



**ANALYSIS OF THE LAW  
OF SUCCESSION ACT  
AND ITS IMPACT ON  
WOMEN'S LAND, PROPERTY  
AND INHERITANCE RIGHTS IN KENYA**

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KELIN remains committed to supporting the review process to ensure consistency in the framing and application of the laws on succession in Kenya to guarantee the full protection and realization of land and property rights for the women and girls in the country.

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## **LIST OF ACRONYMS AND ABBREVIATIONS**

ADR Alternative Disputes Resolution

AIDS Acquired Immunodeficiency Syndrome

CBO Community Based Organizations

FBO Faith Based Organizations

KELIN Kenya Legal and Ethical Issues Network on HIV &  
AIDS

HIV Human Immunodeficiency Virus (HIV)

## 1.0.EXECUTIVE SUMMARY

Land and property rights determine women's living conditions and their family survival, especially in the rural areas<sup>1</sup>. In rural Kenya, women not only rely on land for food produce but also as a source of income which enables them access health care services and educational opportunities for themselves and their families<sup>2</sup>. Despite the importance of these rights, discriminatory cultural practices and laws continue to inhibit the realization of women's land and property rights.

Kenya has taken progressive steps in elevating the status of women's land and property rights in the past years. The promulgation of the Constitution in 2010 provided better protection for women. The provisions on gender equality and elimination of gender discrimination in law, customs and practices related to land and property<sup>3</sup> are key gains for women's land and property rights.

In addition, Parliament has enacted progressive laws on marriage, matrimonial property, private and community land that recognize and protect women's land and property rights. However, reforms on women's right to inherit land and property continue to lag behind. Patriarchy, discriminative legal provisions and inadequate legislation on land, property and inheritance continue to inhibit the realisation of women's land and property rights. Cases of asset stripping, widow eviction, forced harmful cultural practices continue to be reported by women across the country.

KELIN has since 2009, been implementing projects that facilitate justice for widows, orphans and vulnerable children who have been denied their lawful right to access, inherit, and own land and property. While implementing the projects, KELIN has established that a major impediment in realising women's land, property and inheritance rights is insufficient inheritance laws. Whereas there exists the Law of Succession Act<sup>4</sup> that deals with devolution of property of a deceased person; women continue to witness land, property and inheritance violations as the law contains discriminatory provisions and fails to adequately protect them from harmful cultural practices. It is necessary therefore for the Law of Succession Act to be reviewed and amended. This analysis provides justification for the review and amendment.

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<sup>1</sup> OHCHR *Women and land, property and housing*

<sup>2</sup> *Ibid*

<sup>3</sup> Article 27, 60 (f)

<sup>4</sup> CAP 160 Laws of Kenya

## 2.0.INTRODUCTION

Research shows that in Sub-Saharan Africa, land is not only a source of security against poverty; but also provides physical safety; psychological well-being; economic development and defines social status. For women, secure land rights means that they are able to provide adequate food; shelter and safe water for their families and manage the impact of HIV/AIDs<sup>5</sup>. However, women face barriers to their access, use of, and control over land and property, due to inadequate legal protections and discriminatory customary practices within communities.

In Kenya, the 2009 National Land Policy<sup>6</sup> recognizes women's land rights as an issue that requires special intervention. In the past seven years, the State has undertaken drastic legal and policy reforms towards protecting women's land and property rights. The progressive 2010 Constitution provides that all persons regardless of their sex and gender have equal rights to own land and property anywhere in the country and prohibits the application of repugnant customary laws and practices. In addition, rules and provisions of international conventions and treaties ratified by the State are part of the laws of Kenya.

Parliament has since enacted several laws to give effect to the constitutional provisions on land. Whereas the State has taken necessary legislative steps to ensure legal protection of women's land and property rights, focus has been mainly on private acquisition and protection of land and property in marriage and upon divorce. Little has been done on land and property inheritance. The Law of Succession Act<sup>7</sup> (herein referred to as the Act) governs the distribution of an estate of a deceased person.

The Act governs inheritance matters for all non-Muslim Kenyans; provides for the protection of the deceased's estate; and sets up the mechanism which property devolves to the deceased's beneficiaries and/or defendants.

Whereas the Act contains certain progressive provision such as equal rights for men and women to inherit property and treat male and female children the same in terms of their right to inherit property from their parents, it fails to adequately protect women's inheritance rights. For instance, the Act does not provide adequate protection for women against asset stripping, eviction and harmful cultural practices; it promotes the use of patrilineal customary practices in distribution of an estate in certain parts of the

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<sup>5</sup> Netherlands Ministry of Foreign Affairs (2011) *Women's Economic Empowerment to Foster Food Security; Case Studies from Developing Countries*

<sup>6</sup> Ministry of Lands and National Land Policy Sessional Paper No. 3 of 2009

<sup>7</sup> CAP 160 Laws of Kenya enacted in 1981.

country<sup>8</sup> and discriminates against widows by relinquishing their inheritance rights when they choose to remarry<sup>9</sup>. Further, the enforcement of this law has been inefficient due to lack of awareness on the existing laws, discriminatory official response, and an expensive judicial process<sup>10</sup>. This has seen the application of customary laws which often restrict women's right to inherit land, leaving them vulnerable to dispossession.

The Constitution of Kenya mandates Parliament to revise, consolidate and rationalize existing land laws; enact legislation to regulate the recognition and protection of matrimonial property; and protect the dependants of deceased persons holding interests in any land, including the interest of spouses in actual occupation of land<sup>11</sup>. As a result of provision, Parliament enacted the following laws; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012 and Matrimonial Property Act No. 49 of 2013, which permit women to acquire and own land and property.

Further, marriage and domestic relations determines how women enjoy their land and property rights. The enactment of the Marriage Act No. 4 of 2014 that provides for recognized marriages; and Protection against Domestic Violence Act No. 2 of 2015 that prohibits harmful cultural practices, both reinforce legal protection of women's land and property rights. Unfortunately, Parliament is yet to amend the provisions of the Act to ensure that it conforms to the Constitution and is aligned with the newly enacted laws thereby disfranchising women. In addition, the ongoing divergent judicial interpretation on certain provisions of the Act presents confusion on the actual position of the law, making decision-making difficult.

The Constitution is the supreme law of the Republic and any law including customary law that is inconsistent with it shall to the extent of its inconsistent be void<sup>12</sup>. The Act must therefore be reviewed and amended to ensure that it complies with the Constitution and relevant regional and international human rights instruments. The amendments will offer strong safeguards for women's land, property and inheritance rights in Kenya. This research therefore analyses the provisions of the Law of Succession Act and its impact on women's land, property and inheritance rights with an aim of identifying areas for law reforms that will improve the status of women's land and property inheritance rights.

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<sup>8</sup> Section 32 of the Act

<sup>9</sup> Section 35 (1), (3) and 36 (1)

<sup>10</sup> FIDA Kenya *Women's Land and Property Rights in Kenya; Training Handbook* pg 3

<sup>11</sup> Article 68 (a) and (c) (iii) and (vi)

<sup>12</sup> Article 2 (4) of the Constitution of Kenya

### 3.0.ANALYSIS OF THE LAW OF SUCCESSION ACT, CAP 160

This section highlights the development and overview of the Act and its place in the current constitutional and legislative arena, with an aim of identifying possible areas for law reform. The section is divided into three parts namely; Pre-Law of Succession Act, which covers the period before 1<sup>st</sup> July 1981; Post – Law of Succession Act covering the period after 1<sup>st</sup> July 1981 to date as the law is still applicable to date; and Post Constitution of Kenya that covers the year 2010 to date.

#### 3.0.1. *Pre- Law of Succession Act, CAP 160*

The situation of inheritance rights in Kenya can be traced back to the pre-colonial period where land and property was communally owned and indigenous communities were governed by customary laws with each community applying its own systems<sup>13</sup>. Whereas patriarchy influenced the way of life during this period, women’s access to land and property rights were guaranteed and protected under the communal set up<sup>14</sup>. As a result of the patrilineal nature of society, women rarely had rights to own and pass on land to their heirs. The advent of colonialism saw the introduction of different inheritance regimes, namely African customary, African Christian, Hindu and European. African customary law was applicable to the indigenous community provided it was not repugnant to justice and morality.

At independence, the different succession and inheritance regimes continued to apply in different socio-ethnic groups. In addition, only four forms of marriages; Civil, African Christian, Mohammedan and Hindu marriages were expressly recognized by law<sup>15</sup>. Customary marriage only received recognition under the Judicature Act <sup>16</sup> which allows the courts to be guided by African customary law in civil cases so far as it is not repugnant to justice and immorality and inconsistent with any written law. Further, the concept of matrimonial property was alien to the indigenous population and courts were guided by the English Law, Married Women Property Act of 1882 in cases of division of matrimonial property.

It was during this period that individualization and absolute proprietorship of land began. This was coupled with a new regime governing marriage, property ownership and succession that disadvantaged a number of women who lost out on rights,

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<sup>13</sup> William .M Musyoka *Law of Succession* 2006 Law Africa

<sup>14</sup> Patricia Kamere- Mbote *The Law of Succession in Kenya: Gender Perspective in Property Management and Control* 1995 IELRC

<sup>15</sup> Marriage Act CAP 150, The African Christian Marriage and Divorce Act CAP 15, The Mohammedan Marriage Divorce Act CAP 156 and The Hindu Marriage and Divorce Act CAP 157

<sup>16</sup> Section 3(2) CAP 8

including those that were customarily protected such as right of access and use of land<sup>17</sup>. For example, African Christians were considered to have adopted the English way of life and therefore English marriage and succession laws were applicable<sup>18</sup>. In *Re Ruenji H.C. Mis. Case No 136 of 1975* and *Re Ogolla (1978) KLR*, the deceased persons in both cases married under African Christian Marriage and Divorce Act (*now repealed*) which did not permit polygamy. The deceased without terminating their first marriage proceeded to marry subsequent wives under customary law. The courts held that the deceased subsequent marriages were *null and void* as they lacked capacity to enter into subsequent marriage. The subsequent wives and their children were therefore not entitled to inherit the deceased's estate.

In 1968, the Commission on Law of Succession was set up to consider the existing laws on succession with an aim of recommending a new comprehensive and consolidated law. The Commission work saw the enactment of the Law of Succession Act, CAP No 160 which was assented on 13<sup>th</sup> November 1972, and commencement delayed until 1<sup>st</sup> July 1981.

### **3.0.2. Post – Law of Succession Act**

Law of Succession Act was created to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons<sup>19</sup>. The Act initially governed all persons until a 1990 amendment that exempted Muslims from applying the law<sup>20</sup>. The Act; has various provisions that seek to protect and promote the rights of women which include:<sup>21</sup>

- a) Women are permitted to make wills and challenge one if not adequately provided for.
- b) A wife ranks high among the dependants of the deceased husband and a surviving spouse is considered as the most suitable person to take charge of her deceased husband's property; and
- c) Children are allowed to inherit without making any preference to a male or female child<sup>22</sup>

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<sup>17</sup> Perpetua Wambui Karanja *Women's Land Ownership Rights in Kenya* 1991

<sup>18</sup> *Ibid*

<sup>19</sup> Preamble- Law of Succession Act CAP 160

<sup>20</sup> Section 2 (3) and (4)

<sup>21</sup> Section 5, 26, 29, 35, 36, 37, 38, 39, 40 and 41 of the Act

<sup>22</sup> International Women's Human Rights Clinic Georgetown University Law Center & The Federation of Women Lawyers: Kenya —*Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation* | 2009

However, despite the progressive provisions, the Act contains discriminatory provisions that hinder full realization of women's inheritance rights. Below is an analysis of the discriminative provisions of the Act.

**a) Application of Customary law to persons who died prior to the commencement of the Act<sup>23</sup>**

The Act provides that customary law will apply to persons who died prior to the commencement of the law in 1981. This provision disproportionately affects women as the distribution of a deceased person's estate among Kenyan communities is patrilineal whereby women are not allowed to inherit land<sup>24</sup>.

The courts have made varied pronouncements on the matter. For example in *Re Estate of Mutio Ikonyo (deceased) & Peter Mutua Ngui & 2 Others (2006) eKLR*, the court ruled that customary laws of the deceased person will apply in the distribution of the deceased's estate thereby disinheriting female members of the deceased. However, another judge in *Re Estate of Pricilla Wairimu Kamau (2005) eKLR*, ruled differently that whereas the deceased died prior to the enactment of the Act, customary laws that discriminate against women (on inheritance) could not be applicable since they are repugnant to justice.

It was believed that the Court of Appeal in case of *Rono -vs- Rono (2006) 1 LKR (G&F)* ended the justification of using customary law to disinherit women by allowing the daughters of the deceased to inherit his estate. However, in 2013 the learned judge in *Re the Estate of Kiguta Mukei alias Kiguta Mukii (Deceased) [2013] eKLR*; ruled that since the deceased passed away in November 1977, the applicable law was Kikuyu Customary law which does not allow women to inherit. The objector having been a female was deprived of her inheritance rights.

It is clear that the provision coupled with the varied court pronouncements is harmful to the realisation of women's land, property and inheritance rights. In addition, the provision contravenes the constitutional provisions on supremacy of the Constitution, equality and non-discrimination<sup>25</sup> and should therefore be deleted.

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<sup>23</sup> Section 2 (2)

<sup>24</sup> Cotran, E. (1969) *Reinstatement of African Law Kenya II The Law of Succession 2* London: Sweet and Maxwell

<sup>25</sup> Article 2 and 27

## **b) Exclusion of application of the Act by Muslims<sup>26</sup>**

The Act does not apply in cases where the deceased person was a Muslim. The provision allows for the mandatory use of Islamic law thereby denying surviving spouse or children regardless of their religion and gender, the right to choose the succession regime to apply. The Constitution of Kenya under Article 24 (4) allows for application of Muslim law before the Kadhi's court to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.

However, Article 170 (5) provides that the jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts. In *R.B & R.G.O v H.S.B & A.S.B [2014] eKLR* the learned judge ruled that the profession of Muslim faith is distinct from the necessary ingredient of submission to the jurisdiction of the Kadhi's Court to deal with the personal law matters of marriage, divorce and inheritance of Muslims. To compel all Muslims to subject themselves to the jurisdiction of the Kadhi's Court would be contrary to all notions of choice, which is the basis of rights and freedoms in the Bill of Rights. He stated;

*'...Hence the provision is for the Muslims to submit, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi's Court...'*

This provision should be amended to remove the compulsive provision on application of Islamic law.

## **c) Discrimination against child or children born out of wedlock<sup>27</sup>**

Section 3 (2) of the Law of Succession Act states:

*'...References in this Act to 'child' or 'children' shall include . . . in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed parental responsibility...'*

This provision presents the notion that paternity is optional and renders the ability of a child born out of wedlock to have a legal relationship with their father only subject to the father's recognition and acceptance. Section 3(3) further limits the rights of children born out of wedlock by extending this optionality to those related to an unwilling

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<sup>26</sup> Section 2 (2) and (3)

<sup>27</sup> Section 3 (2) and (3)

father: A child born out of wedlock is also precluded from enjoying relationships to other persons through their fathers if the father has not recognized, accepted, or assumed responsibility for them per Section 3(2). Thus, if a father does not wish to have a relationship with his child born out of wedlock, the Act completely precludes the child from inheriting from the father's relatives, for example the child's paternal grandparents.

The recognition of a legal connection between a father and his children born out of wedlock is vital under the Law of Succession Act because, without it, the children are precluded from enjoying rights vis-à-vis unwilling fathers that make references to the words "child" or "children." The sections that would preclude children born out of wedlock include Section 26 and 38 of the Act. The provision assures a child born out of wedlock parental care and protection from the mother during the mother's life and beyond her death, even if a mother never acknowledged or raised the child during her lifetime. However, the same is not true for the father.

This provision is unconstitutional because it violates the rights and fundamental freedoms of children born out of wedlock and unmarried women in inheritance. The Constitution under Article 53 (1) (e) provides that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. In making reference to the Constitution, the Constitutional Court in South Africa in *Bhe and Others v. Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)* ruled that a law which denied children born out of wedlock the right to intestate succession from their fathers was unconstitutional.

#### **d) Security in marriage<sup>28</sup>**

Section 3 (5) of the Act reads;

'...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 woman, nevertheless a wife for the 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 affects women in monogamous and polygamous marriage and those in cohabiting relationships. A person married under the Civil, African Christian Marriage

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<sup>28</sup> Section 3 (5)

Act (repealed) and the Marriage Act (repealed) were incapable of contracting a valid marriage under any customary law, and this informed the jurisprudence in **Re Ruenji H.C. Mis. Case No 136 of 1975** and **Re Ogolla (1978) KLR**. However, the amendment of Section 3 (5) when the Act came into force in 1981, saw courts allow women married under customary law by a man who had previously married under statute as wives and their children as children for the purpose of the Act and therefore entitled to a share in the estate of a deceased person.

The court in **Matter of Estate of Reuben Nzioka Mutua (deceased) P&a Cause No. 843 of 1986**, gave different interpretation of the Section, by stating;

*“... I see the amendment (Section 3(5) as having been brought in to cater for women married under customary law who were either neglected or abandoned by their husbands during his lifetime.....if it is interpreted any other way it would render useless any marriage under statute...’*

This interpretation was reversed by the Court of Appeal in **Irene Njeri Macharia v. Margaret Wairimu Njomo and another Nairobi Court of Appeal Number 139 of 1994 (1996) eKLR** where the court ruled that notwithstanding the provisions of Section 37 of the Marriage Act (*repealed*), a woman married under a system which recognizes polygamy is a wife *for* purposes on succession only.

The High Court in **Jessica Atieno Onyony V Cecilia Angela Marwah & another [2006] eKLR** gave a different interpretation of the section. Justice Kubo ruled that the deceased having not dissolved his monogamous marriage, had no capacity to marry another woman during the subsistence of the marriage and his purported customary marriage was, therefore, a nullity and incapable of conferring upon the applicant the status of a wife as far as statute law is concerned.

The court in 2017 was guided by the Court of Appeal decision in the matter of **Re estate of T.O.O (Deceased) [2017] eKLR** and proceeded to recognize a woman married under Luo customs as a wife under the Act despite the deceased having contracted a statutory marriage with his first wife. It is worth noting that the court in **Irene Njeri and Jessica Atieno** cases recognized the children born by subsequent wives as dependants.

It is clear that the provisions of Section 3 (5) invalidate the equality in marriage under the Constitution since it denies women security in marriage, especially when they

transact monogamous marriages.<sup>29</sup> The contradicting interpretation of the Section by the courts hinders seamless implementation of the provision.

In addition to recognized marriages, courts have interpreted this provision to allow women in cohabiting relationships to be considered as dependants. However, the courts have set criterion before presumption of marriage declaration is made. In *Mary Njoki v. John Kinyajui Mutheru and others Civil Appeal No. 71 of 1984* the court stated that a party needs to

*“...establish long cohabitation and acts of general repute..... there has to be evidence that the long cohabitation is not a mere friendship between a man and a woman, that she is not a concubine but that it is safe to presume there is a marriage...”*

In *M.W.G v E.W.K [2010] eKLR*, the judge further ruled that the existence or otherwise of a marriage is a question of fact and is not dependent on any system of law except where by reason of a written law it is excluded. He proceeded to state;

*“... a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife...”*

The above interpretation implies that where a deceased contracted a marriage under statute, for purposes of Section 3 (5) cohabitation cannot be presumed as a marriage and therefore a cohabitee cannot be regarded as a wife.

#### **e) Discrimination based on social origin** <sup>30</sup>

Sections 32 of the Act exempts the application of intestacy in agricultural lands, livestock, and crops in certain areas of Kenya<sup>31</sup> and under 33 of the Act customary laws of the deceased shall be applied when distributing the deceased estate. According to Cotran, the laws applicable in those regions are patrilineal and therefore disadvantage women. The *gazetted* areas are mainly pastoral areas where mainly agricultural land, livestock, and crops are often the only property that the deceased person owned or for which the person had use rights and therefore they constitute the only property available to the widow to keep her out of poverty. The exclusion of these regions based

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<sup>29</sup> Patricia Kamere- Mbote *The Law of Succession in Kenya: Gender Perspective in Property Management and Control* 1995 IELRC

<sup>30</sup> Section 32, 33

<sup>31</sup> These areas are; West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok

on their social structures and the application of customary law in these areas violate Kenyan women's rights<sup>32</sup>

**f) Discrimination based on gender<sup>33</sup>**

Widows inheritance rights are relinquished upon subsequent remarriage under Sections 35 (1) and 36 (1) of the Act. The provision discriminates against widows who choose to remarry by stripping them of their property interest upon remarriage but the same treatment is not accorded to the widowers. This means that a widow will lose her right to live in the marital home if she chooses to remarry, but a widower will be allowed to remain in the marital home if he decides to remarry<sup>34</sup>.

Further, there is need to move beyond providing a spouse life interest over land. For women especially, life interest is not a guarantee that her interests will be protected unless such interest is registered. In *Festus Madegwa Ashimolela and Anor. vs Zembeta Samuel (2006)*, eKLR Justice GBM Kariuki held that ...." *The...widow shall have life interest in the said land. The life interest of the ...widow will not be safeguarded nor will the order have meaning unless the land remains in the hands of the heirs. Accordingly, I order that there shall be registered against land parcel No. Isukha/Shitochi/1493 an inhibition order to prevent registration of any dealing in the said parcel...*"

In addition, a under Section 39 (1) a), a father is granted priority to inherit a deceased person's estate and a mother is only allowed to inherit under Section 39 (1) b) if the father is deceased. This provision discriminates against women by preferring fathers over mothers to inherit.

**g) The Act fails to adequately protect women from harmful practices**

In addition to the above discriminative provisions, the Act fails to effectively protect women from asset stripping, eviction and harmful cultural practices such as widow cleansing and widow inheritance. The provision on intermeddling with the estate of a deceased<sup>35</sup> is not exhaustive to protect the dependants from cruel, degrading and inhuman treatment. The practice of widow eviction, forced wife inheritance and asset stripping continues to be practiced and the land is silent about these violations. There is need for inclusion criminalizing such practices in order to better protect women's land, property and inheritance rights.

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<sup>32</sup> International Women's Human Rights Clinic Georgetown University Law Center & The Federation of Women Lawyers: Kenya —Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation | 2009

<sup>33</sup> Sections 35 (1) b) , 36 (1) c)

<sup>34</sup> *Ibid*

<sup>35</sup> Section 45

### *3.0.3. The Law of Succession Act post -Constitution of Kenya 2010*

Prior to the promulgation of the Constitution, the 2009 National Land Policy<sup>36</sup> recognized that women's land rights was an issue that requires special intervention. The policy call for the state to enact appropriate legislation to ensure effective protection of women's rights to land and repeal existing laws that discriminate against women in relation to land<sup>37</sup>. The Constitution was the first legal document to incorporate some of the National Land Policy recommendations.

The promulgation of the Constitution of Kenya in 2010 was a great achievement for Kenyan women. The Constitution is the supreme law of the land and the yardstick by which all other laws are judged. It prohibits laws including customary laws that violate the Constitution<sup>38</sup>; prohibits any form of discrimination against any person regardless of any status<sup>39</sup>; and calls for Parliament to ensure that laws are enacted to give effect to the Constitution.

On land and property, the Constitution establishes, public, private and community land. Principles of land policy include; security of land rights and elimination of gender discrimination in law, customs and practices related to land and property in land<sup>40</sup>. Women inheritance right applies to private and community land. Under Article 69, Parliament is mandated to; revise, consolidate and rationalise existing land laws; and enact legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land<sup>41</sup>.

Further, the Constitution under Article 2 (5) and (6) provide that the general rules of international law that form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Key international and regional human rights instruments ratified by Kenya that promote the protection of women's land, property and inheritance rights include:

- a) Universal Declaration of Human Rights (UDHR)
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR)
- c) International Covenant on Civil and Political Rights (ICCPR)

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<sup>36</sup> Ministry of Lands and National Land Policy Sessional Paper No. 3 of 2009

<sup>37</sup> Ibid Clause 223 a) and b)

<sup>38</sup> Article 2(4)

<sup>39</sup> Article 27

<sup>40</sup> Article 60 (1) b) and f)

<sup>41</sup> Article 68 a) and c) vi)

- d) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- e) African Charter on Human and People's Rights (ACHPR)
- f) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)

After the promulgation of the Constitution, Parliament started to revise and enact new laws. Specific to women land and property rights, Parliament enacted the following laws; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Matrimonial Property Act No. 49 of 2013 and Community Land Act No. 27 of 2016. Whereas the Marriage Act No. 4 of 2014 and Protection Against Domestic Violence Act No. 2 of 2015 do not specifically deal in land and property rights, their application directly affects women's land and property rights. The Law of Succession Act is yet to be revised to conform to the constitutional provisions.

***a) Land Act No. 6 of 2012***

The Act consolidates previous existing land laws to ensure compliance with the law. The Act makes provision on management, administration and land. Specific to women's land rights, the Act defines Matrimonial home as "...any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home..." and matrimonial property as "...any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage...". It further provides under Section 5(2) that there shall be equal recognition and enforcement of; and rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.

The Law of Succession is silent on matrimonial home/property. It only defines a house to mean a family unit comprising a wife, whether alive or dead at the date of the death of the husband and children of that wife. The law should therefore make provision for protection and distribution of matrimonial home. In addition, the Act should make provision-inhibiting discrimination of women's inheritance rights in all land tenure systems.

***b) Land Registration Act No. 3 of 2012***

The act deals with all registration and/or any dealing in land. It provides for registration framework. Under Section 93, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the

Matrimonial Property Act. A spouse has overriding interest to registered land and requires spousal consent for disposition of land. The Act further allows through the appropriate office, the registration of inhibitions, cautions and restrictions to protect an interest over land.

In addition to recognizing matrimonial property in dealing with a deceased's estate, the Law of Succession Act should have provisions where an estate can be protected by officers other than police or chief. These officers could include judicial officer or land registers that can facilitate the registration of inhibitions, cautions or restriction in accordance with the Land Registration Act. Currently, the Law of Succession provides for protection against intermeddling with the estate of a deceased person though there is no definition of the term "intermeddling".

*c) Matrimonial Property Act No. 49 of 2013*

The Act provides for the rights and responsibilities of a spouse in relation to Matrimonial Property. Under Section 2, contribution is defined to include monetary and non-monetary contribution; matrimonial home is defined as any property owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and spouse defined as husband or wife.

Matrimonial Property is defined under Section 6 as; matrimonial home(s), household goods and effects in the matrimonial home (s); any other immovable or movable property jointly acquired during the subsistence of the marriage. Trust property, including that held under customary trust and immovable property acquired or inherited before marriage does not form part of matrimonial property.

On ownership, Matrimonial Property vests in spouses according to their contribution towards its acquisition and shall be divided between spouses if they divorce or their marriage is otherwise dissolved<sup>42</sup>. The Act makes provision for division of matrimonial property in polygamous marriage.

Whereas division of matrimonial property can only be done after marriage is dissolved, a party can move to court under Section 17 for declaration or rights to any property that is contested between that person and former spouse. A spouse shall not during the subsistence of the marriage be evicted by a spouse from the matrimonial home except by a court order and shall not be evicted by *any other person* except; in execution of a decree; bankruptcy or power of sale where property was mortgaged or charged. This

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<sup>42</sup> Sec 7

provision protects women from eviction and the Act should also offer similar protection for widows against eviction by any person upon the death of their husbands.

In the case *Rono v Rono (2005) eKLR* the deceased died intestate leaving behind two wives and nine children (six daughters and three sons). The two widows and a son petitioned the court for letters of administration with the consent of the other family members. The contention arose over the distribution of the deceased's estate where sons and the 1<sup>st</sup> wife were allocated large shares while the 2<sup>nd</sup> wife and daughters wanted 50:50 share of the estate. The 1<sup>st</sup> wife argued that prior to the deceased marrying the second wife; she had contributed to the development of a farm therefore entitled to larger share. The the sons argued that since they were sons and the daughters were married, they were entitled to a larger share than their sisters. The court ruled that both the sons and daughters have rights to inherit their father's estate and proceed to share the property equally.

The court did not consider the argument on spousal contribution since it was not a factor under Section 40. The learned judges embraced the principal of *fairness* and *equity* in distribution of a deceased's estate between or amongst persons beneficially entitled thereto.

Matrimonial Property should be factored in during the distribution of property in both monogamous and polygamous marriages. A spouse should automatically be allocated matrimonial home and household goods and thereafter his/her contribution toward acquisition of other properties be considered. In determining the share including in polygamous unions, the court should be guided by fairness and equity as decided in *Sophia Wangechi Mugo v Geoffrey Wambugu Mugo & another [2016] eKLR*. This argument was shared by Kiage JJA in his concurring judgment in *P.N.N -vs-Z.W.N (2017) eKLR* where he observed that marriage is a relationship of equals and that equality in the Constitution doesn't mean Matrimonial Property should be divided equally but

*"...division and distribution of Matrimonial Property should be on a basis of fairness and conscience and not a romantic clutching on the 50:50 mantra..."*

On whether inherited property forms part of matrimonial property, the court in *J E N K v J N K [2015] eKLR* held that under Section 5 (of the Matrimonial Property Act), the only time such property would not form part of matrimonial property is where the inheritance was received before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of the matrimonial property.

*d) Community Land Act No. 27 of 2016*

The Act provides for the recognition, protection and registration of community land rights and its management and administration.

Section 30 provides that every member of the community has the right to equal benefit from community land, which includes full and equal enjoyment of rights of use and access; and women, youth and marginalised groups have the right to equal treatment in dealing with community land. In addition, it provides that women married to a member of the community shall gain automatic membership of the community and such membership shall subsist until a legal divorce.

The Act calls for use of Alternative Dispute Resolution (ADR) to settle disputes concerning community land<sup>43</sup>. The Law of Succession identifies 12 regions which are predominantly occupied by pastoral communities who hold land communally. The Act calls for use of customary laws which predominantly discriminate against women. The Act needs to be amended to reflect provisions of this land tenure system and how women's inheritance rights can be protected in such set up including the use of ADR.

*e) Marriage Act No. 4 of 2014*

The Act was enacted to amend and consolidate the various laws relating to marriage and divorce. It recognises customary, civil, Islamic, Hindu and Christian marriages with Islamic and customary marriages presumed polygamous or potentially polygamous<sup>44</sup>; and sets out the requirement for each marriage. All marriages must be registered; this addresses the old age challenge of proving customary marriage. Women have experienced challenges in proving customary marriage, especially when certain key customary rules were not followed. In *GITUANJA vs GITUANJA (1983) KLR* it was held that the existence of customary marriage was a matter of fact which is proved with evidence. The Act makes the existence of customary marriage a matter of law.

The Act has similar definition of spouse as the Matrimonial Property Act and outlaws child marriages. Widows and widowers have a right to marry or not to re-marry under Section 15.

While the law does not recognize cohabitation as a form of marriage, it defines cohabit as

... to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage...

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<sup>43</sup> Section 39 (1)

<sup>44</sup> Section 6

As stated earlier; whereas cohabitation is not formally recognised under statutes, courts have developed common law principle on presumption of marriage conferring some marital rights and duties on cohabiting couples meeting certain criteria.

The recent decision under the new marriage region being the case of *RLA v FO & Another (2015) eKLR* where Justice Mayeba ruled that under Section 6 of the Marriage Act, 2014, only five types of marriages are recognized in Kenya (Christian, Customary, Civil, Hindu and Muslim) and while long cohabitation is not recognized under the Act, the Act does not do away with those relationships where couples have lived together as man and wife for years and even resulted into children. While agreeing with set out criteria on presumption of marriage which include; actual cohabitation, the length of the cohabitation, and whether the man and woman held themselves out as husband and wife; the court further included that their lifestyle should show even to strangers that they are married and not in a relationship of convenience.

Justice Musyoka in *S.W.G- v- H.M.K (2015) eKLR* where he stated

*“...where a marriage does not comply with the relevant formalities laid down by the Marriage Act ...it may be rescued by presumption of marriage by cohabitation...”*

The alignment of the Law of Succession Act to the Marriage Act will help address the unresolved interpretation of Section 3 (5). At the time of enacting the Law of Succession, there was no law that expressly governed customary marriage; this would be the reason why Parliament inserted Section 3(5). Women in cohabiting relationships can still have their inheritance rights protected under common law principles. In addition, the definition of dependants under the Act needs to conform to the reality of life. For example, the definition of a dependant as former wife or wives whether or not maintained by the deceased prior to his death should change.

The recent pronouncements by the court on spousal maintenance *vis-à-vis* Article 45 (3) of the Constitution should guide in determining a dependant. In *M S V v S J V & another [2015] eKLR* Justice Lenaola stated;

*‘...Article 45(3) is in harmony with Article 21(3) of the Constitution which enshrines equality of men and women and specifically states that “women and men have the right to equal treatment.....the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore ...’*

He further held that: -

*'...neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner...'*

Another form of marriage that is not recognized under statute is the woman to woman marriage. The old age tradition that is slowly dying off is common among the Kisii, Kuria and Kalenjin communities. The practice involves a woman mainly of an advanced age with no children or son pays bride price and marries another woman. There is no sexual encounter between the women.

Women take wives under three circumstances: barren women and widows take wives to obtain rights over children produced; rich women accumulate wives to gain prestige and wealth in the same way men do through polygamy; and in some societies where women have the right to have a daughter-in-law, women without sons can exercise their right to a daughter-in-law by marrying a woman and giving her to a non-existent son<sup>45</sup>. A woman married under this form of marriage has been considered as a wife and allowed to inherit by the court in *Eunita Anyango Geko and another vs Philip Obungu Orinda (2013) eKLR* and *Monica Jesang Katam v Jackson Chepkwony & Ano. (2011) eKLR*.

*f) Protection against Domestic Violence Act No. 2 of 2015*

The Protection against Domestic Violence Act aims at protecting persons in a domestic relationship from violence. The Act has broad and not exhaustive definition of domestic violence. Domestic violence under Section 3 includes abuse such as forced wife inheritance and any other conduct against a person where such harm may cause imminent harm to the safety, health and wellbeing of the person. Domestic relationship is described to include; living with the same household with that person or a family member of that person and family members include; spouse, children, adult son/daughter, parent, siblings or other relatives such as grandparents, uncles, aunt, father in-law and mother in-law<sup>46</sup>. The Act gives power to the court to issue protection orders.

The Law of Succession Act is silent on violations such as forced widow inheritance, asset stripping and eviction of deceased persons' beneficiaries, therefore not providing adequate protection to women.

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<sup>45</sup> R.J Cadigan *Woman-to-woman marriage: practices and benefits in Sub-Saharan Africa Journal of Comparative Family Studies* Spring 1998

<sup>46</sup> Section 4 and 5

#### 4.0. KEY ISSUES

The most pressing obstacle to gender equality in women land, property and inheritance rights is insufficient laws and patriarchy that subordinates women to men. According to the United Nations Division for the Advancement of Women (as it was then referred), widows in Africa irrespective of their ethnic group are among the most destitute women in the region since they are mostly subjected to patriarchal customary practices. They also suffer discrimination in inheritance rights, lose social status and are marginalised. Human Rights Watch in 2003 reported that majority of women's inheritance rights violations occur since they revolve around land and property grabbing by the deceased's relatives and linked the high HIV/AIDS pandemic to women's inheritance rights violations<sup>47</sup>.

In recognition of the importance of women's land rights and in meeting their international and regional human rights obligations, Kenya has undertaken constitutional, legislative and policy reforms aimed at abolishing discriminatory laws and policies that inhibit the realisation of women's land rights. A progressive Constitution and laws that promote the realization of women's land rights are some of the key achievements the State has taken. However, on women's inheritance rights, Kenya still relies on an old legislation that inhibits the realisation of women's inheritance laws.

While the Law of Succession Act has progressive provisions aimed at promoting women's inheritance rights, the same law also has discriminative provisions and fails to adequately protect women's rights. The following are key shortcomings of the Law of Succession Act:

##### 1. Conflict with Constitution of Kenya

The Constitution is the supreme law of the land and *"Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid"*<sup>48</sup>

Sections 2 (2), (3) and (5), 32, 33, 35(1), 35(5) and 36(1) of the Act discriminate against children born out of wedlock, Muslims, women and girls and widows. These provisions do not conform to the equality provision under Article 27 of the Constitution. In addition, rules of international law shall form part of the Laws of Kenya and any treaty or Convention ratified by Kenya shall form part of the Laws of Kenya. The

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<sup>47</sup> Netherlands Ministry of Foreign Affairs (2011) *"Women's Economic Empowerment to Foster Food Security; Case Studies from Developing Countries*

<sup>48</sup> Article 2(4)

discriminative provisions are against the following regional and international human rights instruments that Kenya has ratified:

- a) Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- b) Article 2, 3 and 26 of International Covenant on Civil and Political Rights (ICCPR);
- c) Article 2, 15 and 16 of Convention on the Elimination of All forms of Discrimination Against Women (CEDAW);
- d) Article 2 Convention on the Rights of Children (CRC);
- e) Article 2, 3, 18 (3) of the Africa Charter on Human and People's Rights (ACHPR);
- f) Article 2 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) .

Further, under Article 60 (1) f), of the Constitution, Parliament is required to enact legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land. Further, Section 7 (1) of the 6th schedule of the Constitution 2010 provides:-

*“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution”.*

The Act is yet to be amended to conform to the Constitution.

The Committee on the Elimination of Discrimination against Women (CEDAW) in its concluding observation of the Kenyan government's 7<sup>th</sup> period report in February 2011 applauded the government for enacting a Constitution that gives legal recognition of women's land and property rights.

However, CEDAW was concerned about the existing legislation that permitted women's land and property disinheritance; and stereotypes and harmful cultural practices that perpetuate discrimination against women. It called upon the State to enact necessary legislation and put in place comprehensive steps, including awareness creation to modify or eliminate harmful cultural practices that hinder the realisation of women's rights.

In March 2016, the Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observation to Kenya's combined 2<sup>nd</sup>- 5<sup>th</sup> period report reiterated CEDAW's observation on need to review legal provisions that allow for discrimination against women.

*Appendix 1 is matrix on areas of the Act that need to be amended.*

## **2. Non-conformity with existing laws**

After the promulgation of the Constitution, Parliament embarked on reviewing and enacting legislations that conform to the Constitution and support the implementation of the Constitution. Key legislation that promote the respect of women land rights include Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Matrimonial Property Act No. 49 of 2013 and Community Land Act No. 27 of 2016. The Marriage Act No. 4 of 2014 and Protection against Domestic Violence Act No. 2 of 2015.

Land Act, Land Registration Act, Matrimonial Property Act all recognize matrimonial property. Matrimonial property is defined as matrimonial home(s), household goods and effects in the matrimonial home (s); any other immovable or movable property jointly acquired during the subsistence of the marriage<sup>49</sup>. Rights and responsibilities of spouses in relation to Matrimonial Property are recognized by law. The Act should therefore adopt the definition and concept of matrimonial property especially in determining distribution of a deceased's estate.

Some women in Kenya live in a communal set-up where land is governed by the Community Land Act. The Act gives equal rights and benefits to all community members, including full and equal enjoyment of rights of use and access. The Community Land Act recognises inheritance<sup>50</sup> in community land. The Act should make provision of how property in a communal set up should be distributed upon death.

On marriage, the Act does not define marriage and this has seen different judicial interpretations of Section 3(5) of the Law of Succession Act. The Marriage Act sets out the recognized marriages in Kenya and what constitutes a valid marriage. Marriage is a key element in succession; the Act therefore must ensure that the necessary provisions of the Marriage Act are integrated in the Act.

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<sup>49</sup> Section 6 of the Matrimonial Property Act No. 49 of 2013

<sup>50</sup> The provision of inheritance discriminate against widows who choose to remarry.

The Act is silent on violations women go through after the death of their spouses and parents. Asset stripping; evictions; physical and mental abuse; and forced wife inheritance are some examples of violations women go through after the death of their spouses. The Section on intermeddling focuses on the property as opposed to the beneficiaries. Protection against Domestic Violence Act No. 2 of 2015 prohibits certain violations against widows; however, the same is not exhaustive. The Act should have specific provisions criminalizing cruel, degrading and inhuman treatment against the deceased's beneficiaries. The Act should also make provision on having other officers to protect the estate and beneficiaries of a deceased. This should include elders and land registrars.

### **3. Access to Justice**

Access to justice is as constitutional right. Specifically, Article 48 provides that 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 succession process in Kenya involves filing the requisite documents in the right court. The process is complex, expensive and takes approximately 9 months to complete. Backlog of cases, complex processes, and high litigation costs has seen many women, especially in the rural areas, fail to pursue succession in order to protect their interests<sup>51</sup>. There is need to ensure that the process is accessible to all.

In addition, ADR including traditional justice dispute resolution mechanism is now an accepted mode of resolving disputes. The Act should allow for use of ADR especially when dealing with contentious probate.

### **4. Lack of awareness**

The Law of Succession has been in existence for over three decades, but women continue to suffer human rights violations. For example, despite the provision under the Act on daughters'<sup>52</sup> right to inherit, many are unable to claim this right due to lack of awareness on the existence of the law and unresponsive government. This challenge has been brought by social bias and lack of proper implementation and enforcement mechanisms of the existing laws<sup>53</sup>.

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<sup>51</sup> Human Rights Watch Report *Double Standards: Women's Property Rights Violations in Kenya*. New York: (2003)

<sup>52</sup> Section 35 and 38

<sup>53</sup> R. Giovannelli, *Gender and Land Tenure Reform* in ONE BILLION RISING (2009) pg. 198

The Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observation to Kenya's combined 2<sup>nd</sup>- 5<sup>th</sup> period report in 2016 called upon the government to take all necessary measures including raising awareness amongst women, local administration, traditional leaders, land administrators and judicial officers on women's land rights. In addition, CESCR further called upon the State to provide legal support to women to reclaim their rights.

## 5.0.RECOMMENDATIONS

Based on the analysis, various interventions are required to address the challenges women face in land, property and succession matters. Below are recommendations aimed at addressing the challenges:

### a) Parliament

In consultation with other stakeholders, Parliament is called upon to review and harmonize the Law of Succession Act CAP 160 and ensure it conforms to the provisions of the Constitution of Kenya 2010. In addition, as an oversight body, Parliament should monitor government agencies and ensure women's land; property and inheritance rights are protected and fulfilled.

### b) Judiciary

Tasked with the duty of enforcing and interpreting laws, there is need for the Judiciary to create jurisprudence that promotes women's land and inheritance rights. In addition, it should review the Law of Succession Rules to ensure that it promotes access to justice on women.

### c) Other government agencies

Government agencies including the independent constitutional commissions need to engage in awareness creation on existing provisions of the law that promote inheritance rights. Where applicable, present relevant reports for example, a report to Parliament to help push for law reforms. In addition, through the Legal Aid Programme, the Government should offer legal services to the indigent women whose rights have or are under actual threat of violations. Government agencies should further collaborate with others in order to promote women's land and property rights.

### d) Civil Society Organisations (CSOs)

As a government watch dog, CSOs need to engage in lobbying for law reforms and provide legal aid services to women whose land, property and succession rights have

been violated. In provision of legal aid services, CSOs should also engage in strategic impact litigation to challenge the unconstitutional provisions of the Law of Succession Act, CAP 160. Further, using their existing network, CSOs should engage in awareness creation on the existing laws that promote women's land rights and build the capacity of communities to demand for their rights.

e) Community members

As right holders, community members need to hold the State accountable for its actions. Community members are requested to form synergies with State and non-State actors for effective legal reforms. In addition, community members need to seek redress when their rights are violated.

## **6.0.CONCLUSION**

This analysis has established that while the Law of Succession has provisions that protect women's inheritance rights, it contains a number of provisions that are discriminatory hence unconstitutional. In addition, the law does conform to the current laws that govern marriage and land. This shortcoming places women in a state where their land rights are trampled upon. In order for women's land, property and succession rights to be protected and respected, there is need for the Law of Succession to be amended to ensure conformity with the constitutional and legislative framework; and current social trends.

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APPENDIX 1 MATRIX ON THE LAW OF SUCCESSION ACT CAP160 LAWS OF KENYA

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
<b>PART 1: PRELIMINARY</b>			
2 (1)	Application for the Act	In line with Article 27 (4) of the Constitution, we recommend that the Act applies to estates of all persons regardless of their sex, ethnic or social origin, religion or culture.	Amend to read Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons regardless of their sex, ethnic or social origin, religion and culture_and to the administration of estates of those persons
2(2)	Application of the Act	We recommend deletion of this section as it promotes use of customary law, which inhibits women from inheriting property.	Deletion
2 (3) and (4)	Application of the Act	We recommend deletion of this section as it prohibits choice of the succession regime to be applied.	Deletion
NA	Application of the Act	We recommend insertion of provision allowing Application of Islamic Law	Insert after 2(1) 'A person who professes the Islamic faith may be governed by the Islamic law in all matters relating to succession'
2(4)		We recommend Deletion of this section as it excludes the applicability of the act to	Delete section

1

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
		Muslims whose laws are predominantly discriminative against women's right to property especially on matters succession.	
3 (1)	Interpretation	We recommend the inclusion of the following words be included in the interpretation to ensure that the Act conforms with other written laws	To insert
		"child"	"Child" means a person who has not attained the age of eighteen years.
		"cohabit"	"Cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.
		"intermeddling"	"intermeddling" means a) taking possession of or disposing of or using the property of the deceased without the authority under this Act or any other applicable law; b) ejecting, by force or by coercion a surviving spouse or minor child from the matrimonial home

2

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
			c) Any unlawful dealing with the deceased persons estate or interfering with the deceased
		"marriage"	'marriage' means a union recognized under the Marriage Act No. 4 of 2014
		"matrimonial home"	'matrimonial home' means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home; and includes any other attached property
		"matrimonial property"	"matrimonial property" has the meaning assigned to it under the Matrimonial Property Act 2013
		'residue estate'	"residue estate" means the remainder of the net intestate estate after the matrimonial home, matrimonial property and personal effects have been distributed or otherwise transferred

3

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
		'spouse'	'spouse' means husband or wife
3	Interpretation	We recommend the deletion of household effect in the "personal and household effects" as they are regarded to matrimonial property.	Amend to read "personal property" means clothing and articles of personal use and adornment, furniture, appliances, pictures, ornaments, food, drink, utensils, simple agricultural equipment, livestock, and all other articles of household use or decoration normally associated with a matrimonial home, but does not include any matrimonial property or any other thing connected with the business or profession of the deceased
3 (2) and (3)	Interpretation	We recommend the deletion of provisions discriminating child(ren) born out of wedlock as the same is unconstitutional;	Amend to read "References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive), a child born in and out of wedlock, an adopted child"
3(5)	Interpretation	We recommend the deletion of this Section to	Delete

4

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
		ensure it conforms to the recognized forms of marriage under the Marriage Act 2014. The deletion will ensure security of marriage.	
<b>PART III : PROVISION FOR DEPENDANTS</b>			
27	Discretion of court in making orders	We recommend that court should not have complete discretion but the discretion should be exercised in accordance with sound legal , factual, fairness and equity.	Amended to read "In making provision for a dependant the court shall have discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him or her by way of periodical payments or a lump sum, and to impose such conditions, except that the discretion shall be fair and promote equality.
29(a)	Meaning of dependant	We recommend the deletion of the word "wife or wives and use gender neutral language. Further, the deletion of "former wives" as dependants in cases of succession is contrary to the current laws governing marriages and matrimonial property rights.	Amended to read "For the purposes of this Part, "dependant" means— (a) Spouse or spouses and the children of the deceased whether or not maintained by the deceased immediately prior to his or her death;"
<b>PART V: INTESTACY</b>			

5

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
32	Excluded property	We recommend the deletion of this section as it is meant to supercede customary law except in cases of livestock, agricultural land, or crops located in exempted areas of land that have been specified in the Gazette, but in practice, it is applied much less often, especially in rural areas. This is because rural communities "remain unaware of statutory laws relating to property" and are instead "inclined to use customary laws in matters of inheritance, women especially widows who have no opportunity for redress in customary application, will be denied property due to patriarchal nature of customary laws.  Further, the mentioned areas are mainly covered by Community Land Act No. 27 of 2016 as such the Act should guide the succession process.	Amend Section 32 to read "The provisions of this Part shall not apply to Land and any property registered under the Community Land Act No. 27 of 2016.
33	Law applicable to excluded property	We recommend that the provision on use of customary law for intestacy probate which discriminate women are unconstitutional. However, the Community Land Act is applicable in majority of the Districts listed thus inheritance of Land under the Act will be guided by the Act.	Amend to read "The law applicable for excluded property shall be Community Land Act No. 27 of 2016 or any other relevant law at the time being in force"
35 (1)	Where intestate has	We recommend the deletion of the conditional	Amend to read

6

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
	left one surviving spouse and child or children	<p>clause after the section, which terminates widow's life interest upon remarriage. Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry.</p> <p>The section does not also recognize the widows absolute right to the matrimonial home upon the death of the husband, therefore we further recommend the deletion of the section that only provide personal items and life interest and introduce a section that allows for entitlement of matrimonial home and properties.</p>	<p>“(1) Subject to the provisions of section 35(3) and 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—</p> <p>(a) entire matrimonial home and personal effects of the deceased;</p> <p>(b) share of matrimonial property as determined by the court</p> <p>(c) One third of the residue estate</p> <p>The court shall, where applicable, protect the deceased children interest in matrimonial homes</p>
35 (2)	Where intestate has left one surviving spouse and child or children	We recommend the deletion of life interest in 35 (2) and make provision on what share child/children should be allocated.	<p>Amend to read</p> <p>“2)-A surviving spouse shall, (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date-</p> <p>(2) Subject to the provisions of subsection 35(3) and section 40 below, the surviving</p>

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Section	Marginal Note	Rationale for amendment	Proposed amendment
			child or children shall be entitled to share equally in the remaining two-thirds of the residue estate; and for each minor child, his or her portion of the residue estate shall be held in trust by his or her parent, guardian, or caretaker until he or she reaches full age.
35 (5)	Where intestate has left one surviving spouse and child or children	We recommend the deletion of remarriage of a widow as a way of cause for having her rights terminated and property devolve upon the children	Delete words “in the case of a widow, remarriage”
36(1)	Where intestate has left one surviving spouse but no child or children	We recommend that the surviving spouse get the entire net estate and the deletion of the conditional clause after the section, which terminates widow's life interest upon remarriage in instances where there are no children involved. Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry and do have any children.	Amend to read “(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled to the entire net intestate absolutely.”
37	Powers of spouse during life interest	We propose the deletion of the section as we have made proposal earlier we have made recommendation for spouses to get actual interest	Delete
39	Where intestate has left no surviving spouse or children	We recommend the review of the section to ensure alignment to the constitutional provisions on equality and on discrimination. The section	Amend to read Where an intestate has left no surviving spouse or children, the net intestate

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Section	Marginal Note	Rationale for amendment	Proposed amendment
		discriminates the rights of women as it allows a mother to inherit if father is not alive. It prefers the entitlement of men to women in the devolution of the net estate.	estate shall devolve upon the kindred of the intestate in the following order of priority (a) biological or adoptive parents: if none..."
40 (1)	Where intestate was polygamous	<p>We recommend a review of the section as it equates women's status to children and does not have regard to the contribution by the wife in the acquisition of the property. It is also contrary to the Matrimonial Property Act No. 49 of 2013 which clearly states the entitlements of the subsequent wives to a polygamous marriage.</p> <p>We further recommend the introduction of a sub section to indicate that the wives have exclusive rights to their respective matrimonial homes</p>	<p>Amend to read</p> <p>"(1) Where intestate was polygamous under system of law permitting polygamy, and is survived by more than one wife, and had one or more children:</p> <p>(a) Where each wife had a separate matrimonial home:</p> <p>(i) Each wife shall be entitled to the matrimonial home and personal effects.</p> <p>(ii) Each wife shall be entitled to equal shares with the other wife or wives of one-third of the residue of the net intestate estate</p> <p>(iii) Each child of the deceased shall be entitled to an equal share with the other children of two-thirds of the residue of the net intestate estate.</p> <p>(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
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			<p>entitled to an equal share in the matrimonial home and in the personal and household effects.</p> <p>(i) Subject to paragraph (iii) of subsection (1) (b), the wives shall be entitled to one-third of the residue of the net intestate estate to be divided equally among them.</p> <p>(ii) Subject to paragraph (iii) of subsection (1) (b), the children shall be entitled to the remaining two-thirds of the residue net intestate estate, to be divided equally among them.</p> <p>(2) Where the intestate man was validly married to more than one woman under any system of law permitting polygamy, and is survived by more than one wife, but had no children:</p> <p>(a) Where each wife had a separate matrimonial home:</p> <p>(i) Each wife shall be entitled to the matrimonial home and personal and household effects.</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
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			<p>(ii) Subject to paragraph (iii) of subsection (2) (a), each wife shall be entitled to equal shares with the other wife or wives of the residue of the net intestate estate.</p> <p>(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects and in the residue estate.</p> <p>(3) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another wife or more than one wife living, each wife living in a separate matrimonial home, and she is survived by her husband and had one or more children:</p> <p>(a) The husband shall be entitled to the matrimonial home and personal effects</p> <p>(b) The husband and each child, upon reaching full age, shall be entitled to the deceased's residue estate, in equal shares</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
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			<p>among them.</p> <p>(4) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another wife or more than one wife living, and the deceased shared her home with one or more of her husband's other wives, and she is survived by her husband and had one or more children:</p> <p>(a) Each child, upon reaching full age, shall be entitled to co-ownership of the deceased's share of the matrimonial home and personal and household effects, in equal shares among them.</p> <p>(b) The husband and each child, upon reaching full age, shall be entitled to the residue of the net intestate estate in equal shares among them.</p> <p>(5) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another</p>

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			wife or more than one wife living, and she is survived by her husband, but had no children, her husband shall be entitled to the matrimonial home and personal and household effects “ The court shall, where applicable, protect the deceased children interest in matrimonial homes
41	Property devolving upon child to be held in trust	We recommend the deletion of “or who may be female, marry under that age” and the ‘ or so marry” as it permits early child marriage contrary to the Children Act and Marriage Act	Delete the words ‘or who may be female, marry under than age” and or ‘so marry”
<b>PART VII- ADMINISTRATION OF ESTATES</b>			
44	Application of this Act	We propose the deletion of this section since the Act will apply to all property save for Community land	Delete
45	No intermeddling with property of deceased person	We propose the inclusion of other forms of intermeddling including interfering with the deceased beneficiaries rights. Intermeddling has been defined in Section 1	Amended to read (1) As of the time of the deceased’s death, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person or any use rights in the matrimonial home pursuant to section 32, unless he or she is authorized to do so by

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			law or by a grant of representation and a subsequent confirmation of the grant under this Part. (2) Any person who contravenes the provisions of this section shall– (a) be guilty of criminal offence and liable to a fine not less than one hundred thousand shillings or to a term of imprisonment not less than five years and (b) be answerable to the rightful executor or administrator or owner by operation of law or holder of a use right by operation of law to the extent of the assets with which he or she has intermeddled after deducting any payments made in the due course of administration.  (2) “ A surviving spouse and the child or children shall be entitled to protection against (a) Eviction from the matrimonial home; (b) Subjection to harmful cultural practice; (c) Physical and psychological abuse

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			Any person found in contravention of these acts shall be guilty of an offence and liable to a fine not less than one hundred thousand shillings or a term of imprisonment not exceeding one year.
Section 46	Duties of officers in relation to protection etc. of deceased property	We recommend the inclusion of other officers and need for the officers to inform the deceased beneficiaries on the need on the succession processes.	Amend to include a new section that reads (6) "Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) shall- (a) Ensure that all persons who appear to have a legitimate interest in the estate of the deceased, receive all accurate and necessary information to redeem any legal claims they may have in the estate of the deceased. (b) Ensure accurate information on the rights dependants to inherit property and to remain in the matrimonial home; protection from harmful cultural practices; process of filing for probate and administrative cause
70	Powers of court	We propose the need for court to promote openness and access to justice	Amend to include section to read 2) a court shall, before making a grant of representation - (a) ensure that any surviving spouse

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			appears before the court and is notified in person of his or her right to act as administrator; and (b) ensure form and information are easily accessible to assist dependants in the process of administering the estate with or without an advocate; and 3 The Court shall embrace Alternative Disputes Resolutions in cases of contentious probate
74	Error may be rectified by court	We recommend the inclusion of property inadvertently left out during the succession process. Many women in Kenya are not aware of their spouses estate and others discover their existence after completing the probate process	Amend to include property inadvertently not listed.

1. Note, the Act should adopt a gender-neutral language.

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