (Cape Town Women's Legal Centre 2010) pg 9

enactment of new laws, which recognize that customary laws were not only discriminatory but unconstitutional.⁵⁵¹

In South Africa, women can now inherit property under customary law.⁵⁵²The customary law of succession that permitted men only to inherit property were found to be unconstitutional and no longer law.⁵⁵³ Women in a customary marriage are allowed to access land and can also gain ownership rights and can hence and administer property.⁵⁵⁴All customary marriages are considered to automatically convert to community interest, which means that wives have a right to half of the marital assets upon divorce.⁵⁵⁵ This contrasts Kenyan interpretation where women rights may only be respected if brought out in courts of law; at customary level, is a contested interest. In Kenya, equality in marriage does not translate to automatic equality in distribution of the matrimonial property.⁵⁵⁶

5.2 Equality in Property Division

In *ST v CT* ⁵⁵⁷.The parties got married under South African law on 17 July 1992 in Hamburg, Germany. They signed an ante-nuptial contract (the contract) which regulated their marriage. The marriage led to community of property and the accrual system was included. The appellant, Mr. ST, is an experienced advocate.The respondent, Mrs CT, is of German nationality and is also a lawyer, although she never

⁵⁵¹ *ibid*

⁵⁵² *ibid*

⁵⁵³ *ibid*

⁵⁵⁴C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law*(Cape Town Women's Legal Centre 2010)pg 9

⁵⁵⁵*ibid*

⁵⁵⁶Civil Appeal No. 128 of 2014

⁵⁵⁷*ST v CT (1224/16) [2018] ZASCA 73 (30 May 2018)*

qualified as such in South Africa.⁵⁵⁸ The parties met in Namibia in 1990 while the respondent was visiting there. At that time the appellant, who ran practices in Johannesburg and Namibia, was an Acting Judge in Namibia. In December 1991 the respondent discovered that she was pregnant with the appellant's child. On 13 February 1992, the respondent broke off the relationship, but the appellant travelled to Hamburg during July 1992 to propose marriage to her. The marriage relationship broke down finally in early 2010 (there had been a breakdown and reconciliation earlier, in 1994). This divorce action was instituted by the respondent in the high court during November 2010. She claimed, amongst others, spousal maintenance, full particulars of the appellant's current assets and liabilities in terms of section 7 of the Matrimonial Property Act 88 of 1984 (the MPA) and half of the accrual.

The Court observed that the marriage had lasted for 24 years. Because of the marriage, the respondent uprooted herself from Germany and was not able to pursue her legal career there which she would have if she had wanted.⁵⁵⁹ During a large part of the marriage the respondent was responsible for the primary care of the children because the appellant was pursuing his legal career, a career which would sometimes take him away from home.⁵⁶⁰ We do not think she can be criticized for having declined to requalify herself as a South African lawyer.⁵⁶¹ That would have been a substantial undertaking as a middle-aged woman, given the significant differences between South African law and German law.⁵⁶² She testified, and we have no reason

⁵⁵⁸ *ibid*

⁵⁵⁹ *ST v CT (1224/16) [2018] ZASCA 73 (30 May 2018)*

⁵⁶⁰ *ibid*

⁵⁶¹ *ibid*

⁵⁶² *ibid*

to doubt, that she has now made her life in South Africa, more particularly in the Cape Peninsula, and does not wish to live in Germany.

The Court held that the waiver of right to claim maintenance upon dissolution of marriage in ante-nuptial agreement is invalid and unenforceable and the applicant was ordered to transfer to the defendant her undivided half share in the property situated at 5 Woodlands Road, Rondebosch, Cape Town (the Rondebosch property) free of consideration.⁵⁶³

The South African government enacted new laws and policies that focus on land reforms since apartheid, with an accentuation on restitution, redistribution of land and reforms of the land tenure system.⁵⁶⁴ Restitution recognizes that black South Africans were historically dispossessed of their land, and should receive compensation for it, while redistribution seeks to address the imbalance of land ownership with the aim of transferring the land taken from Africans by the whites during apartheid back to the black South Africans.⁵⁶⁵

The Interim Protection of Informal Land Rights Act 31 of 1996 protects “informal land rights”, defined land rights held under customary or traditional law or practice, in cases such as, from appropriation of the land or illegal evictions.⁵⁶⁶ Section 2(1) restores land rights to the owners and such rights can only be taken away by

⁵⁶³ *ibid*

⁵⁶⁴ C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (CapeTown Women's Legal Centre 2010)pg 10

⁵⁶⁵ *ibid*

⁵⁶⁶ *ibid*

consent.⁵⁶⁷ Another new law, the Communal Land Rights Act 11 of 2004, was enacted to reform the land tenure in a comprehensive manner. The Act was not well received by women's rights groups and was later declared unconstitutional by the Constitutional Court in 2010 and repealed⁵⁶⁸.

In the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*⁵⁶⁹, it was found that the government had failed to consult with traditional leaders and communities prior to introducing the new law, and had therefore failed to adhere to the constitutional requirement.⁵⁷⁰ The law was repealed for lack of public participation prior to enacting the law.

The above position changed with the landmark case of *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)*,⁵⁷¹ which came before the courts in 2004. The father of Ms. Bhe's two daughters had died without a will. Under customary law of succession the deceased father ought to inherit the house she and her daughters lived in. Ms. Bhe sought orders for her daughters, as children of deceased to inherit the property. The Women's Legal Centre arguing on Ms. Bhe's behalf stated that the customary law of succession that allowed only males to inherit their father's property was unconstitutional because it discriminated against women. The Constitutional Court was in agreement and ruled in her favor.⁵⁷²

⁵⁶⁷ *ibid*

⁵⁶⁸ *ibid* 10

⁵⁶⁹ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214(CC)

⁵⁷⁰ C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (Cape Town Women's Legal Centre 2010)pg 11

⁵⁷¹ *Bhe and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)* 2005 (1) SA 580(CC)

⁵⁷² *ibid*

The court stated that customary law that encouraged primogeniture was a violation of women's equality under the law and denied women their rights to dignity, which are protected under the Constitutions' Bill of Rights.⁵⁷³ Ms. Bhe's daughters, were granted orders to inherit the property.⁵⁷⁴ That was a paradigm shift where children are denied their overriding interest.

As a result of the decision in Ms Bhe's case, the government introduced a new law, named the Reform of Customary Law of Succession and Regulation of Related Matters Act.⁵⁷⁵ This law was aimed at reforming the existing customary law of succession by prohibiting the disputed principle of primogeniture.⁵⁷⁶ The law recognizes that widows and children of customary marriage had no protection under the customary laws of succession.⁵⁷⁷ That was a bold and positive move.

The South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, expressly provides for rights of equality, and prohibits all forms of discrimination against women on the basis of gender. Section 8 expressly provides for protection of women and the girl child.

⁵⁷³ *ibid*

⁵⁷⁴ *ibid*

⁵⁷⁵ Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009

⁵⁷⁶ C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (Cape Town Women's Legal Centre 2010) pg 13

⁵⁷⁷ C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (Cape Town Women's Legal Centre 2010) pg 13

In *Mthembu v Letsela*⁵⁷⁸, the relationship between the Constitution the application of customary law were examined in the two rulings of cases filed by *Mthembu*. The decisions were in the decision in the High Court in Pretoria and in an appeal in the Supreme Court of Appeal. The appellants filed an application in the High Court seeking a declaration that the rule on primogeniture under customary law and regulation 2(e) be rendered invalid on the ground that the rule discriminated against women, and younger children in families and children born out of extra-marital affairs. The appellant argued that this provision offends the equality principle guaranteed under section 8 of the then interim Constitution.

In the High Court case, the Judge dismissed the application, on the reasoning that the rule and the regulation were not inconsistent with the equality rule cited from the interim Constitution. They appealed to the Supreme Court of Appeal and sought orders to set aside the decision of the High Court and to rule in favour of the applicant, as required by section 35(3) of the interim Constitution, and rule against the order for primogeniture in order to allow all descendants to participate in intestacy.⁵⁷⁹The Supreme Court of Appeal declined to find in favour of appellant on the constitutional challenge or to develop the rule in the interim Constitution because law does not operate retroactively. The court reasoned that the rights of the heir in the estate had vested on the death of the deceased, well before the interim Constitution took effect.

⁵⁷⁸*Mthembu v Letsela and Another*(71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000)

⁵⁷⁹*Mthembu v Letsela and Another*(71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000)

In an alternative argument, the Supreme Court of Appeal was urged to conclude that the rule of primogeniture and regulation 2(e) are bad under the common law because they are anti-public policy or violate rules of natural justice which are grounded on the value of equality as a fundamental right. The court of appeal dismissed the application on the reasoning that neither the rule nor regulation were offensive because they did not violate the common law. The court added that the regulation, was not unreasonable under the common law. The learned Judge said that the principle on male primogeniture was well established and “many blacks” were happy with the way their property was devolved. The Court held that section 23 is inconsistent with the Constitution and therefore invalid and regulation 2(e) automatically falls away. The Judge continued that the customary law of primogeniture, as concerns intestate succession, is inconsistent with the equality rule provided for in the Constitution. It would follow that the decision in the *Mthembu* case would invariably apply and the judgment stands.⁵⁸⁰ In *BHE and others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as amicus curiae)*⁵⁸¹, the court pointed out that customary law had maintained its patriarchal features.

In the past, the courts’ interpretation of customary law was that husbands were entrusted with all assets and income belonging to a married couple. Married women and minors are put in one class that is incapable of owning property. Their husband

⁵⁸⁰ *Mthembu v Letsela and Another*(71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000)

⁵⁸¹ *BHE and others v Magistrate, Khayelitsha, and Others(Commission for Gender Equality as amicus curiae)*2005(1) SA 580 (cc) (Paragraph [89] at 620F.)

and male relatives had the exclusive domain over property as “guardians”.⁵⁸² The income women earned from own labor was given to their husbands. This principle was later codified into law that was eventually repealed.

To remedy women injustices towards property rights and snatching their consumable rights, Recognition of Customary Marriages Act (RCMA)⁵⁸³ was enacted and the same came into force in 1998. Section 6 of that Act has granted women full status and capacity, and provides that women have equal rights to acquire and when they deem fit dispose of their property in the respective customary marriages.⁵⁸⁴The RCMA enabled spouses to merge their assets with both parties having equal rights to manage the estate. If marriage is dissolved, parties will share the estate in equal terms.

The gap created by RCMA’s is that the Act applied to marriages that occurred after 1998 (the effective date). All women who were married under customary marriages before 1998 were subjected to the same discriminatory practices relating to property ownership under the customary law. In the 2008, Legal Resources Centre filed case, *Gumede v President of the Republic of South Africa and Others*⁵⁸⁵ seeking a declaration that RCMA discriminated women on the basis of gender, race and culture. In that case, Ms. Gumede entered into a customary law marriage in 1968. The parties divorced in 2003 and by that time, they had acquired two houses. The marriage took place before the Act and was automatically subject to customary law. Ms. Gumede was consequently denied her interest in the two houses. The Constitutional Court

⁵⁸²C Beninger, *Woman Know Your Rights, Women’s Property Rights Under Customary Law*(Cape Town Women’s Legal Centre 2010)pg 14

⁵⁸³ Recognition of Customary Marriages Act (RCMA) No 20 of 1998

⁵⁸⁴*ibid*

⁵⁸⁵*Gumede v President of the Republic of South Africa and Others 2009 (3) SA 152 (CC)*

boldly ruled that the Act was discriminatory and unfair to women property inheritance rights; the Act was struck down of the limiting provision. Since then, all women married under customary law have equal rights to property.⁵⁸⁶

5.3 Land arrangements and the Principle of Equality

Land arrangements cannot abrogate the right of all South Africans to equal treatment, including women.⁵⁸⁷To the extent that civil law conflicts customary rights, civil law should prevail.⁵⁸⁸Racial discrimination in land rights will not be tolerated, and the historical practice of maintaining a second-class system of land tenure for blacks must cease.⁵⁸⁹

In South Africa the smallest interracial differences are found on whether land ought to be distributed only to those who know how to use it productively.⁵⁹⁰Except for those of Asian origin, solid majorities, including among blacks, support this policy.⁵⁹¹Similarly, large majorities with rather small interracial differences support treating men and women equally when it comes to land claims and policy.⁵⁹²

Originally, all family members had full legal capacity, with each family member having a clearly recognized claim over property and related obligations.⁵⁹³Each

⁵⁸⁶C Beninger, *Woman Know Your Rights, Women's Property Rights Under Customary Law* (Cape Town Women's Legal Centre 2010)pg 15

⁵⁸⁷J Gibson, *Overcoming Historical Injustices Land Reconciliation in South Africa*(New York Cambridge University Press 2009)pg 20

⁵⁸⁸ *ibid*

⁵⁸⁹ *ibid*

⁵⁹⁰ *ibid*

⁵⁹¹ *ibid* 69

⁵⁹² *ibid* 69

⁵⁹³A Claassens, *The Communal Land Rights Act and women: Does the Act remedy or entrench discrimination and the distortion of the*

member could place claims to the property which was linked to their respective 'houses':⁵⁹⁴ It was recognized that a house served more purposes than a simple dwelling room. A house was defined as a distinct unit legal cell or unit within a complex joint family. Each wife, her children and livestock and field the wife cultivated constituted a house.⁵⁹⁵

Preston-Whyte has attempted description of a wife and her specific rights to her 'house' and fields she cultivated.⁵⁹⁶ He emphasized that the male family heads could not make decisions impacting property, without the consent of their wives.⁵⁹⁷ Women were in a better economic position as producers of food, and for that reason, they played pivotal role in activities such as farming and subsistence.⁵⁹⁸

It is worth noting that women, including unmarried women and widows directly owned various accounts of land.⁵⁹⁹ Fields were for once described as 'belonging' to women.⁶⁰⁰ Such is the 1931 account of the 'life and customs' of the Xhosa by the African missionary, John Henderson Soga. Each wife of a chief or commoner was given land for the upkeep of her family.⁶⁰¹

customary?<<https://www.africaportal.org/publications/the-communal-land-rights-act-remedy-or-entrench-discrimination-and-the-distortion-of-the-customary/>>accessed 12/7/2018

⁵⁹⁴*ibid*

⁵⁹⁵*ibid*

⁵⁹⁶*ibid*

⁵⁹⁷*ibid*

⁵⁹⁸*ibid*

⁵⁹⁹A Claassens, *The Communal Land Rights Act and women: Does the Act remedy or entrench discrimination and the distortion of the customary?*<<https://www.africaportal.org/publications/the-communal-land-rights-act-remedy-or-entrench-discrimination-and-the-distortion-of-the-customary/>>accessed 12/7/2018

⁶⁰⁰*ibid*

⁶⁰¹*ibid*

Laws and policies recognizing women's rights remain very difficult to implement.⁶⁰² In a lucky case with progressive laws are in place, enforcement mechanisms are weak and funding for effective implementation remains a challenge.⁶⁰³ Inheritance is in real life viewed as a private matter. This explains the Government's hesitation in 'interfering' with the issue.⁶⁰⁴

The research on South Africa cases has depicted insights on how courts have dealt with implementation of the Constitution in relation to human rights *vis a vis* the multi-cultural practices. It is an area of interest that scholars may wish to develop more jurisprudence.

The next Chapter will give a summary of the study, make conclusions and suggest the way forward by making recommendations from the findings of this research. The recommendations should hopefully help the various stakeholders on how they can champion Kenyan women property inheritance rights and general empowerment of women. The recommendations will address among others, ways in which women should move away from servitude and child bearing roles to economic, social, political and any other form of empowerment and to say "No" to negative cultural practices so as improve their lives as envisaged in the Maputo Protocol.

⁶⁰²UN-HABITAT, *Progress Report on Removing Discrimination Against Women in Respect OF Property & Inheritance Rights*, Tools on Improving Women's Secure Tenure Series 1, Number 2 August 2006 pg 28

⁶⁰³*ibid*

⁶⁰⁴*ibid*

CHAPTER 6

SUMMARY, FINDINGS AND RECOMMENDATIONS

This Chapter gives a summary of the ideas and arguments in the preceding Chapters, the respective findings and suggests the way forward to the various stakeholders on how women property inheritance rights can be realized for the general empowerment of the women in Kenya.

6.1 SUMMARY

Chapter 1 of the study looked at the definition of culture, the recognition of cultural practices and their impact on women, the origins of culture and how cultural practices are conveyed, efforts made by the birth of international & regional instruments in protection of rights, feminist theory on gender inequality and reviewed existing literature. It was noted that the family is often regarded as the key structure for perpetuating patriarchy, modeling authoritarian social relations as it teaches sexual differentiation of social functions.

Chapter 2 offered the definition of what constitutes property, analyzed Kenya as a patriarchal society and diversity of laws governing ownership of property in Kenya. It was found that the position of women in relation to matrimonial property is extremely weak. Customary law in relation to property rights of women seems to be out of step with the present economic structure and this has the effect of weakening the economic power of women.

Chapter 3 identified the existing legal framework and reviewed how it affects the acquisition of women property rights in Kenya, the impact of cultural practices on realization of women property rights in Kenya and the nexus of constitutional and

legal provisions with customary laws on women's right to property. It is evident from the study of the Kenyan law and practice that the mere substitution of customary land rights with statutory rules and international covenants has partially failed. Improvement of women's security tenure is not fully addressed since custom still provides legitimacy and influences general opinion of the decision makers.

Chapter 4 of this study focused on the guiding principles that the Court's apply in the pursuit of justice particularly in observance of women property rights, the interaction of formal and customary systems in Kenya and equality of men and women. It is an undisputable fact, that while legislatures around the world can create the laws and regulations that protect individual property rights, they do not have the responsibility of enforcing those rights. Enforcement is left to the courts and to the local administrative structures or police forces across the country.

Chapter 5 was key as it attempted to draw a comparison between Kenya and South Africa in the observance and promotion of women property rights. It is clear that South Africa is on the path of achieving the 50:50 gender rule whereas the two third gender rule is a subject of endless debate currently in Kenya.

6.1 FINDINGS

The status of women in Africa remains critical and unusual that women property rights questions requires to be addressed urgently. This question need not only be

addressed by feminist scholars, but by anyone who cares about agricultural development, property rights or capital formation.⁶⁰⁵

The multiple legal systems have largely contributed to discriminatory practices against women. Exemptions in Article 45 of the Constitution of Kenya 2010 and Article 49(3) of the Marriage Act, explicitly discriminate against Muslim women and women finding themselves in customary marriages. Under the Muslim laws, women cannot serve as Kadhis in Kadhi courts. Legalization of polygamy among the Muslims violate the provisions that bar discrimination against women stipulated in the Constitution and the Maputo Protocol.⁶⁰⁶

As observed in this research, legal process is quite pricey. In addition to cases taking long to conclude court fees, witness travel expenses and related charges is a hindrance to most women access to rights.⁶⁰⁷ Even in instances where judgment delivered in favor of women, execution of the decree is difficult particularly in a rural setting.⁶⁰⁸

Authors have observed that protection of property rights is good for economic development.⁶⁰⁹ Where women actively participate in the rural economy, it is deemed necessary to protect their property rights and not to look at them as members of a

⁶⁰⁵S Joireman, *The Mystery of Capital Formation in Sub-Saharan Africa: Women, Property rights and Customary law* <<https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1073&context=polisci-faculty-publications> accessed 13/7/2018

⁶⁰⁶Concluding observations on the eighth periodic report of Kenya Committee on the Elimination of Discrimination against Women pg 2

⁶⁰⁷Federation of Women Lawyers, *Women's Land And Property Rights In Kenya A Training Handbook* <<http://fidakenya.org/wp-content/uploads/2017/04/Women-Land-rights-Handbook.pdf>> accessed 2/8/2018

⁶⁰⁸ *ibid*

⁶⁰⁹ *ibid*

household.⁶¹⁰ Scarcity of resources and failure by the national machinery to advance women rights are an impediment in the realization of women property rights.⁶¹¹I would like to reiterate my point that, the gap lies with enforcement and implementation of the existing laws and instruments. There is urgent need to develop on this study to go deeper into the Kenyan people's attitudes so as to find a paradigm shift towards the right direction.

6.2 RECOMMENDATIONS

- a) A progressive society expects cultural attitudes and biases to give way to considerable equitable rights to land and to other forms of property ownership.⁶¹²To this end, legislative reforms should be made in a manner that encourages land policy and legal framework supportive of women.⁶¹³Positive outcomes and implementation of reforms ought to translate to social transformation that will address the basic needs and rights of every Kenyan inclusive of adults' capacity of women.⁶¹⁴The big question is whether the state will play its role in this transformation agenda. It is indeed possible for the state to facilitate women's access to land, look for ways and forms of eliminating all discriminative traditional practices that impede equality to land rights, and establish a supportive

⁶¹⁰*ibid*

⁶¹¹Concluding observations on the eighth periodic report of Kenya Committee on the Elimination of Discrimination against Women pg 3
referer=https://scholar.google.com/&httpsredir/=1&article=1070&context=twls>accessed 12/7/2018

⁶¹²P Karanja, *Women's Land Ownership in Kenya*<[https://scholar.valpo.edu/cgi/viewcontent.cgi?](https://scholar.valpo.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir/=1&article=1070&context=twls)

referer=https://scholar.google.com/&httpsredir/=1&article=1070&context=twls>accessed 12/7/2018

⁶¹³*ibid*

⁶¹⁴*ibid*

legal framework to protect women's rights to inheritance and ownership of land;⁶¹⁵

- b) Efforts to repeal and amend discriminatory laws under religious beliefs and continuous review of the precedents decided on cultural practices should, I believe, be made possible and in line with reasonable customary practices in order to harmonize them with Article 16 of the CEDAW⁶¹⁶ and the women's intentions. Equality of women and men in Muslim marriages can be made less discriminatory. A husband's right to arbitrary and unilaterally divorce his wife is one of the actions that require reforms. This can be realised through re-codification of the Muslim family laws in a manner that will respect Article 27 of the Kenya Constitution 2010, and the respective Articles of all other International Conventions that Kenya is a party.
- c) Findings from this study indicate that discrimination of women under Islamic law is in a critical state and there is urgent need for change. It is in fact oppressive and abusive. Efforts to allow Muslim women to participate in decision making process will be a useful step forward. Rethinking the Muslim women status by involving women in alternative dispute resolution as Mediators and Arbitrators is one way of clearing the impediment. Kadhi's system is key to analyzing and addressing women property inheritance rights in the sense that women will then be made part of dispute resolution and decision making process.

⁶¹⁵*ibid*

⁶¹⁶*ibid*

- d) The Kenya Government should provide a conducive environment and decisively implement, without delay, effective measures that will promote women's role in leadership. Protection of women to freely undertake their work without fear of discrimination on gender basis, harassment, intimidation and violence would be welcome. It is through encouraging women rights defender organisations to promote human rights that women will be able to make progress towards realization of their property rights.
- e) The state should in the same breath not only strengthen effective co-ordination and the provision of adequate resources to the State Department of Gender Affairs and the National Gender Equality Commission but also purpose to ensure dealing with the real issues. The state should for example carry out effective investigations, and not only prosecute but also ensure severe punishment for all the people involved in cases of harassment and violence against women. To this end, efforts made by human rights defenders cannot be ignored. Human rights defenders have provided good initiatives, suggestions and effective remedies to victims of violence. The state should now ensure effective implementation of the Truth Justice and Reconciliation Commission (**TJRC**) recommendations for instance, in a manner that will champion and prioritize women's rights.
- f) In my opinion, the National Gender and Equality Commission has not done enough to highlight and protect women property inheritance rights. There is therefore urgent need to act without fear of contradiction or the Commission be declared redundant if its agenda for women is not proactively pursued. It could be that the Commission is not well equipped

to fulfill its mandate. I would therefore suggest that there be continuous efforts to interrogate and equip complaint mechanism and authority of the Commission to ensure it issues binding findings and solutions going forward. Government may think of granting the Commission prosecutorial powers if that will be useful in discharging their mandate.

- g) The state should collate information and publish more data disaggregated by sex, gender, ethnicity, disability, and age, in order to inform policy and programs on women and girls, as well as assist in the tracking the progress in the achievement of the gender-related targets of the Sustainable Development Goals.
- h) Persistence discriminatory stereotypes on the roles and responsibilities of women in the society as well as perpetration of discriminatory and harmful practices such as widow inheritance that deny women property inheritance rights should in my opinion be criminalized and the perpetrators effectively prosecuted and adequately punished.
- i) The Kenya Government is the custodian of the Constitution 2010 that should counter discriminatory stereotypes and harmful practices against women and girls. In line with Vision 2030, women should ensure implementation and if not, amendments to the school curriculum that will ensure elimination of discriminatory gender stereotypes and empower women in entirety. In criminalizing harsh and subjective traditional practices (that refers to those not legislated), the state will add to its own voice the deliberate efforts to develop and implement a comprehensive strategy to eliminate harmful practices and stereotypes that discriminate

against women, including increased awareness-raising campaigns for community and religious leaders and the general public;

- j) The Kenya Government should take immediate steps to implement the African Commission's ruling recognizing people's rights to their ancestral land, and ensure consultation with the affected women during this process. The state has made steps to streamline the rights of women, youth and people with disabilities for example, by empowering them in various ways. The gender, youth, minority and marginalized people's mainstreaming is meant to ensure that groups such as women are properly equipped and empowered. Women, youth and people with disabilities have an allocation and access to 30% of supply of goods and services to public institutions. This special groups have access to credit and if credit is diligently managed, it will guarantee women the right to own property and conduct their own affairs. Indeed the state has succeeded in mainstreaming of the minority rights and these has been included in the score card of public institutions performance contracts. All public institutions are required to report compliance with this requirement and most if not all of them submit quarterly reports.
- k) Repeal of various laws will play a major role in addressing discriminatory practices. The Matrimonial Property Act, Section 7, recognizes the principle of equality in all spheres of marriage. Repealing Section 11 of the Land Laws (Amendment) Act (2016) and restoring of the requirement of spousal consent for any transactions relating to marital property as envisaged in the Land Registration Act (2012) is key to promotion of

women rights. An overhaul of the Succession Act will ensure that women enjoy equal rights to men in relation to inheritance and property laws;

- l) I support implementation of the recommendation towards division of matrimonial property, I am however of the view that it be made mandatory for matrimonial property to be registered in joint names of the spouses either expressly or constructively, upon acquisition of the property, during subsistence of marriage. This will protect legal wives against illegal interests in their husbands' property and the subsequent wives who did not work for it.⁶¹⁷
- m) The Government of Kenya should commit to repealing clauses in national laws that deny women the rights to equal opportunity. Specifically, the amendment to the spousal consent clause in matters of transfer of land and particularly Section 7 of the Matrimonial Property Act 2015. ⁶¹⁸ This law should instead be tightened to protect women and the issues of marriage.
- n) The Government should also take steps to stop any directives that will lead to discrimination of women and slap a ban on discriminative institutional practices and attitudes by public servants and any citizen.⁶¹⁹

⁶¹⁷Concluding observations on the eighth periodic report of Kenya Committee on the Elimination of Discrimination against Women pg 12-13

⁶¹⁸Federation of Women Lawyers (FIDA-Kenya) Shadow Report on Kenya's 8th Periodic Report Scheduled to be reviewed during the CEDAW Committee's 68th Session, 2017 pg 6

⁶¹⁹*ibid*

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