

WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA



**Training
Handbook**



Federation of Women Lawyers, Kenya



Vision

FIDA-Kenya's vision is to help create a society that is free from all forms of discrimination against women by reason of either their gender or sex.

Mission

FIDA-Kenya's mission is to ensure that women are free from all forms of injustices based on gender, sex, class, ethnic origin, physical disability, and religious belief.

Values

WOMEN CENTRED:Putting women first.

PROFESSIONALISM:Professionalism in relationships and dealing with clients, ensuring client confidentiality, and excellence.

EMPOWERMENT:Empowering women, staff, the membership and stakeholders.

INTEGRITY:Conducting all business with utmost honesty, integrity, transparency and accountability.

TEAM WORK:A firm belief in mutual respect for each individual and team work.

A LEARNING ORGANISATION:Learning from experience and through innovation, always seeking to improve.

WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA

A TRAINING HANDBOOK



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FOREWORD

Despite the various progressive pieces of legislations enacted in the recent past, the Kenyan society is still predominantly patriarchal, and women are consistently marginalized and discriminated upon at family, community and societal levels. FIDA Kenya is undertaking comprehensive work amongst the communities to address gender discrimination against women owning land and other properties. Article 40 of the Kenyan Constitution, guarantees the right to property ownership, while Article 60 ensures equitable access to land and security of land rights but *without mentioning women or acknowledging their historical landlessness*.

This handbook will not only simplify the new land laws in relation to Women' Land and Property Rights, but also sensitize women and the community at large, with the knowledge on the legal requirements and processes for land ownership and registration. This knowledge will among other protective measures enable women to legally register the land they own to avoid being disinherited incase of divorce, widowhood or through other legal technicalities. Additionally, this hand book would provide clarity on the constitutional and legislative provisions on land & women property rights; awareness creation on the situational analysis of legislative provisions on land & women property rights and give a way forward on the available prospects & strategies in advancing Women's Land and property rights in Kenya.

Ruth Aura
FIDA Kenya Chairperson

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Teresa Omondi
Deputy Executive Director

ACRONYMS

ACHPR	The African Charter on Human and Peoples Rights
AU	The African Union
BPA	Beijing Platform for Action
CEDAW	Convention on the Elimination of all forms of discrimination against women (CEDAW).
COMESA	Common Market for eastern and Southern Africa
EAC	East African Community
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
MCA	Matrimonial Property Act
MWPA	Married Women Property Act
NLC	National land Commission
NLP	National Land Policy
OAU	Organization of African Unity
UDHR	Universal Declaration of Human Rights, 1948.

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PURPOSE OF THE HANDBOOK

Women in Kenya, as elsewhere in developing countries, are denied the full enjoyment of property and land rights, in spite of the governments commitment to promoting gender equality by ratifying international instruments that seek to protect women's rights. Until August 2010, the constitution prohibited discrimination on the basis of sex, but undermined this protection by condoning discrimination under personal and customary laws. Kenya has made positive steps in developing a Constitution that reflects international standards of gender equality, and enacting laws to give effect to the constitutional provisions. However, due to the deeply entrenched prevailing patriarchal attitudes, it is still difficult to attain the equality envisioned by the Constitution of Kenya 2010. The newly enacted laws, including the National Land Commission Act 2012, the Land Act 2012 and the land registration Act 2012 all entrench principles of gender equality in access to land. The general public is not yet fully aware of the new changes that are likely to improve the women's lot if fully implemented.

The purpose of this handbook is to provide a framework for training target community leaders on the rights of women to land and property rights as anchored in the laws and policies, with the expectation that the knowledge gained will not only help gradually change attitudes, but also enable women to begin enjoying rights that have for a long time, been denied them. To achieve this purpose, the handbook demonstrates;

- a) the extent to which the Constitution, the recently enacted land laws, the National Land Policy protect women's land and property rights in Kenya. It also introduces the Matrimonial property Bill 2012 for purposes of showing how, if and when adopted, it could change the situation of women's matrimonial property rights for the better.
- b) The practical avenues through which women can now claim their land rights within the policy, legal and institutional frameworks.

Organization of the handbook

The handbook has been organized as follows;

- | | |
|----------|---|
| Module 1 | Background and Context of Women's property rights in Kenya. |
| Module 2 | International and regional framework for women's land and property rights |
| Module 3 | The Constitutional framework for the protection of women's land and property rights. |
| Module 4 | The national legal framework on land
Part 1
The National land Commission Act
Part 2
The Land Act
Part 3
The land Registration Act |
| Module 5 | Matrimonial property |
| Module 6 | The Law of Succession |

MODULE 1: BACKGROUND AND CONTEXT OF WOMEN'S LAND AND PROPERTY RIGHTS IN KENYA

Session aim:

By the end of this session, participants will be able to;

1. Demonstrate an understanding of the social and legal context within which women's land and property rights are governed.
2. Describe the challenges that hinder the enjoyment of women's property and land rights.

Suggestions for the Trainer

You may begin the session by asking the participants to briefly share their experiences or narrate stories of people they know whose property rights have been abused, including the circumstances, the action taken if any, and how the incident has affected lives. The stories shared may be used to explain concepts and principles during the rest of the training. *Time required: 15 minutes.*

The Context

Among Kenyan communities, women ordinarily do not own land or movable property. At best, their rights are hinged on their relationship to men either as their husbands, fathers or brothers who own and control land, while women are relegated to the right of use only. Although Kenya now has comprehensive laws that should translate to benefits for women in relation to their land and property rights, in practical terms women are still disadvantaged in terms of access to and control of economic structures and resources.

Some important facts on women's participation in land use and ownership are as follows;

1. Even through the estimated ratio of women to men is 1:1, only 5% of land title deeds in Kenya is held by women jointly with men.
2. Only 1 percent of land titles in Kenya are held by women alone.
3. 89 percent of subsistence farming labour force is provided by women
4. 70 percent of labour in cash crop labour production is provided by women.
5. About 32 percent of households are headed by women.

Hindrances to the enjoyment of women's land and property rights

A complex mix of cultural, legal, and social factors and obstacles stand in the way of women realizing equal property rights in Kenya. The few statutes that could advance women's property in the past deferred to religious and customary property laws that privilege men over women.

These include;

1. Cultural beliefs

Under customary law, whoever inherited property was enjoined to access it to other members of the family, including men and women of certain categories. The reason for males inheriting was predicated on the notion that sons remained within their families while daughters got married and left. Although this is not always the case, patriarchal traditions in which men inherit and control land and other property remains.

The deep-rooted cultural beliefs continue to give precedence to male relatives in the ownership or inheritance of property. Sexist attitudes are infused in Kenyan society as demonstrated by men interviewed by the Human Rights Watch who said “women are untrustworthy, incapable of handling property, and in need of male protection”. The guise of male “protection” actually strips women of their property as a way of asserting control over women’s autonomy, bodies, and labor-and enriches their “protectors. Women are mostly not allowed to own or inherit property and property is distributed only to sons and not daughters. On the death of a husband, wives are often disinherited of their husband’s land and property. A woman may be forced to be remarried by the late husband’s brother or close relative to remain on the land. Her attempts to challenge these traditions may invite violence and other forms of aggression against her.

2. Lack of awareness

Women often have little awareness of their rights and seldom have means to enforce them. Apart from lack of knowledge of their rights as women, they are also ignorant of laws generally relating to purchase or acquisition of land or land registration processes. When widowed they do not know how to legally engage with the intricate succession procedures, which leaves them vulnerable and are often taken advantage of with regards to property left behind by their deceased husbands.

Laws are drafted in technical language, not easily understood by women. This discourages women, particularly in areas where illiteracy is high, from taking a leading role in buying, selling or leasing property, and prefer to rely on their husbands or other male relatives, who sometimes end up registering the land in their own names, to the detriment of the women. Rural, illiterate women do not even have access to the new constitution which guarantees their rights to land and property. Accordingly, they are unable to effectively claim their land and property rights as and when need arises.

3. Discriminatory official responses

Cultural discrimination influences official responses to women’s property rights. Currently, women find it difficult to pursue remedies for property rights violations. Some leaders and governmental authorities often ignore women’s property claims and sometimes make the problems worse. A woman may be seeking the intervention of a local chief or other government official who is influenced by prevailing cultural beliefs, the dispute may not be taken seriously as women are not considered to have enforceable property rights. Most chiefs and government officers are men, who tend to identify with, and therefore make decisions that tend to favour their own, while silencing women when their rights are infringed upon. Some simply say they do not want to interfere with culture. These responses have a disempowering effect on women seeking the protection of their property rights.

5. Expensive legal system

The legal process is expensive both in terms of time and money, and therefore a hindrance to accessing justice in court. Cases take too long to be heard and determined. Costs related to court fees, travel costs, witness expenses, among others are prohibitive to most women. Even where

judgment delivered is favorable to the women, it is still difficult to enforce it especially in a rural setting among communities hostile to the woman.

6. Fear

Women who try to fight back face hostility and may be subjected to physical or sexual violence, or ostracized. They therefore would rather put up with the property rights abuses to avoid physical injury to themselves.

7. Lack of Participation

Women are not sufficiently represented in institutions that deal with land. Their rights under communal ownership and group ranches are also not defined, which allows men to dispose of family land without consulting women.

6. Discrimination encouraged by the law .

Existing family laws are not gender sensitive and have contributed towards entrenching discrimination against women as far as their land and property rights are concerned. For example, the Law of Succession Act allows equal inheritance rights for men and women, yet at the same time excludes specific gazetted districts in which customary law remains supreme. It gives preferential treatment to men over women and . For example, when a woman dies, there are no limits as to how her husband should deal with her estate. Yet when a man dies, the wife's rights to the estate of the deceased husband are restricted. Furthermore, the Succession Act also exempts Muslims women from its provisions. Courts too have overlooked and misinterpreted family property and succession laws.

Conclusion

Women's access to land determines not only women's and households' level of living and livelihood, but also food security. The existing obstacles, women's property rights are abused and they are therefore impoverished by lack of access to land and property. Culture evolves, and as important as culture is, if they are a source of discrimination against women, they must evolve. This is crucial not only for the sake of women's equality, but because there are real social consequences to depriving half the population of their property rights. Women's insecure property rights contribute to low agricultural production, food shortages, underemployment, and rural poverty. If Kenya is to meet its development aims, it must address the property inequalities that hold women back.

MODULE 2: INTERNATIONAL AND REGIONAL FRAME- WORK FOR WOMENS LAND AND PROPERTY AND LAND

Session Aim:

By the end of this session, participants will be able to;

- a. Identify key regional and international laws which Kenya has ratified and which address women's rights to land and property.
- b. To demonstrate an understanding of the provisions of those instruments, and how they relate to Kenyan law.

Trainers Guide

Participants may be asked to name the regional and international instruments that they know of, and what they contain on women's property rights. They may discuss these in groups than report back before the presentation begins.

Time requires: 10 minutes. Discussion 5 minutes, report back 5 minutes

Unequal property rights and harmful customary practices violate international laws which recognize the rights of women as equal to those of men. Kenya has ratified international treaties requiring it to eliminate all forms of discrimination against women, including discrimination in marriage and family relations, to guarantee equality before the law and the equal protection of the law, and ensure that women have effective remedies if their rights are violated. International law also obliges states to modify discriminatory social and cultural patterns of conduct. Kenya is violating those obligations.

Under the Constitution (Article 2) the general rules of international law shall form part of the law of Kenya. This means that every instrument that Kenya has ratifies at regional or international level becomes part of Kenyan law. Regional instruments are those that cover Africa or parts of Africa only, while international ones cover the whole world, apart from countries that have not accepted to sign, ratify or accede to them. Most of the principles contained in the Constitution have been borrowed from these instruments.

Regional and Sub regional instruments

(i) The African Charter on Human and Peoples' Rights (ACHPR)

The provisions in the ACHPR was adopted in June 1981 by the organization of African Unity (OAU) , now the African Union (AU) to provide a human rights framework for Africa that takes into account the peculiar circumstances of the continent. The ACHPR gives recognition to rights of women by stating under Article 2 that;

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

It further states under Article 3 that

“Every individual shall be equal before the law”

and that

“Every individual shall be entitled to equal protection of the law”.

The Charter therefore by extension prohibits discrimination against women even on the issue of woman’s property and land rights.

Under Article 18, member states are required to eliminate every discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

(ii) The Common Market for Eastern and Southern Africa (COMESA) Gender policy

The main objective of the COMESA gender policy is to facilitate the inclusion of perspectives into all policies, structures and systems. The gender policy recognizes women and men in their different roles, have unequal access to resources and benefits, and that women have limited access to land. sustainable economic and social development of the region requires the full and equal participation of women, men and youth. Articles 154 and 155 of the COMESA treaty, recognize the critical and important contribution of women to the economic and social transformation of the region. The treaty also recognizes the role of women in business especially participation in Agriculture, Industry and Trade.

Through the gender policy, COMESA commits itself to eliminate gender inequality and ensure women’s economic empowerment and equal access to and control of resources and opportunities.

(iii) East Africa Community Treaty

Article 6 (d) of EAC-Treaty recognizes gender equality as one of its fundamental principles that shall govern the community.

It also recognizes the promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights therefore prohibiting gender discrimination in land and property issues.

International legal instruments

Specific standards to protect women’s rights include;

- Convention on the Elimination of all forms of discrimination against women (CEDAW).
- The Universal Declaration of Human Rights (UDHR), 1948,
- The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966,

(i) The Convention on the Elimination of all forms of Discrimination Against Women

CEDAW is unique among existing human rights instruments because it is concerned exclusively with promoting and protecting women’s human rights which operates from the premise that patriarchy is a global reality. It is the most important legally binding international document concerning the human rights of women. CEDAW is sometimes referred to as the international bill of rights for women as it offers the most comprehensive coverage of women’s rights for both public and private spheres

by bringing together all conventions and treaties that protect and promote the rights of women

Under Article 14 of CEDAW, states are obliged to ensure equal treatment of men and women in land and agrarian reform. Land rights under marriage and inheritance laws should be based on equality.

Article 16 of CEDAW states that land tenure reform must ensure women's property rights during marriage, at divorce and in the event of her husband's death. This provision is mirrored in the Kenyan Constitution.

(ii) The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a declaration adopted by the United Nations General Assembly in 1948 after the Second World War and represents the first global expression of rights to which all human beings are inherently entitled. Under the UDHR, provisions relating to land and property include:

- a. The rights to equality before the law and to equal protection of the law (Article 7);
- b. The right to own property (Article 17);
- c. The right to adequate housing (Article 25).

All member states therefore are under an obligation to ensure that women and men have equal rights to property and land.

(iii) Beijing platform for Action, 1995,

The Beijing Platform for Action (BFA) is an agenda for women's empowerment which aims at accelerating the removal of all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making.

The BPA calls upon Governments to "Undertake legislation and administrative reforms to give women equal rights with men to economic resources, including access to ownership and control over land and other properties, credit, inheritance, natural resources, and appropriate new technology".

The development of the National Land Policy, and the new laws including the National Land Commission Act 2011, the Land Act 2012 and the Land Registration Act 2012 are significant steps made by Kenya to achieve some of the vision of these regional and international conventions as far as women's land and property rights are concerned.

MODULE 3: THE CONSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF WOMEN'S PROPERTY RIGHTS

Session aim;

By the end of this session, participants will be able to

- (a) Identify constitutional provisions on women and property rights
- (b) Demonstrate an understanding of those rights and their implications on women's lives within communities.

Trainers Guide

The session may begin by asking participants to share what they know about the constitutional provisions on women's rights to land and property. The importance of this is that it will help the trainer determine the participants' levels of understanding, and hence tailor make her/his entry level with a particular group. *Time required 10 minutes*

Several provisions exist in the Constitution that guarantee the rights of women to own property and land. These are provisions relating to;

- Access to justice,
- National values and principles,
- Equality and freedom from discrimination,
- The protection of the right to property
- Principles of land policy, and
- Judicial authority.

The constitutional provisions on land are based on the National Land Policy (NLP), which identifies women's land rights as an issue requiring special intervention. The key principles in the Land policy (2009) include access to justice, gender and inter generational equity. Under the Land policy principles and guiding values, gender equity and sensitivity as principles have been given prominence.

1. Access to justice

Trainer's guide

The participants may be asked to list some of the challenges people face, women in particular, in seeking court intervention whenever their rights are violated. Practical experiences may be shared. Note down the responses on flip chart and use the information to explain the basic concepts of access to justice.

Article 48 of the Constitution provides for the right to access to justice and states

“the state shall ensure access to justice for all persons and , if any fee is required, it shall be reasonable and shall not impede access to justice”

The elements that make up access to justice are that;

- I. People, notably the poor and vulnerable,
- II. Suffering from injustices,
- III. Have the ability to have their grievances listened to,
- IV. Obtain proper treatment of their grievances by state or non-state institutions,
- V. Get redress of those injustices on the basis of rules or principles of state law, religious law or customary law in accordance with the rule of law.

The implication of Article 48 are that even poor people can now seek court intervention when their rights are violated. Women who have been denied land or property rights can go to court even when they have no money to pay for legal or court fees by invoking the provisions of Article 48.

Women are generally marginalized in society and poverty is often said to wear the face of a women. For there to be access to justice for women , laws must be put in place in place to address women’s right to land and property, women must be aware of those laws, and the courts should deal with cases of injustice and discrimination against women in strict compliance with the law. The courts must also ensure that the orders given for purposes of fulfilling right to property and land are enforced.

National values and principles of governance

Article 10 ii (b) of the constitution sets out the national core values and principles of governance, which include

- *Human dignity*, - women should not be treated with indignity when it comes to their property rights, for example, being thrown out of her and or home, or taking away her property upon the death of her spouse.
- *Equity*- women must have a fair share or opportunity to inherit family land or property, or equal opportunity to acquire property and to participate in decision making organs regulation land.
- *Social justice*- women must not suffer any form of injustice as far as issues of land and property are concerned. For example, courts or government administrators must ensure land and property issues are resolved in accordance with the rule of law.
- *Equality*- land and property matters must be handled or decided on the basis of the principle of equality between women and men(Art 27 of the Constitution)
- *Human rights*; The right to property is a human right. Women’s rights are human rights too and therefore women’ right to property must be protected.
- *Non-discrimination and protection of the marginalized*; women are often marginalized and discriminated against on land and property, which is now prohibited by the constitution.

Equality and freedom from discrimination

Article 27(2) of the Constitution states that

“equality includes the full and equal enjoyment of all rights and fundamental freedoms”

Article 27(3) provides that

“women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.”

The implication of Article 27 is that one cannot justify the discriminatory treatment of a woman or girl on the basis of their sex when dealing with issues of property and land.

Protection of right to property

Article 40 (1) provides that,

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

- (a) of any description and
- (b) in any part of Kenya”.

Article 40 (2) prohibits parliament from enacting any law that allows the government or any individual to

- (a) ...“deprive a person of property of any description or of any interest in, or right over, any property of any description or
- (b) ...to limit or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).”

Article 27 of the Constitution provides for equality and freedom from discrimination on the basis of sex, marital status, belief, culture, among other grounds. The provisions under Article 40 therefore imply that women, like men, have a right to own property and land of any kind anywhere, and culture and traditions cannot be used to deprive them of those rights.

Article 45(3) of the Constitution provides that parties to a marriage will be entitled to equal rights at the time of marriage, during the marriage and at its dissolution. This means that upon entry into marriage, the parties become equal partners. Matrimonial property is discussed further in Module 5.

Principles of land policy

Article 60 (1) (f) provides for the principles of land policy which include the elimination of gender discrimination in law, customs and practices related to land and property in land. This article is important because it seeks to rectify historical injustices that have continually faced the women of Kenya. The previous constitution promoted discrimination of women in land and property rights by allowing for the application of customary laws which are discriminative in Nature. This article will benefit not only the women but Kenyan citizens generally.

Article 60 (1) (f) eliminates gender discrimination in relation to land and property and gives everyone, including women, the right to inheritance and unbiased access to land. The Constitution ensures

that women and men will have the right to equal treatment and opportunities in political, economic, cultural and social spheres without discrimination as provided for under Article 27 (3).

Judicial authority

The constitution requires under Article 159(2) that courts must be guided by the principles that;

- (a) Justice shall be done to all irrespective of their status- *even women who are disadvantaged must benefit from justice processes;*
- (b) Justice shall not be delayed- *women tend to give up on their cases when they take too long. This provisions allows for the legitimate expectations that justice will be dispensed quickly.*
- (c) Alternative dispute resolution (ADR), which includes traditional justice mechanism, will be applied when appropriate- *women sometimes shy away from public hearings that characterize a court hearing. ADR is a private process that allows for amicable settlements that serve the best interests of the parties. For women who find it difficult to go through the formal justice processes, there is now a more suitable alternative to through which they can get quicker, less costly and more satisfying settlements.*
- (d) Justice shall be administered without undue regard to procedural technicalities- *women who are not conversant with legal technicalities can pursue their cases even with limited knowledge of court procedures.*

Article 159 (3) provides that

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

- (a) contravenes the Bill of rights
- (b) is repugnant to justice, and morality or results in outcomes that are repugnant to justice or morality
- (c) or is inconsistent with this constitution and any written law.”

Trainers Guide

Participants may share some examples of what they have experienced or witnessed, that they consider to be repugnant to justice and morality.

The examples given further may be used to demonstrate how they contravene the bill of rights, for example, Article 27 on equality and non discrimination, article 10 on national values and principles or article 40 on the right to property.

MODULE 4: NATIONAL LEGAL FRAMEWORK ON LAND

Session aim:

1. By the end of this session, participants will be familiar with gender principles contained in the recently enacted laws on land, namely;
 - a. The National land Commission Act 2012
 - b. The Land Act
 - c. The Land Registration Act 2012

The enactment of the new land laws has in effect repealed a number of laws that formerly existed to regulate land issues in Kenya. There are;

- The Indian Transfer of Property Act;
- The Government Lands Act;
- The Registration of Titles Act;
- The Land Titles Act;
- The Registered Land Act;
- The Wayleaves Act; and
- The Land Acquisition Act.

Part 1

The National Land Commission Act No 5 of 2012:

The National land Commission (NLC) Act aims at giving effect to the constitutional provisions for the establishment of a National Land Commission to manage land in Kenya. The Act elaborates on the functions and powers of the NLC, and qualifications and procedures for appointments to the Commission; The objective of the Act is to give effect to the objects and principles of devolved government in land management and administration, to establish mechanisms of handling grievances over land and for connected purposes.

The NLC takes over the management of land on behalf of the national and county governments, thus removing the discriminatory cultural practices under which communal land is currently managed. Under the Act, the NLC should be guided by the following values and principles contained in Article 60 of the Constitution:

- (a) *Ensure equitable access to land*; This includes women's right not only to occupy and work land, but also to equitably own it.
- (b) *Security of land rights*; this is important especially in the advent of large scale commoditization of land resources. The rights of women who, for example, are at risk of being thrown out of their matrimonial homes upon breakdown of marriage or upon death of a spouse can be secured by invoking this requirement.

- (c) *Sustainable and productive management of land resources*: women play a big role in the agricultural sector, are responsible for ensuring availability of wood fuel and for domestic use, yet they remain marginalized, neglected and discriminated against in the distribution of resources. This requirement should correct the status quo and make it possible for women to enjoy fair distribution of benefits arising from their contribution in agricultural production.
- (d) *Transparent and cost effective administration of land*: Women often have no idea how and when land transactions within the community, or even at family level, are being undertaken as they are completely left out of negotiations or agreements on land. Enhanced transparency will ensure that women are well informed of such transactions, they can contribute to the processes and will be better placed to oppose actions that may disadvantage or marginalize them further.
- (e) *Sound conservation and protection of ecologically sensitive areas*: The NLC has a role in preventing degradation of the environment. This will translate to stopping practices that destroy the environment leading to further poverty. With better environment, there will be better food production, and better health for families, and less burden for women particularly in rural areas.
- (f) *Elimination of gender discrimination in law, customs and practices related to land and property in land*; As pointed out in the earlier lesson, discrimination of any kind against women is now outlawed and the commission is now under an obligation to ensure that the non discrimination provisions in the law and in the Constitution are upheld and fully implemented.
- (g) *Encouragement of communities to settle land disputes through recognized local community Alternative dispute resolution initiatives consistent with the constitution*: This requirement recognizes that community mechanisms may be influenced by patriarchal and discriminative approaches, and therefore includes the need for those processes to be in line with the Constitution which prohibits discrimination. A major advantage of community mechanisms of dispute resolution is that they are more accessible, cost effective and less technical for women.

The NLC Act provides a framework for ensuring that land reform initiatives guarantee the equal right of women to possess, inherit, access, and transfer their land to persons of their choice. It, however, does not provide clear mechanisms for addressing historical injustices women of Kenya have faced in ownership, access, control and management of land and property including landless women or displaced. The Commission therefore would be expected to provide guidance. The commission should develop guidelines through a participatory and inclusive process, particularly ensuring the participation of women, on how equal rights for women will be achieved. It should also put in place monitoring processes to ensure compliance with the principles espoused under the Constitution.

Exercise

Divide the participants into groups of about six people per group. Let them brainstorm on and make recommendations on key actions they need to take in order to actualize those rights within their respective communities. Provide flip charts and let them list the actions and report back. Time needed: 30 Minutes

Composition of the members of the National Land Commission

The NLC provides under Section 7(1) for the composition of the Commission. The commission shall comprise of a chairperson and eight members, whose appointments must be in compliance with the provisions of the constitution, which provides guidelines on gender equity.

- (a) The chairperson appointed in accordance with section 7 of the Act;
- (b) Seven members appointed in accordance with section 8 of the Act;

The Section 250(11) of the Constitution provides that the chair and vice chair of a commission shall not be of the same gender. This means that if the chair is a man, the vice chair shall be a woman and vice versa. The commission also has to observe the constitutional requirement that not more than two-thirds of its members shall be of the same gender. This means that out of the nine commissioners, at least three must be women.

The inclusion of women in the national land governing body should translate to better articulation and inclusion of gender sensitive policies and actions for the improvement of women's right to land.

Part II

The Land Act No 6 of 2012

The Land Act seeks to give effect to Article 68 of the constitution. It focuses on revising, consolidating and rationalizing land laws and eliminate culturally biased practices that hinder women's participation in the control of land. It also seeks to provide for sustainable administration and management of land and land-based resources and for the connected purposes.

Article 5 (2) of the Act provides for "equal recognition and enforcement of land rights arising under all tenure systems and non discrimination in ownership of, and access to land under all tenure systems"

Allocation of public land

Section 12 states that the NLC, may allocate public land on behalf of the national and county government land by way of public auction, or through application targeting groups to ameliorate their disadvantaged position. Women, as a disadvantaged group stand to benefit from this provision. The use of public procedures where everybody has a chance to apply for public land allows women fair opportunities to also apply for available allocations. Section 14 requires the commission to send out a notice to the general public and other interested parties informing them of the intention to allocate public land.

Conservation of land based natural resources

The Commission is charged with the responsibility of making rules and regulations for the sustainable conservation of land based natural resources and provide incentives for individual and communities to invest in income generating natural resource and conservation programmes. It is also required to develop regulations on measures to facilitate, access, use and co management of forests, water and other resources by communities who have customary rights over these resources.(section 19).

These provisions if well utilized can result in the improvement of women's lives at community level, considering the significant roles they play for example in food production and providing water for domestic use.

Contracts over land

Section 38 of the land Act provides that all contracts;

- (a) Must be in writing
- (b) Signed by all parties to it
- (c) Attested by a witness

unless the sale is through a public auction

The contract can be canceled and the seller can take back their land in the event of breach of contract, either by repossessing the land peacefully or seeking a court order.

Who is a spouse?

The term 'spouse' has not been specifically defined in the Land Act. However, its definition could be inferred from the definition of the term 'marriage', which has been defined as a "civil, customary or religious marriage". This means that a woman in a "come we stay" association that is not formally recognized by any of the marriage regimes would not qualify to contest any transactions by her partner. The lack of a specific definition of the term 'spouse' is likely to cause practical difficulties in determining whether or not spousal consent was obtained for a transaction.

Charges on matrimonial property

Under Section 105 of the Land Act, the court may re-open a charge of any amount secured on matrimonial property, "*in the interest of doing justice between the parties*".

The parties referred to by this provision include the borrower's spouse. The court has wide powers in considering an application to reopen a charge on matrimonial property. Furthermore, the court is required to consider, among other things:

- The financial standing and resources of the borrower, relative to those of the lender, at the time the charge was created;
- The interest rates and any variation thereof from time to time; and
- The age, gender, health, experience and understanding of the commercial transaction of the borrower, at the time the charge was created.

These provisions put women in a better position to challenge any mischievous transactions their spouses may have entered into that are detrimental to the woman or to the family as a whole.

Part III

The land Registration Act, 2012

The Land Registration Act (LRA) has been enacted to revise, consolidate and rationalize the registration

of titles to land and to give effect to the principles and objects of devolved government in land registration, and other related purposes. All land registered or deemed to be registered under the LRA must comply with the provisions of the Act. Accordingly, traditions and customs that could be detrimental to women's property rights cannot be applied when dealing with land governed by the LRA.

Effects of registration

Upon acquiring land and registering it under the RLA, the registered proprietor becomes the absolute owner of the land. A person registered as proprietor of a lease holds the leasehold interest in the land (Section 24).

Once a certificate of title issued by the Registrar is prima facie evidence of absolute ownership. That title can only be challenged by reason of

- (a) Fraud or misrepresentation by the proprietor,
- (b) Illegally or unprocedurally acquired through corruption

For purposes of giving evidence to prove any wrongdoing, a certified copy of the certificate of registration shall be considered as an original (section 25)

Overriding interests

All registered land is subject to overriding interests, unless the contrary is indicated in the register. These include;

- (a) *Spousal rights over matrimonial property* *Trusts including customary rights:*
- (b) *Rights of way, water and profits subsisting at the time of first registration under this Act;*

This means that whether or not a wife's name appears on a certificate of registration, her rights as a wife will be considered in any dealings regarding the land in question. Further if women who, for example, must access water from a source within the registered land, their interest would have to be protected.

Execution of instruments

All instruments under the LRA must be signed or thumb printed as evidence of personal acceptance of the instrument. (If it is a body corporate or association or cooperative society, the signing must be done in the presence of a magistrate, judge, advocate or notary public (Section 44).

The following documents must also be attached to the instrument;

- Copy of identity card
- Copy of Personal Identification Number (PIN)
- Passport size photographs
- Where applicable, a marriage certificate
- Any other document that the cabinet secretary may prescribe.

The execution must be verified by a witness for purposes of establishing identity. The Registrar has the discretion to dispense with this requirement should she or he deem it appropriate.

Minors

The name of a person aged under 18 can be entered in the register under the name of a guardian either on first registration or as a transferee or on transmission. The minor's interest is to be held in trust until the child attains age 18. The Registrar is required to place a restriction on the property and the child should not in any way deal with the land until she/he attains age 18. If the Registrar is aware that a child has been registered, she /he should register a restriction against that title (Section 47)

Note: Since it is impossible to get an identity card and PIN before attaining age 18, this provision seems to be unnecessary since one requires to have these documents to be able to sell, charge, lease or in any other way deal with the land.

Through Power of Attorney properly executed may allow an agent to act in a land transaction on behalf of a registered owner. A person with disability may be represented by a legally appointed guardian. The registrar must exercise due diligence and satisfy herself/himself that the person claiming to be guardian indeed is entitled to act as such.

Co-ownership between spouses

One of the gains for women in the new law is the creation of statutory rights for spouses, and any person seeking to carry out a land transactions will necessarily have to disclose their marital status. These rights affect all land and not just matrimonial property.

An important provision in the land Registrations Act relates to co-ownership of land between spouses. The Act provides that in settlement programmes, land shall be allocated to households in accordance with national values and principles of governance, which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalized. Key highlights of this act of relevance to women include

1. Presumption that the spouses shall hold the land as joint tenants
2. Registering spouses as joint tenants
3. Acquired interest in land (including customary land) through contribution of labour or other means to the productivity, upkeep and improvement of the land,
4. Participation of women in the settlement process

Section 93 of the LRA provides for co-ownership between spouses and states that

“Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses, or all the spouses-

- (a) There shall be a presumption that the spouses shall hold the land as joint tenants unless-
 - (i) A provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or he own name only, or that the spouses are taking the land as joint tenants; or
 - (ii) The presumption is rebutted in the manner stated in this subsection; and
- (b) The Registrar shall register the spouses as joint tenants.

(2) If the land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land....”

A spouse is deemed to be a co owner, even though their name may be missing from the title document – It recognizes that where land is held in the name of one spouse, but the other spouse has contributed to the productivity, upkeep or improvement of the land, the contributing spouse acquires interest in the land, whether or not this interest has been registered.

A sale or charge is void without the consent of a spouse- Any transaction, be it a sale, transfer, lease or charges of any land or dwelling house held in the name of one spouse shall require the consent of the other spouse for it to be valid.

Section 93 (3) provides that

“where a spouse who holds or dwelling house in his or her name individually undertakes a disposition of that land or dwelling house-

- (a) The lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or
- (b) The assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under s duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender of the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

A bank lending money with land as collateral is therefore under a duty to find out whether the consent of the other spouse or spouses has been obtained. If the borrower misleads the bank or lender or purchaser or other interested party, the transaction becomes void if contested by the spouse who did not consent to the transaction. This is a major gain for women who have characteristically been left out of such transactions by their spouses. The spouse or spouses are considered to have acquired an interest in that land.

This is a very important gain for women as it recognizes that women often are not included in certificates of title, yet they contribute substantially in food production or the general improvement of the property. It also gives recognition to polygamous marriages and ensures that all wives in a marriage are taken into account as far as their property rights are concerned.

Partition

Section 94 provides for partition of land by tenants in common, which can be done through applying to the Registrar. Under 94(3)(e), where the tenants in common are spouses or dependants who are not agreeable to the partition, the Registrar is required to take their concerns into consideration before making a decision to partition or not to partition the land. Before making the decision to partition, the Registrar must ensure that spouses or dependants are not rendered homeless by the partition.

Sale of Co owned land

The RLA provides that in the event that the land sought to be partitioned cannot be partitioned due to failure of the parties to agree on terms and conditions of sale, or because of any other reason,

the parties may approach court for orders that the land be sold and proceeds shared accordingly (Section 96).

This provision may be applied, for example, when sharing matrimonial property upon dissolution of a marriage and the parties cannot agree on who should keep the matrimonial home.

Penalties

Under Section 103, any person who gives false information or acts fraudulently with regards to a land matter may upon conviction, be fined five million shillings or imprisoned for five years or both.

MODULE 5: MATRIMONIAL PROPERTY

Session aim:

By the end of the session, participants will be able to;

1. Demonstrate an understanding of the current legal framework and proposed law for regulating matrimonial property.
2. Relate the legal framework to real life situations.

Trainers Guide

Participants may be asked to share experiences or incidences they have witnessed on injustices to women relating to matrimonial property upon termination of marriage. Alternatively, the trainer may go back to earlier flip charts and pick out examples that demonstrate violation of married women's rights upon termination of marriage, or upon death of a spouse.

Women's rights to matrimonial property have been largely compromised due to the patriarchal order of society that views men as the sole owners of matrimonial property

Article 68(c)(iii) provides that

“parliament shall enact legislation which shall regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage”.

Article 68(c)(vi) provides that parliament shall enact legislation

“to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land”

and

“to provide for any other matter necessary to give effect to the provisions” of the constitution.

These provisions seek to put right injustices women have historically faced in relation to matrimonial property.

So far courts have been relying on the Common Law adopted from the United Kingdom, particularly the Married Women's Property Act of 1882 and the Matrimonial Causes Act

1. Matrimonial Causes Act (MCA)

Under Section 28 of the MCA, after the pronouncement of a divorce, the court will make orders regarding the application of the settled property for the benefit of the parties and the children. This power shall be exercised even if there are no children meaning that they shall be exercised for the benefit of either spouses including the wife.

Section 29 provides that the court may give protection orders to protect a married woman's interest in her property acquired before the marriage or after a desertion. A husband or his creditors can under this section be estopped from laying claim over property acquired by his wife before their marriage or acquired during his desertion.

Married Women Property Act (MWPA) 1882

The Married Women's Property Act is a United Kingdom Statute of general Application which currently governs matrimonial property in Kenya. It was enacted in 1882 to reduce the legal inequalities between women and men, and also to give married women had the same rights over their property as unmarried women. The effect of this Act is that, for example, a married woman can retain ownership of property which she might have received as a gift from a parent, unlike before when a woman's property automatically became her husband's upon marriage. It provides that a married woman is entitled to hold and transact property separate from that of her husband for equal division of matrimonial property. This is, however, not yet entrenched in Kenyan statutory law and courts have been giving contradictory pronouncements on women's entitlements to matrimonial property upon a marriage breaking down.

The Act further provides that not only can a woman acquire property but she can also sue in her own name to protect such property including suing her husband.

Matrimonial Property Bill (MPB)

Kenya currently does not have its own legislation on matrimonial property. The MPB 2012 is yet to be debated in parliament. It seeks to give life to Article 45(3) of the constitutional which provides for equality in at the time of the marriage, during the marriage and after the marriage.

It provides guidelines on how matrimonial property is to be owned and controlled by spouses. It mainly aims at

- (i) Protecting the land and property rights of women in marriage, whether monogamous or polygamous, through defining the parameters of matrimonial property and creating provisions for women to control how this property is used
- (ii) It defines matrimonial property and acknowledges non financial contribution of women to the land and property acquisition.

The Bill defines matrimonial property to include; Matrimonial property includes the matrimonial home or homes, household goods and effects in the matrimonial home or homes, immovable property, owned by either spouse which provides the basic income for the sustenance of the family, any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property.

The principles adopted by the MPB include;

- Equality based on the fact that a married woman has the same right as a married man to acquire, hold and dispose of property whether movable or immovable; to contract; and to sue, and to be sued. (Clause 3)
- The capacity of either spouse in a marriage to acquire his or her own separate property during the subsistence of the marriage. (Clause 4)
- Where a man has two or more wives, each wife shall enjoy equal rights, be subject to equal liabilities and have equal status in law. (Clause 5).
- Interest of any person in any immovable or movable property acquired before a marriage shall not be affected by the marriage(Clause 6)

Other proposals in the Bill include;

Trust property

Trust property, which is defined in the Bill as property held by a spouse as trust property whether acquired by way of inheritance or otherwise. The Bill proposes that trust property shall not form part of matrimonial property- unless by agreement entered into before or during the marriage, parties have agreed otherwise.

Ownership of property

The MPB proposes that ownership of matrimonial property, should be deemed to vest in the spouses in equal shares irrespective of the contribution of either of them towards the acquisition thereof, and shall be divided accordingly upon the occurrence of divorce or dissolution of the marriage provided that in appropriate circumstances a determination can be made during the subsistence of the marriage.

Liabilities

Any liability incurred by a spouse before marriage relating to property shall after marriage remain the liability of the spouse who incurred it, except that if the property becomes matrimonial property under Clause 7 ,the liability shall be equally shared by the spouses ,unless they agree otherwise.

Contribution

Where one spouse acquires property whether before or during the marriage and the property is not and does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution shall acquire a beneficial interest in the property equivalent to the contribution made. (Clause 10)

Polygamy

Trainers guide

Invite the participants in their groups to discuss the best way, in their opinion, of sharing matrimonial property in a polygamous marriage. Describe a scenario to guide them in their discussion. Allow them 10 minutes to do this and report back.

Total time required: 20 minutes.

Where a man has more than one wife in a polygamous marriage;

- Matrimonial property acquired by the man and the first wife shall be owned equally by the man and the first wife only, if the property was acquired before the man married the second wife.
- Matrimonial property acquired by the man after the man marries a second wife shall be regarded as owned equally by the man, the first wife and the second wife, and the same principle shall be applied to any subsequent wife or wives.

Where it is clear either by agreement or through the conduct of the parties that any wife has her separate matrimonial property with the husband, then any such wife shall own that matrimonial property equally with the husband without the participation of the other wife or wives.

Special provisions

- No estate or interest in any matrimonial property shall during the subsistence of the marriage and without the consent of both spouses, be alienated, whether by way of sale, gift, lease, mortgage or otherwise, and either spouse shall be deemed to have an interest in such property capable –Clause .12 (1). *This means that women would have a say in how matrimonial property is dealt with within the family.*
- A spouse shall not be liable during the subsistence of the marriage to be evicted from the matrimonial home by or at the instance of the other spouse except in accordance with an order of a court.(Clause 12 (2))
- A spouse shall not be liable to be evicted from the matrimonial home by any person except-
 - On the sale of any estate or interest in the matrimonial home in execution of a decree;
 - By a trustee in bankruptcy; or
 - By a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.
- Parties can still own and dispose of property separately unless they have agreed otherwise. Where, during the subsistence of a marriage, property is acquired in the name of one spouse, there shall be a rebuttable presumption that the property belongs absolutely to that spouse;
- Where the properties are in the joint names of the spouses, it shall be presumed that their beneficial interests therein are equal, unless there is evidence to the contrary. Clause13
- Where, during the subsistence of a marriage, either spouse gives any property to the other as a gift there shall be a rebuttable presumption that the property thereafter belongs absolutely to the donee.
- No spouse shall be liable solely by reason of marriage for any debt contracted by the other spouse prior to their marriage.

MODULE 6: The Law of Succession Act

Chapter 160 Laws of Kenya

Law of succession provides the mechanism by which property devolves from its deceased owner to the people he/she left behind. It seeks to ensure that all rightful dependant/beneficiaries inherit the deceased property and also provides for the procedures to be followed:

The law;

- (i) Describes beneficiaries of land and property in the event that a person dies. One of the beneficiaries is the spouse or spouses of the deceased.
- (ii) Gives provision for women to inherit their spouses property

The law of Succession Act seeks to give both men and women equal rights in matters of succession. However, it contains several discriminatory provisions. This law governs both succession with a will (testate) or without a will (intestate).

Testate Succession

The law of Succession Act provides for the making of wills and the accompanying formalities. The provisions are gender neutral and uses terms like “every person” or “any person”. Capacity of women to make wills has been specifically provided for. Under section 5(2), “ a female person, whether married or unmarried , has the same capacity to make a will as does a male person” as long as she is an adult of sound mind. The will may be oral or written. She can only make a will in respect of property that she owns. This means that matrimonial property if registered in the husband’s name only cannot be considered her property for purposes of making a will.

It is noteworthy that wills made by men tend to favour men over women.

Intestate Succession

Under Section 35, a surviving spouse in a monogamous union is the most suitable person to take charge of a deceased man’s estate, contrary to most customary laws.

Where there is no will, female and male children should inherit from their parents equally. If there is one surviving spouse and a child or children, the surviving spouse is entitled to

- (i) An absolute interest in the deceased’s personal and household effects and
- (ii) A life interest in the rest of the estate.

This means the surviving spouse becomes the absolute owner of personal and household items and can use other property, such as land and houses during the spouse’s lifetime. The spouse cannot dispose of the second category of property without court permission.

If the surviving spouse is a woman, her interest in the property terminates if she remarries.

A surviving husband’s interest does not terminate upon remarriage.

When the surviving spouse dies or, in a woman’s case, remarries, the estate goes to the children. The

intestate succession rules also provide that if one dies without a spouse or children, the estate goes first to the father, and if the father is dead, to the mother. Thus, even though women have inheritance rights under this act, men have priority rights.

What happens when there are no children within a marriage?

Section 36 provides that when a spouse dies and had no child with the surviving spouse, the spouse is only entitled to the first Kshs 10,000 or twenty percent of the residue of the net intestate estate and a life interest in the whole remainder, so long as in the case of a women, she remains unmarried.

How is property shared in a polygamous marriage?

In a polygamous marriage, when the man dies, the property is to be divided according to the number of wives or 'houses' and depends on the number of children per house. Every surviving wife is considered to be an extra unit to the number of children in the household. It does not matter whether the children are female or male.

Section 3(5) provides;

“notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another women, nevertheless a wife for purposes of this Act and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.”

This provision accommodates the tendency of African men to marry under statute then relapse back to traditional African practices. The provision has been criticized on the basis that it denies women security which they seek in a monogamous marriage, and they only realize later that what they considered matrimonial property has to be shared by other women, as often is the case, they knew nothing about.

The Act exempts Muslims, who are subject only to Islamic laws on succession.

The provisions of the Law of Succession Act, to a large extent attempts to eliminate discrimination against women. The practice is still disadvantageous to women and courts have given contradictory judgments when it comes to succession of wives and daughters.

Timing guidelines for training

Ideally the training should take two days as below. This will, however depend on the level of participation and the exercises that may be introduced by the trainer. The timelines below only serve as a guide for the trainer but may be altered as appropriate for each given training.

Module	Topic	Duration
Module 1	Background and Context of Women's property rights in Kenya.	2 hours
Module 2	International and regional framework for women's land and property rights	2 hours
Module 3	Constitutional Framework for the protection of women's property and land rights	3 hours
Module 4	National legal framework on land	3 hours
Module 5	Matrimonial property	3 hours
Module 6	The Law of Succession	2 hours

GLOSSARY OF TERMS

“Customary laws” means laws based on tradition that may be influenced by public opinion in a particular society about standards of behaviour or norms.

‘Community’ means a social, religious or occupational group whose members reside in a specific locality, often have a common cultural and historical heritage, sharing common characteristics and interests and perceived or perceiving itself as distinct in some respect from the larger society within which it exists. It may also refer to a locality inhabited by such a group.

“Community land” means land held by communities identified on the basis of ethnicity, culture or similar community of interest.

“Discrimination” means the prejudicial treatment of an individual based on their membership in a certain group or category. It involves the actual behaviors towards groups such as excluding or restricting members of one group from opportunities that are available to another group.

“gender inequality” means the differential treatment and outcomes that deny women the full enjoyment of the social, political, economic and cultural rights and development. It is the antithesis of equality of men and women in their human dignity, autonomy and equal protection.

“Marriage” means a civil, customary or religious marriage.

“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied by spouses as their family home

“Trust Property” means property held by a spouse as trust property whether acquired by way of inheritance or otherwise.



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