

GEARING TOWARDS EQUAL INHERITANCE AND PROPERTY RIGHTS FOR WOMEN IN KENYA

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR
OF LAWS DEGREE**

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in evaluating this study project.

CEDAW	Convention on the Elimination of All Forms of Discrimination against women
UNHRC	United Nations Human Rights Committee
FIDA	Federation of Women Lawyers in Kenya

In the Matter of the Estate of M'Miriti M'Atune (deceased), Succession Cause 119/2003 [2010] eKLR.

In the Matter of the Estate of Mugo Wandia (deceased), Succession Cause 320/2007, [2009] eKLR.

In the Matter of the Estate of the Lawrence Douglas Magambo, Succession Cause 309/2002, [2010] eKLR.

Rono v Rono and Another, Civil Appeal 66/2002, [2005] eKLR.

Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna [2014] eKLR.

Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguthi & 4 others [2015] eKLR.

Otieno v Ouko and Siranga [1986] eKLR.

In the Estate of Mutio Ikonyo v Peter Mutua Ngui, Succession Cause 303 of 1998 eKLR.

Gitari M'mwando v Gitari M'mwando & another [2015] eKLR.

Hotensia Wanjiku Yawe v Public Trustee (Civil Appeal No.13 of 1976) eKLR.

Erastus Gichingiri Muhoro v Gerishon Gichingiri Muhoro & 2 others [2014] eKLR.

Constitution of Kenya 2010.

The recommendations of this study seek to set out the measures which the Kenyan government and other stake holders should take to address these problems and consequently begin to tackle the patterns of discrimination and inequality which Chapter three identifies.

in society, to an era where women are increasingly becoming more outspoken about their rights. Inheritance has gained profile as a public policy issue in African countries for several reasons. Most prominently, inheritance has been tackled as part of the larger problem of property rights regimes that are discriminatory against women.¹ Majority of Sub-Saharan countries, do not grant equal inheritance rights to men and women.²

Ratification of the 1981 UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), spurred reforms in national legislations to promote equality in inheritance rights.³ The Law of Succession Act Cap. 160 of the Laws of Kenya which came into force in July 1981 was meant to create a single inheritance regime to be applied to all Kenyans and formally complied with international equality standards.⁴ Various legislations as regards equality of land rights in succession followed subsequently. These were the Land Act, 2012; the Land Registration Act 2012 and the National Land Policy. However, customary and religious practices continue to apply in inheritance matters leading to the disinheritance of many women. This paper studies the impact of the continued application of customary law and other discriminatory religious practices to women's right to own property.

based on the same evils it was trying to address.

Sections 32 and 33 exempt from application of the Law of Succession, the intestacy provisions to some districts which are ‘*gazetted*’⁷ in respect of agricultural land and livestock. If a person dies intestate in any of these areas, customary law applies with regard to agricultural land and livestock.⁸ Women under such areas cannot benefit from or seek protection under the provisions on intestacy.⁹ Article 2(4) of the Constitution of Kenya 2010, which invalidates application of customary law where it is inconsistent with the Constitution, illustrates that the Constitution has allowed the use of customary law. The role of customary law within the Kenyan legal system has also been outlined in the Judicature Act (1967) which states that;

*‘The Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law’.*¹⁰

Many women have argued that customary practices and traditions governing succession go against justice principles since they undermine their property and inheritance rights. Section 82(4) of the Repealed Constitution, embraced legal pluralism by recognizing the application

⁵ Harari M ‘*Women’s Inheritance Rights and Retaining Power: evidence from Kenya.*’ Massachusetts

guest of male relatives by blood or marriage'.¹² The customary laws of various ethnic groups oppose the equal inheritance principles outlined in the Law of Succession Act and as a result, outcomes in courts are often inconsistent and contradictory.¹³

Matrimonial property rights of cohabitating women whose 'husbands' have passed away have also been neglected. Although case law provides otherwise, the law does not recognize such a relationship as giving rise to a presumption of marriage and thus such women are not regarded as wives for inheritance purposes.¹⁴ Widows' rights to property have also been neglected under the Law of Succession Act. Section 36 provides that the life interest of a deceased person shall vest in the surviving spouse and in the case of a widow, it terminates upon her remarrying. Section 40 of the Law of Succession Act equates a widow to a child where an intestate was polygamous. The section provides that a widow should be considered as an additional unit to the children in the distribution of the personal and household effects of the deceased.¹⁵ The Law of Succession Act denies deceased persons' mothers their inheritance rights if the fathers are alive. This is because Section 39 provides a hierarchy of the dependents where the intestate has left no surviving spouses or children and the father tops the hierarchy.

The current Constitutional framework provides for equality and non-discrimination. Article 27 provides that;

and practices related to land and property in land.

The Marriage Act, 2014 in Section 3(2) provides for equality of parties to a marriage at the time of marriage, during the marriage and at the dissolution of the marriage. The Matrimonial Property Act, 2013 affirms the equal status of married couples by providing that *a woman has the same rights as a married man to acquire, administer, hold, control, use and dispose of property whether movable or immovable.*¹⁸

1.2 Statement of the problem

The legal framework in Kenya has promoted gender equality by having in place provisions that prohibit discrimination or bias based on one's gender. The Constitution of Kenya 2010, The Land Act 2012,¹⁹ The National Land Policy,²⁰ The Matrimonial Property Act²¹ and The Law of Succession Act²² all contain provisions relating to this robust exposition of the right to equality and non-discrimination in matters of inheritance. Despite these provisions, many people still opt to go the customary way when it comes to succession matters translating to the fact that there remains a considerable disconnect between official policy and actual practice. These statutory provisions generally have no effect on the great majority of the population, who are governed, in family and personal matters, by customary law. Statistics have shown that only 3% of women in Kenya own land, consequently making them

legal title to property including land. This is because they have been excluded from these rights by customary practices and certain provisions of the succession laws.²⁴ This has become a major problem in the country and has exacerbated women's vulnerability to chronic poverty and intergenerational transmission of poverty.²⁵ This, in a way has been linked to economic decline and poverty traps.²⁶

The attempts made through international human rights instruments and national legislation to address challenges to women's property and inheritance rights do not seem sufficient. Customary law practice continues to impede the full realization of such measures to protect women's rights.²⁷ The justification for carrying out this study is to look for solutions to this predicament in order to address the plight of women. This is in light of the 2010 Constitutional provisions on equality and non-discrimination and the subsequent legislations protecting women's property and inheritance rights.

²³ International Finance Corporation (IFC) & World Bank, *Voices of Women Entrepreneurs in Kenya*, IFC Gender Entrepreneurship Markets & Foreign Investment Advisory Service, 2006

property:

3. What measures need to be ingrained in the society to ensure consistency between the law, policy and practice?

1.5 Objectives of the research

The main objectives of this research are;

1. To examine the law in Kenya relating to succession and property rights with a keen analysis on the legal loopholes giving rise to gender inequality.
2. To provide an analysis of customary law jurisprudence in Kenyan courts and reasons why the customs, traditions and other practices are still being applied in succession matters.
3. To develop recommendations that ensure a woman's statutory rights to own property and inherit are implemented to the core.

anything from their fathers. This inequality is perpetuated by the continued and widespread discrimination against women in the inheritance of property. Despite provisions of the law that have given women some form of protection, in practice, many women are unable to inherit property and land from their spouses and fathers. According to FIDA's Report on *Empowering Women with Rights to Inheritance*²⁹ the inability to inherit is the result of several deficiencies in the Law of Succession Act as well as continued use of customs to determine succession matters.

*The UN Habitat*³⁰ cites customary laws and practices as one of the factors blocking women's equal property and inheritance rights. Gender discrimination in inheritance systems has been described as a violation of human rights and linked to poverty traps and intergenerational transmission of poverty.³¹ This has been reinforced by the fact that many women have been found to be living below the poverty line due to the fact that they have no access to property from their parents or deceased husbands.³²

Inheritance is a complex problem as a mode of property transfer. Schemes of inheritance and property allocation at death are deeply embedded in notions of culture and tradition in many African societies.³³ A major vulnerability for inheritance rights experienced among the vast

²⁸International Finance Corporation (IFC) & World Bank, *Voices of Women Entrepreneurs in Kenya*: World Bank, 2006, 10.

²⁹Federation of Women Lawyers in Kenya 'Empowering Women With Rights To Inheritance'- Georgetown

in many such contexts, wives never become recognized as full members of their husbands' lineage and hence are never able to own or directly have control over land.³⁵

The Law of Succession Act, which is the main Act in Kenya that governs succession matters, has been noted to have some challenges that have led to inequality in women's property and inheritance rights. Mbote shows the inadequacies of this legislation and concludes that only an in-depth study of cultural practices will help us understand the rationale behind customary legal principles.³⁶ Only then, can we be able to ascertain the effect customary law has had on women and consequently try to find alternative routes to the solution.

The United Nations has set out guiding principles for enacting laws. Among them are guiding principles on inheritance laws and how to ensure equal rights in inheritance. They include that legislation should prohibit discrimination against women and girls in inheritance and allow females to inherit property and land on an equal basis with males. The principles also provide that legislation should state that civil laws shall have supremacy over customary laws and practices that are discriminatory. In addition legislation should ensure that wives and husbands are entitled to inherit equal shares of a marriage and that legislation should protect widows and girls' rights in testate succession among others.³⁷

Women in Kisii, like most African women in customary tenure systems, have only secondary rights to their husband's land. Not only do women lack control over the land they farm but

nonetheless not addressed why such discriminatory customs are still being practiced and what can be done to ensure that such customs are abandoned and the law embracing equality is followed in succession matters. These are the focal points which my study will be based on.

1.7 Theoretical/Conceptual framework

“While some scholars say that Gender Equality translates into the absence of discrimination, or that equality and discrimination are each other’s antithesis, others claim that Gender Equality is an extensive goal. Prohibition on discrimination along with positive actions as well as other methods, such as gender mainstreaming, are appropriate tools in achieving that goal.”³⁹

These different perceptions originate in whether the concept of gender equality is understood as comprising formal or substantive equality. Formal equality acknowledges no special treatment on grounds of sex whereas substantive equality aims at equalizing the outcome. Preferential treatment of one sex over another in social, economic and political spheres is consistent with Substantive Equality.

Substantive equality concentrates on remedying disadvantage rather than achieving gender neutrality. It requires government and private actors to take the steps necessary to advance access by all citizens to benefits, supports, programs, goods and services in a way that is responsive to their particular needs. Its goal might also be thought of as full “citizenship” in

outside mainstream society.

The main issues outlined in this study are strengthened by two main theories in which the legal research is conceptualized. These theories are William Blackstone's and Libecap's property rights theories and the liberal feminism theory.

Blackstone's property rights theory identified property rights as the third 'absolute' right, inherent in every Englishman which consists in free use, enjoyment and disposal of all his acquisitions without any control.⁴⁰ The need for equality in inheritance rights for women which is the focus of this study, also brings out the aspect of importance of women's property rights. By getting an equal share of inheritance with their male counterparts, women's right to own property is safeguarded. This reinforces Blackstone's theory of property since women are then able to use, enjoy and dispose of that property as they wish without any control except as limited by the legal framework in Kenya.

Libecap (1989) emphasizes that property rights matter. These property rights provide the basic economic incentive system that shapes resource allocation. These rights, he argued, also reflect the conflicting economic interests and bargaining strength of those affected. Property rights when afforded to women as they are to men through inheritance would then increase their bargaining power and enable them to invest it leading to their improved living standards.⁴¹

of Succession Act in Sections 32 and 33 to govern matters of intestacy in certain so called 'gazetted districts' leads to disinheritance of women as they are marginalized.

The continued application of customary practices and rules in succession therefore undermines women's rights to inheritance since men are viewed as the only ones who should inherit from their fathers. This situation gives rise to the significance of the liberal feminist theory since women need to be accorded equal treatment to men.

Radical feminists believe the society must be changed at its core in order to dissolve patriarchal norms. This means that social change is vital to the gender equality discourse. Acts of legislation or legal reform espoused by liberal feminists are not enough to ensure the full realization of women's rights.

1.8 Research Methodology

This study will focus on the application of customs and traditional practices in inheritance matters post the new Constitutional dispensation and new land laws vouching for equality in inheritance rights. The research will be based on existing literature in the field of succession law and the use of customs, traditions and other religious practices.

The research is to be based on the use of various databases in collecting useful material. These databases contain various literature including scholarly articles, journals, cases, statutes and books relevant to my research area. These databases include but not limited to

2. Time factor- where the time allocated for research may be limited compared to the amount of research needed for this topic.

1.10 Chapter Breakdown

This research proposal will form Chapter one of the dissertation in order to give the reader a chance to have an idea of what really are the issues that are going to be addressed later on in the paper.

Chapter two of the dissertation will look into the legal framework in Kenya with regards to, to what extent it has addressed gender equality in ensuring inheritance and property rights of women are safeguarded. The same chapter will also look into the inadequacies of the Law of Succession Act as the main law governing succession matters in Kenya.

Chapter three will encompass the African customary law jurisprudence from the courts in relation to this topic. It will also discuss the findings based on the inconsistencies observed between the law in books and practice with regard to gender inequality in succession.

Chapter four will feature the way forward in terms of the conclusion and recommendations from this study.

1.11 Time Limit

I, anticipate completing the dissertation by January 2016 due to extensive research which requires a lot of time coupled with compiling the work

laws protecting women's inheritance rights consequently ensuring that their right to own property is also protected. This was mainly due to the overwhelming influence that cultural practices and customary law had on personal law. Many have, over the years tried to water down this huge influence customary law has on the society. These include radical feminists, human rights activities and legislators.

The sources of law in Kenya are outlined under the Judicature Act Cap 8 of The Laws of Kenya.

2.1 International Law on Gender Equality

The principle of equality is a central commitment in international human rights instruments.⁴⁵ Article 2(6) of the Constitution of Kenya 2010; includes treaties and conventions ratified by Kenya as part of Kenyan law. They form part of Kenyan law that all Kenyans are subjected to adhere to. The international legal framework on human rights is quite extensive. The principle of equality in international human rights instruments is expressed in very general and open-textured terms.

Article 2 of the Universal Declaration of Human Rights (UDHR) provides that *every human being is entitled to all the rights and freedoms within the Declaration 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*

(CEDAW) focuses specifically on women, stating that '*discrimination against women*' shall mean '*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*'⁴⁸

CEDAW also requires states to adopt measures "to ensure the full development and advancement of women" and "to modify the social and cultural patterns of conduct of men and women, with a view to *achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*"⁴⁹

Article 16 of the Universal Declaration of Human Rights provides for equality between men and women during marriage and at its dissolution. Similarly, there is a specific provision in article 23(4) of the ICCPR for equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.⁵⁰

the supreme law in Kenya which binds all persons and state organs and ensures every organ legislation.⁵³ “Any law, including customary law, that is inconsistent with this Constitution, is void to the extent of the inconsistency...”⁵⁴ The preamble to the Constitution lists equality as one of six essential values upon which governance should be based. This expression of principle is given legal force in Article 10, which includes human dignity, equity, social justice, inclusiveness, equality, non-discrimination and protection of the marginalised among the national values and principles of governance that are to be used in applying and interpreting the Constitution and other laws, and in making or implementing policy decisions.

This is further emphasised in Article 20(4) (a) which lists **equality** and equity as values to be promoted in interpreting the Bill of Rights and Article 21(3) which creates a duty on state actors to address the needs of “vulnerable groups” in society.

Article 27 provides for equal treatment of men and women in political, economic, **cultural** and social spheres. This is interpreted to include equality even in the application of customary law which is still applied in various parts of the country. Many communities in Kenya continue to actively practice their cultures.

This involves carrying out customs and religious practices encompassed in the said cultures. The Constitution through Article 27 ensures that those still taking part in such activities are restricted by the equality provision. This is despite the fact that most of these cultural practices and customary law as a whole is discriminatory in nature. Freedom to practice one's culture and religion is also a fundamental human right enshrined in the Kenyan

This section unequivocally gives people an equal platform regardless of who they are in Kenya. It substantially expands the list of protected grounds and the scope of the right to non-discrimination compared to the previous Constitution.⁵⁷ It indirectly ensures that girls and women have equal inheritance rights to their male counterparts since no one is to be discriminated against.

Article 45(3) provides for equal rights for men and women are during marriage and at its dissolution. This provides for gender equality between spouses since they enjoy equal rights even in property ownership.

Women's property rights including their access to land have been protected under the Constitution of Kenya 2010. These provisions provide a crucial anchorage for gender equality and are discussed below.⁵⁸

Article 60(1) lays down the principles that underpin land holding, usage and management in Kenya. Equitable access to land and elimination of gender discrimination in law, customs and practices related to land and property in land are the key principles related to this topic. Article 60 (1) elevates the gender equality discussion regarding land issues in Kenya.

Article 68(c) (vi) provides for the enactment of laws that protect dependants of deceased persons holding interests in any land including the interests of spouses in actual occupation of land. This provision protects the inheritance rights of both men and women in the event

The main law governing inheritance in Kenya is the Law of Succession Act, Cap 160 of the Laws of Kenya. The Act came into force in 1981. The Law of Succession Act is a double-edged sword which somewhat serves women by providing inheritance rights, but denying them inheritance rights equal to those of men. This is the guiding legislation on inheritance matters in Kenya. The misapplication of customary law and the legal loopholes that exist in this Act compromise the overarching intent of non discrimination with regard to inheritance rights in the country.

Customary law mainly governed personal law matters before then which included marriage, divorce, inheritance and property. The enactment of the LSA in 1981 marked a great milestone in the quest for reform in the right to inherit by women. African customary law and practice support a patrilineal mode of inheritance premised on a widespread belief that women do not deserve or are incapable of handling property.⁶⁰ Widows and daughters were left with nothing to their name whenever their husbands or parents passed away. Rules of general application in customary law dictated that men and women did not have an equal status in the society hence property was left to the men as they were the heads of the households.

The LSA became a source of hope for many of these women who felt that they needed to be on an equal societal recognition stand as their male counterparts.

Section 2(1) provides that "Except as otherwise expressly provided in the Act or any other

because they are deemed to have moved to another household where they would inherit, mainly their husbands property.

The Law of Succession gives freedom of testation to both men and women in Section 5(2). This means that women whether married or unmarried have the same capacity to make a will as men.

Section 29 of the Act sets out the meaning of a dependant for the purposes of succession. It includes wives, former wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

Wives and former wives have been included in this definition to mean that they should also not face discrimination as to getting a share of their former husband's estate. This puts them in a better position as customary practices subject such women to relentless mistreatment from their relatives who usually take away their deceased husbands property.

The Act includes deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters within Section 29's meaning of dependants. The Act provides for gender equality since it does not specifically give priority to any gender.

Section 40 accords both daughters and sons of a polygamous person who died intestate equal shares in the property of the intestate.

districts in the Acts' intestacy provisions. These districts include West Pokot, Turkana, Marsabit, Mandera, Wajir, Garissa, Tana River, Narok, Isiolo, Samburu, Lamu and Kajiado. Section 33 posits the application of the deceased's customary law in the said districts in place of the Law of Succession Act. This prejudices women in these districts since customary law is generally discriminatory towards them. As a result then, women in such districts would either get very little inheritance, if anything, compared to their male counterparts.

Sections 35 and 36 provide for widows the life interest of their deceased spouses' net estate, personal and household effects provided that they do not get re married. This means that upon remarriage of the widow, they lose their inheritance rights. Many women especially widows are subjected to such harsh rules that emanate from customary law that perceives remarriage of widows as a 'transgression'. This is different from men who are allowed to re marry once their wives pass on. This sections subject women to solitude at the expense of an inheritance that they have a right to.

Section 39 provides for an order of priority of the division of an intestates estate in the event he/she was not survived by any children or spouse. The Act provides for property to devolve upon the father of the deceased as the first in the order of priority. This means that if the father gets all of the inheritance the mother of the deceased gets nothing out of their child's estate. Such a situation exposes these women to poverty and denial of their right to inherit their children's property.

the years been a bone of contention that is subject to judicial discretion.

2.5 National Land Policy

National Land Policy aims to “guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity”. The policy recognises that women, children, minority groups and persons with disabilities have been denied access to land rights as a result of discriminatory laws, customs and practices. It is based on certain principles, including the protection of human rights for all, gender equality and equity. The government commits to ensuring that men and women have equal access to land and to facilitating the enforcement of the legal rights of access, control, ownership and inheritance, access to credit and co-registration. The policy affirms that access to land shall be assured for all Kenyans on the basis of equity and fairness.

2.6 The Land Act 2012

Article 4(2) of the Act prescribes elimination of gender discrimination in law, customs and practices related to land and property in land as a guiding principle towards the State officer’s exercise of power. This promotes women’s land rights since they are placed on an equal platform with men.

2.7 The Matrimonial Property Act 2014

This Act gives spouses an equal status in acquisition, administration, ownership and control of property.⁶⁴ This ensures that women are protected from harassment where the husband

women's statutory rights to inherit and own property are properly enforced, there is a need for further affirmative action other than what is in the law. This will be delineated in the next two chapters of this study.

The study also adopts a contemporary perspective. From a legal point of view, the gender dimension of succession-related legislation is mainly determined by norms concerning the legal status of women and/or discriminating against women. It is therefore on these norms that this study focuses.

3.2 The nature of customary laws and practices

Kenya's legal system is pluralistic. Legal pluralism refers to the existence of more than one legal system in a country.⁶⁵ This occurs where there is interplay between state law, customary law and religious laws. Customary law is considered as a source of law in many African countries alongside common law, case law and Acts of Parliament. Customary law forms part of the culture of the African people. In a typical African country, the great majority of the people conduct their personal activities in accordance with and subject to customary law.⁶⁶

Customary law is the indigenous law of the various ethnic groups of Africa. It is largely made up of practices and customs of the people of a particular ethnic community.⁶⁷ The term "African customary law" is a blanket description that indicates many different legal systems of ethnic communities. It doesn't involve a single uniform set of customs prevailing in any given country.⁶⁸

These systems originate from the diverse ethnicities and operate only within the area occupied by the ethnic group. The content of customary law is extremely diverse, possibly

*such as a clan or tribe rather than equals.*⁷⁰

Customary law dictates that when a family head dies, the estate passes to the eldest son and his descendents. If the couple has no sons, then the estate devolves to the deceased's father or, if he is no longer alive, to the nearest male relative. Under this system, a family's property could go to a distant uncle even though the deceased's wife and daughters are still alive and living in the family home.⁷¹

The normative force and legitimacy of customary law is derived from the idea that it is passed on from generation to generation and its integration to people's identity and culture. The colonial administrations recognized customary law and its institutions, although its application was generally restricted to Africans.

Customary law has gradually developed as African societies have undergone change, most of which can be seen arising from colonization.⁷² It has been influenced by many factors among them is the interaction between African custom and colonial rule. During the colonial era, colonial authorities manipulated customary law for their own ends, and compilations of customary rules were often filtrated by male elders and thus followed men-biased interpretations of customary law.

Customary rules usually are in the form of abrogated norms which have been in force for decades or even centuries. These norms are likely to reflect entrenched socio-cultural

3.3 Customary law jurisprudence

In many developing countries, there tends to be minimal interpretation of state policies and laws particularly in rural areas. Kenya is an example of such countries where some laws and policies are regarded as theoretical rather than practical. This is primarily due to the fact that most communities in Kenya are patriarchal. As a result, Kenya is largely regarded as a patriarchal society that extols men. Broadly speaking, under patrilineal succession systems, property devolves through the male line, from father to son, usually excluding the women in the lineage. This particularly applies to land ownership where in many communities, ancestral land would only be passed down to the males in the family.⁷⁵ The customary law of the Kamba community dictates that a married woman cannot inherit her father's property. There was a presumption that she would inherit her husband's property and thus she didn't need to inherit twice. This is also the case in the Kikuyu customary law. Embu customary law also dictates that married daughters are not entitled to inherit any share from the estate of their parents. Embu customary law application was disputed in the matter of the *Estate of Hezekiah M'Mwando & another* where it was held that the net estate of the deceased should be divided equally pursuant to Sections 38, 41 and 42 of the Law of Succession Act.⁷⁶

The Masai customary law only recognizes inheritance by the male children of the family and not the females. In *Re Estate of Lorionka Ole Ntutu*, the court denied the appellants their application which aimed at excluding their sisters from their father's inheritance. They

Kikuyu customary law dictates that once a wife gets divorced to her husband then her children are not entitled to their father's inheritance.⁷⁸ This is inconsistent with section 29(2) of the Law of Succession Act that includes children of the deceased whether or not they had been previously maintained by the deceased.

Formally, the relationship between statutory and customary law is determined by the legal status of customary law within the legal system. Statutory and customary laws and practices violating constitutional and international human rights norms have been struck down by courts in some cases. However, jurisprudence from the courts over the years, also indicate its countenance to discriminatory customary law provisions. *In the Estate of Mutio Ikonyo V Peter Mutua Ngui*, Justice Mwera held that the appellant was not entitled to inherit her father's property since she was a married woman according to the Kamba customary law.⁷⁹

The Constitutional Court of South Africa in *Nonkululeko Letta Bhe & Others v Magistrate, Khayelitsha*, also enunciated that customary law has a significant place in the country's legal system and therefore it was to be accommodated and not merely tolerated.⁸⁰ This was also reinforced in the *SM Otieno case* where it was held that customary law is formally part of the Kenyan legal system, and must be applied in case of legislative lacuna.⁸¹

shouldn't be applied. The result was that the married daughters were also entitled to a share in the inheritance.

International law has also had a major impact in the protection of women's inheritance rights. The courts in *Rono v Rono & another* and in the *Estate of Andrew Manunzyu Musyoka* relied on the principles of equality as espoused in international covenants. The rulings cited the Convention on Elimination of All Forms of Discrimination against Women to declare customary law discriminating against women as repugnant to justice and principles of equity that are national values of the Constitution of Kenya as well.

3.3.1 The New Constitutional Dispensation

There has been sanguine jurisprudence from the courts under the new constitutional era concerning the application of discriminatory customary laws and practices. Article 27 of the Constitution of Kenya on non discrimination was held in *Agnes Kwamboka Ombuna v Birisira Kerubo Ombuno* to criminalize any form of discrimination.⁸⁵ This means that any disregard to this provision would mean reprimand. The court in *Peter Karumbi Keingati & 4 others v Ann Nyokabi Nguthi & 4 others* was of the same opinion. The new constitutional era had brought with it novel provisions that required rules of equality it championed for to be followed in matters succession.⁸⁶

In the *Matter of the Estate of M'mukindia M'ndegwa (deceased)*, Justice Kasango M found in favour of the wife and redistributed lands of the deceased to ensure his wife and daughters

Constitution 2010 and even after its adoption protected the rights of women and their daughters to an equal share of inheritance. This trend shows the fading culture of discriminatory customary law rules. The rulings have followed the national and international legal and policy framework on equality. This is because finding otherwise would be derogatory to human dignity and equality amongst women in Kenya.

3.4 The gap between policy and practice on women's inheritance rights in Kenya

This section discusses patterns of discrimination and inequality in Kenya. The analysis in this part of the research is based on the study of existing research from a range of sources, including data from research undertaken by international organisations, governmental bodies, NGOs and academics. It seeks to grasp and present the basis of the continued discrimination and inequality in succession which affects women in Kenya.

As highlighted in Chapter two of this study, the Kenyan legislative framework on equality and particularly gender equality is laudable. It is, however noteworthy, that despite these significant provisions on non-discrimination and equality of women, the practice is still very much alive. It follows that the legal framework in Kenya with regard to succession and equality is not the 'panacea' that many women have been yearning for. This is due to the loopholes that exist in some of the legislation such as the Law of Succession Act and the Judicature Act.

The National Land Policy moreover acknowledges the fact that there exists an inconsistency

caused by many factors, and primarily by the existence of socio cultural attitudes commensurate with formal legislation.⁹¹ These deeply entrenched socio cultural attitudes are largely due to customary law influence that advances a patrilineal system of inheritance and property ownership.

3.4.2 Implementation and Enforcement of Gender Equality Laws

Provisions of the law on equality on their own cannot suffice. Implementation of these statutory rights of women is a key issue in the gender equality discourse. Implementation and enforcement of gender equality laws on succession are a major contributing factor to the colossal gap between policy and practice. Effective implementation of the existing laws requires administrative and social mechanisms to be put in place. Such mechanisms include access to justice through the courts for aggrieved women.

3.4.3 Ambiguity in the legal framework on equality

The inadequacies of the Law of Succession Act discussed in Chapter two and the ambiguity that is inherent in the repugnancy clause in Section 3(2) of the Judicature Act have increasingly contributed to the lack of realization of women's inheritance rights. The users of customary law purport that its rules are 'not repugnant to justice and morality' as espoused by the Judicature Act. They argue that rules concerning succession may appear secular but are actually shot through with sacred meanings and implications.⁹²

authorities as well as men and women in areas where customary law might conflict with new statutes. This is to ensure the effectiveness of the law.

4.1 Recommendations

From the findings, it is clear that lawmakers could incentivize gender equality, rather than imposing it by putting in place laws that have no impact on the societal practices. In order to solve the problem of the existing disconnect between official law and practice, a number of issues need to be addressed.

4.1.1 Incentives and Cultural Dialogue

Creating incentives for cultural and religious groups to accept progressive values could promote individual women's rights while leaving the power to change internal norms squarely in the hands of African communities, at least for a time. Cultural dialogue involves discourse on the impact of various cultural norms regarding succession and how they adversely affect the society at large. This should be done through various channels involving the heads of ethnic communities who have influence over the overall activities in the rural area.

4.1.2 Legal Reform

Legal reform is needed to ensure the eradication of outdated discriminatory customary law precedence. This is particularly required in the Law of Succession Act that contains provisions that prejudice women and in particular widows. There needs to be a proper stand

The institutions concerned with advancing and advocating for women's statutory rights need to be reinforced. This is in a bid to strengthen their capacity to carry out their mandate effectively.

4.1.5 Representative capacity of women in the legal process

Majority of the legislators in Kenya's Parliament are male. There is a need to elect more female representatives in Parliament to ensure that all laws regarding succession in the future factor in the gender equality issue.

4.1.6 Judicial Implementation

Courts play a major role in the implementation of the law. Access to justice is fundamental in the implementation of gender sensitive laws. Access to courts is necessary to enforce the rights enshrined in the constitution, in legislation and in case law. Article 2(c) of the CEDAW mandates states "*to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination*".⁹³ Kenya as a state party to this convention needs to ensure that she has fulfilled this obligation.

The courts, as shown in Chapter three have been progressive in ensuring that women get an equal share of inheritance as their male counterparts.

4.2 Conclusion

This Study has highlighted the inconsistency between the legal system and practice with regard to protection of women's inheritance rights. This was with a main focus on how

The study found that customary law's predominance is primarily due to the socio cultural attitude deeply seated in the mindset of the society that advances patriarchy among other factors. The study makes recommendations about further legal and policy reforms which Kenya can undertake, measures to improve implementation and enforcement of the legal framework on equality in succession and measures to put an end to discriminatory customary law practices in Kenya, all of which have had a tardy influence on the general handling of succession. In so doing, this research seeks to contribute to the ongoing debate about how we can create the equal society to which they aspire.

Ultimately, women's right to inherit will be secured only when cultural understanding encompasses a respect for women's rights and when statutory legal systems respect and adapt to the cultures in which they will be applied.⁹⁴

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