



Survey Report:  
**Impact of Dowry on  
Women's Land and  
Property Rights in Kenya**

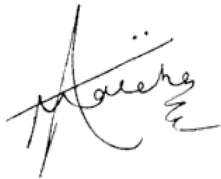


## Acknowledgement

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**Allan Achesa Maleche**

# Acronyms & Abbreviations

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ADR	Alternative Dispute Resolution
AIDS	Acquired Immunodeficiency Syndrome
AJS	Alternative Justice Systems
ASAL	Arid and Semi-Arid Lands
CEDAW	Convention on Elimination of all Forms of Discrimination against Women
CoK	Constitutional of Kenya
CLA	Community Land Act in 2016
HIV	Human Immunodeficiency Virus
KELIN	Kenya Legal and Ethical Issues Network on HIV and AIDS
CSOs	Civil Society Organizations
NGO	Non-Governmental Organization
NLP	National Land Policy
NLC	National Land Commission
LRA	Land Registration Act
UNSD	United Nations Statistical Division

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## Executive Summary

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Women's right to own property in Kenya is still far from being fully realized, despite the constitutional guarantee on equality and non-discrimination on ownership of property. This is because, while various progressive laws have been enacted to ensure security and ownership of land, the implementation is still lacking. In many instances, women do not hold independent land rights; the rights are limited to access, while the actual control and ownership are vested on the male relatives. In cases of widows, women often hold the land in trust until the sons attain the age of maturity. Securing land rights for women often depends on the strength of her relationship with her husband's family and the clan.

In the event of the death of a spouse, the question as to whether a woman is allowed to remain on the land often depends on the legality of her union and whether dowry had been paid or not. Her property ownership is compromised if the dowry had not been completed. Payment of dowry is an age-old tradition in many African societies. This tradition is used to demonstrate the groom's worthiness as a suitor, and his capability to adequately provide for his bride-to-be. This practice and its processes often differ from community to community in Kenya. Dowry, in this context, has been identified as one of the institutions which superimpose adverse traditional notions against women.

Under the Marriage Act, dowry is equated to any token of stock, goods, and money or other property given or promised in consideration of an intended marriage. Where the customs of the parties require the payment of dowry as proof of marriage, the payment of any token is termed as sufficient proof. Notably, though, dowry payment and completion has played an instrumental role in predetermining a woman's right to own matrimonial property upon the death of her spouse. For women, in particular, land and property ownership marks the end to economic uncertainty and vulnerability, and when disinherited as a result of lack of dowry payment, this has a potential impact on the entire community.

In the case of Janet Adhiambo Mwai (deceased), the practice of dowry payment was used to determine the validity of the subsequent marriage which was entered into without returning the dowry paid by the first husband to indicate divorce as per the Luo customary practices on marriage. The court observed that since dowry had not been returned, the deceased was still validly considered to be married to her husband and thus he had a right to bury her and assume a right to her property and children. This case demonstrates that a woman's right to property during and after marriage, whether dead or alive is determined by the cultural practices associated with the pre-and post-conditions of dowry payment. On the other hand, in the Appeal Court case, Ms Everline Kerubo Makini was ordered to refund the money paid as bride price after granting Mr James Mayaka a divorce. They were married under the Kisii customary law and later solemnized their wedding at

These two cases indicate that dowry is an important institution in the welfare of a Kenyan woman and once the token is paid, then the practice of the community is usually put into consideration before divorce or separation. The culture is patriarchal and discriminates against women, therefore the women victims rarely get justice. The Constitution of Kenya provides for the application of culture so long as it adheres to the bill of rights, enacted laws, justice and morality. The question then arises as to whether the practices associated with dowry meet this threshold, and thus whether the said practices which violate women's rights to dignity, property, equality and non-discrimination should be applied in a vacuum.

It is anticipated that this research's findings will assist in visualizing the correct cultural positions, thereby reducing levels of abuse and exploitation of the vulnerable due to lack of written accounts of cultural positions.





## CHAPTER 1

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# INTRODUCTION



## 1.1 Background

Land is considered to be one of the most important factors of production and is viewed as the foundation for economic development. It is the primary source of livelihood for many, especially farmers and pastoralists in rural areas. The safeguarding of land rights and access to and control of land is critical to economic and social welfare particularly for the rural woman (Odeny, 2013).

The rights for women to access, use, and control land and other natural resources are indispensable in the pursuit of equity, equality and improvement of their standards of living. These rights are also important in securing women's access to valuable resources that can provide for their needs as well as for their families, their independence and livelihoods (KELIN Kenya, 2020).

Kenya has made great progress towards the realization of land and natural resources rights for women. Current legal, administrative and policy framework reviews are explicitly entrenched in the international, regional and sub-regional instruments, protocols and in the national legal framework. Such framework includes the Convention on the Elimination of Discrimination Against Women (CEDAW), Africa Union's Framework and Guidelines for land policies, The Land Registration Act, 2012, The Environment & Land Court Act, 2011, The Constitution of Kenya 2010, National Land Policy, Land Amendment Act 2016, The Matrimonial Property Act, The Marriage Act, Law of Succession and Land Registration Act.

Kenya is among the 115 countries found by the UN Women to have provided for women's property rights that are equal to men. However, despite the progressive provisions in the legal framework, retrogressive practices brought about by patriarchal systems, customary laws and cultural practices still hamper the desired impact of the realization of women land rights. Upon a cursory examination of the current status of women's land ownership, one finds that the practical application of these legal and policy frameworks has not been successful because land is often governed through male-dominated decision-making systems and structures.

A woman's access to property usually depends on her relationship with a man. Where a spouse's death occurs, the question as to whether a woman can remain on the land frequently centres on the legitimacy of her union and whether dowry payment had taken place or not. Where dowry wasn't paid in full, her property ownership is compromised. Dowry payment remains an age-old tradition in numerous African societies. The tradition serves to signify the groom's worth as a suitor and indicate his capacity to provide sufficiently for the bride-to-be. The practice and the accompanying processes frequently vary across communities in Kenya. In this context, dowry has been recognized as an institution that superimposes adverse conventional notions against women (KELIN Kenya, 2020).

The study will thus seek to gather information regarding forms, nature, extent and intensity of the practice of dowry in Kenya against the background of the provisions of the Constitution of Kenya, 2010, and other relevant legislation on the rights of women to property and inheritance.

## **1.2 Research Problem**

What is the impact of dowry on the lives of women and their land, property and inheritance rights?

## **1.3 Research Objective**

The objective of this research is to gather information regarding the forms, nature, extent and intensity of the practice of dowry in Kenya against the background of the provisions of the Constitution of Kenya and other relevant legislation on rights of women to property and inheritance. The primary focus of the project is to have an in-depth understanding of the constitutionality of dowry and gain insights into how this affects women's rights to land, property and inheritance.



## CHAPTER 2

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# LITERATURE REVIEW



## 2.1 Case studies on the current practice: a cross-cultural perspective

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### 2.1.1 China

It is contended in China, where dowry was part of marriage, Chinese women had practically no property rights (Lang, 1946). Lawfully they were allowed to own property but usually had no right to inherit property. They received whatever they held as gifts or as wages. Men had inheritance rights, but women did not (McCreery, 1976).

Women in China were not members of the property-owning unit (Hirschon, 1984). A woman, therefore, did not own betrothal gifts or even dowry. Before 1950, betrothal gifts included the transfer of jewellery, clothing, household goods and cash to the girls' home. In the 1980s, very few brides brought any dowry to their marriage, because of the substitution of labour as the chief source of wealth. Since the bride's family no longer gave back the betrothal gifts in the form of dowry, this impacted the woman's property ownership after marriage. The woman's earnings were perceived by the groom's household as a recompense for the expenditure involved in acquiring her. Her wages were therefore included in the familial fund, rather than offering a source of individual independence. A woman was thus valued by the amount of property she was worth.

According to the Ch'ing Code, a family's property was owned by its head and the other members of the family were barred from using and disposing it off without the head's consent. Women were allowed to inherit only in exceptional circumstances. The Ch'ing code decreed that after the death of the family head, his property ought to be divided equally among his sons. Where there were no sons, one of his brothers would be appointed his heir. On the occasion that the

family head had neither sons nor brothers to assert their rights, then daughters were allowed to inherit. Widows who did not remarry and unmarried daughters were customarily entitled to maintenance from their husband's or father's estate, but ordinarily, they had no right to inherit (Chiu, 1966).

### 2.1.2 India

Among the Hindus in Karnataka, the bride's family pays dowry to the groom and his family, who manage it during the entire marriage period. Most families practice dowry payment and it is perceived as a means to improve the daughters' socioeconomic status (by marrying her into a relatively wealthier family). Even though some communities in India historically did not demand dowry, the practice has advanced and spread within the last few decades. In most cases, the bride's family covers the wedding expenses as well, even though sometimes the groom's family pays for some wedding-related expenses (Giovarelli, 2005).

Dowry payment in North India does not provide wealth for the bride. The woman's dowry is managed by her father-in-law while household goods are controlled by her mother-in-law. A woman's life cycle determines her access to property. Older women have more control over dowry goods either as givers of dowry (mother to brides) or as receivers (mothers to the grooms) as compared to younger brides who have little or no control (Giovarelli, 2005).

In practice, Sharma notes (Hirschon, 1984) it is not the bride who gains most out of this wealth, but her husband's family. The bride is therefore a vehicle for the passage of valuables. The value of a woman is the amount of property she brings to her marriage. This has even led to killings of women who did not bring much dowry so that a man gains more from another marriage. The bride is given movable property in form of jewellery and household goods as an inheritance when they leave their parental home for marriage.

Dowry is not returned upon divorce. The girl's family is fundamentally procuring someone to look after their daughter, but fail to empower their daughter economically. Nonetheless, much of the bride's family's wealth goes toward paying the dowry, and it is considered a daughter's pre-mortem inheritance (Giovarelli, 2005).

Customary law dictates that Hindu women neither have any right to land or property brought into the marital community nor the right to land or property from their parents' home. Women are thus left vulnerable and have no remedy in case of challenges faced in marriage (Giovarelli, 2005).

Laws regarding separation and divorce are specific to each religious community in India, similar to inheritance laws. Laws governing the different faiths; Hindu, Islam, and Christianity all permit monetary maintenance in some form, but none allow a woman the right to any of her husband's ancestral or separate property. According to the Hindu Marriage Act, Hindu women have the right to be maintained by their husbands. However, in reality, women hardly receive any maintenance and usually must sustain themselves unless they have adult sons who might assist them. Customarily, separated or divorced Hindu women are often socially ostracized, making their lives very challenging. Women cannot move back to their parents' home because of insufficient land, finances, and more so their brothers living in the family home. Moreover, their brothers would be angry at their intrusion because once a daughter's dowry is paid, the remainder of the family's wealth belongs to the sons (Giovarelli, 2005).

Divorced Hindu women were considered a disgrace to their families, no matter the cause for

separation. The community perceived these women as having been raised improperly, which lowered the chances of their younger sisters marrying well. However, women who were members of the upper castes, (Bunt or Brahmin for example) could turn to their birth family for support and could move back to their birth family's home in case of divorce (Giovarelli, 2005).

While the formal law<sup>1</sup> in India has attempted to protect women's rights to land by providing for daughters to inherit land, this legal right is, for the most part, not effected. As discussed above, women will not enforce their right to inherit land against their parents' wishes because their parents have already contributed so much wealth (and often land) to them in the form of dowry. The focus, then, of changes within formal law and women's rights to land has to shift to the marital community, considering customary law that dominates the cycles of a woman's family life.

### 2.1.3 Uganda

In traditional African communal tenure systems, land was used collectively, mostly for cultivation and grazing—it was not owned by individuals. Women relocated to their husbands' clan and the clan's land. There was no need for daughters to inherit their parents' property to safeguard themselves, unless when they were single or were divorced and had returned home, upon which an agreement was brokered with their parents' clan so that they would have access to land. As is typical for African countries, the written law in Uganda is broadly supportive of women's rights.<sup>2</sup>

The Constitution (1995) guaranteed women equal rights at par with men; due to past historical injustices against women the Constitution accorded them special protection and help; and forbade any customary laws, traditions, or customs that discriminated against women<sup>3</sup>. Additionally, The Land Act (1998) stipulated that any decisions related to customary land tenure, based on the customary traditions and practices of the community, are null and void if the decision deprived women, children, or the disabled the right to ownership or occupation of land. Nevertheless, the same Land Act does not offer women equal land rights but rather stipulated two legal protections against the loss of the use of land within the marriage. First, spouses must provide consent before their residence and land surrounding their residence can be sold. Second, wives have the right to occupy and use "family land" that is a residence and from which they received subsistence.<sup>4</sup>

These provisions represent a weak political settlement orchestrated by the legislative and executive branches and forced on women policymakers. Co-ownership of marital land has been fiercely debated in Uganda since the Land Law was drafted in 1998.

<sup>1</sup>If women have the formal right under written law to inherit land, why are they not enforcing this right? Daughters gave two common reasons for not asserting their rights under the Succession Act. Most stated that they were not willing to ask for land from their family because: (1) their family already paid or would pay very high dowries and other expenses to get them married; and/or (2) their families had limited land, and they felt uncomfortable asking to take a share of that small parcel of land away from their brothers. From these women's perspective, they received their share of the family property through their dowry and wedding expense. Parents responded similarly: their responsibilities to their daughters were met by seeing that they were married. Moreover, daughters also pointed out the impracticality of inheriting land from their birth families, as they customarily move to their husband's village at the time of the marriage and, therefore, would not be in a position to use the inherited land. Field research respondents also reported that the community was generally not sympathetic to daughters asserting land rights

<sup>2</sup>For example, the Constitution (Article 22) of Ghana states that assets jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage; the 1997 Constitution of Burkino Faso calls for community property for spouses; the Mozambique Constitution (Article 12) states that norms and practices cannot violate a person's equal rights; the Ethiopian Constitution calls for equality among men and women; and the Tanzanian Constitution stipulates equality for men and women. U.N. Human Settlements Programme (UN-HABITAT), Shared Tenure Options for Women: A Global Overview 39, HS/785/05E (July 2005), available at <http://www.unhabitat.org/programmes/landtenure/publications.asp>.

<sup>3</sup>Constitution, Art. 33 (1995) (Uganda)

<sup>4</sup>An amendment to the Ugandan Land Act (June 18, 2003) provides: "security of occupancy on family land"

Women rights groups in Uganda made specific demands during the law-making process. They also initiated public dialogue and advocacy mainly concerning the landless poor and marginalized groups. They also developed an agenda more closely focused on women land rights. Different women's groups made submissions to the parliamentary Sessional Committee on Lands, Water, and Environment, which sought to influence the Committee to adopt a clause on co-ownership of the matrimonial home in its report and the draft Bill to be debated in the full house. The Bill as presented to the full house, however, did not include this provision (Giovarelli, 2005).

The Speaker to Parliament instructed that these principles be accepted for drafting into the appropriate language. There were divergent opinions among lawmakers and the public over whether the amendment was passed or not. A year after the enactment of the Bill into law on July 2, 1998, the Speaker ruled that the amendment had never been passed by Parliament due to a procedural omission during the Land Bill debate. Therefore, an amendment would need to be made to the Land Act of 1998 for it to enter into law. Not surprisingly, co-ownership of marital property is still not the law today. The clause is described in Uganda as the "*lost clause*" because it was conveniently and covertly dropped from the bill at the last moment (Giovarelli, 2005).

Women generally do not own land, under the customary law in Uganda either individually or jointly with their husbands, mainly because of the distribution of wealth at the time of marriage in the form of a bride price. The groom's family provides gifts and money to the bride's family. Research conducted revealed that bride price was often the reason women and men gave why they do not or should not own land while they are married (Giovarelli, 2005). Bride price payment concurrently indicated respect and love for the bride and deemed her her husband's property, generating the very common statement heard by men in field interviews from field interviews conducted, regarding women's rights to land: "*property cannot own property.*" Female property ownership is thus perceived as a threat to the family and the community.

Respondents in Giovarelli's study posited that if a woman owned property, she would not need to stay married and could leave anytime. Rural women interviewed by (Giovarelli, 2005) were indifferent to rights of ownership within their marriage as long as they had access to land, although a majority of women thought that married women should have the right to buy and own land. Women who were separated or divorced had no legal standing to land or property that was acquired during their marriage under the Marriage, Divorce, and Adoption Rules of 1998. Co-ownership of marital property was not the norm; rather, each spouse owned land separately. This is primarily true because ancestral land must stay with the tribe, and women move to their husband's home. Thus, women only have user rights to marital property unless they purchase land for themselves.

The case studies of Karnataka State and Uganda are meant to provide two examples of how intra-household relationships and customary law controlled these relationships which affected women's actual and perceived rights to own or control land. Wealth distribution via bride price or dowry and inheritance presupposes the family will remain intact. When families stay intact, women by and large at least have the right to use land. However, when the family unit breaks down because of divorce, death, or the taking of a second wife, women often lose their right to access and use the "*marital*" land, which is under the ownership and control of their husbands, his family and their tribe. At the same time, women in patrilineal societies rarely have a customary right to inherit land from their parents (Giovarelli, 2005).

Even when formal law allows daughters or wives to inherit land, customary law supersedes national laws making it impossible to enforce the formal law. Daughters who relocate to live with their husbands and his family often receive moveable property as a pre-mortem inheritance,



but not land, which would be an unrealistic inheritance in many cases, as the daughters live in another village. Moreover, women often cannot inherit their husband's land, as it is passed through the male bloodline, or it belongs to the husband's family or tribe.

The exchange of wealth at the time of marriage, while intended to strengthen the position of brides, may have the opposite effect, keeping women in marriages even when their husbands are abusive or violent. In both Karnataka and Uganda, data revealed that women would never choose to divorce their husbands because they would have no place to go and no way to support themselves.<sup>5</sup>

### 2.1.4 South Africa

In South Africa, bride wealth is paid by the groom to the bride's father and this takes place over many years. The implication created here is that women were used by various interested parties to gain property, while the woman herself had no say and no control of the property. According to (Jean La Fountain, 1955), the payment of bride wealth items (goats, heifer, and hoe) among the Gisu symbolized rights over a woman which are transferred to her husband. The woman has no say over what goes on, and neither does she have ownership rights. The payment is seen as an economic transaction by the use of the word "Khugula" (p.7) - to buy in bargaining.

La Fontain concludes that women are viewed as property, exchanged for a lower value of property like cows. This is reducing women to objects yet they are active subjects, they cannot be objectified.

### 2.1.5 Kenya

There is a significant interplay between the formal and customary systems in Kenya, although the relationship remains unclearly defined in law, including in land legislation. The gaps between formal and customary law are often where women's rights are undermined. Generally, under customary laws in Kenya, independent land rights for women are not culturally legitimate. Marriage has a direct bearing on the acquisition and disposal of property by women (Renee Hirschon 1984), women's inferior status developed through the private ownership of property together with monogamous marriage. This theory, however, is not culture-specific. The position of women concerning property ownership differs from one place to another; hence answers to questions regarding property ownership patterns need to be regionally, culturally and historically specific.

Several different norms and rules related to marriage and succession show that a woman's land rights depend on her relationship with a male. When the relationship ends, the woman stands a good chance of losing her movable and immovable property (Watch, 2003).

Customary marriages follow the rules and practices of the specific community; each of Kenya's forty-three tribes is governed by its customary laws, although there are significant similarities across communities. Most marriage practices are patrilocal, meaning the wife leaves her family and relocates to her husband's community upon marriage (Kameri-Mbote, 2006).

Bride price is commonly paid among almost all ethnic groups and is often a requirement for the formalization of a customary marriage (BBC, 2012). The price is usually negotiated by the parents of the bride and groom, often taking the form of livestock or cash paid to the bride or

<sup>5</sup><https://www.google.com/url?q=http://www.ulii.org/ug/judgment/supreme-court/2015/13><sup>17</sup>Women's land and property rights in Kenya

her family. The Marriage Act, 2014, recognizes the practice of paying bride price, but a token amount is considered sufficient to prove a customary marriage where the custom of the parties requires a dowry or bride price payment (Marriage Act, 2014).

The existence of customary marriages before the Marriage Act (2014) proved to be difficult since they were not registered, but were rather formed through a series of customary steps. The steps vary among the ethnic groups but generally include elements such as dowry payment by the man's family to the woman's family (not to the woman directly), consent of the parties and their families, the slaughter of a ram or goat, and cohabitation. Although women married under customary laws are considered part of their husband's clan, when it comes to property ownership, they are regarded as neither full members of their natal nor of their marital clans (Watch, 2003).

Divorce under customary law typically involves clan or family elders, in large part because the marriage is seen as a union between clans or families, not just the individual parties. Wives are not usually entitled to maintenance upon separation or divorce, and rarely receive a share of their husband's property. Divorce in many clans was dependent on the repayment of the dowry.

According to customary law, a married woman retains property acquired before marriage although acquisitions after marriage were generally considered part of her husband's estate. (Njau, 1979; Mucai, 1976). This situation would vary according to different indigenous societies. In most tribes, a married woman does not own property during the marriage. In some, the wife's property, whether acquired before or after marriage, is controlled by the husband during the subsistence of marriage. The wife had user rights but was not allowed to sell or dispose of such property without her husband's consent (Contran, 1968). Exceptions of this norm dominate among the Nyika (Digo, Giriama, Chonyi, Rabai, Duruma, Kambe, Kauma, jariba, Ribe), (Mucai, 1976).

This study undertook a desktop review and gathered information regarding the forms, nature, extent and intensity of the practice of dowry in Kenya and women's property rights and inheritance across different communities. The excerpts are shared below:-

**L**ucia Kamene, a thirty-three-year-old widow from the Kamba ethnic group, lived and farmed on land in eastern Kenya with her husband until he died in 1997. After he died, Kamene's brother-in-law told her and her children to leave, claiming that she was never married and he now owned the land. "He claimed that I wasn't married to my husband because not all of the customary steps were completed." Kamene considered herself married, as did her other in-laws, even though a few customary rituals were not done. "Even the clan knew we were married," she said. "The first time anyone said we were not married was a week after the burial."

Kamene's brother-in-law demanded the land title deed and her late husband's identification card. "He threatened me," she said. "He told me, 'I'll burn you with fire

if you don't put the title and I.D. card on the table right now.' He told me if I dared talk back to him, he'd beat me." Terrified, she gave him the documents. "I feared that my brother-in-law might attack me. I was afraid for the children." Soon after that, Kamene moved to Nairobi, taking only clothing for herself and her children and leaving behind livestock and other property. "My brother-in-law took everything," she said. "He did all this to evict me . . . This man was jealous of me because he didn't have boys. He thought my son would claim the land." Kamene's brother-in-law and his wife now live in Kamene's house.

Although Kamene informed the local chief of these threats, he did nothing. She did not report this to the police, who were far away. To this day, she wishes she could live on her land but fears going back. She now lives with her children and those of her sister (who died of

AIDS) in Nairobi's Mukuru slum. They live in a metal shack with no running water or electricity.

Watch, H. R. (2003). Double Standards: Women's Property Rights Violation in Kenya. Human Right Watch, 15(5A), 1-51.

Many women, particularly in urban areas, cohabit with men but do not complete all steps for a customary, civil, or religious marriage to be definitively recognized. Many of these women consider themselves married and in fact, may have enforceable rights under the common-law doctrine of presumption of marriage. Women in this status are prime candidates for disinheritance. In-laws use this hazy marital status along with other excuses, such as having no sons, to disinherit these women.

**P**atricia Wairiumu, a thirty-six-year-old widow from the Maragoli ethnic group, lived in Nairobi when her husband died in 1995. Shortly after he died, Wairium's in-laws raided her Nairobi home and stripped it bare. They wanted her to be inherited because they had paid dowry. She recalled:

*My in-laws took everything, even wedding presents . . . They took the television, furniture, beds, clocks off the walls, a table, stools, a radio, glasses, bed sheets, mattresses, and pans. They carried all this away. All they left in the house were the few things I had*

*locked up.*

*My brother-in-law said he wanted to inherit me and take all the property [including rural land]. I said in that case I didn't want the land, and I refused the brother. They wanted to kill me . . . My brother-in-law said that this is the custom and, out of respect for him, I should accept being inherited. He said he was an old man and I should give him the property and serve as his [second] wife . . . My mother-in-law was threatening, too. She said I should take care of her because I married her son and they paid for me. They wanted to make use of the 20,000 shillings [U.S.\$ 252] they had paid as dowry*

**O**mwena Omung'ina, a thirty-two-year-old woman from the Kisii ethnic group, lived with her partner for nine years and had two daughters with him but did not marry him. Nonetheless, their families and friends considered them husband and wife while he was alive. That changed when he died. "My husband's family didn't recognize me as his wife because I had just given birth to girls. That was a problem. They said I was a prostitute." She said his family "took everything" the day after he died. She objected, but the family

summoned a commander from the army, where her husband worked. The commander said the property must go with the body to the rural home because that is the tradition. Her in-laws took the property and her husband's rural land. She did not attempt to claim the land, saying this would be "suicidal." She explained, "My in-laws have already bewitched me. If I go back, they would physically hurt or kill me." Omung'ina never reported this to the police. "I know if I go to the police, they will tell me it's a private matter," she said.

Dowry can exacerbate property rights violations: if it is paid, some people consider the woman herself as property, and she has less bargaining power to defend her rights or resist wife inheritance.

On the whole, most tribes in Africa vest the rights of use rather than ownership on women. This is in line with the African concept of property ownership, particularly land, which was communally held. Divorce was a very rare thing to happen (Mbithi, 1969). In her study on the rights of spouses to property, Njenga Njau (1979, p. 24) states that as long as marriage remains "healthy", issues relating to the property rights of spouses will not arise.

**E**mily Owino, a fifty-four-year-old widow from the Luo ethnic group, lived and farmed on her husband's land from the time she married at age fifteen until her husband died several years ago. With four children, she depended on that land, her simple home, and her meager possessions to subsist. When her husband died, her in-laws took everything. "Things started disappearing from the time of the burial ceremony," she said. "They took farm equipment, livestock, cooking pans, bank records, pension documents, house utensils, blankets, and clothes . . . This happened in the three months after my husband died. I was desperate."

Owino's in-laws also pressured her to be cleansed by a jater. They hired a herdsman to cleanse Owino, paying him KSh500 (U.S. \$6). She had sex with this man-against her will and without a condom. "They said I had to be cleansed in order to stay in my home," she recalled. "I tried to refuse, but my in-laws said I must be cleansed or they'd beat me and chase me out of my home. They said they had bought me [with the dowry], and therefore I had no voice in that home." Succumbing to the cleansing ritual did not, however, save Owino from losing her home and land. The situation became unbearable: While she was gone, Owino's in-laws rented out her land, which the renter was cultivating, and took the title deed. "The land was supposed to be mine. My husband had

verbally willed it to me," Owino said. "There were witnesses. My in-laws knew it was my land, but they didn't care." When Owino complained, her in-laws threatened to assault her. Owino reported the incursion on her land to a village elder. "I told the elder 'I've come from my parents' home and found that someone planted cassava on my land.' The elder asked for a bribe before he would take action. He said, 'If a lady wants assistance, she must pay.' I didn't have the money." She then took her case to the local chief. According to Owino, the chief considered this an inconsequential "family case" and referred Owino back to the elder, who again refused to handle her case. She did not go to the police: "I had no money to go to the police. I was told that unless I have money, I couldn't go to the police." She could not afford a lawyer for a court claim. Since the local authorities were unhelpful, Owino again asked her mother-in-law if she could cultivate part of the land. "My mother-in-law refused, and told me to go back to my parents," Owino said. "I had to leave my home. I couldn't stay because I had nothing to eat, no land to till." Owino moved with her children from place to place until someone offered her a small, leaky hut made of poor-quality grass. None of her children are educated beyond pre-school. Though still young, they work as herders and maids. "If I could have stayed on my property, my children could have gone to school," Owino



## CHAPTER 3

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# LEGAL FRAMEWORKS



Kenya's commitment to the establishment and entrenching of gender equality is exemplified through its membership in several international legal instruments, which seek to safeguard women's rights. The Kenyan government has the mandate to defend the doctrines of nondiscrimination. Equity and equality form the basis of the Kenyan Constitution 2010 as well as regional and international human rights standards (Human Rights Watch & FIDA, 2020).

**Article 2(6)** of the Constitution stipulates that any treaty and convention ratified by Kenya will form part of the laws of Kenya. By this Article and the provisions of the Treaty Making and Ratification Act 2012, the rights enshrined in any ratified international agreement form part of the Kenyan laws.

## 3.1 International Instruments & Guiding Principles

### 3.1.1 The Convention on the Elimination of All Forms of Discrimination against Women-CEDAW

CEDAW<sup>6</sup> or the Treaty for the Rights of Women was adopted by the United Nations in 1979 and was ratified by Kenya on 9th March 1984. It is considered to be the most comprehensive international agreement on the basic human rights of women.

CEDAW urges States parties to end all forms of discrimination against women in laws, policies and practices, through short-term special mechanisms. **Art. 2** compels States to *“take all measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”*

<sup>6</sup>The Treaty provides an international standard for protecting and promoting women's human rights and is often referred to as a “Bill of Rights” for women. It is the only international instrument that comprehensively addresses women's rights within political, cultural, civic, economic and social spheres. As of August 2009, 185 countries had ratified CEDAW.

**Art. 14** calls on States Parties to take into special consideration problems faced by rural women and the key role they play in the economic subsistence of their families, to enhance women's participation in rural development to guarantee such women the right. The Article further calls on States to ensure rural women's access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes. Rural women according to **Art. 14** are entitled to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

**Art. 15** requires States Parties to accord women and men equality before the law. States parties are required to accord women in civil matters, a legal capacity similar to that of men and equal opportunities to utilize that ability. Particularly, States parties will accord women equal rights to conclude agreements, to manage property and treat them equally in all procedural processes in courts and tribunals.

**Art. 16** compels State Parties to take appropriate measures to eradicate discrimination against women in all matters on marriage and family relations and the state to particularly ensure equality of men and women. Moreover, the state is required to ensure that men and women have the same rights and responsibilities during marriage and its dissolution, as well as grant the same rights to both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

CEDAW advocates for the equality of women and men in the family as well as in society. The Convention offers a wide-ranging standard of equality for women and men in marriage and family relations, specifically in Article 16. In 1994, the CEDAW Committee further affirmed this right in its General Recommendation No. 21 on Equality in Marriage and Family relations. The CEDAW Committee recognized the significance of culture and tradition in shaping the thinking and behaviour of men and women and the significant role they play in limiting the full realization of basic rights by women.

## 3.2 The International Bill of Human Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

### 3.2.1 The Universal Declaration of Human Rights

The UDHR was a pacesetter document in the history of human rights. It set out, for the first time, fundamental human rights to be universally protected. The UDHR encouraged and set the stage for the adoption of several human rights treaties. Kenya ratified the Declaration on July 31st 1990.

**Art. 2** sets the principle of nondiscrimination based on the grounds of sex, race, colour, language, religion, language, political or other opinions, national or social origin, property, birth or other status.

**Art. 7** advocates for equal protection of the law for all without any discrimination, whereas **Art. 8** guarantees everyone the right to an effective remedy by capable

national tribunals for acts violating fundamental rights granted by the constitution or law.

**Art. 16** Grants men and women of full age to equal rights as to marriage, during marriage and at its dissolution. Art. 17 guarantees all the right to own property individually as well as cooperatively with others and no one could be arbitrarily deprived of their property. The UDHR promises all the economic, cultural, social, civic and political rights that reinforce a life free from want and fear.

### 3.2.2 The International Covenant on Civil & Political Rights

The ICCPR is a fundamental international human rights treaty offering a range of safeguards for civil and political rights. The ICCPR obligates countries that have ratified the treaty to defend and uphold basic human rights, such as the right to life and human dignity; equality before the law; assembly, freedom of speech, and association; privacy and religious freedom; ill-treatment, freedom from torture, and arbitrary detention; gender equality; the right to a fair trial; right family life and family unity; and minority rights. The Covenant compels governments to take administrative, judicial, and legislative measures to protect the rights enshrined in the treaty and to provide an effective remedy.

## 3.3 Regional Instruments and Guiding Principles

### 3.3.1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa-Maputo Protocol

The Maputo Protocol or the African Bill of Rights of Women's Human Rights was adopted in Maputo, Mozambique on July 11th 2003 and Kenya ratified it on October 13th 2010. It continues to be the most advanced legal tool offering a wide-ranging set of human rights for African women. It is the only women's human rights instrument that underscores an extensive and essential human right for African women highlighting their social, political, cultural, economic as well as environmental rights.

**Art. 2** unequivocally deals with equality and eradication of all forms of discrimination against women. It outlines legislative and policy measures that State parties should be taking to eradicate discrimination against women. *"... In this regard they shall incorporate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life"* (Maputo Protocol, Article 2 (1) (c)). This article calls for gender mainstreaming of women's issues. Therefore, all laws, policy decisions and development plans should be changed and amended considering women.

**Art. 6** demands States Parties to ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee:

- i. Monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;
- ii. During her marriage, a woman shall have the right to acquire her property and to administer and manage it freely.



**Art. 7** instructs States Parties to enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage.

In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage. "... In this regard, they shall ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage" (Maputo Protocol, Article 7 (d)). Upon divorce, separation or annulment of marriage women are eligible to an equitable share of the property which grants women rights over the matrimonial property.

**Art. 8** guarantees women and men equality before the law, equal protection and benefit of the law. It obliges State Parties to ensure that:

- Law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
- Reform of existing discriminatory laws and practices to promote and protect the rights of women;

It is indispensable that women are given support when accessing the judicial and legal services whilst pursuing a court case regarding property.

**Art. 19** Safeguards women's right to sustainable development;

- Promote women's access to and control over productive resources such as land and guarantee their right to property;

The Kenyan government is obliged to support women acquiring, managing and administering land.

**Art. 19** Safeguards widows' rights and compels State Parties to take suitable measures to guarantee that widows are entitled to all the human rights, by ensuring that they are not subjected to cruel, and degrading treatment.

**Art. 20** Protects widows' rights to inheritance.

A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

On the death of her husband, a woman shall have the right to her share of her husband's property and may continue living within the matrimonial home, despite her later remarriage. The Protocol does not define the term 'property' but gives separate references to both 'property' and 'marital home' within Art. 20, it can be implied that the intention of the Protocol is for women to have the right to inherit an equitable share of all types of her deceased husband's property and not just simply the marital home (The Circle et al., 2014).

The Maputo Protocol indisputably strengthens women's rights in its entirety, while clarifying on specific and distinctive experiences of African women and establishing the standards for women's human rights in Africa that includes among others, elimination of discrimination against women; rights of the widows; widows right to

inheritance; the right to access to justice and equal protection before the law; women's right to sustainable development; separation, divorce and annulment of marriage; and marriage rights.

Despite the substantial number of ratifications to the Maputo Protocol and the advancement made in the fulfilment of the rights of women in Africa, the gains have been extremely slow and low. The slow progress in implementation of the Protocol could be as a result of lack of accountability, absence of or limited access to verifiable data and limited capacity for data and information processing have contributed to these less than satisfactory levels of implementation. The Maputo Protocol does not draw a correlation between (non) payment of dowry and women's land rights and inheritance. However, it recognizes women rights to own property and inherit from their deceased husbands.

### 3.4 The African Commission on Human and Peoples' Rights (ACHPR) (African Charter)

The African framework for the preservation of human rights is composed of the African Commission on Human and Peoples' Rights, which acts as a complaint and reporting system, and the African Court on Human and Peoples' Rights, whose verdicts are binding on the member states. The African Commission on Human and Peoples' Rights ("the Commission") is charged with the protection and advancement of human and peoples' rights in Africa, and interpretation of the African Charter on Human and Peoples' Rights (the African Charter). Kenya ratified the African Charter on January 23rd, 1992. The African Court was set up by an additional Protocol to the African Charter that took effect in 2004. The Court complements the African Commission and its decisions are legally binding. The African Commission can refer cases to the African Court on Human and Peoples' Rights when it considers that a State has not complied with, or is unwilling to comply with recommendations in its communications.

**Art. 2 & 3** State parties are obliged to ensure equality of all persons – men and women and to guarantee equal protection of their rights.

**Art. 14** guarantees the right to property. It may only be encroached upon public interest need or in the general interest of the community and according to the provisions of appropriate laws.

**Art. 18** obliges the State to eliminate all forms of discrimination against women and also ensures the protection of the rights of the woman and the child as specified in international declarations and conventions.

**Art. 19** promotes equality of All peoples and equal enjoyment of rights and respect.

**Art. 22** protects and promotes all people's rights to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

ACHPR adopted a resolution proposing that states parties to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) enact legislation to ensure that women and men enjoy the same rights in case of separation, divorce, or annulment of marriage. The ACHPR resolution stated that women and men have "*the right to an equitable sharing of joint property deriving from the marriage*" in circumstances of separation, divorce, or annulment of marriage

On 14 November 2020, the African Commission on Human and Peoples' Rights (African Commission) launched General Comment No. 6 on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). General Comment No. 6 specifically focuses on article 7(d) of the Maputo Protocol, which addresses the right to property during separation, divorce or annulment.

As noted in General Comment No. 6:

Women on the continent find themselves in a vulnerable status in terms of the enjoyment of their socio-economic rights on an equal basis as men. They have limited access to and enjoyment of property rights. Unequal power dynamics in the relations between the sexes, discriminatory social and cultural structures and practices and women's lack of economic empowerment, among others, are key factors that affect women's rights to property in Africa.

It further notes that in many parts of Africa, women's contribution to the acquisition of marital property had been continuously overlooked through the following factors:

- Gender discriminatory registration laws and practices, which prohibited or discouraged women from owning housing, land and property jointly with their spouse, or gave preference for registration of housing, land and property in the name of the male spouse only.
- The application of the concept of marital power, which grants power to only the husband to administer his wife's property and/or their jointly owned property.
- Gendered responsibilities compelling women to use their resources for the upkeep of the family and maintaining the home while men use theirs for the acquisition of properties.
- The application of negative customary norms and religious practices.

Thus, General Comment No. 6 is intended to guide the interpretation of the rights of women during separation, divorce or annulment of marriage; to establish that women and men have the right to an equitable sharing of the joint property originating from the marriage; to provide guidance on how marital property should be shared fairly and in a manner consistent with the notion of 'substantive equality'<sup>7</sup> between women and men, and to outline the overall and specific obligations on member states towards promoting the effective domestication and implementation of article 7(d) of the Maputo Protocol.

In May 2018, the ACHPR issued a landmark judgment in [APDF & IHRDA v Republic of Mali]. The Court further held that the Persons and Family Code (Family Code) violated Articles 1(3), 2, 3, 4 and 21 of the African Charter on the Rights and Welfare of Children (Children's African Charter); Articles 2(2), 6(a) and (b), and 21(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol); and Articles 5(a), 16(a) and (b) of The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which the state has ratified. Four of these violations were in relation to child marriage, consent to marriage, discriminatory inheritance and marriage practices. The Court held that Mali was culpable of these violations, proposing amendments and other revisions to the Family Code. The Court held the government of Mali to violate its obligations under international law and ordered the State to review and make changes in the Family Code.

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<sup>7</sup>refers to the form of equality that requires the adoption of measures that go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural impediments for equal enjoyment of rights; tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law. Ibid

## 3.5 Framework and Guidelines on Land Policy in Africa adopted by the AU in 2009

The Framework and Guidelines on Land Policy in Africa is a joint initiative of the partnership and combined effort of the African Union Commission (AUC), the UN Economic Commission for Africa (ECA) and the African Development Bank (AfDB) to promote Africa's socio-economic progress, agricultural transformation and modernization. Started in 2006, the aim of the Land Policy Initiative (LPI) was to study land policy matters and difficulties in Africa to develop a framework to strengthen land rights, enhance productivity and improve livelihoods. The Framework was adopted by the Assembly of Heads of State and Government in July 2009.

The Framework and Guidelines posit that better and more productive use of land necessitates that women land rights be reinforced through a variety of processes including legislation enactment that permits women to enforce documented claims to land within and outside marriage. This should come concurrently with equal rights for women to inherit and bestow land, co-ownership of registered land by spouses and the promotion of women's participation in land administration structures. To ensure full enjoyment of land rights, these measures must be part of an ideology that removes issues regarding the land rights of women from the private sphere of marriage and family and places them in the public domain of human rights.

## 3.6 Legal Frameworks in Kenya

### 3.6.1 Constitution of Kenya, 2010

The Constitution makes key provisions that guarantee the rights of women to own land and property. These provisions relate to Access to justice; National values and principles; Equality and freedom from discrimination; Protection of the right to property; Principles of land policy; and Judicial authority.

Below are key examples:

**Art. 2 (4)** provides that any law, including customary law, inconsistent with the Constitution is void to the extent of the inconsistency.

**Art. 2 (5) and (6)** provide that the general rules of international law and any treaty or convention ratified by Kenya form part of the Law of Kenya and require Kenya to domesticate the Convention on the Rights of Child, CEDAW, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa that outlaw any form of discrimination based on sex.

**Art. 10 (2) (b)** points out national values and principles of governance to include equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.

**Art. 27** - Equality and Freedom from Discrimination

**Art. 27(1)** - Legal Equality

"Every person is equal before the law and has the right to equal protection and equal benefit of the law."

**Art. 27(2)** - Freedom of Equality

"Equality includes the full and equal enjoyment of all rights and fundamental freedoms."

**Art. 27(3), (4)** - Political, Economic, Cultural and Social Equality

**Article 27(4)** accords considerably increased protection to women, it prohibits discrimination based on disability and age, neither of which was included in the list of protected grounds in the previous Constitution.

Kenya's international commitment in respect of equality extends not only to eliminating discrimination, but also requires it to take measures to promote substantive equality through positive action (in Kenya referred to as "*affirmative action*" while CESCR has stated that "*states parties may be, and in some cases are, under an obligation to adopt special measures to mitigate or suppress conditions that perpetuate discrimination*"). It is, therefore, particularly welcome that **Article 27(6) (7)** compels the State to take legislative and other measures to redress any injustice suffered by individuals or groups because of past discrimination.

*To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

This article includes an important citation to the building of a framework to take steps to address discrimination issues. The inclusion of **Art. 27** in the Constitution depicts the government's commitment to carrying out positive action to achieve equality and non-discrimination (The Circle, 2014).

**Art. 2(4)** Stipulates that the Constitution shall take precedence over any law including customary law, which is inconsistent with the Constitution. This provision is especially pertinent to land policy, where customary practices which discriminate against women are still prevalent i.e., the laws of succession. **Art. 2** along with **Art. 60** ensure that land policy must harmonize to eradicate gender discrimination. This Article could help expand the right to non-discrimination in a broad range of issues of law regulating personal or family relationships and property rights where customary laws are still upheld (The Circle et al., 2014).

To this end, **Art. 2 (4)** stipulates: ". . .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."

Kenya's international obligations relating to discrimination and equality obliges it not only to enact legislation safeguarding individuals against discrimination, but also to introduce measures through which they can seek restitution for the damage suffered, and which are sufficient to address any structural grounds of discrimination.

### 3.6.2 Property Rights in Kenyan Perspective

Land in Kenya is classified as public, private or community as per **Art. 61(2)** CoK. Public land is reserved for public use or environmental conservation. It is administered and managed by the National Land Commission on behalf of the people of Kenya (Art 62 CoK). Private land is held by natural or legal persons. The Ministry of Lands

is mandated to register any interests in private land (Art 64). Community land is held by communities based on culture, ethnicity or similar community interests (Art 63).

**Art. 40** CoK stipulates that subject to Art. 65 every person has the right, either individually or in association with others, to acquire and own property - of any description and in any part of Kenya.

**Art. 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. . . . limit or in any way restrict the enjoyment of any right under this Article based on any of the grounds specified or contemplated in Article 27 (4).

**Art. 60 (1) (f)** further stipulates the elimination of gender discrimination in law, customs and practices related to land and property.

Protection of deceased persons' dependents' holding interests in any land, including the interests of spouses in actual occupation of land, is safeguarded in **Art. 68 c (vi)**. Widows' land rights are reliant on several factors, which include: age, number of children, and the widow's relationship with the deceased's family, and are often uncertain under customary law due to her position as a foreigner to the family lineage. In some areas, widows hold land in trust for their sons until a designated age. When sons are of age and take over, a widow may remain firmly on the land, but if there are no male children, her position is insubstantial since she lacks a connection to the patrilineage (Harrington and Chopra, 2010).

Access and control of property are critical to the quest for women's political, economic and social empowerment. Land is considered to be one of the most important factors of production and is viewed as the foundation for all economic development. It is the primary source of livelihood especially for farmers and pastoralists in the rural areas (Odeny, 2013). In practice, women remain deprived and discriminated against in land matters. The main cause of limitation is customary laws and practices, which continue to prevent women from owning or inheriting land and other forms of property. Customary practices in Kenya generally grant women secondary rights to land, through their relationships to a male relative; women hardly ever inherit land in their own right. Kenya has experienced legal reforms that are geared towards granting Kenyan women equal inheritance rights (Musangi, 2017).

### 3.6.3 Principles of Land Policy

Art. 60 of the constitution provides that land should be held, used and managed in an equitable, efficient, productive and sustainable manner per the following principles of land policy:

- Equitable access to land; Security of land rights.
- Elimination of gender discrimination in law, customs and practices related to land and property in land;
- Encouragement of communities to settle land disputes through recognised local community initiatives.

The constitution further requires under **Art. 159 (2) (c)** that courts must be guided by the principles that justice shall be done to all irrespective of their status, is not delayed, and that Alternative Dispute Resolution (ADR), which includes traditional justice mechanisms, should not contravene the bill of rights especially **Art. (27)**. Women who find it challenging to access justice through the formal justice system can use ADR as a suitable alternative to resolve land disputes in quicker, less costly and more satisfying settlements between parties involved. In addition, **Art. 159 (2) (b)** undertake that justice is administered without undue regard to procedural technicalities; a situation that often affects women with limited knowledge of judicial processes and or have low literacy levels.

**Article 159 (3)** provides that “Traditional dispute resolution mechanisms shall not be used in a way that that:

- contravenes the Bill of rights,
- is repugnant to justice, and morality or results in outcomes that are repugnant to justice or morality,
- or is inconsistent with this constitution and any written law. (As provided in Article 27, Article 10 and Article 40 respectively).

The CoK 2010 has enhanced access to justice for women by demanding favourable interpretation of laws in implementation, easier access and simpler court processes as well as encouraging the use of more affordable and accessible community dispute resolution mechanisms. The Constitution provides more opportunities for women to be included in leadership and decision-making positions by requiring that there be no more than two-thirds of the same gender appointed or nominated in positions of leadership. Devolution was established as a mechanism of bringing services near to the people; therefore enhancing the participation of women in making decisions on issues that affects them and designing specific solutions.

### 3.6.4 National Land Policy 2009

The National Land Policy (NLP) 2009 provides the legal basis to secure equal land rights for women and men as enshrined in the CoK 2010. This policy underscores land rights as human rights, applied to all Kenyans regardless of their sex and social status; protecting women against discriminatory laws, customs and practices that often infringe on these rights. It calls for the enforcement of existing laws and establishing a clear framework to protect the inheritance rights of women. The policy recognizes, protects and recommended the registration of community rights to land and land-based resources taking into account multiple interests of all land users, including women. Noting the challenges of cultural norms and traditions by various communities including land ownership, control and use practices, the policy calls on the government to put in place appropriate legislation to ensure effective protection of women's rights to land and related resources including securing the rights of women in pastoral communities. It makes provision for joint spousal registration and documentation of land rights, joint spousal consent in land transactions including disposal ensuring women can participate in key decisions over household land and property. The policy calls on the government to outlaw and repeals any laws or regulations, customs and practices that discriminate against women in relation to land; and to promote inheritance rights of unmarried daughters. Acknowledging inadequate access to legal information on such rights, the policy recommends public education and sensitization of the communities on the abandonment of cultural practices that bar women from enjoying their land rights including inheritance rights.

### 3.6.5 Land Act 2012

The Land Act was developed to give effect to **Art. 68** of the constitution; focused on revising, consolidating and rationalizing land laws and eliminating culturally biased practices that hinder women's participation in the control of land. The Act provides that a state officer shall be guided by principles of non-discrimination and inclusivity when dealing with land. The Act also provides for sustainable administration and management of land and land-based resources and connected purposes. **Art. 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". Among other provisions, this Act under Section 12 provides that the NLC may allocate public land on behalf of the national and county government by way of public auction, or through application targeting groups to ameliorate their disadvantaged position; a provision seeking to benefit women and marginalized groups including application and allocation of public land.

The Act provides for sustainable "*Conservation of land-based natural resources including making rules and regulations*" including incentives for individual and communities to invest in income-generating natural resource and conservation programmes. To promote women's empowerment, the Act (section 19) provides that measures to facilitate, access, use and management of forests, water and other resources by communities who have customary rights over these resources are developed, creating opportunities for equal and sustainable use of natural resources by men and women.

This Act does not specifically define the term 'spouse'. 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 definition is discriminatory of a woman in a "come we stay" association and whose land rights are not recognized for not fitting the "civil, customary or religious marriage". 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<sup>8</sup> and put women in a difficult situation to prove marriage in case of a court challenge.

### 3.6.6 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. All registered land is subject to overriding interests. In this case, whether or not a wife's name appears on a certificate of registration, her rights as a wife will be secured in all dealings. The Act makes provisions for ownership in common where parties own equal distinct shares. Tenancy in common advances women's land rights by protecting the interests of women who are co-owners of a property or parcel of land.

<sup>8</sup>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.



**Section 93** of the LRA provides that “Subject to the law on matrimonial property if a spouse obtains land for the co-ownership and use of either spouse or all the spouses:-

- There shall be a presumption that the spouses shall hold the land as joint tenants unless- clearly indicated otherwise in the certificate that the land or property is solely for the one spouse, or the presumption is rebutted in the manner stated in this subsection and;
- The Registrar shall register the spouses as joint tenants.

Significant gains for women in this law is the creation of statutory rights for spouses, and any person seeking to carry out a land transaction (all property) will necessarily have to disclose their marital status; the presumption that the spouses shall hold the land as joint tenants, registering spouses as joint tenants, acquired interest in land (including customary land) through the contribution of labour or other means to the productivity, upkeep and improvement of the land, and participation of women in the settlement process. A spouse is deemed to be a co-owner, even though their name may be missing from the title document by their contribution to the improvement of the land and property. 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. Recognizing that women are often not included in the certificates; this law serves the interest to secure women's right to land and property by ensuring their voices count in decision making over property transactions. The Land Registration Act guides the sharing of matrimonial property upon dissolution of a marriage and when parties cannot agree on who should keep the matrimonial home. While this law recognizes the rights of women in a polygamous marriage, their share of land and property by time and contribution is not well stipulated in the law or the matrimonial Act, a situation that can be exploited to deny women their rights to matrimonial property.

### 3.6.7 The Matrimonial Property Act, 2013

The Act has progressive provisions that seek to secure the matrimonial property during the dissolution of marriage and its implementation gave life to Article 45(3) of the Constitution and provides for equality at the time of the marriage, during the marriage and after the marriage. While acknowledging the historical injustices that women often face while pursuing their matrimonial property right, **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 dependents 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. Often, land and property are not jointly registered under the names of both spouses; but often documented in the name of the male spouse. This leaves the women and children vulnerable to forced eviction, GBV during and after the dissolution of marriages, regardless of the women's contribution. Joint registration of land and property by spouses often increases women's negotiation and rights to be included in decision making as provided in this law.

Significantly, this law recognizes the direct and indirect contribution by a spouse toward the improvement of land and or property including non-monitory forms of contribution. Such improvements can be used to claim an interest in other property

acquired during the marriage which may not qualify as matrimonial property. The Act also protects women who risk eviction from their matrimonial property, including homes, apartments and plots with a claim from the spouse to vacate the premises during marital disputes. Such evictions are done only with a valid court order.

The Act also provides for the division of property in a polygamous family upon divorce. The matrimonial property acquired between the man and the first wife before he married the subsequent wives shall be retained equally between the husband and the first wife. Thereafter, the remaining matrimonial property shall be divided subject to each of the wife's and husband's contributions to the acquisition of such property. By allowing prenuptial agreements couples can mutually agree before marriage whether investments owned before or after marriage would be separately owned or jointly owned matrimonial property. Notwithstanding other co-wives/wives, one wife can agree with the husband to acquire property without the participation of the other co-wives and in such situations, the property is shared between the husband and that particular wife. However, the implementation of this Act remains challenging as it requires women to show the contribution to claim of matrimonial property which is often difficult for most married women who work as home managers to quantify.

### 3.6.8 The Marriage Act, 2014

Kenya recognizes five different marriage types – civil, customary, Christian, Muslim and Hindu – all of which are now governed by the Marriage Act, 2014. Previously, the legal framework for marriage included seven separate laws. All have been repealed by the Marriage Act, 2014, which consolidates the five marital regimes into a single law with separate parts establishing the legal framework governing each. Several provisions of the Marriage Act apply to all marriages. The minimum age of marriage is raised to 18 for both girls and boys, in all marriage types.<sup>9</sup>

All marriages require the voluntary consent of both parties, as well as their presence at the marriage ceremony. All marriages are to be registered and have the same legal status. However, while “marriage” is defined as, “the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered per this Act”, the legal status of unregistered marriage which would otherwise fall under the Act's jurisdiction is unclear.<sup>10</sup>

Civil Marriages must be monogamous. Parties are required to provide notice of their intention to marry to the Registrar 21 days to three months prior to the marriage. They must be celebrated in front of a Registrar, who completes and signs the marriage certificate, acquires the signatures of the parties, and provides copies to the parties and the Registry. On dissolution, either party can petition the court to dissolve the marriage on the grounds of adultery, cruelty, exceptional depravity, desertion or irretrievable breakdown of the marriage, provided at least three years have passed since the celebration of the marriage.<sup>11</sup>

<sup>9</sup><http://landwise.landesa.org/record/1528>

<sup>10</sup>Marriage Act, supra note 74 at Cap 150; African Christian Marriage and Divorce Act at Cap 151; Matrimonial Causes Act at Cap 152; Subordinate Court (Separation and Maintenance) Act at Cap 153; Marriage and Divorce Registration Act at Cap 155, Mohammedan Marriage Divorce and Succession Act at Cap 156; and Hindu Marriage and Divorce Act at Cap 157.

<sup>11</sup>Section 66(6) of the Marriage Act, supra note 74, provides a list of conditions under which a marriage may be considered irretrievably broken down.

Customary marriages were previously recognized as valid but were, for the most part, not governed by formal law but rather by the laws of the specific community, which remain un-codified. The Marriage Act, 2014, brings customary marriages into the formal legal framework, although it preserves their customary nature, presumed to be polygamous or potentially polygamous. Note that polygamy refers to a man having multiple simultaneous wives. There is no legal limit to the number of wives a man may have. A polygamous or potentially polygamous marriage may be converted into a monogamous marriage upon the voluntary declaration of both parties in the presence of a marriage officer, provided there are only two parties to the marriage at the time of the declaration. Notice of a customary marriage must be provided to the Registrar within three months of the completion of relevant ceremonies and/or steps. Marriages are to be celebrated per the customs of either or both parties.

Where customary practices include payment of dowry, payment of a token amount is sufficient to fulfil the requirement for the purposes of the Act. Parties to a customary marriage must apply to the Registrar within six months of their marriage and must both appear before the Registrar in person to be issued with a marriage certificate. Section 8 of the Matrimonial Property Act defines land and property rights within a polygamous marriage, although the Act explicitly excludes Muslim marriages and therefore applies only to customary marriages.

This Act in general amends and consolidates the various laws relating to marriage and divorce by bringing together the various existing laws in the country into one coherent legal instrument, therefore, regulating all Hindu, Islamic, Civil, Christian and Customary marriages. Though recognized under this Act, all these unions must be registered. Thus, a customary marriage or consensual union that is not registered will not be recognized as a marriage under the law. The marriage act recognizes and codifies polygamy as part of customary marriages allowing men to marry multiple wives without the previous wives(s) permission. While a monogamous marriage cannot be converted into a polygamous marriage, a polygamous form of marriage may be converted into a monogamous marriage, if both parties to the marriage agreement and the husband only have one wife at the time of the conversion. This law affords parties to any form of marriage equal rights, stating that parties to a marriage have equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

### **3.6.9 Community Land Act, 2016**

In response to the Constitutional demands in Article 63(5), the Parliament of Kenya passed the Community Land Act in 2016 (CLA 2016) giving effect to the recognition of Community land. CLA 2016 seeks to provide recognition, protection and registration of community land rights; management and administration of community land; the role of county governments in relation to unregistered community land and for connected purposes. The bulk of the land in Kenya, about 70%, is under customary ownership. The process of land adjudication, consolidation, and registration crystallized men's absolute ownership and control of land; and excluded women from the decision-making processes as men held the vast majority of seats in institutions such as land boards that adjudicate land rights.

Community land in Kenya is vested in the Community. The term "Community" has been defined to mean a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry, similar culture or unique mode of livelihood, socioeconomic or

other similar common interest, geographical space, ecological space, or ethnicity. The constitution of a community is therefore not limited to ethnic lines as is the case with the current practice.

Community land may be held under customary, freehold, leasehold land tenure systems and such other tenure systems recognized under the Act or other written law. Further, community land may be held as communal land, family or clan land, reserve land, or in any other category of land recognized under the Act or any other written law. As opposed to the land being owned by or vested in an individual, this Act now allows land to be vested and to be registered in the name of the Community. In Community land, there is communal use of land, meaning, holding, or using land in undivided shares by a community. In the new law, i.e., Community Land Act, 2016, there are deliberate provisions to ensure women participate in decision making and the administration and management of Community Land as provided in key provisions below:

**Section 14** upholds customary rights of occupancy without discrimination; Women cannot, therefore, be evicted from customary land.

**Section 14(1)** provides “A customary right of occupancy in Community Land shall in every respect be equal in status and effect to a right of occupancy granted in any other category of land and shall be capable of being allocated by the Community to person, family, group of persons, clan, etc.”

**Section 14(4) (c)** provides, “The registered community shall, when considering the application for allocation have regard to:

- a) Equality of all persons including equal treatment of women and men.
- b) Non-discrimination of any person based on gender, disability, minority, culture or marital status.”

**Section 15** provides that the forum for decision making by the Community shall comply with two-thirds (2/3rd) gender rule. This allows women to participate in decision making including dispute resolution.

The Act requires community land rights to be registered per its provisions and the provisions of the Land Registration Act, 2012. In this respect, a Certificate of Title issued by the Community Land Registrar shall be evidence of ownership of the land. Section 30 (3, 4, and 5) of the Act provides that women, men, youth, minorities, persons with disabilities, and marginalized groups have the right to equal treatment in all dealings in community land and that a registered community shall not directly or indirectly discriminate against any member of the community on any ground including race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture. The Act further states that every man or woman married to a member of the community shall gain automatic membership of the community and such membership shall subsist until the spouses legally divorce and the woman remarries after the death of a spouse.

Although the CLA 2016 provides for rights of women to land, the requirement of the communities to register as legal entities such as is registered in the name of “communities”, “a clan or family”, or a “community association is silent to the power and gender dynamics, hence gender-neutral. Section 15 (1) of the Act states that a registered community shall have a community assembly which shall consist

of all adult members of the community. The same applies to the formation of the Community Land Management Committee and the Community Assemblies. Women are also excluded from mandatory participation in the boundary marking process and dispute resolution, and unclear provision on the inclusion of all spouses in the registration of family property. The Act fails to provide clear pronouncement on representation required by gender in the decision-making body, a situation that risks having male-only or few female adults' representations in assemblies and community land management committees due to gender blindness often attributable to cultural norms and practices. The Community Assembly is a critical decision-making body since all decisions must be ratified by the assembly thus the need to ensure that it is representative of all community members, women and men. The exclusion of women in key decision making in land administration and management is often shaped by cultural beliefs and norms that relegate women as beneficiaries of decisions made by men; a situation that furthers entrenches gender inequality and deny women their rights to land. Limited representation of women in key land governance decision making bodies need urgent attention to ensure ongoing efforts to implement CLA 2016 do not deepen gender inequalities in access and control over land. The passing of the Community land law is a good step in the right direction towards protecting and securing women's land rights; however, the good intentions must be accompanied by appropriate actions to translate and implement the good intention to realize the desired outcomes.

CLA 2016 has resulted in major gains in securing women's land and property rights, reaching women living in approx. 70% of the landmass. Gains resulting from the CLA 2016 and proactive engagement of women in pursuing their land rights mean that women are now able to:

- Register land and property jointly with their husbands
- Ensure their voices are heard in the land-related decision-making process
- Participate in institutions that adjudicate land disputes such as Land Boards and National Land Commission
- Contest decisions based on customary law and demand corrective action
- Demand for incentives, such as tax credits and subsidies for joint registration
- Sensitize their families to understand why it is important for women to own land and;
- Use ADR to resolve land-based disputes efficiently and in cost-effective ways.

### 3.6.10 Law of Succession, Chapter 160 Laws of Kenya

**Chapter 160 Laws of Kenya** - It seeks to ensure that all rightful dependent/beneficiaries inherit the deceased property and also provides for the procedures to be followed. The Act treats men and women equally. However, there is significant discrimination regarding the provision that if the surviving spouse is a woman, her interest in the property terminates upon her remarriage. If a surviving spouse is a man and he remarries, his interest does not terminate. This section needs to be amended because it contravenes the constitution.

**On polygamous marriages** - 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 woman, 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.

**The provisions of the Law of Succession Act, to a large extent attempts to eliminate discrimination against women.** However, the practice is still undermining matrimonial property rights of the first woman versus other wives as it comes to succession, and especially when sharing property. This denies women the freedom and security they need over their matrimonial property; while also serving to encourage men to marry many women.

The Law of Succession Act amendment bill tabled in Parliament in 2020 however aims to address some of the most pertinent issues that contribute to succession law disputes in Kenya including:

- Dependency and gender equality and in particular the recognition of widowers as dependents in their own right without the need to provide evidence to prove that they were dependents.
- Equal distribution of rights between parents of the deceased where it had previously been recognized the father to the deceased had the prior rights to the mother in respect to the estate of the deceased. The proposed amendments will ensure that mothers of the deceased who die intestate are entitled to receive an equal share to their husbands in the event the deceased did not leave behind a wife (vest) or children.
- Elimination of former wives' automatic rights in the deceased's estate. The effect of this is to cause former wives who claim a share in the deceased's estate to firstly satisfy to the courts that they were being maintained by the deceased prior to his death before being entitled to a share of the estate; and
- Re-marriage and what will happen to beneficiaries' interests upon subsequent marriages.

Overall, the effect of the amendments has been to embrace the principle of gender equality espoused under Article 27(4) of the Constitution of Kenya into the law on succession in Kenya.

### **3.6.11 The Land Laws (Amendment) Act No. 28 of 2016**

The Land Laws (Amendment) Act No. 28 of 2016 introduces amendments to the provisions of the Land Act touching on eviction from public and private land. A valid court order, which is a crucial instrument for the realization of many fundamental rights, is now not a legal requirement in such evictions. The Land Laws (Amendment) Act No. 28 of 2016 attempts to clarify existing confusion over the definition of matrimonial property and defines the same as "any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage." Matrimonial Property is now distinguished from matrimonial home which is defined under the Act to mean "any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home".

This law eliminates the rebuttable presumption of joint tenancy where a spouse obtained land for co-ownership and used by both spouses; previously incorporated in Section 93 of the Land Registration Act (LRA). Spousal Interest is no longer automatically deemed to be an overriding interest over registered land without their being noted on the register. This requires that more deliberate efforts be made on the part of married couples to register property in their joint names for such an interest to be recognized in law. It is important to understand that parties that jointly own any property are all required to execute any documents relating to the sale or transfer of such property – in such a case the issue of spousal interest will not arise.



## CHAPTER 4

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# METHODOLOGY



## 4.1 Introduction

This chapter documents all the processes involved in carrying out this research. The methodology applied in this research involved; Research design, the area of study, target population/respondents, respondent sampling, data collection tools and instruments, data processing, data analysis and data presentation.

## 4.2 Research design

This research applied both qualitative and quantitative research methods. Qualitative research was applied in the analysis of words/narratives received from the respondents. Quantitative research on the other hand deals with numbers and statistics. The statistics derived from the data collected from the questionnaires was analyzed and information derived from them. A digital questionnaire was developed and deployed to facilitate data collection.

## 4.3 Target population

The target population for the research was the adult female population. Women above the age of eighteen were randomly selected and interviewed. The interviewed women fell between two main categories namely;

- Married/Ever been married
- Never been married/Single.

The married/ever been married category was further subdivided into three more subcategories namely:

- Married
- Divorced/Separated
- Widowed

Key informants in the land sector were also interviewed using a separate set of questionnaires. This involved both state and non-state actors. Views of elders who sit on dowry committees were also sought.

## 4.4 Study area

The study undertaken was national research. Select counties were sampled as a representation of the entire country. Interviews were undertaken in 25 counties. Each (county except two) was assigned an enumerator trained in digital data collection using tablets/smartphones. A minimum of 15 women was interviewed per county.

The selected counties included the following;



Table 4-A: Selected Counties

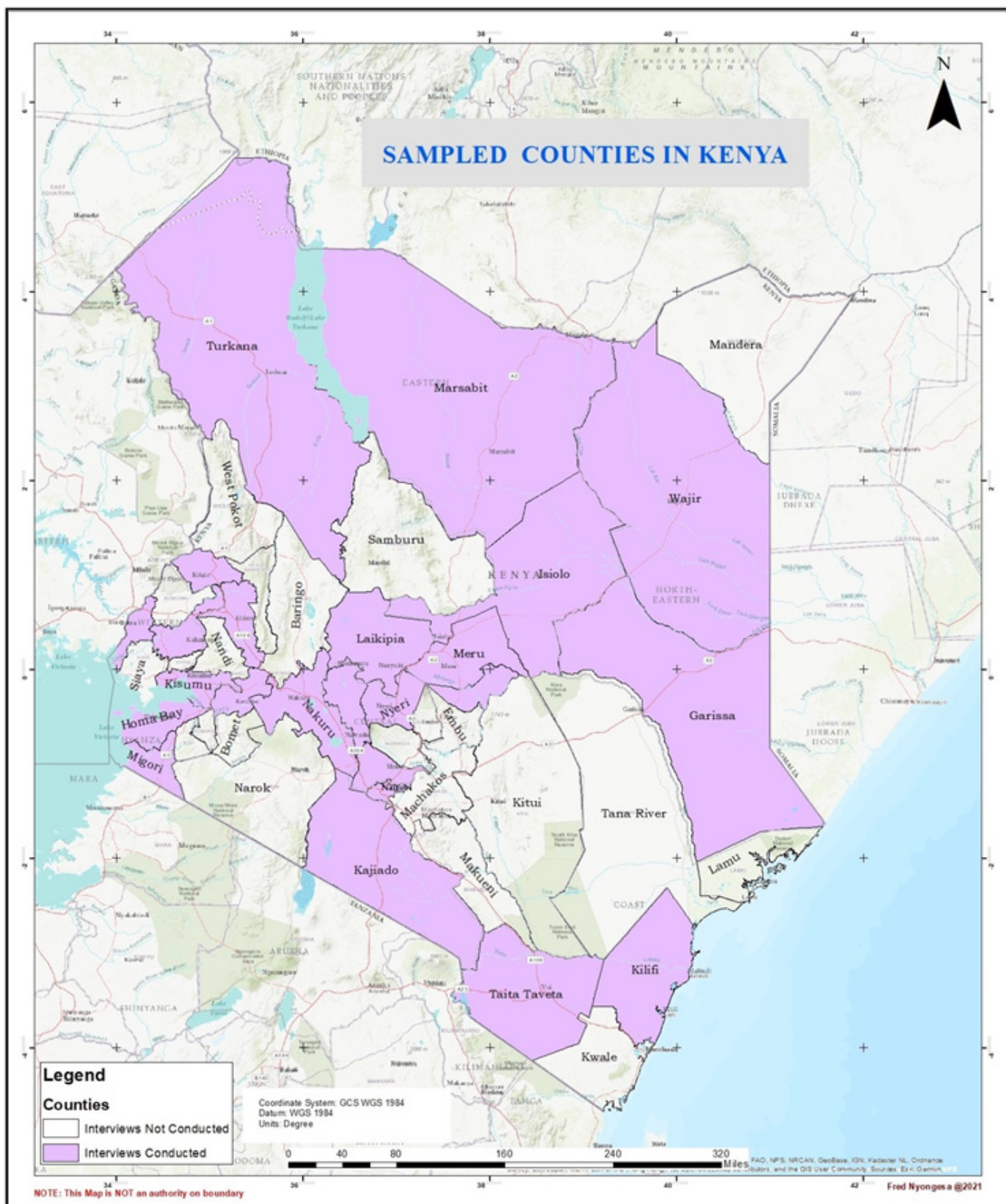
CODE	COUNTY	CODE	COUNTY
003	Kilifi	027	Uasin Gishu
007	Garissa	031	Laikipia
006	Taita–Taveta	032	Nakuru
008	Wajir	033	Narok
010	Marsabit	034	Kajiado
011	Isiolo	035	Kericho
012	Meru	037	Kakamega
013	Tharaka-Nithi	040	Busia
018	Nyandarua	042	Kisumu
019	Nyeri	043	Homa Bay
022	Kiambu	044	Migori
023	Turkana	047	Nairobi
026	Trans-Nzoia		

## 4.5 Sampling Procedure

Random sampling was used to get respondents to be interviewed. Women falling in different age groups, religious backgrounds, cultural backgrounds and educational backgrounds were randomly selected and interviewed by the enumerators.

## 4.6 Data Collection Instruments and Procedure

Internet-enabled smartphones and tablets were used in carrying out data collection for this research. Physical one on one interviews were conducted between the enumerators and the selected women. Upon completion of each interview, the data was submitted and received in real-time at the central geo-database. Data received from the field had the full consent of the respondents as those who did not consent to the interview did not have their views taken. A total of 455 responses/submissions were received from the field. Key informants were also interviewed.



The table below shows the respondents per county.

*Table 4-B Respondents per County*

COUNTY CODE	COUNTY	RESPONDENTS	COUNTY CODE	COUNTY	RESPONDENTS
003	Kilifi	16	027	Uasin Gishu	16
007	Garissa	15	031	Laikipia	17
006	Taita–Taveta	19	032	Nakuru	21
008	Wajir	15	033	Narok	15
010	Marsabit	15	034	Kajiado	16
011	Isiolo	19	035	Kericho	16
012	Meru	16	037	Kakamega	31
013	Tharaka-Nithi	15	040	Busia	15
018	Nyandarua	15	042	Kisumu	16
019	Nyeri	12	043	Homa Bay	15
022	Kiambu	15	044	Migori	15
023	Turkana	17	047	Nairobi	19
026	Trans-Nzoia	24			

## 4.7 Data Processing

The data collected from the field was processed to conform to the right format for analysis. The data was cleaned up and only the relevant data was maintained.

## 4.8 Data Analysis

The processed datasets were subjected to various data analysis processes. Using specialized geospatial and statistical software, the data was analyzed and the results were presented in form of maps, tables, charts/graphs and a summarized narrative. Some of the software used in the analysis included; ArcGIS, Quantum GIS, SPSS and Ms Excel/Word.



## CHAPTER 5

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# RESULTS & FINDINGS



This chapter presents the results and findings from data collection, data processing and the data analysis processes that were undertaken.

## 5.1 Quantitative Analysis

### 5.1.1 Consent of the Respondents

Each respondent was asked by the enumerators for their consent before carrying out the interviews. This was a very critical aspect as only those who gave consent had their views collected.

Table 5-A Respondents' Consent

		Do you consent to participate in the interview/research?			
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	24	5.0	5.0	5.0
	Yes	431	94.0	94.0	100.0
	Total	455	100.0	100.0	

Do you consent to participate in the interview/research?



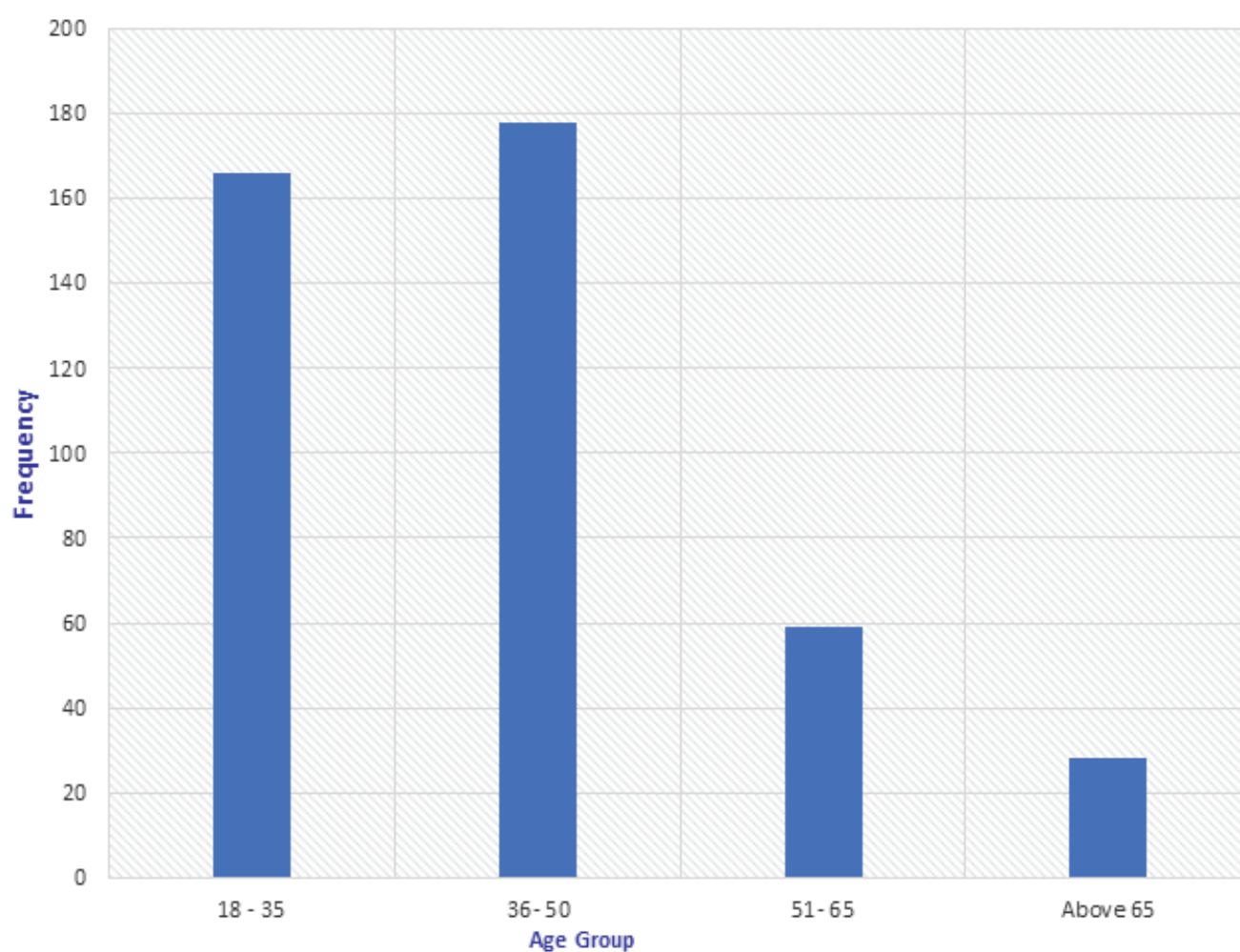
### 5.1.2 Age of the Respondents

The respondents were over 18 years old. 38.52% of the respondents were youth. The majority of the respondents interviewed were between 36-50 years at 41.30%. 51-65-year-olds accounted for 13.69% of the respondents while those above 65 years were 6.5% of the respondents.

Table 5-B Age of the Respondents

Age Group	Frequency	Percentage
18 – 35	166	38.52%
36- 50	178	41.30%
51- 65	59	13.68%
Above 65	28	6.50%
Total	431	100

Age distribution of respondents



### 5.1.3 Highest level of education

Data on the level of education was collected from each respondent interviewed. This data was critical in the research and analysis of the different responses received.

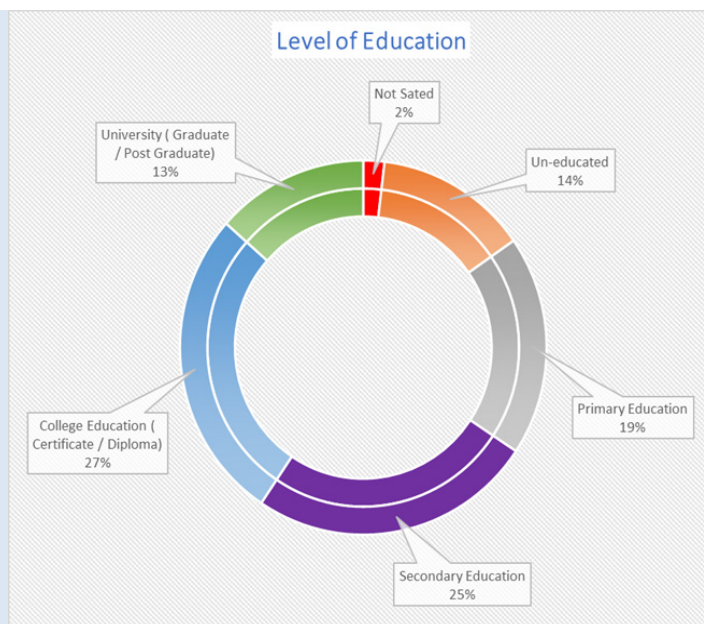


Table 5-C Level of education

Level of education	Frequency	Percentage
Not Sated	8	1.86%
Un-educated	58	13.46%
Primary Education	82	19.03%
Secondary Education	108	25.06%
College Education (Certificate / Diploma)	117	27.15%
University (Graduate / Post Graduate)	58	13.46%
<b>Total</b>	<b>431</b>	<b>100.00%</b>

## 5.2 Marital Status of Respondents

### 5.2.1 Married or ever been married

The research sought to get views from women who were either married or had never been married. A question was posed to the respondents on whether they were married or have ever been married. Of the women interviewed, 12.53% had never been married while 87.47% of the respondents interviewed were married or had ever been married at one point in their lives.

Table 5-D Married or ever been married

Married/Ever been married	Frequency	Percentage
No	54	12.53%
Yes	377	87.47%
<b>Total</b>	<b>431</b>	<b>100.00%</b>

**Married/Ever been married**

**Yes: 377**

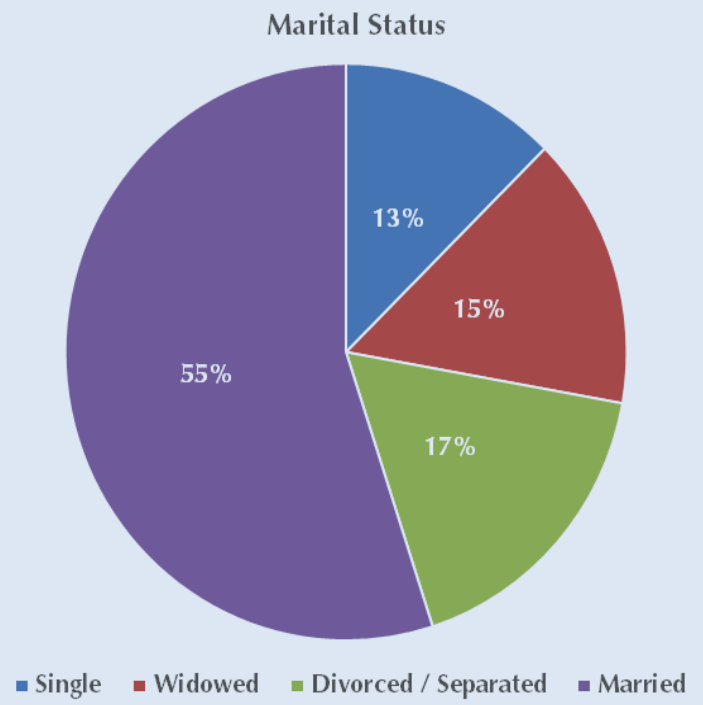
**No: 54**

### 5.2.2 Current marital status

Respondents who answered in the affirmative in the above section were further interrogated to determine their current marital status. This was done to determine whether the respondent was still married, divorced/separated or widowed. The table and chart below show the statistics derived from this question.

Table 5-E Current marital status

Marital Status	Frequency	Percent
Single	54	12.53%
Widowed	66	15.31%
Divorced / Separated	74	17.17%
Married	237	54.99%
<b>Total</b>	<b>431</b>	<b>100.00%</b>

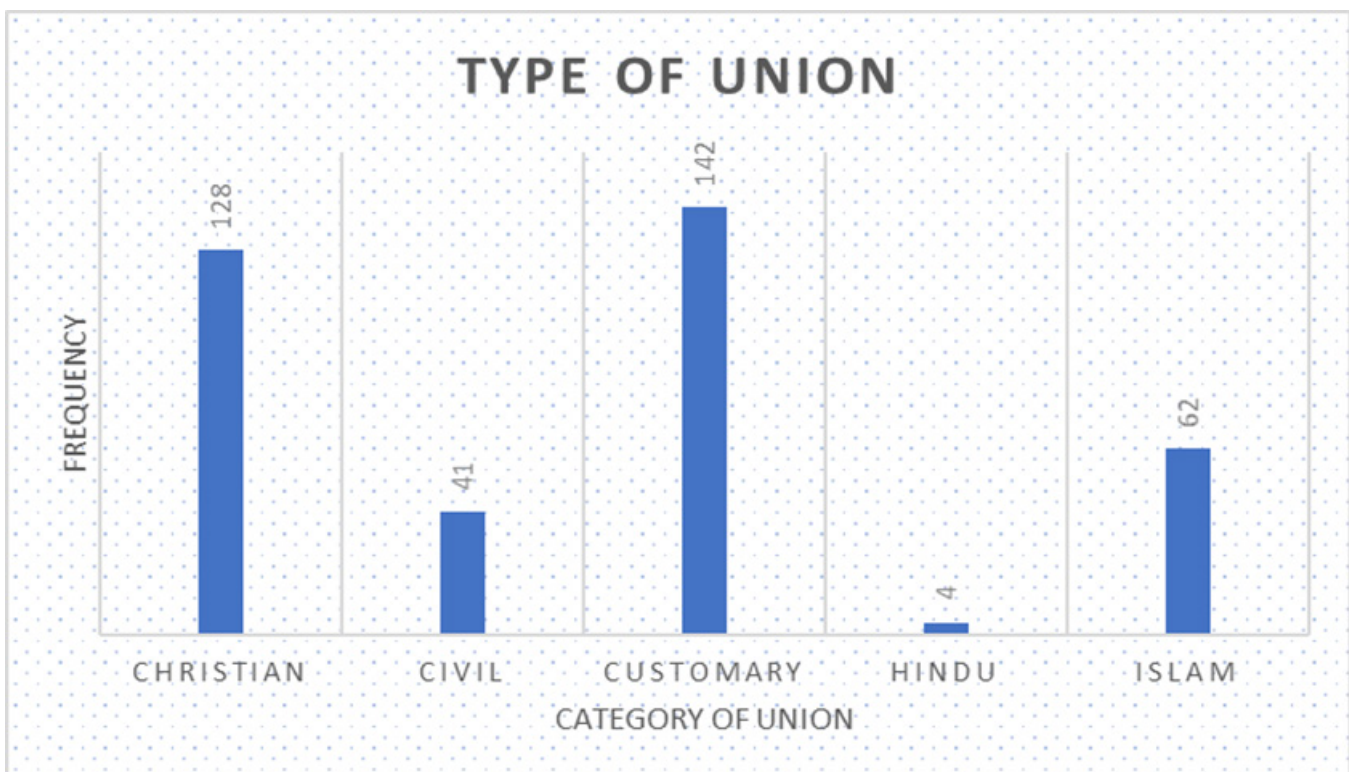


### 5.2.3 Type of union

The types of union documented in this research included; Christian, Muslim, Islamic, Hindu and Customary Unions. The married/ever been married respondents interviewed fell in the following categories as shown in the table and chart below.

Table 5-F Type of union

Category	Frequency	Percentage
Christian	128	33.95%
Civil	41	10.88%
Customary	142	37.67%
Hindu	4	1.06%
Islamic	62	16.45%
<b>Total</b>	<b>377</b>	<b>100.00%</b>





### 5.2.4 Legal Status and Recognition

Views of the respondents were sought in regards to the legal standing of their marriages. They were asked if they thought their marriages were recognized by law. The respondents were further questioned on the recognition of their marriages by both sides of their relatives. 6.9% of the respondents (married/ever been married) interviewed did not consider themselves as legal wives while the remaining 93.1% considered themselves legal wives. 89.12% of the marriages were recognized by both sides of the relatives while 10.88% were not recognized.

Table 5-G Legal Status

Do you or did you consider yourself a legal wife?		
Category	Frequency	Percent
No	26	6.90%
Yes	351	93.10%
<b>Total</b>	<b>377</b>	<b>100%</b>

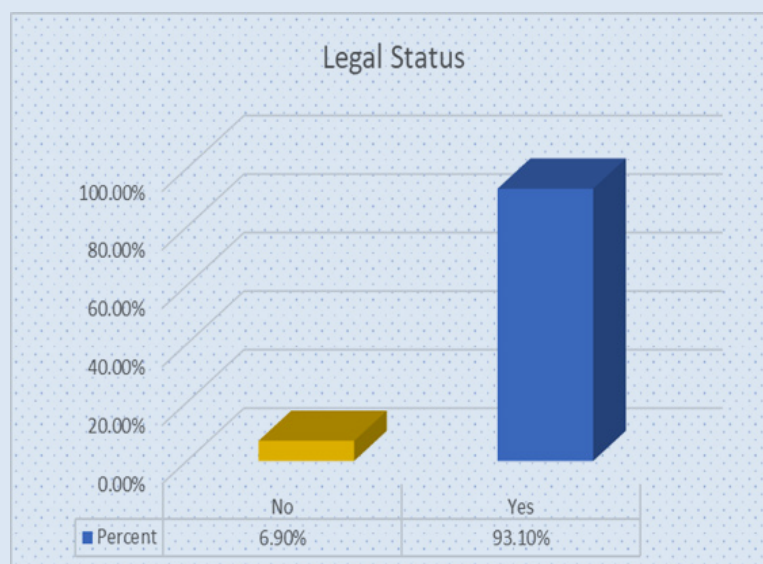
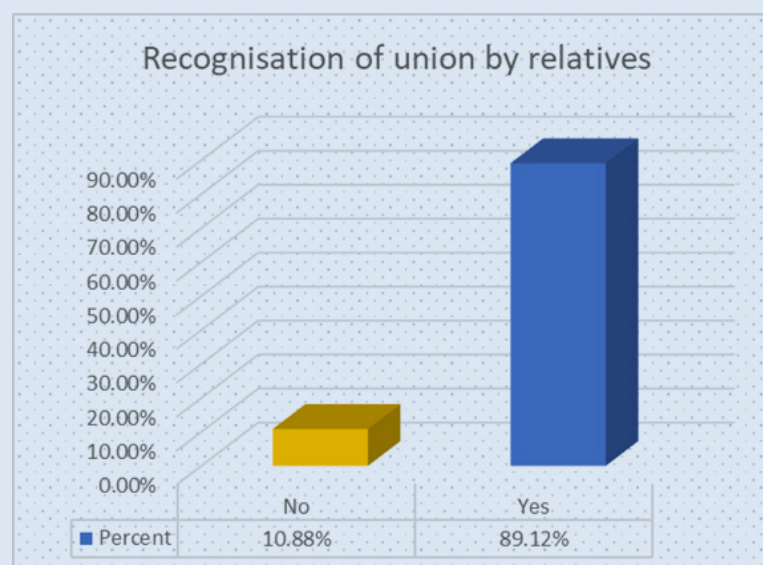


Table 5-H Recognition

Do your relatives from both sides recognize your marital status?		
Category	Frequency	Percent
No	41	10.88%
Yes	336	89.12%
<b>Total</b>	<b>377</b>	<b>100%</b>

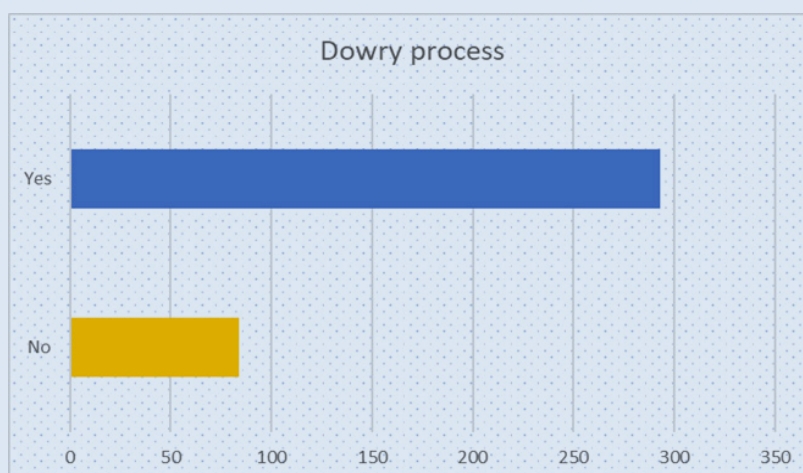


### 5.2.5 Dowry Process

22.28% of marriages did not undergo the dowry process while 77.72% underwent the dowry process. These statistics were derived from the pool of respondents who are married, divorced/separated or widowed. The table and chart below illustrate more.

Table 5-I Dowry Process

Category		Frequency	Total Frequency	Percent
No	Widowed	25	84	22.28%
	Divorced/separated	32		
	Married	27		
Yes	Widowed	41	293	77.72%
	Divorced/separated	42		
	Married	210		
<b>Total</b>			<b>377</b>	<b>100%</b>

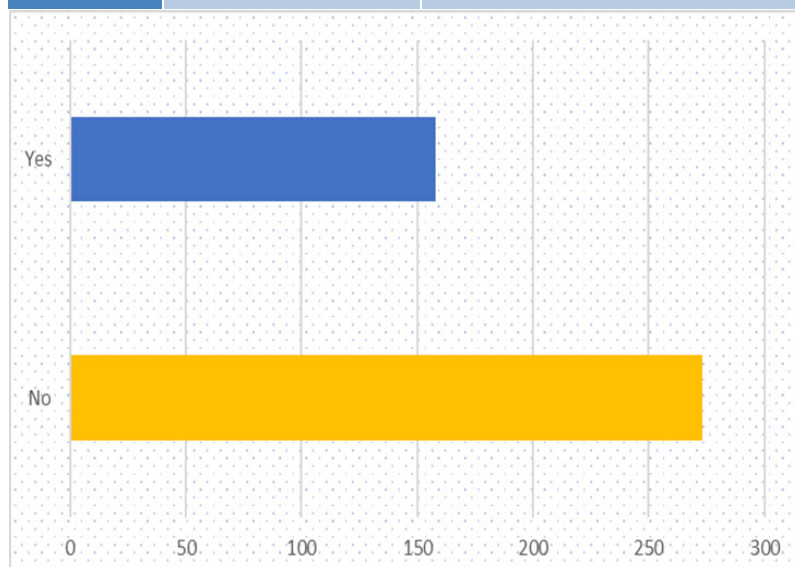


### 5.2.6 Is there a difference between dowry and bride price as per your community?

63% of the respondents thought that there exists no difference between dowry and bride price. 158 respondents, however, believed there is a difference between the two.

Table 5-J Difference between dowry and bride price

Category	Frequency	Percent
No	273	63
Yes	158	36
<b>Total</b>	<b>431</b>	<b>100</b>

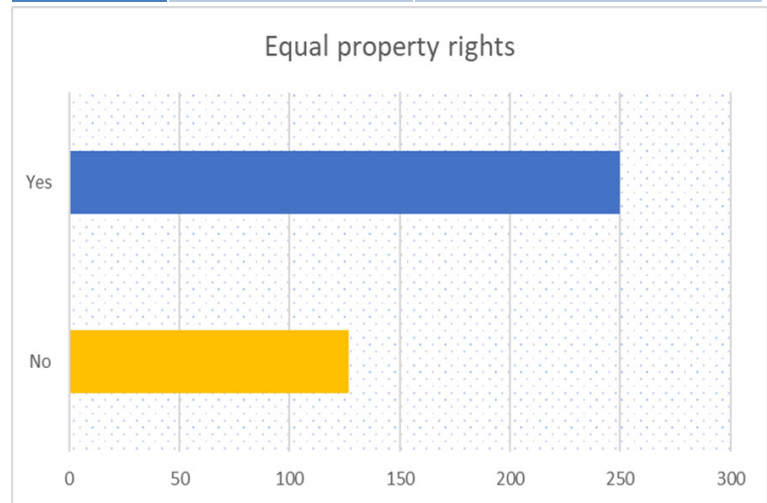


### 5.2.7 Equality of property rights post marriage

The sampled respondents were asked for their opinion with regards to property rights post marriage. This question sought to find out what the women thought would be their level of rights in regards to matrimonial property once married. Do they think they will enjoy the same/equal rights as their spouses? 33.69% of the respondents believed they will not have equal rights with their spouses post-marriage while 66.31% believed they should have equal rights as their husbands post marriage.

Table 5-K (i) Equal property rights

Category	Frequency	Percent
No	127	33.69%
Yes	250	66.31%
<b>Total</b>	<b>377</b>	<b>100%</b>



Further, the sampled respondents who are either divorced or separated were asked whether they enjoyed the same/equal rights as their former spouses post marriage. 75% of the respondents indicated that they did not enjoy equal rights as their former spouses, 23% stated that they enjoyed equal rights as their former spouses while 2% were uncertain.

Table 5-K (ii) Equal property rights

Category	Frequency	Percent
No	56	75%
Yes	17	23%
Not sure	1	2%
<b>Total</b>	<b>74</b>	<b>100%</b>



Further, the sampled respondents who are widowed were asked whether they enjoyed the same/equal rights as they had during the lifetime of their spouses. 68% of the respondents indicated that they did not enjoy the same/equal rights as they had during the lifetime of their spouses. while 32% stated that they enjoyed the same/equal rights as they had during the lifetime of their spouses.

Table 5-K (iii) Equal property rights

Category	Frequency	Percent
No	45	68%
Yes	21	32%
<b>Total</b>	<b>66</b>	<b>100%</b>

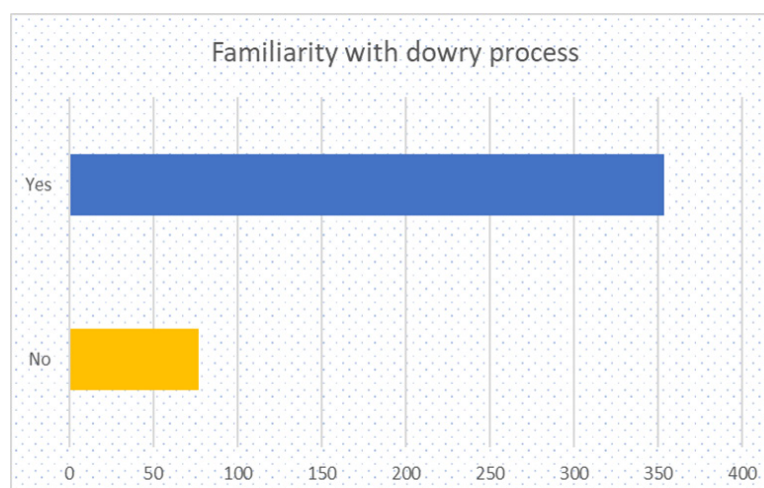


### 5.2.8 Familiarity with the dowry process

The research sought to find out how familiar the respondents were with the dowry process. 77 women translating to 17.87% interviewed were not familiar with the dowry process while 82.13% of the women interviewed were familiar with the dowry process. The table and graph below represent these statistics.

Table 5-L Familiarity with the dowry process

Category	Frequency	Percent
No	77	17.87%
Yes	354	82.13%
<b>Total</b>	<b>431</b>	<b>100%</b>

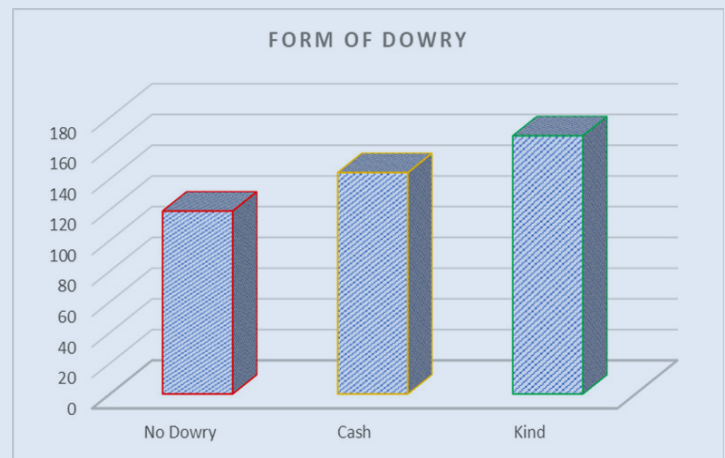
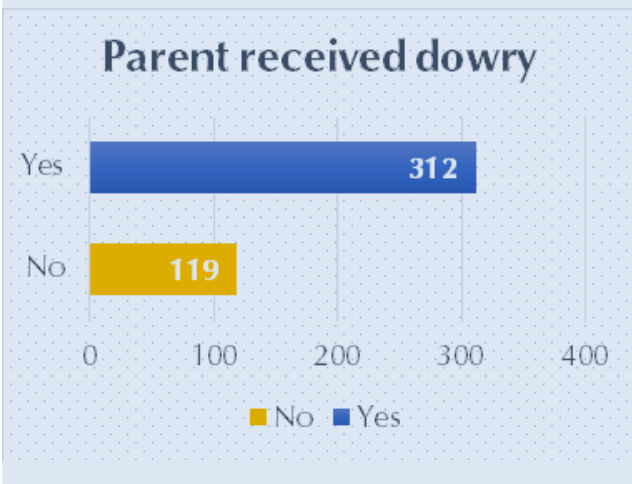


### 5.2.9 Dowry received by parents

Part of the data collected for this research project included the respondents being asked whether their parents received dowry and if they received it in what form it was. 27.61% responded in the negative while 72.39% responded in the affirmative. Of the 72.39% whose parents received a dowry, 33.41% was in form of cash while 38.98% was in kind. The information is depicted in the tables and charts below.

Table 5-M Dowry received

Category	Frequency	Percent
No Dowry	119	27.61%
Cash	144	33.41%
Kind	168	38.98%
<b>Total</b>	<b>431</b>	<b>100%</b>

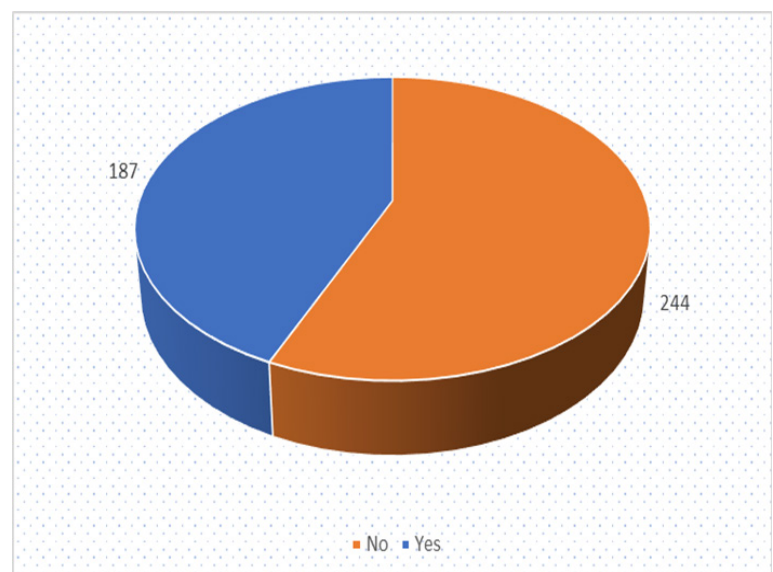


### 5.2.10 Dowry and security of matrimonial land and property rights

The respondents' views were sought on whether they felt their matrimonial land and property rights were secured after the payment of dowry. 56.61% of the respondents did not feel that their rights had been secured after payment of dowry; on the other hand, 43.39% believed that dowry had given them security in relation to their matrimonial land and property rights. The table and chart below further present the analyzed results on this question.

Table 5-N Dowry and security

Category	Frequency	Percent
No	244	56.61%
Yes	187	43.39%
<b>Total</b>	<b>431</b>	<b>100%</b>

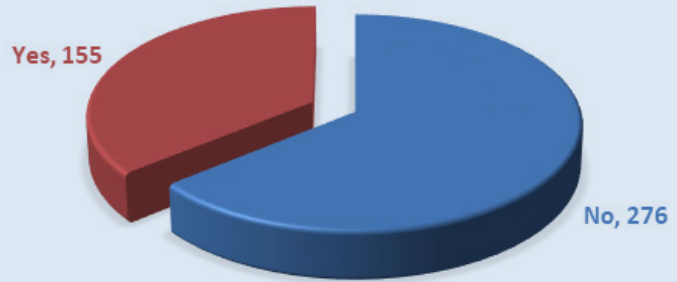


### 5.2.11 Relationship between dowry paid and the magnitude of land and property rights

The research sought to answer the question of whether there exists a link between the dowry paid with the magnitude of your land and property rights. 64.04% of the respondents felt there existed no link between the dowry paid and the magnitude of their land and property rights. 35.96% felt there existed a link between the two components. The table and chart below show the statistics on this research question.

Table 5-O Relationship between the dowry paid and the magnitude of their land and property rights

Category	Frequency	Percent
No	276	64.04%
Yes	155	35.96%
<b>Total</b>	<b>431</b>	<b>100%</b>



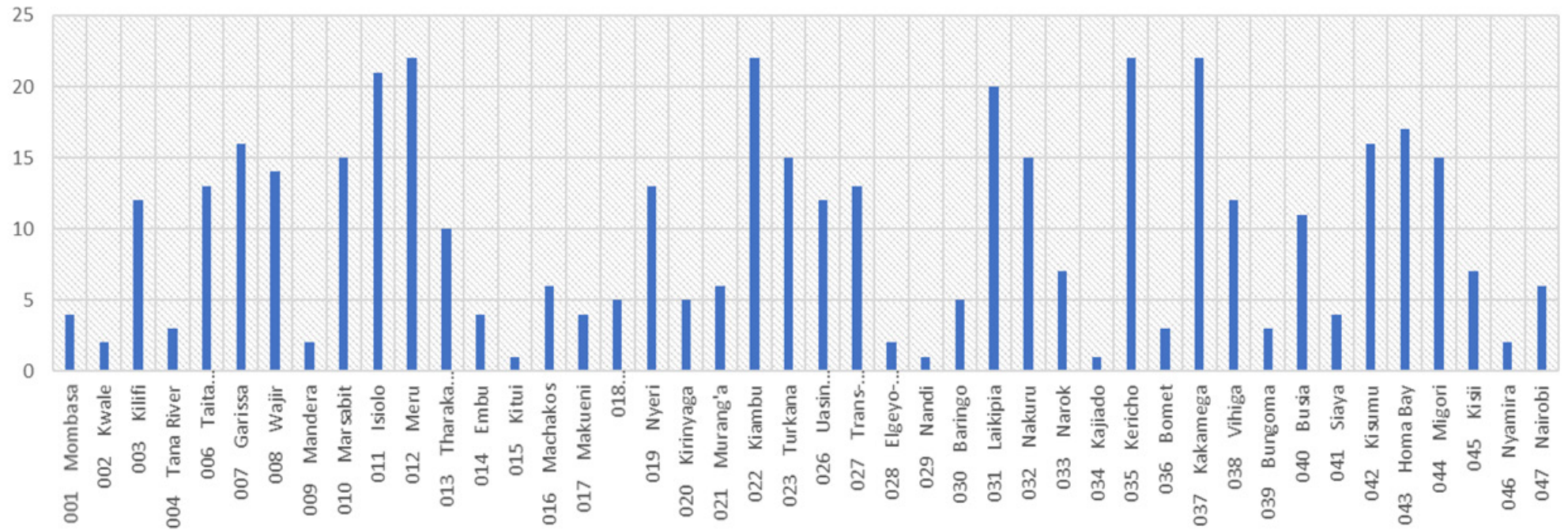
### 5.3 Geographical distribution of respondents by County of birth

The research sought to answer the question of whether there exists a link between the dowry paid with the magnitude of your land and property rights. 64.04% of the respondents felt there existed no link between the dowry paid and the magnitude of their land and property rights. 35.96% felt there existed a link between the two components. The table and chart below show the statistics on this research question.

Table 5-P Geographical distribution

County Of Birth		
County	Frequency	Percent
001 Mombasa	4	0.93%
002 Kwale	2	0.46%
003 Kilifi	12	2.78%
004 Tana River	3	0.70%
006 Taita Taveta	13	3.02%
007 Garissa	16	3.71%
008 Wajir	14	3.25%
009 Mandera	2	0.46%
010 Marsabit	15	3.48%
011 Isiolo	21	4.87%
012 Meru	22	5.10%
013 Tharaka Nithi	10	2.32%
014 Embu	4	0.93%
015 Kitui	1	0.23%
016 Machakos	6	1.39%
017 Makueni	4	0.93%
018 Nyandarua	5	1.16%
019 Nyeri	13	3.02%
020 Kirinyaga	5	1.16%
021 Murang'a	6	1.39%
022 Kiambu	22	5.10%
023 Turkana	15	3.48%
026 Uasin Gishu	12	2.78%
027 Trans-Nzoia	13	3.02%
028 Elgeyo-Marakwet	2	0.46%
029 Nandi	1	0.23%
030 Baringo	5	1.16%
031 Laikipia	20	4.64%
032 Nakuru	15	3.48%
033 Narok	7	1.62%
034 Kajiado	1	0.23%
035 Kericho	22	5.10%
036 Bomet	3	0.70%
037 Kakamega	22	5.10%
038 Vihiga	12	2.78%
039 Bungoma	3	0.70%
040 Busia	11	2.55%
041 Siaya	4	0.93%
042 Kisumu	16	3.71%
043 Homa Bay	17	3.94%
044 Migori	15	3.48%
045 Kisii	7	1.62%
046 Nyamira	2	0.46%
047 Nairobi	6	1.39%
<b>Total</b>	<b>431</b>	<b>100%</b>

Distribution by County of Birth





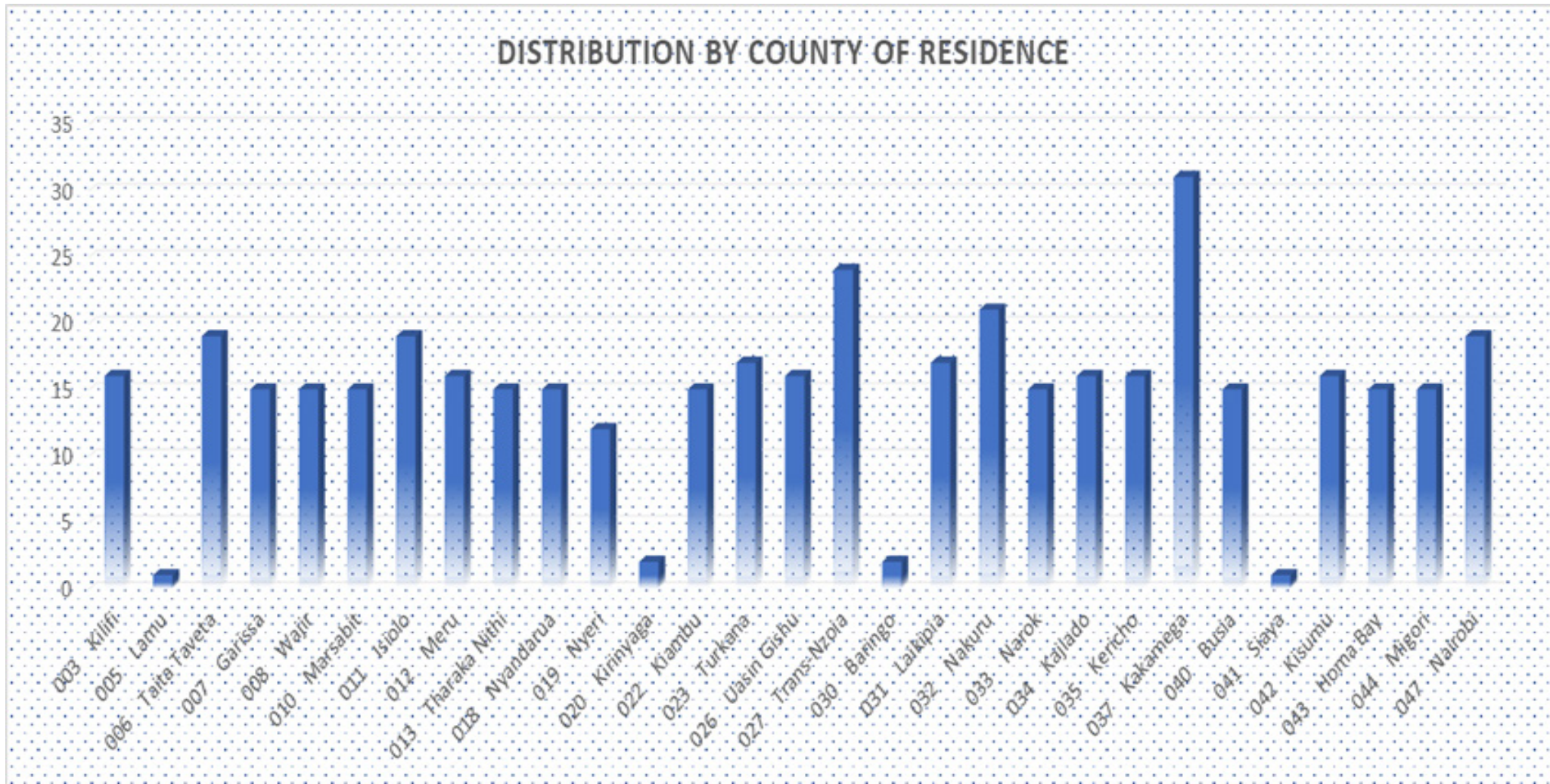
## 5.4 Geographical distribution of respondents by County of Residence

Data on the county of residence of the respondents was collected as shown in the table and graph below:

*Table 5-Q Distribution by County of Residence*

County Of Residence		
County	Frequency	Percent
003 Kilifi	16	3.71%
005 Lamu	1	0.23%
006 Taita Taveta	19	4.41%
007 Garissa	15	3.48%
008 Wajir	15	3.48%
010 Marsabit	15	3.48%
011 Isiolo	19	4.41%
012 Meru	16	3.71%
013 Tharaka Nithi	15	3.48%
018 Nyandarua	15	3.48%
019 Nyeri	12	2.78%
020 Kirinyaga	2	0.46%
022 Kiambu	15	3.48%
023 Turkana	17	3.94%
026 Uasin Gishu	16	3.71%
027 Trans-Nzoia	24	5.57%
030 Baringo	2	0.46%
031 Laikipia	17	3.94%
032 Nakuru	21	4.87%
033 Narok	15	3.48%
034 Kajiado	16	3.71%
035 Kericho	16	3.71%
037 Kakamega	31	7.19%
040 Busia	15	3.48%
041 Siaya	1	0.23%
042 Kisumu	16	3.71%
043 Homa Bay	15	3.48%
044 Migori	15	3.48%
047 Nairobi	19	4.41%
<b>Total</b>	<b>431</b>	<b>100%</b>

### DISTRIBUTION BY COUNTY OF RESIDENCE





## CHAPTER 6

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# KEY FINDINGS & RECOMMENDATIONS



## 6.1 Findings

The objective of the research was to gather information on the practice of dowry, with a particular focus on the Kenyan context. The information would give an in-depth understanding of the commonality of the practice and its effect on women's rights to property and inheritance. The study also sought to find the provisions in the Constitution of Kenya and other relevant legislation, on the rights of women to property inheritance.

The research found that most Kenyans were familiar with dowry practices, with more than 80% of the respondents affirming their awareness, and more than 70% having undergone it themselves. It was clear that dowry, whether in cash or in-kind, was a way of life in a majority of the Kenyan communities.

The study found real-life examples of women who had been negatively affected by this practice. It, therefore, comes as no surprise that a majority of the respondents did not feel that dowry secured their rights. Women have suffered after the death of their spouses as Kenya is still largely a patriarchal society that passes inheritance to the next male kin, and women inherit land as an exception; not the norm. This discrimination has led to the economic degradation of these women, who lack the resources to fight for their rights. Payment of dowry per social norms tends to diminish a woman's right to inherit property from her parents. Further, a conservative interpretation of the concept of dowry implied that the "price" has been "paid" for the woman, and as result ought not to be entitled to any land and other property rights at the matrimonial home. The concept of dowry and impact on married, separated, divorced and widowed cluster of women in a number of communities sampled during the research cannot be overemphasized. Dowry has some positive aspects but mostly negative consequences, for it stands at the foundation of patriarchy.

Kenya has made significant strides in her legislative framework that secure women's rights. The recent development of the Manual for Rural Women Access to Land by the Ministry of Lands, for instance,

is believed to increase access to correct information by women about their land rights. The manual is designed to provide rural women with knowledge on what to do to claim their land rights and where they can seek help. However, while the effort is commendable, the reach is low and more needs to be done in terms of community sensitization. There was still a significant number of women in the study who believed that dowry guaranteed the security of matrimonial property despite research proving otherwise. There was also a general perception among key informants that the National and County Government have failed to demonstrate leadership in implementing the set policies meant to protect women, with CSOs left to do the work, and often with limited resources.

It is therefore recommended that:

- i. The Ministry of Lands and Physical Planning and the National Land Commission should partner with CSOs and allocate resources for information, education and communication including through face-to-face dissemination, workshops and local barazas to disseminate existing laws including the *Manual for Rural Women Access to Land*. Such efforts need to take into account diversity in languages and emerging issues such as the concept of dowry and how that plays out in women's land and property rights.
- ii. We further recommend that the Ministry of Lands and Physical Planning in the continuation of its gender work do dedicate a budget line with sufficient resources for gender mainstreaming. This will improve the ministry's capacity to provide education and training; recruiting more women's land and property advocates to respond to violations.
- iii. The National Land Policy needs to be realigned to provide a section within the policy addressing "Women and Land", with critical analysis of the problem that women face in securing their land and property rights, challenges and opportunities in Kenya. This provision can benefit from rapid assessment of issues affecting women and girls, men and boys; use of multi-stakeholder consultations and review of other agency reports on the same issues with rich experiences of women at the community level. This will also accommodate the concept of dowry as a cultural issue and how it influences women's property rights in the long-run.
- iv. Undertake social action research with communities and transformation processes that enable communities to understand the role of culture in advancing and or deterring women's land rights and other gender nuances. Research plays an important role in informing interventions for the promotion of women's land and property rights in policy and practice.
- v. Promotion of Alternative Justice System (AJS) mechanisms and processes is important to strengthen the framework around land dispute resolution. Women's participation in dispute resolution must be facilitated and promoted in AJS as well. The Ministry of Lands and Physical Planning and related ministries and the National Land commission and other governmental bodies need to strengthen and deliberately allocate sufficient resources for collection and use of sex disaggregated land data for planning and policy decisions and reporting on regional and international commitments.



## CHAPTER 7

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# CONCLUSION



Dowry is one of the customary practices that contribute to gender inequality regarding land access and ownership in countries. Its absence is believed to contribute to high levels of informal unions in the over 20 counties studied. While women typically face more limited land rights, women in informal unions lack even the legal protections of formal marriages. These women remain as distinct outsiders to their husband's family and community, despite the contributions they make to the welfare and wealth of the family and wider community. Yet the practice of paying a dowry itself reinforces the notion of women as property that can be "bought," and as such not entitled to any land or property rights at all.

This research shows that Kenya has progressive legal frameworks that secure women's land rights including the provisions of the NLP, CoK 2010 and the various Acts of Parliament discussed in this report. These laws also underscore the principles of human rights, inclusion and women participation in decision making including in the administration and management of land. These legislative milestones continue to create the much-needed political environment for Kenyan women to claim their land rights. Despite this great achievement, enforcement of the laws that secure women's rights to land remains a challenge, leaving women still vulnerable to losing their land; left out of key decision-making bodies in administration and management of land to mainly cultural barriers. This calls for a dedicated effort to bridge gaps in policy and practice. There are deep cultural barriers attributed to the patriarchal society. Most of the traditions and norms deny women's rights to land and property in favour of their male counterparts. Legislative reforms alone will not sufficiently address the challenge of securing women's land rights; efforts have to go hand in hand with addressing social norms and traditions to influence power relations between men and women.

The use of ADR in advancing women's land rights is progressive and yields positive social and economic impact for women whose land and property rights get secured. The ADR and AJS committees can secure women's land and property rights if they include women representation, are built to deal with gender dynamics especially in the cultural context and are equipped with legal knowledge in land dispute resolution. Access to justice via courts is often a challenge for most women whose land rights have been violated, mainly due to fear of associated costs, distance to the courts and fear of reappraisal from family members. The use of ADR and AJS provides women and local communities the opportunity to address such challenges more harmoniously with potentially similar results to that of the court; with high changes of embracing the Do No Harm approach to dispute resolution.



## **REFERENCES**



ActionAid Kenya, GROOTS Kenya and LANDac, (2018, Nov). Securing women's land rights in Africa: Scaling for impact in Kenya. *Synthesis Report*.

BBC, (9 Nov. 2012). Kenyan bid to ban bride-price payments.

Chiu, V.Y. (1966). *Marriage Laws and Customs of China*. Hong Kong: Chinese University of Hong Kong, New Asia College, Institute of Advanced Chinese.

Cotran, E. (1968). *Case Book on Kenya Customary Law*.

Giovarelli, R. (2005). Customary law, household distribution of wealth, and women's rights to land and property. *Seattle J. Soc. Just.*, 4, 801.

Harrington, A. & Chopra, T. (2010). *Arguing traditions*.

Hirschon, R. (1984). *Women and Property – Women as Property*. London and Canberra: Croom Helm, St. Martin's Press New York.

Kameri-Mbote, P. (2006). Women, land rights and the environment: the Kenyan experience. *Development*, 49(3), 43-48.

Kelin Kenya, (2020). *Research on The Impact of Dowry on Women's Land, Property & Inheritance Rights in Kisumu and Homabay*.

Lang, O. (1946). *Chinese Family and Society*. New Haven: Yale University Press.

Mbithi, P. (1974). *Rural Sociology and Rural Development*. Kenya Literature Bureau, Nairobi Kenya

McCreery, J. L. (1976). Women's property rights and dowry in China and South Asia. *Ethnology*, 15(2), 163-174.

Mucui, V.M. (1976). *Matrimonial Property in Kenya Proprietary Rights of Women LLB*. Thesis, University of Nairobi

Mucui-Kattambo, et.al., (1995). *Law and the Status of Women in Kenya*.

Musangi, P. (2017). Women land and property rights in Kenya. *The World Bank Land and Poverty Conference, Washington DC, 20–24 March*.

Njau, W., & Kabira, (1985). Constraints to participation of women in Economic development. A Case of Kiambu District, (Unpublished).

Njenga, N.J. (1979). *The Marriage Institution and the Rights of spouse to property with special reference to married women's Property Act of 1982*.

Odeny, M. (2013, April). Improving access to land and strengthening women's land rights in Africa. In *Annual World Bank conference on land and poverty, The World Bank, Washington, DC*.

The Global Initiative for Economic Cultural & Social Rights, & Lugar, H., (2020). *How to use Treaty Bodies' Concluding Observations to advance Women's Land and Property Rights: Kenya Case Study*.

The Lawyers Circle, (2014). *Implementing The Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya's Legal Framework*. London: Dechert, Oxfam.

The Lawyers Circle, (2014). *Implementing The Protocol on the Rights of Women in Africa: Analysing the Compliance of Kenya's Legal Framework*. London: Dechert, Oxfam.

UN Women, *Progress of the World's Women 2011–2012: In Pursuit of Justice* (2011)

Watch, H.R. & FIDA (2020). *Once You Get Out, You Lose Everything: Women & Matrimonial Property Rights in Kenya*.

Watch, H. R. (2003). *Double Standards: Women's Property Rights Violation in Kenya*. *Human Right Watch, 15(5A), 1-51*





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