

THE LAW OF SUCCESSION ACT AND THE GUSII CUSTOMARY
LAW OF INHERITANCE.

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the L.L.B. Degree, University of Nairobi.

by

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ABBREVIATIONS

1. E.A.L.R. (E.A.) - Eastern African Law Reports
2. J.A.L. - Journal of African Law
3. K.L.R. - Kenya Law Reports
4. M.L.R. - Modern Law Review
5. Tan. L.R. - Tanzania Law Report
6. U.R.T. - United Republic of Tanzania

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1. African Christian Marriage and Divorce Act Chapter 151
2. African Wills Act Chapter 169
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5. The Marriage Act Chapter 150
6. The Magistrate Court's Act
7. The Registered Land Act Chapter 300
8. The 1897 East African Order in Council
9. The 1897 Native Courts Regulations
10. The Law of succession Act Chapter 160
11. The Probate and Administration Act

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INTRODUCTION

The Law of succession Act Chapter 160 of the Laws of Kenya came into operation on 1st of July 1981 as legal notice number 93 of 1981 shows. Those who died before it will be governed by their laws of succession which were in force then. This means that the Customary Law of succession of the Gusii and other laws of succession that applied to other communities before the commencement of the Act will still apply to the estates of the people who died before 1st July 1981.

All those who die after the commencement of the Act however, are to be governed in all respects by the Act. It contains a code on matters as intestate and testate succession.

Section five of the Act provides that one may make a will and indicate the Law of succession that will govern his estate. That is, whether his customary Law of succession or that in the Act. However as will be shown in the discussion in this paper, the formalities of making the wills are complicated and most people may end up dying intestate. In that extent the intestate succession rules of chapter 160 will apply.

The Act was enacted to apply uniformly in Kenya on the assumption that customary Law of succession discussed in chapter two of the paper was out of touch with realities of modern Kenya. In the chapter it will be shown that this assumption was wrong as far as the members of the Gusii community are concerned. In chapter one, we discuss the difficult times that customary Law has gone through both in colonial and independent Kenya. The aim here is to give a background to the discussion of the Act in chapter three as to how ~~it is~~ further instances where customary Law is aimed at being phased out.

Thus in chapter three we discuss the Act how it has been based on wrong assumptions and how it may be impracticable on application. Finally we give our conclusion.

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CHAPTER I

A BACKGROUND TO THE CUSTOMARY LAW OF SUCCESSION

The indigenous African communities of Kenya had customary law to govern their social, political and economic lives even before the establishment of the colonial Rule.¹ Law is common and indeed an indispensable attribute of all human societies including the African communities.² However each African community had and still has its own customary law that is different from that of the other societies because each society has different philosophy of life that is reflected in these laws. The reasons for the existence of this differences in the philosophies of Life have been stated to include Historical events of each community, the geographical positions, their way of thinking about human life and their languages.

The object of this part of the paper is to show the difficulties that customary Law has faced both in the colonial and post colonial periods of Kenya. The problems in the view of the writer of this paper have hindered the development of customary law and in some instances as will be shown below led to the total disappearance of the same.

Only those areas of customary law related to customary Law of succession are discussed below. These pertain to the institutions of property and marriage.⁴

These two areas of customary Law are discussed in the context of the difficult tests of repugnancy to justice and morality, inconsistency of written Laws, rules of ascertainment, which they had to pass through before they could apply in society according to statutory provisions that are discussed below. Also the customary Law is discussed in the context of the legislations that were applied which had English values, and others promulgated to replace customary Law and in some aspects as will be shown.

lead to its disappearance in the long run.

The British government started administering Kenya directly in 1895.⁵ It has been indicated⁶ that the basic problem faced by the colonial government at its establishment was how to develop a legal system that would embrace the whole country; This is because there were different groups of people with different ways of life in the same territory. These were the European settlers, the Asians, the African ethnic groups and the Moslems. The problem was aggravated by demands made by each of the groups that their respective laws be applied onto them. The European settlers for instance, were insistent that they were entitled as of right to the English legal system which they had brought with them from England as part of their heritage of the common law.⁷ The Moslems who are said to have had a complete legal system under the Mohammedan law had to be taken into account.⁸ The African ethnic groups formed a majority of people in the colony. One writer has said that if too much imposition of law was going to be done on these people, the government was to be ready to expect a rebellion from them.⁹

To govern all these people, the rulers of the colony derived their legal excuse for administration from the 1897 East African Order in Council.¹⁰ Under this statute, the colony was to be ruled by orders in council which were laws promulgated in the colony by the Governor or Commissioner by virtue of powers conferred to him.¹¹ Under that statute also, foreign law was imported to apply in the colony. This for instance was importation of common law doctrines of equity and statutes of general application which were in force in England in the 1st August of 1897 to be applied in so far as the inhabitants of the protectorate permitted.¹² English laws imported as such were naturally to apply to the English people in the colony. But these, as was shown above, were not the only inhabitants of the protectorate. It means therefore that in so far as the Africans, the Moslems and Asians permitted, English laws would apply onto them by virtue of that provision.

But to talk of permission is to talk of compromise between these various groups and the rulers of the colony. This is not what happened, but instead the laws were imposed on the people as will be shown in the following instances.

Article 12 of the East African order in Council provided for the application of Indian Acts.¹³ These were the Indian civil and criminal procedure codes and the Indian penal code to regulate matters in courts; whereas by virtue of section 3 of the native courts Regulations¹⁴ these were the courts presided over by a European Officer namely, the High court, the chief Native courts, the provincial court, the District court and assistant collectors courts. It meant therefore that those Africans who took their affairs into the Europeans manned courts had no choice but to have their affairs governed by the foreign procedures and a new penal law to replace their customary law of the same.

Article 52 (c) of the East African order in council further show that although customary law was allowed to apply, it was to be at the mercy of the commissioner. It provides as follows:

'The Commissioner may, with the consent of the Secretary of state, make rules and orders for the administration of justice in native courts and in particular...

(b) alter or modify the operation of any native law or custom in so far as in so far as may be necessary in the interest of humanity and justice.'

This provision did not apply to none native courts or their laws. It shows the racial bias by the government and disrespect for the African Institutions of courts and their customary law in that, customary law could now be modified at the whim of the commissioner. This same negative attitude towards customary law remained throughout the colonial period and even after, to the detriment of customary law as will be realised by the end of this part of the paper.

Another superficial allowance for the application of customary law was article 20 of the 1902 East African order in council. It provided a direct legal basis for the application of customary law. It reads as follows:

'In all cases civil and criminal to which natives are parties every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or inconsistent with any order in council or ordinance, or any regulation or rule made under any order in council or ordinance and (b) shall decide all such cases according to substantial justice without undue regard to technicalities of procedure or without undue delay.¹⁵

This article appeared as it is as article 7 of the 1921 Kenya colony order in council, made after the annexation of Kenya colony in 1920. It remained like that until 1967 when the judicature Act subsection 2 is substantially the same as article 20 of the 1902 order in council quoted above except for the fact that the judicature Act's provision removed the racial aspect implied in article 20 of the 1902 order in council. This is due to the extent that originally customary law was only to apply in a case where both parties to the dispute were 'natives' which meant that if one of the parties was not a native for instance was a European or an Asian, then instead of customary law applying, it was English Law that applied. This was prejudicial to the African party. The present position as changed in the judicature Act Section 3(2) shows clearly that now even if one of the parties is not an African still customary law may guide the court.

In the foregoing account it has been shown that there were statutory provisions as basis for the application of customary Law. It is now appropriate to show the difficult tests that customary law had to go through in order to be applicable.

In article 20 of the 1902 order in council and in section 3(2) of the judicature Act customary law in order to guide the courts must not be repugnant to justice and morality. It must not be inconsistent with any order in council as was shown above.

In the first place, the provisions show that customary law was and is only to 'guide' the court in deciding disputes. It means that it is not mandatory that the courts were to and will apply customary Law.

They could and may choose not to be guided by it especially if they thought or think that it was repugnant to justice and morality or inconsistent to any written Law. These tests for customary Laws application also appeared in Section 12 (3) of the 1902 order in council which provided that the commissioner would make ordinances respecting customary Law so far as this was not opposed to justice and morality.

It has been indicated by critics¹⁷ of these statutory provisions for customary Law that no order in council or even in independent Kenya, endeavoured to define the phrases repugnancy, justice, morality and humanity. It is not therefore clear what they meant or what they now mean.

One colonial Judge in a Tanzanian case Gwao bin Kilimo vs Kisunda bin Ifuti¹⁸ has said

'I have no doubt whatsoever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condemn such things as the institutions of slavery.'

It is clear from the views of this Judge that the standard/used were s/ those of the British ruling society. In this way, those in authority could do anything to rid of customary Law using their standards. This implies an attitude that the people were primitive. The British government was to remove from the African anything that might harm him¹⁹. For instance, the customary way of punishment by flogging was abolished on grounds of justice and morality.²⁰ On these same grounds other customary areas not related to the Law of succession such as custody²¹ of children, were replaced by statute with English values of the welfare principle this was the Gurdian ship of infants Act section 17.

There was also the test of inconsistency. Aurther Philips has indicated²² that one of the problems that customary Law faced was that it was not on record. To provide that it would not apply if it was inconsistent to any written Law amounted to a displacement of it, in place of

the English written Laws that would apply. This inconsistency tests for instance outlaw all the criminal customary Law in favour of the penal code as further indicated in the constitution of Kenya²³ section 77(8) which provide that no person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written Law. However, as regards the personal matters of the people, such as succession and marriage whose customary Law is not in written may apply to people by virtue of section 82 4(b) and (c) of the constitution. But even this must not be inconsistent to the constitution. Case Law²⁴ has shown that customary Law regarding personal matters of marriage may be disapplied on grounds of inconsistency with the constitution.

Another test is that of ascertainment. This is to the effect that the custom to be applied apart from it having to pass the tests of repugnancy to justice and morality and inconsistency to written Law, it must be ascertained according to rules set out.²⁵ These are that the party relying on the custom in a civil case must plead it. He must further show that the custom has been in existence since time immemorial and was relied on without interruption and that it must be confined to a particular locality or group of people²⁶.

The Legislature has however provided a way that can help the courts go to go about establishing a custom. This can be seen in Section 87(1) of the civil procedure code which reads as follows:-

'Any court may, in any cause or matter pending before it in which question may arise as to the Laws of any tribe casts or community summon to its assistance one or more competent assessors and such assessors shall attend and assist accordingly²⁷

However the provision is to the effect that the court may choose to call assessors, which means that it may not call them if they choose not to.

It has been indicated²⁸ that assessors may take the form of expert witness such as anthropologists that may be carrying out some study in the area or

old man or elder, who are considered to have a lot of wisdom due to their age and position in society as was indicated in the case of R vs Mutiwiwa.²⁹

In the case, the court received assistance of assessors whose opinion was regarded as being on the same footing as the evidence of an expert witness. The evidence so given to the court by such assessors or expert witnesses, is further subjected to the discretion of the court. For instance section 51 (1) of the Evidence Act provides that the court is to form an opinion as to whether it is to admit the evidence given. This clearly shows that a court may not be bound by such evidence after much effort has been spent in obtaining it.

The rules of ascertainment of customary Law that applied in the colonial period only in courts presided over by a European officer³⁰ have now been extended by the Magistrate Courts Act³¹ to all courts in the country. The extension of these rules to all the courts unlike in the colonial period shows how much more the independent government is determined to extinguish customary Law than the colonial government.

The independent government has been more aggressive in extinguishing customary Law than the colonial one. For instance the Magistrate Courts Act which defines what customary Law may be applied by the courts³² has left out customary Law of contract and tort. In 1961 the Law of Contract Act³³ provided that the English Law of Contract is to be the Kenya Law of Contract whereas the High Court has held in Kamanza Chiwaya vs Manza Tsuma³⁴ that it is the English Law of civil wrongs or torts which applies to Kenya and not the customary Law of wrongs. This means that the English principle of liability and reliefs will be applied in place of those under customary Law.

The courts have not awarded customary Law the respect it deserves.

A History of this can be seen in the administration of customary Law in the native courts³⁵. Section 13 of the native tribunals rules of 1908 gave the supervisory powers over the natives tribunal to the subordinate courts. The subordinate courts were presided over by the provincial and District commissioners³⁶. These were to revise cases and hear appeal from the native courts following the procedure of an original case in a magistrate's court³⁷. But this was normally not the case in practice since sometimes appeals from the magistrates to the subordinate courts were dealt with administratively, that is, without following the procedure laid down and sometimes the penal code was applied before being authorised to do so³⁸. The problem of this situation is that one could not trust such administrative officers with customary Law if they could not in the first place follow the procedure laid down by themselves.

In some instances³⁹ the District Commissioners who had the supervisory role over the courts, did not know what customary Law to be applied in a given situation, or they could ignore whatever custom there was and applied what they thought was right.

In the areas of marriage and property which pertain to the Law of succession will be discussed in the context of the foregoing account on customary Law.

The colonial government was always quick to provide Law for those Africans they thought had accepted the western way of life. For instance Regulations 64 and 65 of the 1897 native courts Regulations. These provided that the personal status of a native christian would be governed by the Law for the time being in force in such cases in British India, which the natives who were neither Christians nor moslems would continue being governed in their personal status by their Laws if such Laws in the opinion

of the court were not repugnant to natural morality and if it could be ascertained. This provision carried the civilising element in that these Africans as is defined in article 65, that is, Baptised and has not subsequently formally absorbed the Christian religion or who is certified to the satisfaction of the court by the responsible European head of any recognised Christian mission within the protectorate to be a bona fide member of any Christian religious body, were to be considered as having abandoned their old sinful way of life under customary Laws which was the control of sin. Therefore it was necessary to provide for such converted people in the new life hence the importation of the English Laws of personal status that applied to Christians in British India.

In connection to this provision was also section 39 (a) of the East Africa marriage ordinance of 1902 which provided that the Law of succession which would apply to the people who got married under that ordinance was the English Law so long as the property of the subject of succession could be said to have been individually owned by the deceased person who married under the civil Law. This provision catered for the African whether Christians or not who had chosen to marry under the civil Law. Such people were assumed to be living in the English way, for instance in acquiring property which they could call their own that needed not be governed by customary Law. This was to encourage the Africans who had opted for the English way of living to stay there since they could then find it a complete system of living.

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The English Laws of marriage, either under the East African Marriage ordinance which is the present day marriage Act⁴⁰ or under the native Christian marriage and Divorce ordinance the present day African Christian marriage and Divorce Act⁴¹ embodied the English values and principles of marriage. This was for instance the institution of monogamy. This was in direct conflict with customary practice of polygamy.

It means therefore that those Africans who married under the English statutes, had to abandon their customary practices of polygamy. They lack capacity while the first marriage is still existing and has not been brought to an end either by divorce or death to marry a second or third wife.⁴²

In the earliest position as shown in the 1902 marriage ordinance, such subsequently married wives and their children were not to be considered as widows and their children legitimate heirs of the deceased man for purposes of succession. But this position was later altered when the government realised that so many of the Africans who got married under the English ways had not changed much from the African nature and therefore still went back to the traditional ways and contracted polygamous marriages. The new position came to be that shown in Benjwa Jembe vs Pricilla Nyondo.⁴³ In that case, Pricilla Nyondo who had been married to the deceased, under the rites of the Anglican Church, brought an action against her brother in law and the wives that her husband married while the marriage between him and her (Pricilla) was still subsisting, that she be declared the sole heir to her deceased husband's estate according to the English Law of succession by virtue of section 39(a) of the 1902 marriage ordinance. The court in the first instance granted her the declaration as prayed but on appeal Justice Barth held following the 1904 marriage ordinance which had amended section 39(a) of the 1902 ordinance, that succession of a deceased native Christian's estate followed the Law of the tribe to which such native Christian belonged.

The marriage Act when interpreted generally, provide for monogamy to the effect that any subsequent marriage after the monogamous one and which marriages are contracted at the time when the first one is still subsisting, are not to be recognised as marriages. This shows that the endeavour to civilise the African in the area

of marriage and indirectly in that of succession did not stop.

As regards succession in relation to the subsequent marriage after the monogamous one, the wives and their children do not legitimately belong to that family since only the monogamous family will be recognised in the marriage Act. It follows that they cannot inherit the property of the deceased since the first wife may always come up and state that she is the legitimate heir as opposed to the rest not legally married and their children not legitimately born in that family. This has happened in two cases.

(1) In the matter of the estate of Boaz Ogola vs Public trustee and in the matter of the estate of Bernard Mbiire Ruenji⁴⁴.

In both cases there was a marriage subsequent to the first marriage under the marriage ordinance. The subsequent marriages were purpotendly entered into under customary Law which recognised polygamy. The subsequent wives and their children were held by the courts not to be entitled to claims of the deceased intestate estates, since for purposes of succession they were not widows and the children illegitimate, their marriage having been illegal according to the provision of the marriage Act⁴⁵.

It is not clear why the court did not consult Pricilla Nyondo's case above and in effect hold that as concerned succession such wives and children could inherit the deceased's estate. It shows that the court was determined to extend the effects of monogamy to matters of succession so as to discourage the African from marrying subsequent wives to the first monogamous marriage, since such men would naturally not want the wives and children in the subsequent marriages to suffer on their decease.

The legislature in enacting the marriage statutes⁴⁷ and the courts in interpreting these statutes as shown in the foregoing cases, by trying are all out to civilise the African by trying to make him adhere to the monogamous institution of marriage. This endeavour has not been successful as can be generally seen in the society today.

African men are potentially polygamous in that after they have contracted the monogamous statutory marriages, they still go ahead and marry subsequent wives or wife. The wives do inherit according to customary Law,⁴⁸ unless and until the first wife raises an alarm in court as was in the forgoing cases. Because of these nature of the African, the Law of succession Act⁴⁹ that was enacted recently is to the effect that such subsequent unions are to be regarded as marriages for the purposes of succession. It is however not in line with the marriage Act which does not regard these as marriages. In otherwords, the position of monogamy still exist in the marriage Act as opposed to recognition given to polygamy by the Law of succession.

Another area where customary Law has been shaken by the western values and principles is the relation to Land. To the African it has been said⁵⁰ Land is the sole livelihood. He hunts from it, cultivates on it, builds on it dies and is buried in it. The activities on land in the old societies used to be done in a communal manner normally a group of family or a woman and her children or cowives⁵¹. The smallest community that could own land was the family and not an individual as in western civilisation⁵². To the African Land is a property that has been used by the ancestors, held presently by those a life who hold it for those in the future generation.⁵³ There is therefore servise rest on an individual member of the owning family in alienating Land even if that individual has been given his shares. Even if partition among all the members entitled thereto has been done, he is supposed to put it into good use and keep it for his descendants. However customary Land tenure in many areas of Kenya has been interfered with by injecting into it foreign radical concepts⁵⁴ such as prescription and Limitation as a means of acquiring rights on Land. Throughout the colonial period the substantive Law of the native court remained the customary Law of the respective areas.

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The most radical concept of Land relation that was introduced to customary Land tenure is individual ownership of Land⁵⁵. This started in the colonial period during the development of Agrarian Administration.⁵⁶ Social economic changes had taken place in the country for instance after the war it was realised that even the reserves had to produce food for the people. The Land system in the reserves therefore needed to be improved since this could provide the African with security to work and produce products that could benefit him as a person⁵⁷. This was because Land had acquired a monetary value. It could be mortgaged, sold, and farmed so as to benefit the individual. It was realised that under African Land tenure system of communal ownership the development as such could be slow and therefore there was great need to bring about reforms in it⁵⁸. Some unofficial Land consolidation and individualization of tenure was already taking place with no or little administrative prompting.⁵⁹ But the real efforts made on individualization were through the processes of consolidation adjudication and Registration of individual titles to the Africans⁶⁰. In 1959 the present Registered Land Act was enacted. The act embodies the English concepts of land Law. The individual registered as owner of Land, is referred to as an absolute proprietor⁶¹. The absolute proprietor can do whatever he likes with the Land in respect of which he has both legal and beneficial ownership. This can be seen in many occasions⁶² when these registered proprietors chase the rest of the family members from the Land. The court upholds the claim that he is the sole proprietor and therefore the others are trespassers. This was the position in the case of Esiroyo vs Esiroyo⁶³. In this case a father chased his sons from the land that he had registered under his name as absolute proprietor within the meaning of section 27 and 28 of the Registered Land Act. The court upheld his contention that he was the sole proprietor and his sons were trespassers despite the fact that the father himself had obtained

the Land from his father and was therefore supposed to pass it onto his sons according to customary Law. The court ignored the customary Law position regarding Land which would have been to the effect that the sons were not trespassers but were simply on the family Land. The court in this case was in effect holding that registration of Land in a person's name extinguishes all customary claims. This is so because the person so registered may sell the Land, and pass a good title without anybody or any member of the family being consulted⁶⁴ or even he may mortgage or commit any waste on it and nobody in the family will question since he is in Law an absolute proprietor of the Land. An absolute proprietor may sell all his land and will not have any left for his descendants to inherit. Section 101 (4) of the Registered Land Act provides that only five people may be registered on any piece of Land as a maximum number. This means that the five absolute proprietors for instance in a polygamous family may evict the owners from home at anytime since then this others are trespassers.

The individual concept of owning Land that has been introduced to replace customary Land tenure of customary has effects on the Law of succession. Now a man may inherit Land from his father but the moment he registers it under his own name, he may sell it away and those coming after him will have nothing to inherit. He may buy Land elsewhere and register it under his own name and his family will only benefit under the doctrine of tracing in equity. Under that doctrine, the family members can argue that they contributed either materially or that they made conditions favourable for the person to acquire the property. But practically this will involve a lot of court processes and time. But the African's view of Land as a communal property has not changed as such.

The peasant still insists that he must get a share from those registered on family Land, as he would still have got under customary Law. The position is that those registered only hold in trust for those family members unregistered. The court has upheld this customary trust in some cases⁶⁵ for instance in Mwangi Maguthu vs Maina Maguthu⁶⁶, where the court upheld the customary right of a party that had been excluded by registration as being entitled to a share of the Land.

Despite the court's holding in favour of a customary trust, there is still a tendency of those registered to sell part or all the Land as they wish without considering the others in the family or the future generation arising from his line. This is the case with the who after getting their customary rights in Land sold them to get money to invest in other areas such as business. Land as the sole property of inheritance has lost meaning; since it can be sold away. Now people may inherit other assets such as business.

Under customary Law the rights of women to own Land individually were unknown.⁶⁷ But under the Registered Land Act the absolute proprietor may be a woman or a man. A woman who has acquired Land may sell it and pass a good title. In this position, it is confusing when the court held that a woman's right to the Land is subject to her customary Law in the case of Land Registrar vs Moraa Ogoro⁶⁸ counsel for one of the claims to the estate of one Moraa Ogoro argued that since Moraa Ogoro was a registered proprietor she had passed a good title to daughter when she gave the Land to her through an oral will. In that case although the court held in favour of customary Law to the effect that married daughters do not inherit their mothers Land, the counsel for the married daughter was of the view that the court ought to interpret section 27 and 28 of the registered

Land Act strictly as it is since it would have in this case legitinised the rights held by the deceased registered proprietor which in making the oral will she passed to her daughter.

Social economic changes have also affected the development of customary Law adversely. The African family lived together in villages and derived support from the Land. This has now been interfered with by members of the family being separated and scattered due to various factors such as schools for the children and those that leave their families to work in the urban centres or in early cases in farm plantations⁶⁹. The breaking up of such family ties has many effects on customary Law. In the first place customary Law will not be passed to those children that have grown outside home in school and in urban centres. Those in urban centres tend to mix with others from different cultures so that the original cultures tend to disappear.

One Lawyer⁷⁰ has obtained that the Africans are so much in a new situation that customary Law has not much meaning, in that, they have acquired what he calls new property unknown to customary Law of succession. Such property he says⁷¹ are such as cars, modern houses and furniture, Bank accounts and insurance policies inter alia. Author Philips has gone on to site examples⁷² whereby if these modern property were let to devolve according to customary Law of succession, it be repugnant to justice and morality.

Following the view that customary Law had radically changed or that it could not apply to new positions as was reported by Auther Philips, the government enacted statutes⁷³ under which the African who found themselves in the said new situations would have English Law of succession regulate their succession matters. One of such statutes was the African will Act⁷⁴. The Act was essential English Law of succession especially in the method of making wills⁷⁵.

It was supposed to be used by those African elite who were seen to have acquired property that was unknown to customary Law of succession and therefore had to devolve according to English Law. The Law of succession Act⁷⁶ which is a unifying statute of all Laws of succession in the country also assumes that customary Law of succession has lost meaning in most aspects and therefore its important to provide Law to regulate the affairs of the individual.⁷⁷

The statutes like the African will Act and the Law of succession Act in so far as they assume that customary Law has ceased to apply in alot of situations, are just but father instances in which customary Law in history from the colonial period as has been shown in the foregoing account has faced.

It is against the foregoing account of customary Law that we discuss the Law of succession Act.

CHAPTER II

THE THEORY OF INHERITANCE AND THE GUSII CUSTOMARY LAW OF SUCCESSION

This chapter is divided into two sections. In section A the principle aim is to indicate that the Law of succession has certain concepts or features in any human society,¹ and that these are forms of property, ownership of that property, which may be individual or communal, the family concepts in which the rights of the spouses, children and others are defined in relation to succession and the institution of marriage which will give the heirs a right to inherit family property. In this section it will be shown however that although each society's Laws of succession take into account these common features, the Laws differ from one society to another. The reasons as will be shown for this difference is because each society due to certain factors, regard general features differently. What is meant herefor instance is the way Africans own a particular property such as Land. It will be reflected by the Law of succession that Land is communally owned by them². The Law of succession will be different where the Land is owned individually as in English society. This section is an introduction of section B.

Section B discusses the Law of succession of one African society. The purpose here is to show how a particular society deals with the transmission of property from one person to another after death. In doing so the society gives effect to its philosophy of life. That society is Gusii.

This chapter makes it clear that different societies have different philosophies of life. The difference in life should not be construed to mean that some societies are inferior to others or primitive.

SECTION A

The Theory of Inheritance

The common concepts that underlie Laws of succession in any human society are property and ownership of the same family membership as derived by the institution of marriage and also how a society gives effect to human dignity and human equality.³ It is worthy of note that the Laws of succession in every human society irrespective of the society's ideology or system of Law have origin in the fact that some property is privately owned, and the death of the Owner⁴. The Law of succession becomes necessary to serve man's universal need to face the death of his fellow man. He has to bury him administer the estate and determine the heirs and their beneficial rights to the property that the deceased has left. What form of property and the nature of ownership in that society determine the character of the Law of succession.

The English community until 1926 distinguished between real and personal property for purposes of succession. The real property had what they called rules of inheritance while the personal property had rules of succession⁵. In the rules of inheritance the real property may have been land according to English terminology which descended to the deceased's blood relatives while personal property may have been chattels or personal estate. This was regulated by rules of succession and was distributed to the next of kin⁶. The English community further divided property with such terminologies as moveable and immovaeble in relation to rules of succession⁷. They also have different forms of property such as assets, stocks and shares. Bank accounts and insurance policies and have ways of relating to them to the Laws of succession.⁸

The Africans on the other hand also have property and regard that property in a particular manner according to its value in society⁹. For instance they have Land and cattle and own less consequential personal belongings however as regards Laws of succession, they will not put the property into particular divisions similar to those of the English people shown above. For instance the same terminologies such as moveable and immoveable property cannot be applied to the African property in relation to their Laws of succession since this will from common knowledge, appear mechanical.

The consequence is that although the two communities have what can be called property and some of which is principally regarded in society, since the principle regarding or grouping is not similar, the Law of succession of the two societies will not be similar and will not therefore serve the same purpose.

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Every Society is capable of formulating its Laws of succession and there is no merit in a claim that customary Law cannot deal with its certain kind of property. Therefore the argument¹⁰ that customary Law is primitive and cannot cater for 'modern' property is unfounded and is calculated to discredit customary Law that adjusts like any other Laws to the new situations.

In principle no one has power to pass on interest in what he does not own. The concept of ownership may take two forms¹¹. These are communal and individual ownerships. The concept of ownership gives exclusive control of the thing owned. This is to say that to own is to control use and regulation of that which is owned.

Different concepts of ownership exist in English and African societies. The differences however are what each of these societies regard as individually owned. This is because what the Africans may regard as comunally owned may be regarded as individually owned by the English community or part

of it individually and part communally owned¹².

The illustration here comes from ownership of Land in Kenya. The African communities regard Land as family property hence communal ownership¹³. The effect of this is that an individual cannot alienate communal property either by making a will or by outright disposition such as sell without the consent of the other members of the community¹⁴. This is not the case with the English community whose Land is owned under a Law identical to that contained in the registered Land Act of Kenya¹⁵: Under this Act once a person has been registered as a proprietor he becomes an absolute owner of that piece of Land. He may sell, mortgage or charge it or he may give it as a gift to anyone he chooses without having to consult the family members. This foreign element of individual ownership has been sanctified by court in some cases¹⁶.

Individual ownership of Land has direct implications on the Law of succession. For instance as has been highlighted above, where land is individually owned, the individual has absolute freedom to dispose of it. On the other hand in communal ownership the Laws of succession will be different. For instance the society will have set out rules on how that property is to devolve whether the holder dies testate or intestate in that the holder cannot for instance make a will to disinherit a right heir in the community¹⁷. A further instance of this is that among the Africans the heir of Land is the family and never an individual.

The Africans have extended communal ownership to all forms of property. For instance an African young person working somewhere outside his place of birth may acquire property according to his abilities. Whereas he may be said to individually own that property, the family still looks at it with a communal eye. This is because of the inherent feeling and sharing that obtains in the African family. This has been summarised as follows.¹⁸

'Belonging to a family includes the concept of the individual being owned by and extends to family ownership of all properties which the individual acquires by his personal exertions, mental and otherwise....'

The individual though may be far away from home and however rich he may become, he still is sentimentally attached to home and hence his property. When he dies he will be carried home for burial. It is only rarely that Africans are buried in the public cemeteries in urban areas¹⁹. This communal feeling was great in an African traditional society where people worked ate and faced difficulties together²⁰. This has also been summarised as follows.

'The individual's authority or his mandate to manage his affairs ceases upon the happening of an event which incapacitates him for example his becoming insane or upon his death, in any of these eventualities the family resume full control of his person and property which are theirs and administer them.²¹

The different ways of life explain why the Africans never make wills the way the English would expect. Such statutes as the African wills Act that provided for the Africans to make wills under English methods created for the Africans problems²².

As we have stated Law reflects what is in society, what changes have taken place and not to impose foreign values on the people.

Marx in his conversation with Bakunin in 1869 has stated as follows:

'As all other civil rights the codes of inheritance do not appear as a cause but a consequence, a legal product of the existing economic organisation of the society, based on private ownership over the means of production²³'.

In this statement, it is clear that Marx was talking of a society where individual ownership was prevalent and that this was reflected in the Laws of that society. However this also applies to all other societies.

The importance of the marriage institution with regard to succession is that it defines the heirs. It determines whether or not the spouses are legitimate heirs of the property of a deceased person.

Both the English and the Africans have means of bringing a marriage into existence.²⁴ But the differences again occur between the two communities in the methods of bringing a marriage into existence in that, what the Africans may call a marriage, the English may not call it so. The One illustration will make this clear. The Africans have different types of marriages and different ways of bringing a marriage into existence as compared to the English community.²⁵ For instance, they practice polygamy as opposed to monogamy.²⁶ The English Laws of succession will not apply in a polygamous situation.²⁷ Until 1981 when Africans contracted monogamous marriages and thereafter purposed to marry other wives, the latter were not regarded as widows for purposes of succession. The reasoning was that they were not spouses according to the English statutory Laws of marriage.²⁸

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The same statutes define the word marriage differently²⁹. They do not include the African forms of marriages such as sororate, woman to woman, and the levirate union, which are quite normal.

The Laws of succession which will reflect on these two societies as to who the heirs in the family are, will be different depending on each society due to their differences in regard to marriage.

Under customary Law of succession the rights of heirs varies with the sex. For instance a daughter has different rights to the family land than that of a son.³⁰ Among the English the sex of a child is irrelevant.

The difference also exist in what each society may term as an illegitimate child. For instance among the English, if a child is born out of a polygamous marriage, that will be illegitimate for purposes of succession to the deceased man's property.³¹ Whereas among the Africans who practice polygamy such children born out of the marriages are

rightful heirs.³²

As a matter of principle a society may in its Laws of succession be matrilineal or patrilineal or it may have a mixture of the two.³³ The Laws of inheritance will reflect this principle, with the effect that if a society is patrilineal its Laws of succession will be different from those of a matrilineal society or otherwise.

The other principle which may differ from society to society can be seen in the patterns of distribution of property.³⁴ That is what the rights of the heirs are. In some societies, e.g. the socialist communities, the heirs may be permitted only to own a fixed share.

Whereas the rest must be sold. Among the Africans the option given to a widow on the decease of her husband for instance that she may remarry and yet retain a share of inheritance or unless she remarrys she has no share, may differ from those given to a widow in an English society.³⁵

The Kenyan courts have failed to realise the distinction of philosophies of life between the societies, In Re Maangi and Re Kibiego.³⁶³⁷ In the former, it was held that the Africans did not have Law relating to administration of estates and failure to apply the probate and administration Act 1881³⁸ amounted to discrimination. The Act was therefore applied instead of Kamba and Nandi customary Law respectively. In the latter, the Kenya high court refused to apply the relevant Nandi customary Law relating to administration of estates on the ground that it was mediaval.³⁹

These decisions are absurd because they refuse to recognise customary Law Jurisprudence. They have failed to see that the Africans did not distinguish between rules that govern funerals and those of the administration of the estates. The Ghanian position applies to customary Law in Kenya. It is described as follows.⁴⁰

"For the administration and management of his property and the affairs of the deceased, the family at a duly constituted meeting appoints a successor or usually but not invariably, the appointment falls on the oldest and nearest relation of the deceased within the group.⁴¹

In the theory of inheritance one can see that although the Law of succession may take into consideration common features to all human societies, it may be serving different purposes in the various societies.

Each society is essentially different from another like an African society from an English one.

SECTION B

the most litigious people. Give a Gusiic money and the first thing he does is go to court no matter who he is suing!

THE GUSII CUSTOMARY LAW OF SUCCESSION

The authority for the application of the customary Law of the Gusiic community is as in any other Kenyan community governed by the Judicature Act and the magistrate courts Act. In section 2 of the latter, a claim under customary Law includes a claim based on customary Law of succession.

The application of the customary Law which is not written has been sanctioned by the constitution which allows the application of different personal Laws⁴².

Despite the statutory protection given to customary Law of succession as shown above, in practise it has been suppressed.

Gusii customary law of succession has not escaped that suppression.

In this section the purpose will be to indicate the present position as regards the application of Gusii customary law. This is done with a view to showing that the government in enacting the law of succession Act ⁴³ to replace customary law in many of its aspects has not taken some relevant factors into consideration. It is shown ⁴⁴ that the government did not have data upon which some of the assumptions have been based.

To avoid the same mistake, the writer does not rely only on the written text of the Gusii customary law of succession. ⁴⁵ She supplements the text with material obtained in the course of interview with elders based on Gusii customary law. The danger of relying on E. Cotran's Restatements of African Law, has been voiced elsewhere in court ⁴⁶ and by various writers. ⁴⁷ The latter are to the effect that English analogy of laws of succession was used, that is, testate and intestate succession and administration of estates. The defect of this is that one arrives at a wrong conclusion as to what the customary laws of succession are. For instance the customary laws of succession may not necessarily follow the categories known as testate and intestate succession but may be a combination of the two. The technique of recording the customary laws using pre-arranged uniform plan has also been condemned as resulting in the reduction of very important local variations. ⁴⁸

The Gusii ethnic group is to be found in the southern parts of the Nyanza province of Kenya. They are a Bantu speaking people bordered by the Luo, the Kipsigis and the Maasai, whose cultural compositions and languages are quite different from that of the Gusii. ⁴⁹

Like all other African communities the Gusii have rules which regulate their affairs in social, political and economical lives. There never was a central form of government in which laws could be formulated and enforced as we know about the government of today. ⁵⁰

The community's inheritance is patrilineal in principle. Communal ownership of principle property obtains and the marriage is potentially polygamous. The widows and unmarried daughters are well taken care of.

Basically in the Rules of succession there is no difference between distribution of the property to the heirs when in the lifetime of the head of the homestead and after his death when it may be done by an administrator.⁵¹ The only difference is the personnel so that in the lifetime it is the father of the home who does it while in his death it is done by an administrator.

The principle types of properties that are subject to the rules of succession are cattle which was the only form of property subject to distribution or succession in the early days, and land.⁵² The others enumerated by E. Cotran⁵³ include food in the garden or granery or crops, but furniture and this include the modern furniture stools, cupboards, or house wares, spears and shields, radios and television sets, motor cars, money, ornaments such as rings, bracelets and walking sticks.

It is in the home that has been called 'a house'⁵⁴ where the property is held and is referred to as 'etugo'⁵⁵. In a polygamous home, there are many 'houses' in that each wife has got her children and property that has been allotted to her, including her household utensils, furniture, cattle obtained as dowry from her daughters and land where she cultivates to get food for her children and other property that she may have as enumerated above. Therefore the family is made up of the father, his wife or wives and children as far as property holding is concerned.⁵⁶ But this may not be strictly so since there may be a lot of sharing in use of property with the grandparents and uncles on the fathers side. This is because the African family is an extended one to include relations.⁵⁷

This aspect of extended family has not so much faded due to social change although individualistic tendencies have shown signs as can be seen generally in society today .

In the home the father takes the role of the head of a homestead, theoretically all the property in the home is vested in him. He holds the family land upon trust for himself and the other members of the family. But the facts that the rest of the family has defined rights in it and does things with his consent and also he in their consent, shows there is communal ownership of the property. The head of the homestead represents the family when the defence of the family property is needed either in court or extrajudicially. He may couse some of the family land. Adult children have control over their property, their bank accounts, insurance policies, their television sets, cars and household to mention a few. They may deal with these as they wish or even give them away in any manner and the trustee's powers do not extend to such property.

A father normally distributes the family property to the respective members during his lifetime. This is particularly so as regards land and cattle.⁵⁸ The only difficulty that may arise is in a polygamous home whereby the head of the home has such property as shops or cars, which cannot be distributed in species to the various houses. The choice open to the family are to sell such property and share the proceeds or retain the business as a partnership and profits be shared by the houses.

As concerns distribution of land among the heirs, the father when alive, may call all his eldest sons together and if he wishes, some elders, to witness the division of land. The land is divided according to the 'houses' in a polygamous house. The eldest wife gets a share slightly bigger than her immediate Junier co-wife in that order. The rationale is to respect the eldest wife as the beginner of that home. This practice has been so despite the fact that the eldest wife may be having fewer children than

her next junior co-wife. But in modern times, due to scarcity of land, the practice has ceased to take place or where it does occur the difference of share is very small to just show appreciation to her.

Every married woman must of right get a piece of land to cultivate. This includes the woman married in the woman to woman marriage which is common among the Gusii.⁵⁹ The woman is married by another woman with no sons to inherit the land allocated to her by her husband. Such a married woman cultivates the land given by the head of the homestead to the woman who married her. She is treated like a daughter by the other woman who married her. The children she will get around the home or if she came with them from her home having got them outside marriage, are regarded to belong to the woman who married her. The custom caters for the marriages so that they continue even when a woman has no children or has no sons.

Another situation is a woman married by an uncle of the home using dowry of his niece in the home.⁶⁰ That is where a woman only has daughters and they get married, if she has no sons to use the cows and if her husband does not use them in marriage or still if she choses, she may give these cattle to a step son in a polygamous home or to a brother of her husband if she is a widow by then pay dowry for a woman. The woman so married inherits the land of the woman from whose house cattle came to marry her. She is treated for all purposes of inheritance as belonging to that house. Her children are regarded as those of the husband of the woman who married her. The same case applies to children born to a woman married using cattle of dowry of another house. This is a situation where a barren woman or one without sons may give cattle to a step son or brother of deceased husband to marry a wife who would bare children for her. A woman married as such and her children will inherit the land of the woman who provided dowry.

In a polygamous home the youngest wife may be given more land to cultivate than the others. This was so when land was still plenty so that after a man had distributed land among his wives, he remained a piece for himself which was normally cultivated by the youngest wife for him. It has been refered to as emonga⁶¹

The married women are allotted land for purposes of holding it for their sons and not because they are heirs themselves. This is because they are the ones who cultivate and feed the children in the family.⁶² However if a woman dies and she has no children at all to inherit the land, it is to be redistributed among the co-wives.

The land that has been allotted to a married woman is further divided among the sons of that woman.⁶³ Each son must belong to another who has been allotted land since that is where he will inherit from. A common expression among the Gusii is that 'Father died here, Mother cultivated here, so we brothers know that this is our land.'⁶⁴ This indicate that the sons right to inherit must have been derived from marriage of the mother and father.

The distribution of land among the sons is in a pattern similar to that among the houses in a polygamous family.⁶⁵ That is each son must get a share the eldest son getting a slightly bigger share than his immediate junior brother. The explanation is that he was the first to be born in his mothers house.

The sons in the houses are however given their land to cultivate as they mature, and this in the traditional society meant that when the sons got married.⁶⁶ In the meantime the rest of the land is left to the mother to cultivate for the sake of the minor sons and daughters in the family before they get married. On distribution of the land to the sons, when the mother is still alive and all the sons and daughters have matured and got married, the mother is left with a portion to cultivate and use for her lifetime

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This will eventually be passed onto the youngest son of the woman.

In cases where the head of the homestead had died and also the wife or wives and left minor children an administrator who may be appointed⁶⁷ holds the land in trust for the children and may inherit it for their benefit.

The other form of property for purposes of succession is livestock. There are three kinds of cattle,⁶⁸ cattle of 'Oboko' cattle of 'Enibo' and cattle of 'Emesuto'

Cattle of 'Oboko' is the cows and goats received as dowry when a daughter gets married. In modern times these have assumed a monetary value so that it is cash which is received instead of cattle. Cattle of 'Enibo' are the cows obtained as gifts from friends, in trade or by other means other than dowry. Cattle of Em suto was normally received by a nephew from his maternal uncle. This practice has ceased.

The cattle of Oboko were normally for the house with daughters that whose marriage provided it.⁶⁹ It was and is for the sons of that house to use in their marriage and food. If there were equal number of sons with that of the daughters of the same mother, the brothers divided the cattle of 'Oboko' so that each son has the cattle of Oboko from a particular sister. However if there were less number of sisters than the brothers, cows were divided in such a manner that each brother had at least a share to contribute to cattle of dowry for his marriage.

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However in cases where there were no sons, and the daughters got married and the mother did not elect to enter into any form of traditional marriages to raise sons for herself, as mentioned above, then the head of the household could make use of the cattle for his own marriage of more wives or in a polygamous home they could be divided among the step sons of that house.

Otherwise as was seen above, the cattle of Oboko would be used in other forms of marriage so that the women so married could inherit the land of the mother of the daughter who provided the dowry if she had no sons of herself.

Cattle of Enibo can be said to have been and is personal property. This is because the holder would ~~now~~ can be a woman, a head of the household, or an unmarried son, who could and can acquire it by the means of trade or gift and use it as he or she chose or chooses.

The head of the homestead can for instance give it to people outside the family to use in a process called ogo sagaria⁷⁰ He does not need to consult the rest of the family members. But when he dies on his funeral all his property must be assembled home to be defined and redistributed. The difference in ownership of that cattle becomes clear when the holder dies without having given them to the people he or she would have wished to give. The cattle are inherited by the rest of the family.

In cases where the head of the homestead had or has a large flock of livestock, and he has many wives, if he dies intestate, the cattle can be distributed among the houses each wife taking a slightly bigger share than her immediate junior co-wife as in the case of land.⁷¹ If the cattle are fewer than the 'houses' a form of compensation can take place between those who have a share and those who did not get.

The institution of making of wills among the Gusii existed as part of the laws of succession.⁷² The will commonly known as 'Omwando' is a persons wishes in regard to property, children and people, before he or she dies as to how they are to be after she dies. Among the Gusii like all African communities the making of wills has got some religious attribute. This is because they are so much associated with death.⁷³

The wills are made mostly at old age or at death bed. At death bed they may be made by anybody even a young person without property since a will among these people is not necessarily with regard to property. Therefore the rules or outlawing of people from making wills on grounds of capacity are none existent among the Gusii, that is age, and sound mind.

The religious aspect in the making of wills also explains the reason why they are not attested as a matter of law so that proving them will be according to that attestation. In the traditional society one needed not call witnesses to hear what he was going to say to a particular person. But he could call the relatives and more especially the one he wanted, to offer the will to. If the neighbours and friends happened to be at the deathbed it was a coincidence and not that they had to be there to attest the will. This is why E. Cotran was not given a specific number of the people who attest the will.⁷⁴

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Another reason for lack of meticulous attestation of a will was because it could be made anywhere and not necessarily on the deathbed. It could be valid so long as the particular person it was meant for got the words. There was no danger of this having to be changed by a person who heard the words because the people feared the ancestral spirits that might haunt one who cheated.⁷⁵

Revocation of a will was quite rare because of the nature of the wills that were made. If a will had to be revoked, it was because it did not conform to the rules of society on particular regard or because it was in the form of a curse. This revocation is not at the lifetime of the person who made it in most cases since a person may make such bad will at his death. It was revoked after his death by sacrifices to appease the spirits of the dead person.

There was or is no destination as to what kind of property alone a will may be made, as E. Cotran has distinguished between livestock or moveables privately cultivated land, and land.⁷⁶ This is because as has been said above of the nature of a will a person can make. that is, either distribution or gifts to others but which must coincide with laid down rules of distribution of property in a society. This a person cannot disinherit rightful heirs aland by beque~~ti~~ng to others more shares than expected. A person cannot give property to outsiders of the family in total disregard to the family. Such a will will be revoked to ensure equal and expected distribution.

CHAPTER III

THE LAW OF SUCCESSION ACT¹

The Act constitutes the law of testate and intestate succession in respect of the estates of people dying after its commencement.² It also constitutes the law in the administration of the estates of such people. The Act has universal application to all people in respect of their property in the country with only a few exceptions.³ It therefore replaces the various laws of succession that were applied by different communities.⁴

In the Act, assumptions are made which the writer considers are wrong. These assumptions are discussed below. The assumptions are three, namely:-

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- (i) That the customary law of succession is inadequate in very many aspects,
 - (ii) that social transformation has taken place in the country to the extent that all the different communities that is the Europeans, Muslims, Asians and Africans can now be governed by a uniform law of succession that will reflect one's philosophy of life for all of them and
 - (iii) that the best universal law that can apply in matters of succession to all these groups is one reflecting the English way of life.

The assumption as regards the inadequacy and unreasonableness of customary law of succession was made and voiced in the colonial period, by one lawyer Mr. Arthur Philips.⁵ What he said should be seen as part and parcel of the broad background given in chapter one of this paper in the difficult times that customary Law has faced. It is from this background that the law of succession Act should be viewed. This is because, what Arthur Philips said gave birth to the African will Act of 1961⁶ and also was adopted by the commission to the law of succession⁷ whose recommendations were accepted and gave birth to the law of succession Act

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respect of laws that would be enacted in the country.

The issue therefore is what prompted the late President to appoint the commission. His action can however be explained in the context of what was happening at the time in relation to law reform.¹⁴

After getting their independence,¹⁵ The Kenyans seemed determined to consolidate all the political factions that had existed early at independence.¹⁶ The racialism of the colonial period had to be discouraged by uniting all people under the Ruling party KANU. Such racialism could have been encouraged by letting different racial groups conduct their personal affairs under their own different laws. *This is* the reason why it was felt that uniform laws such as was to be considered in the area of marriage¹⁷ would be a centre at which all people would be united for nation building. These were nationalistic feelings and a desire to be different from the colonial government. Therefore it was not that the late president had noticed fundamental social economic change as advocated for by Arthur Philips,¹⁸ because much as the people wanted to be united in nation building, they were not yet one in their personal affairs of succession and marriage. Infact the late president seemed to have noted the differences in the laws of succession of the people and the fact that a uniform law may be practicable when he appointed the commission. This is because the commission was to make recommendations in so far as it would be practicable,¹⁹ to apply them as law. It means impracticability was anticipated but which was ignored when the act was passed as will be shown below.

The members of the commission were nine. There were two Africans and some of the ~~seven~~⁶ were Europeans and others Asians.²⁰

There is no doubt, various methods were employed by the commission to assist in the enquiry.²¹

But whether the investigations were thorough and exhaustive to warrant the recommendations made is an issue. Also whether the commission on making the recommendations relied on what they found and remained loyal to the constitution²² is another issue.

The commission never made any efforts to investigate the customary laws of succession as they had been commissioned to do. Instead, they relied on Restatement of such customary law made by E. Cotran who was one of them.²³ The Restatements were being published at the time. It was a dangerous thing to rely on the restatements which have now been criticised by various writers.²⁴ as being inexhaustive and do not reflect true African customary law since the English analogy was used to investigate and restate them. It follows therefore that the recommendations they made on the new law of succession related to customary law should be viewed with caution. The criticism levelled against customary law²⁵ should be seriously since they were based on their ignorance of the same. The restatements also did not cover the customary laws of succession of all the communities in Kenya.²⁶ It was therefore wrong for the commission to recommend a law of succession to cover people whose existing law they never investigated.

The commission stated that they received alot of varied and different views from members of the republic²⁷ They also seem to have noticed how certain groups were still firmly rooted in their laws of succession as stated in paragraph twelve.²⁸

'We thought that the law should recognize that Kenya is a country of many races, tribes, communities and religions, that the laws and customs of these different people are deep rooted and that any changes were suggest should offend as little as possible their resepective beliefs.'

But the commission on making recomenations for the law and drafted Bill²⁹ chose not to be bound abide by their correct thinking as seen in that paragraph.

Instead they chose to disregard and suppress the laws of succession that existed in the name of national unity and nation building as can be seen in paragraph thirteen.

'On the other hand, we thought that the new law should encourage national unity and the building of Kenya as one national irrespective of race or creed.'³⁰

The two foregoing paragraphs are contradictory of one another. It is not practicable to unite people who are fundamentally different. This would be simply inviting resentment and would be unconstitutional. The commission was aware of such strong opposition, for instance the unanimous and very forcefully put arguments by the Muslims.³¹ The commission on the constitution provision for freedom of conscience religion and application of different laws of succession by respective different communities, said they were only recommended to be loyal to such provision but not compelled to.³²

The commission was dominated by members of the European community. This were quick to introduce the changes that had taken place in England as regards the law of succession. This could have been much relevant in reforming the law of succession applying to the European community in the country and not to the other groups. But instead they recommended similar changes on ~~the~~ limiting the freedom of testation for all the communities as had been enacted in an English Act in England.³³

On the method of limiting the freedom of testation, the commission noted³⁴ that the Muslims law was simple and certain, but instead they chose the English one which gives the court alot of discretion, however much this was to invoke. Thus the commission members had natural tendencies influencing them in their enquiry and recommendation with the result that they would not reflect on the correct picture of society's stage of social transformation.

The commission then submitted its recommendations and a drafted Bill to the late President in August 1968.³⁵

The Bill on the law of succession was introduced in parliament by the then Attorney General Mr. Charles Njonjo in 1970.³⁶ On the second reading of the Bill, the A.G. echoed.³⁷ the assumption made about the existing customary laws of succession as was shown above.

The Bill was debated upon and rejected by a majority of the members of parliament. Reasons for rejecting the Bill by various parliamentarians are summed up in the speech of one of them as follows:-

'What this Bill is trying to do is to establish a kind of acceptable natural law assumed to be applicable to various communities or tribes... there is one very obvious danger, society has not advanced to the stage where most of the applicable laws found in the European, western or Eastern countries can be introduced here because it took them a very long time to gain such experience ... we have allowed denominations and faith to exist under one constitution and therefore we must provide constitutionally for their application and protection.'³⁸

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The Bill having been rejected was withdrawn. It was again re introduced in 1972 with only a few none consequential amendments done to it.³⁹ It was passed by a minimum majority and became the law of succession Act 1972. It however did not come into operation until 1st July 1981.

The criticisms levelled against the Bill on the law of succession Act⁴⁰ can also be carried forward to that law after it has been passed. This is because that law still contains the foreign values on succession and does not reflect the socio-economic conditions of the Kenyan people of a none free enterprise economy and is not homogeneous to warrant a uniform law of succession. Also that the law is unconstitutional in so far as it does not regard the fundamental freedom given to the various communities by the constitution to practice the respective laws of succession. The nature of the Act can further be analysed in the context of its provisions.

The law of intestate succession is embodied in section 32 to 42 of the laws of succession Act. Intestate succession has been defined⁴² to mean when a person dies without having made a valid will in respect of all his free property. In such intestacy, the rules of intestacy in the Act are applied other than the exempted areas and specified property as the minister may appoint out in the schedule⁴³

That law of intestate succession does not reflect the customs and beliefs of the Africans. This can be explained as follows. It talks of a persons free property.⁴⁴ It is not clear what this may mean in reference to the land and cattle and other kinds of property that are owned communally under customary law. This communal holdings of property was explained in chapter 2 of this paper.

Section 35 of the Act indicates that one's heirs are the spouse and children. And in a polygamous home as indicated in section 40 the property is divided among the 'houses' according to the number of children in that house. This shows that the customary practice of dividing land giving the eldest wife a slightly bigger share than her immediate junior has been suppressed. As was indicated in chapter 2⁴⁵, this customary practice was merely an acknowledgement of the seniority of the eldest wife to just give her respect and mental satisfaction. It had a purpose to serve which disregarding it is to assume that customary law is repugnant to justice and morality, moreover the share that she receives is too small to raise any anxiety.

Sections 35 and 40 show that one's heirs are the spouse and children. But this is not true of an African society as was noted earlier on whose family concept is the extended family that covers the grand parents and even the uncles.⁴⁶

This people can only benefit according to section.29 if no surviving spouse or children has been left or if they apply to court as dependents according to section 26 and the court will make an order for their provision with regard to certain circumstances outlined in section 28 of the Act.

This method of providing for the dependants is expensive, also is subject to the discretion of the court on application. This is in contrast to the cheap and simple method of providing for the relative under customary law.⁴⁷ The new method may also encourage alot of litigation as was unknown to customary law. Section 35(2) to 42 of the Act on intestacy does not distinguish the sexes of children in regard to inheritance as is done under customary law of succession.⁴⁸ It means that even a daughter may be given her father's land since she is on equal footing as heirs with her brothers. This is not only contrary to customary law of succession as was shown in chapter 2 of this paper, but also unreasonable as will be explained here. Society has not reached a stage where they can regard daughters as heirs of certain property. She may be provided if she is in need but not as of right as an heir to that estate. She may for instance be given other property, but this again is subject to the approval of her brothers. The society does this because a daughter is meant to be married away from her father's estate to a place where she would hold property for her children. It would therefore be unreasonable to give them as heirs since they might benefit twice from her home and from where she is married.

The children may get their share of inheritance during the life time of their father, and also from the mother or gurdian after his death.⁴⁹ In section 35(3) where a child considers that appointment is improperly done he or she may apply to court for its order.

The court on making such order takes into account similar circumstances as these it regards on considering an application before them from any other dependent.⁵⁰ This method of application to solve disputes on improper distribution of property takes along time and may involve unnecessary expenses. One of the circumstances the court is to consider on the application made by a child, is how such a child's conduct was to the deceased.⁵¹

In sections 35 and 36 of the Act, it is provided that the widow's interest in the estate terminates if she remarries. Under customary Law, as was seen earlier there are many forms of marriages that a widow may elect to enter into.⁵² For instance if she had no children with her deceased husband, she may enter into aleviratic union with his brother bare children for her husband. She does this and still remains on the property given to her by her husband. In providing that her interest may terminate on her remarriage, the Act shows lack of understanding on the African concept of marriage. in so far as its not broken by death and remarriage. It is also away of discouraging the African widows from re marrying and therefore getting rid of the customary forms of re marriages that a widow may enter into. It is also not clear why if it is the widower who re marries he should not forfeit the property left to him by his deceased wife. It should not be presumed that once a woman is remarried she moves away from her deceased husband's property. She may remain on it and yet be remarried just as the husband may be in his house after his wife's death and remarry there.

The Law of testate succession is contained in sections 5 to 30 of the Act. Under section 5 a person has freedom to make a will to the effect that his customary Law of succession may apply to his estate.⁵³ He may also make such a will that the Law of succession Act will not apply to his estate. Apparently this seems to be the only direct way that customary Law of succession may continue to apply.⁵⁴ But as will be shown below not many people may make a will to that effect because of the methods employed in making a valid will.

The Law of testate succession in the Act also does not reflect the African beliefs.⁵⁵ It is also impracticable in some of its aspects in its legal implications. This is especially the case with the formalities in making a valid will ^{as} discussed below.

The wills may be made orally or in writing according to section 8 of the Act. Both an oral and written will must be attested. For a written will, Section 11 of the Act is to the effect that it must be signed by the testator or he may affix his mark to it or signed by someone else in his presence. The will further must be attested by two or more competent witnesses each of them must have seen the testator affix his mark or sign the will. Such a witness must sign the will in the presence of the testator. On the other hand an oral will, according to section 9 (a) must also be made before two or more competent witnesses.

On such formality of making a written will as shown in that section 11, it can be seen its along processe that consumes time and it might also be expensive since it may involve lawyers and their fees and also the issue of having witnesses. This may be frustrating to many Africans who may wish to make such written wills. On the requirement that an oral will be witnessed by at least two or more competent witnesses, it is impracticable since as was shown earlier in chapter 2 of this paper,

most oral wills made under customary Law are made at the death bed, or if made out of deathbed, they are said in confidence to someone who may of course not cheat because of fear of invoking the ancestors' spirits or show respect for the old folkes. The requirement of the two competent witnesses being present on utterance of the will is therefore not an issue under customary Law. Further more if it is on the death bed, it would be impracticable to call those two competent witnesses.

It may be only the wife or husband present when such testator dies.

It is also not practical that for an oral will so made and attested, to be valid, the testator must die within a period of three months.⁵⁶

This is trying to limit the time when an oral will may be made to be on the death bed. This is contrary to what is under customary Law as was shown earlier. There was no question of limiting one to time of making of a will. It could be said two years earlier before a person's death or at the instant of death. The effect this provision will have is that most wills made orally may end up being invalid since most such testators will not die in the period within three months of making the wills.

It is not clear what that provision is trying to achieve other than trying to discourage people from making oral wills to the effect that the new intestency rules will apply to their estates.

It has been indicated⁵⁷ on the written will that if it is a bequest to one of the witnesses, and an oral will that if there be any disputes as to the evidence given about the oral will, there must be an independent witness. First as regards the probate of the oral will the witnesses who on giving evidence may conflict according to section 10 are those who were there when the will was being made. It is therefore not clear who this competent independent witness may be or may come from to prove the contents of the will, if he was not part of the witnesses that attested the will.

This is simply a further way of mystifying the probate of the oral wills so as to discourage people from making it in favour of the intestency rules in the Act.

Secondly as regards written wills, most bequests are made to family members. It may be that someone does not want to loose the family privacy and confidence; and therefore would not want someone outside the family to attest the will ~~for~~ for the sake of having an independent witness. This is away of suspecting that the witness in whose favour a bequest may be made may cheat about it. This method very well worked under customary Law where most of the attesting witnesses were family members in whose favour a will would be made, It is not clear or explained in the Act why it is necessary to have this independent witness.

The provision⁵⁸ to have this independent witnesses as explained in the foregoing account is a machinery for breaching the family sentiments of privacy and confidence that exist in the African family in the long run. This has been summarised in the speech of one of the members of parliament when the Bill that resulted in the Law of succession Act was being discuss⁵⁹ed

'The idea of an Independent witness is a way of making courts and magistrates and other third parties have a say in somebody's will. ...

We cannot say that a man is going to make a will and then in the next sentence say that somebody else is going to determine whether that will is good for all of his dependants or not ... we should not flog these dead people after they have died and doubt them when they have no chance to argue.'

On the freedom of attestation given under the Act,⁶⁰ a person may make bequests to people outside the family so long as the family has enough to live on. It is not certain to determine that a family has enough. In most cases the average family needs all that they have, ~~having nothing~~ to give to a member outside the family.

Bequests outside the family were not allowed under customary Law unless they were gifts given by the owner of property in his life time⁶¹. The freedom of testation would promote the breaking of families in the long run since disputes may arise as between the members of the family and the outsiders of the family realise they do not have enough for themselves while those outside the family have been given.

The Law of succession Act as the whole can be seen as an imposition of foreign Law on the people, based on wrong assumptions as to the social economic transformation in the country. Imposition of Law has been defined⁶² and can be conveniently used in this paper as being a situation where fundamental change is contemplated in society through the medium of Laws or legal institutions whose consent is clearly contrary to the perceived and accepted normative order of those whose behaviour it seeks to regulate or change. This has been shown in the foregoing account.

CONCLUSION

The following conclusion emerge from the study of the Gusii customary law of inheritance and the law of succession Act.

The economy that was introduced in Kenya after the commencement of colonialism has introduced changes in the customary law. However these changes falls short of replacing the basic value of the Gusii people with the type of western values one finds in the Law of succession Act. Their life is still largely communistic. For instance land is generally held by families, the marriage is still on alliance of the family of the man and that of the wife. The extended family which helps in the time of great need is still intact.

The existence of new forms of property is no proof of the fact that the Gusii way of life is the ^{same as the} ways of life of other communities such as the Hindus, the Europeans and the Muslems as far as succession is concerned, neither has it brought it close to the other tribes. This leads to a clear understanding that the law of succession Act which is a uniform code is based on a wrong assumption that there is in Kenya today a homogeneous society as regards matter of succession.

The Law of succession is thus another example of imposition of Law to the extent that it embodies English analogies of testate and intestate succession as was discussed in chapter three and also introduces a technical method of making wills in which is unnecessary to those people whose laws of succession are simple. In this respect the Act is no different from the Registered Land Act chapter 300 of the Laws of Kenya which as was discussed also introduces English values of individual Land tenure and imposes it on the African communal Land tenure with adverse effects.

The marriage Bill based on the report of the commission on the Law of marriage in 1968 can also be seen in the same light. It too is on the assumption that society has changed into a homogenous community to warrant a uniform law.

A false start has been made in enacting the Law of succession Act without first analysing the true changes in society which any Law reformer must take into account to reflect in the Laws if those Laws are to be of any help to the society for which they are enacted.

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FOOTNOTES TO CHAPTER I

1. See Ghai and J.P.W.B. Miaslans public Law and political change in Kenya Oxford University Press 1970 part I on the establishment of colonial rule in Kenya. It shows the different communities that the colonial government had to take into account on establishing a legal system. One of them was the African Communities and their customary Laws that reflected their philosophy of life. See also E. Cotran Restatement of African Law Kenya Succession and marriage volumes Sweet and Maxwell London 1969 which record the various customs of the African Communities as they have existed since the period before colonial rule.
2. The expression comes from Elias T. O. in the book The nature of African Customary Law. Published by Manchester University Press 1972 at page 54. It shows that Law is an indispensable attribute to all human societies including the African Communities. Therefore it cannot be said that the African societies had no Law.
3. See A discussion on the different philosophy of Life of societies and the reasons for the differences by G. Kamau Kuria in a paper. Trends in marriage and succession Laws in Kenya 1886-1977, to be presented at the annual Conference 1977 Historical Association of Kenya. The differences in the customs of the various African Communities can also be seen in the Restatements of African Law by E. Cotran ^{supra}
4. See Berislav T. Blagojevic in an article entitled the Yugoslav Law of Inheritance where it is discussed that marital matters of the family have a bearing on the Laws of succession of any human society.
5. See Ghai and Mcauslan's public Law and political change in Kenya supra pages 3 to 12.
6. Ibid page 125
7. Ibid
8. See J.N.D. Anderson Islamic Law in Africa Frank Cass & Co. Ltd. 1970 at page 81
9. Allot Essays in African Law Butter whorths London 1960 chapter five at page 13.
10. The 1897 East African Order in Council as amended from time to time See The 1902 East Africa Order in Council The 1906 East African Order in Council. The 1911 East Africa Order in Council and The 1920 Kenya Protectorate Order in Council and also the 1963 Kenya Independence order in Council (L.N. 718 of 1963) were all made under the Foreign Jurisdiction Act of 1890. They show that Kenya Protectorate was to be ruled through Orders in Council.

27. The civil procedure code section 87(1) L.K.
28. Julius Lewin Recognition of Nature of Native Law and Custom, supra. He indicates that such expert witnesses as anthropologists working among the particular people whose custom is before the court, may be called to give evidence. This is because they may be less interested in the matters in dispute but eager to show the custom that has been in existence.
29. R vs Mutiwiwa L.R. Court of appeal for East Africa 1935 at page 66. See this information about the African courts in Urther Philips Report on Native Tribunals supra.
30. See about the courts that were presided over by an European officer in the 1897 Native courts Regulation section 3. See also information about the extension of the ascertainment rule to all the courts by the magistrate courts Act in Ghai and Mcaulan Public Law and political change in Kenya supra at pages 374-375.
31. The Magistrate courts Act 1967 abolished the African courts and other courts to which appeal lay from and created a three tier hierarchy (a) District magistrates courts (b) Resident Magistrate courts and (c) the High court.
32. See Sec. 2 of the Magistrate courts Act. Chapter 10 L.K. Revised edition 1980. Government printer.
33. Cap 23 the Law of Contract Act 1960.
34. Kamanza Chiwaya vs Manza Tsuma High Court of Kenya at Mombasa, civil appeal No. 6 of 1970 by Harris J.
35. See generally Urther Philips Report on the Native Tribunals Nairobi government printer 1945, and more specifically at page 54 on administrative policy.
36. Ibid.
37. Ibid.
38. Ibid.
39. Hezron Ombasa vs Mongare w/o Manono C. of R. L. R. volume 1 1953 at page 6.
40. The marriage Act. cap 150
41. The African Christian marriage and Divorce Act cap. 151
42. The marriage act sec. 49 and 50

43. Benjwa Jembe vs Pricilla Nyondo volume 4 of East Africa court of Review at page 160 a contrary decision was arrived at in a Nigerian case of Cole vs Cole Nigeria Law Reports.
44. In the Matter of the estate of Boaz Ogola vs Public Trustee High court of Kenya at Nairobi miscellenous civil case No. 19 of 1976 and also in In the matter of the estate of Bernad Mbire Ruenji (unreported) Quoted in Ogola's case.
45. The marriage Act section 50.
46. Benjwa Jembe vs Pricilla Nyondo supra 49.
47. The marriage Act cap. 150 and The African Christian marriage and Divorce Act Cap. 151 supra
48. E.Cotran Restatement of African Law Succession Kenya supra. See generally how the Africa communities in the Laws of succession cover women and children in a polygamous home.
49. The law of succession Act cap 160
50. Julius Nyerere socialism and Rural development U R of Tanzania 1976 at page 4.
51. Ibid.
52. See on individual land holding in the Registered land Act cap 300 L.K. sec. 27 and 28 as opposed to the African position of communal land holding as seen in Julius Nyerere Ibid.
53. See John mbiti African Religion and Philosophy Heinmann 1969.
54. See on prescription in the cases of (i) Khaomba vs Wakhima (1953) 1 court of Review Report at page 3. (ii) Oruru vs Bishenga (1954) 1 court of Review Law Reports at page 6.
55. See this introduction of the individual ownership of Land as seen in the terminologies of absolute propriorator as embodied in the Registered Land Act cap. 300 Laws of Kenya.
56. For the history of agrarian administration in Kenya see Ghai and Mcauslan Public Law and political change in Kenya supra at page 79 to 124.
57. Ibid.
58. Ibid page 117.
59. Ibid.
60. See the Native land Tenure Rules L.N. 452/1956. Which established the system of adjudication, consolidation and registration. See also a discussion of this in Ghai and Mcauslan Ibid.

61. See Section 27 and 28 of the Registered Land Act of Kenya Cap. 360.
62. See what happened in the cases of Esiroyo vs Esiroyo 1973E.A. LR. page 388 Thuku Mbuthia vs Kaburu Kimondo (1964) c of R Report No. 17 and Selah Obiero vs Orego Opiyo (1972) E.A.L.R. page 227.
63. Ibid.
64. See the advantages that accrue on Registration as an absolute proprietor, he has rights to the Land so registered subject only to overriding interests of section 30 of the Registered Land Act.
65. Mungora Wamathai vs Muroti Mugweru High Court of Kenya at Nyeri Civil case No. 56 1972.
Samuel Thaka Mishek and others vs Pricilla Wambui and Another High court of Kenya at Nairobi civil case No. 1400/1973.
66. Mwangi Maguthu vs Maina Maguthu 1971 Kenya High Court Digest No. 16
67. See generally E. Gotran Restatement of Africa Law of succession supra.
68. The Land Registrar vs Moraa Ogoro (unreported) Civil case No. L/S 62 of 1980 at Kisii.
69. It is indicated in Chai and Mcauslan in Public Law and political Change supra at page 95 that throughout the twenties when farming was relatively prosperous, the settlers and government continued to encourage migration from the reserves to European farms, despite evidence that numbers of Africans did not go back to the reserves after completing their contracts but stayed on as illegal squatters.
70. Urther Philips in The Report of the Native tribunals supra paragraph 925.
71. Ibid.
72. See the examples in the Report supra at paragraph 929. The man working in Elburgon and his accumulated cash, and where customary Law of succession was faced with a new situation in Appeal No. 1 1944 where the municipal native officer adjudicated on property of the use at Pumwani because customary Law of succession had nothing to apply on the new property of a house owned by a woman.
73. See 57 and 59 of the police ordinance of 1930. Section 97-99 of the Kings African Rifle Ordinance 1932. The soldiers could make wills and appoint heirs or executors persons who could not otherwise be recognised as such under customary Law of succession. It is not evident whether such wills were effected or customary law continued to apply even when this wills had been made. See this discussion by Urther Philips Report on Nature Tribunals supra at page 308 paragraph 933.

74. The African wills Act was passed in 1961 to enable Africans to make wills subject to certain Limitations which were the application of certain provisions of the Indian succession Act 1865 relating to wills, codicils and probate to wills made by Africans. Cap. 169 section 3 and second schedule.
75. Ibid.
76. The law of succession Act Cap. 160 which came into effect on 1st July 1981. Legal notice No. 93 of 1981.
77. See the "Report of the commission on the Law of succession". Republic of Kenya government printer page 12 paragraphs 51 to 57 which discusses the defects of customary law of succession and which report was given effect by the enactment of the Law of succession Act cap. 160.
78. The African wills Act and the Law of succession Act Supra.

FOOTNOTES TO CHAPTER II

1. Berislav T. Blagojevic The Yugoslav Law of Inheritance, at page 1 For African societies see E Cotran, Restatement of African Laws Kenya succession Sweet and Maxwell London 1969 generally.
2. E. Cotran Restatement of African Laws Kenya succession Supra which shows generally that due to the Africans regarding Land as a communal property the Laws of succession to Land take this into account.
3. Berislav T Blagojevic supra. note 1
4. See Kamau Kuria The Law of succession Kenya a paper prepared for presentation at the Kenya Law society conference 1978
5. See ^{Parry} Parry - The Law of succession Sweet and Maxwell Ltd 1972 sixth edition at page 151.
6. Ibid
7. See the same analogy used by E. Cotran in Restatement of African Law succession. Supra
8. See generally A.R. Mellows The Law of succession 3rd Edition London Butter Worths 1977 page
9. See E Cotran Restatement on the Law of succession in Kenya Supra. He has outlined in the discussion of various communities the various forms of property owned by the communities
10. See Urther Philips Report on the native tribunals Government Printer 1945 paragraphs 927.
11. See Communal ownership as shown by Nyerere in Socialism and Rural development U.R. g. Tanzania 1976 at page 4 Individual ownership. As implied in section 27 and 28 of the Registered Land Act cap 300.
12. See Generally Parry the Law of succession and E Cotran Restatement of African Law succession supra
13. See Elias T.O. The nature of African customary Law published by Manchester University Press 1972 at page 58 on primitive Communism. See also Julia Nyerere supra.
14. See the case of Andiema Bisakeyi vs Matajali Wekhwela 1953 I court of Review Report at page two. Also see Mulumba Gwandubd and others Representing the Tibana Tribe vs Abdulrasool Alidina Visram in 1913-1914 Volume 5 of Kenya Law Reports at page 141 and also in 1915-1916 volume 6 Kenya Law Reports at page 31.
15. See the Registered Land Act cap 300 Laws of Kenya see 27 and see 28. which gives effect to the concept of individualism by investing a registered Land owner absolute rights on the Land subject only to overriding interests by virtue of see 30 of the same statute.

16. See Judgements in the cases of Esiroyo vs Esiroyo in 1973 East Africa Law Reports at page 388 Selah Obiero vs Orego Opiyo 1972 E.A. L.R. page 227 and Thuku Mbuthia vs Kaburu Kimondo 1964 C of R Report No. 17
17. In most African communities since the principle properties are held communally, there are set out principles of succession where the holder dies testate or intestate. See this position in E. Cotran's Restatement of African Law Succession in Kenya supra generally in all African Communities.
18. See N.A. Ollenu The Changing Law and Law Reform in Ghana (1971) J.A.L. 132 at page 150. See also Cotran Ibid.
19. Many funeral announcements over the voice of Kenya Radio are to the effect that most people are burried in their rural home areas.
20. See Julius K. Nyerere Socialism and Rural Development supra.
21. N.A. Ollenu page 150 supra.
22. The western ways of making wills is embodied in the Indian Act and also in the African wills Act which applied certain provisions of the Indian succession Act 1865 relating to wills, codicils and probate to wills made by Africans cap..169 section 3 and second schedule.
23. Berislav T. Blagojevic, The Yugoslav Law of Inheritance supra at page 1.
See also Hazard J.N. Inheritance as an Anachronistic Stimulant where he says that ... in short inheritance Laws must take into account the changes which have occured or which are about to occur in different sectors of the social life of a country.
24. For the English position see generally Bromleys Family Law Butterworths 1967 3rd Edition. For the African positon see E. Cotran Restatement of African Marriage and Divorce Kenya Sweet and Maxwell 1968.
25. See John S. Mbiti African Religions and Philosophy Heinemann, 1969 also N.N. Rubin and E. Cotran Readings in African Law, Volume 2, Frank Lass and Ltd., 1970 London, chapter 10. See E. Cotran Restatement of African Law Kenya Marriage and Divorce, paragraph 1 page 117 for the Nandi "Forcible marriage."
26. The western monogamous marriage is as what Lord Penzance said it was in Hyde vs Hyde (1866) L.R. 1P and D 130, 133 as the voluntary union for life of one man and one woman to the exclusion of all others. This defination has been reproduced in section 2 of the matrimonial causes Act cap. 152 Laws of Kenya. Polygamy is the popposite of monogamy in that it is the marriage by a man of more than one wife.
27. Re Bethel an English case (1888) 38 chapter D page 220.
28. The marriage Act cap 150 and The African Christian marriage and Divorce Act cap 151.

29. Defination of marriage in the statutes the marriage Act cap 150 generally and the African christian marriage and Divorce Act cap 151 generally are monogamous and have only reference to man and woman. They have no reference whatsoever to the African forms of marriage, of woman to woman, Sororate, and levitatic union.
30. E. Cotran Restatement of African Law succession See generally on discussion of the pattern of distribution of principle property such as land among the heirs. It shows that the heirs normally exlude unmarried daughters especially in patrilineal societies.
31. See The cases of Re Bethel(1888) 38 chapter D page 220 In the matter of the estate of Boaz Ogola Mbire vs Public Trustee High Court of Kenya at Nairobi miscellaneous civil case No. 19 of 1976 See also in the matter of the estate of Bernad Mbire Ruensi (unreported) Quoted in Ogola.
32. E. Cotran Restatement of African Law of succession supra.
33. Principles are set out formulations by a society by which to abide. See generally principle of succession in an English society in Parry the law of succession generally as compared to the African position in E. Cotran's Restatement of African Law Succession.
34. Ibid.
35. Ibid.
36. Re Mwangi (1968) E.A. 637.
37. Re Kibiego (1972) E.A. 179.
38. The probate and Administration Act 188.
39. The Relevant Nandi customary Law on Administration of estate that the court ought to have applied canbe seen in Cotran's Restatement of African Law Kenya succession supra at page 115.
40. See N.A. Ollenu The Changing Law and Law Reform in Ghana supra at page 150.
41. See generally E. Cotran Restatement of African Law Kenya Succession supra life gives the postition of the rest of the African societies.
42. See section 82(4) 6(c) of the constitution.
43. Law of succession Act cap 160 C. Laws of Kenya.
44. See Arthur Philips Report on the Native Tribunals supra at page 306 to 313 and also E. Cotran's Restatement of African Law succession Kenya in all the volumes supra.
45. Cotran's Restatement of African Law Succession supra at page 52. There are other writers like Philip Mayer The Lineage Principle in Cusii society oxford university Press 1949.

46. See Nathaniel Omondi vs Chuma Nyafula and Another (1972) K.H.D. 91, In the matter of proposed marriage Between E.L. and F.C. and in the matter of caveat entered by C.C.L. High Court of Kenya at Nakuru, miscellaneous civil case No. 6 of 1972.
See also Yawe vs Public Trustee Court of appeal No. 13 of 1976.
47. See William Twinning the Restatement of African Law a Comment in J. of N African Studies 1,2 (1963) at pages 221 - 228. Simon Roberts Restatement of African Customary Law Review in 1970 J.A.L. page 203 - 205 also in M.L.R. Volume 39 1976 at page 670.
48. William Twinning J.M. African studies supra.
49. Philip Mayer The Lineage Principle in Gusii society supra note 45.
50. Ibid page 1
51. Cotran Restatement of African Law - Compare the topics of Administration of estates on page 53 with those intestate and testate succession on pages 55 and 59 respectively.
52. See Philip Mayer at page 16 supra and Ibid.
53. Cotran page 52 on The Distributable estate.
54. Meaning of 'house' among the Gusii is in reference to a married woman Ibid.
55. 'Etugo' means property Ibid.
56. This includes children who might have been got from the other forms of marriages such as woman to woman marriage (Cotran and Rubin) supra.
57. John Mbiti African Philosophy and Religion, Heinemann 1967.
58. See E. Cotran Succession supra.
59. Cotran and Rubin and E. Cotran Readings in African Law supra
60. E. Cotran Restatement of African Law marriage and Divorce supra section on the Gusii marriages.
61. Many examples of this nature are known by the writer of this paper.
62. Philip Mayer The Lineage Principle in the Gusii Society supra at page 17.
63. See Distribution of Land among the sons in E. Cotran Restatement on Succession supra page 52 see also Philip Mayer Ibid.
64. Philip Mayer The Lineage Principle supra at page 16.
65. See on the Gusii E. Cotran Restatement of African Law Succession supra

66. E. Cotran Restatement of African Law Succession Kenya at page 59 supra.
67. E. Cotran Restatement of African Law Succession at page 54
68. Cattle of 'Oboko' is that livestock received as dowry when a daughter gets married. Cattle of 'enibo' is that which is obtained by trade or gifts, cattle of 'Enesuto' is that one cow that a nephew receives from a maternal uncle.
69. E. Cotran On succession supra.
70. 'Ogosagaria' is when one gives another his livestock to use for a time but returns to that one with all the produce.
71. See E. Cotran Restatement of African Law Succession page 61.
72. Ibid.
73. See John Mbiti African Religion and Philosophy supra.
74. E. Cotran Kenya Succession page 60 supra.
75. See John Mbiti African Religion and Philosophy supra on fear of ancestral spirits by the Africans.
76. E. Cotran Restatement of African Law Succession Supra at page 60.

FOOTNOTES TO CHAPTER III

1. The Law of succession Act cap 160 Laws of Kenya.
2. Ibid section 2.
3. Ibid section 5, 32 and 33.
4. See the various communities with their respective Laws of succession in the Report of the Commission on the Law of Succession, Government printer 1968 at page 7 to 9. Here after will be called the commission.
5. Urther Philips report on the native Tribunals government printer 1945.
6. The African wills Act of 1961 was enacted to allow the Africans who wished to make wills in the English style to do so. This has been discussed by one Lawyer Mr. Kamau Kuria in a paper Laws of Marriage and Property in English Speaking Africa a lecture delivered at seminar/on women and development at Maseru, Lesotho April, 17 to 30. 1977 pages 79 to 80.
7. The Commission on the Law of Succession Supra.
8. Urther Philips Report Supra paragraph 924.
9. Supra not 7.
10. Ibid.
11. Ibid.
12. The then constitution of Kenya section 22(1) and section 26(4) (b) the present section 82(4) (b) (c).
13. Ibid section 179 of the constitution of that period.
14. This was in 1967, when the legislations like The judicature Act, No. of 1967, the Magistrates Jurisdiction.
15. Kenya got her independence in 1963.
16. The KANU MANIFESTO government printer 1967.
17. The report of the commission on marriage and Divorce sweet and Maxwell 1968.
18. Urther Philips Report on Native Tribunals paragraph 924 Supra.
19. The report of the commission of succession Supra.
20. Ibid.
21. Ibid.
22. The constitution provision Supra.

23. E. Cotran Restatement of African Law Succession Kenya volume 2 Sweet and Maxwell.
24. William Twining in an article The Restatement of African Customary Law A comment in the journals of modern African studies 1,2, (1963)page 221-228.
See also Simon Roberts Law and the Study of social control in small scale societies in (1970) Journal of A.L. page 203 - 205
25. Report of the commission of succession supra at page 12 to 13
26. E. Cotran Restatements of African Law Succession supra preface.
27. The report of the commission on succession paragraph 7 page 2 supra.
28. Ibid page 3.
29. Ibid.
30. Ibid page 2.
31. Ibid paragraph 22 page 4.
32. Ibid.
33. The inheritance family provision Act of 1938 as amended by the intestate Act of 1952 of England.
34. Report of the commission on succession Supra paragraph 107 recommendation No. 21.
35. The report as a whole on the Law of succession by the commission supra.
36. Kenya National Assembly Official Report 1970 Government printer.
37. Ibid page 1934
38. Ibid page 1958.
39. See E. Cotran Supra.
40. The National Assembly Official Report supra pages 1935 to 2018.
41. The constitution of Kenya supra section 82 (4) (b) (c).
42. The Law of succession Act. section 34.
43. Ibid section 32 and 33.
44. Supra section 34.
45. See E. Cotran Restatement of African Law succession Kenya supra pg. 52
46. See also John S. Mbiti African Religion and Philosophy Heinmann.

47. E. Cotran Restatement supra. and Ibid.
48. Ibid.
49. The Law of succession Act supra section 35.
50. Ibid sections 28 and 35(4).
51. Ibid.
52. See also E. Cotran and Rubin Readings in African Law volume 2 Frank Cass and Ltd. 1970 London chapter 10.
53. Under section 5 also a Muslem may make a will that Islamic Law may apply to his estate instead of the law of succession Act.
54. There is however another way, that is, if one is located in the areas that may be specified in the schedule by the minister according to section 32 and 33.
55. See a discussion on the nature of the will by Mr. Kamau Kuria in a paper marriage and property in English speaking Africa supra at page 79 to 80.
56. The Law of succession Act Supra section 9 (1)(b).
57. Section 10, section 13 (2) and 14.
58. The Law of succession Act cap 160 supra section 9 (1)(b).
59. Kenya National Assembly Official Report supra at page 2018 speech by Mr. Ayah.
60. The Law of succession Act supra section 5 and 26.
61. See generally E. Cotran Restatement of African Law succession supra.
62. See Okoth Ogendo the concept of legal imposition a paper