



RESEARCH ON THE IMPACT OF DOWRY ON WOMEN'S LAND, PROPERTY AND INHERITANCE RIGHTS IN KISUMU AND HOMA BAY COUNTIES

KELIN Kenya

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Allan Maleche
Executive Director.

THIS RESEARCH WAS INFORMED BY OUR ENGAGEMENT WITH THE WIDOWS AND ELDERS IN THE COURSE OF IMPLEMENTING THE WOMEN LAND AND PROPERTY RIGHTS PROGRAMME IN 2018. MOST OF THE STAKEHOLDERS EXPRESSED THE CONCERN AND THE NEED TO DEMISTIFY WHAT THIS PRACTICE ENTAILS SINCE IT IS A KEY PROCESS CONSIDERED IN NOT ONLY DEFINING A WOMAN'S STATUS IN THE COMMUNITY BUT ALSO CONCURRENTLY AFFECTS WOMEN'S RIGHTS TO ACCESS, OWNERSHIP AND USE OF LAND EXPECIALLY AMONG THE LUO COMMUNITY IN KISUMU AND HOMA BAY COUNTIES.

LIST OF ACRONYMS & ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
CEDAW	-	Convention on the Elimination of all Forms of Discrimination Against Women
CoK	-	Constitution of Kenya
LCE	-	Luo Council of Elders
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
KELIN	-	Kenya Legal and Ethical Issues Network on HIV & AIDS
UDHR	-	Universal Declaration of Human Rights

DEFINITIONS

<i>Ayie</i>	-	The present given to a bride's mother for her daughter's hand in marriage
<i>Chimamwini</i>	-	A practice in Malawi where a married couple lives with the wife's family
<i>Dhako</i>	-	A woman
<i>Dhiang'</i>	-	A cow (any gender)
<i>Dwasi</i>	-	A lactating cow
<i>Ja gam</i>	-	The intermediary between the bride's and groom's family
<i>Jokakwaro</i>	-	Of the same grandfather or lineage
<i>Keny</i>	-	Marriage
<i>Kholo</i>	-	A wife's clan among the Chewa people of Malawi
<i>Mikayi</i>	-	First wife in a polygamous union
<i>Mondo</i>	-	To come early
<i>Nonro</i>	-	Investigations
<i>Ngili</i>	-	Virgin
<i>Nyachira</i>	-	Second wife in a polygamous union



1.0 INTRODUCTION

1.1 BACKGROUND

The practice of dowry as a form of appreciation has since time immemorial played an important role when two parties decide to get married, especially among African communities where it is an age-old tradition. In Kenya where communities are patriarchal, the giving of dowry has always been from the man's family to the bride's family. Among the Luos, which is the community this research has focused on, the significance of dowry is that it is an appreciation to a bride's family. Though there is no set amount, the giving of dowry demonstrates the groom's worthiness as a suitor and indicates that he is capable of adequately providing for his bride-to-be. The practice of dowry and the marriage processes though differ from community to community.¹

KELIN has since 2009 worked to address the needs of widows, orphans and vulnerable children who have been denied their lawful right to access inherit and own land and property. Guided by the provisions of Article 159(2) (c) of the Constitution of Kenya 2010, KELIN has been working with traditional cultural structures such as Councils of Elders to address injustices through the resolution of cases using the tradition justice systems. The implementation of this Cultural Structures Project in the selected Counties of Kisumu and Homa Bay has seen the successful resolution of 308 cases out of the 363 as at January 2017. Currently, this number stands at 714 successfully resolved cases, thus ascertaining the right of women, especially widows, to own and inherit property.²

Article 60(1) of the CoK outlines the principles of a land policy including the elimination of gender discrimination in law customs and practices related to land and property in Kenya, while Article 40 guarantees women the right to acquire and own land individually or in association with others. Despite the legal backing, most women do not have land rights independently, especially if it is ancestral land. In cases of widows, since many Kenyan men do not write wills and die intestate³, if and when the widow becomes the administrator of the property, they often hold the land in trust until the sons attain the age of majority. Securing land rights for women often depends on a variety of factors such as, but not limited to her age, the number of children and their genders.^{4,5}

The customary practice of the giving of dowry among the Luos has played an instrumental role in predetermining a woman's right to inherit matrimonial property upon the death of her husband. For women, in particular, absence of 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. It is for the above reasons that this research project has been conceptualized.

¹ The Luos have the practice of Ayie which is a token of appreciation given to the bride's mother, followed by Nyombo where cows are given to the bride's father and Uncles. Among the Kikuyu community, the formalities are slightly different – first is the proposal stage conveyed privately to the girl through a friend, followed by a public proposal to the girl; last is the consent stage where Ruracio is delivered and it culminates with the Ngurario stage (the pouring of the blood of unity).

² KELIN Cultural Structures Project Dholuo Toolkit. Available at <http://kelinkenya.org/wp-content/uploads/2010/10/Cultural-Structures-Project-Dholuo-toolkit.pdf> accessed on 05.03.2019

³ https://www.academia.edu/17710181/LAND_SUCCESSION_IN_KENYA_THEORY_AND_PRACTICE accessed on 26.02.2019

⁴ <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> at page 13. accessed on 26.02.2019

⁵ <http://documents.worldbank.org/curated/en/786221468175470235/pdf/374480Land0law01PUBLIC1.pdf> Chapter 3, "Overcoming Gender Biases in Established and Transitional Property Rights System." Accessed on 26.02.2019

1.2 BACKGROUND OF THE COUNTIES UNDER STUDY

Homa Bay County lies in western Kenya and is located in the former Nyanza Province along the southern shores of Lake Victoria's Winam Gulf. It is bordered by five counties namely; Migori to the south, Kisii and Nyamira to the east, Kericho and Kisumu to the northeast. The County borders Lake Victoria to the north and west and beyond that is Siaya County. The vast majority of people in Homa bay County belong to the Luo ethnic community; with a small number of minorities such as the Abasuba from Uganda who have largely intermarried with the Luo and been assimilated.⁶

Kisumu County like Homa Bay County lies in western Kenya and is the former headquarters of then Nyanza Province. It is bordered by Siaya County to the West, Vihiga County to the North, Nandi County to the North East and Kericho County to the East. It neighbours Nyamira County to the South and Homa bay County to the South West. Just like Homa Bay County, the county has a shoreline on Lake Victoria, occupying the northern, western and a part of the southern shores of the Winam Gulf.⁷

Just like Homa Bay County, the biggest ethnic community in Kisumu County are the Luos. The Luhyas also make of the largest group among the ethnic minorities. Indian traders are also found in Kisumu, and more recently, the number of persons belonging to the Somali ethnic community has also increased.⁸

1.3 RESEARCH PROBLEM

What is the impact of dowry or non-giving of dowry among the Luo community on the lives of women and the impact on their land, property and inheritance rights?

1.4 RESEARCH OBJECTIVE

The objective of this research is to gather information regarding forms, nature, extent and intensity of the practice of dowry among the Luo community on 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.

⁶<https://informationcradle.com/kenya/homa-bay-county/> and <https://www.nation.co.ke/counties/homa-bay/Fast-Facts-Homa-Bay-County/3444904-1262762-vb1p74z/index.html> accessed on 04.02.2019

⁷ https://en.wikipedia.org/wiki/Kisumu_County accessed on 04.02.2019

⁸ https://en.wikipedia.org/wiki/Kisumu_County#Economy accessed on 04.02.2019



2.0 RESEARCH METHODOLOGY

Qualitative methodologies in the form of in-depth interviews and focus group discussions were used in this research. One of the reasons why this method was opted for is because cultural practices are not documented but passed orally from generation to generation. It was therefore important that face to face meetings be conducted where participants could be asked direct questions that generate further discussion during focus group discussions.

A total of fifty-three (53) respondents were interviewed; 25 men and 28 women spread over Homa Bay and Kisumu Counties from 6th to 10th August 2018. KELIN selected the respondents from among the communities that they are working with. They were mixed both urban and rural populations, though the majority were from rural populations. The individual interviewees comprised of members of the Luo Council of Elders, Teachers, Community Leaders, Church leaders, members of women groups, widows, media personalities, Chiefs, Kadhi, lawyers, Magistrates and Judges. The individual interviews were conducted with each of the respondents using a standard structured questionnaire. Their responses were recorded on paper and the findings are discussed further in the report.

For the Focus Groups Discussions, a two-day meeting was separately held with members of Women groups and representatives of Luo Council of Elders from both Homa Bay and Kisumu Counties. The Focus Group Discussions provided more in-depth information on the cultural practice of dowry payment and the rights of married women regarding her entitlement and position in her matrimonial home.

53
RESPONDENTS
WERE INTERVIEWED

25 MEN

28 FEMALE

SPREAD OVER
HOMABAY &
KISUMU COUNTIES

3.0 LITERATURE REVIEW

3.1 COMPARING CULTURAL PRACTICES

3.1.1 Dowry and Property Inheritance Rights in Kenya

Kenya is made up of different ethnic communities with different cultural practices. Despite the different cultural practices, one thing that is certain is the giving of dowry by a groom to a bride's family for her hand in marriage. Secondly, with the communities being patriarchal, inheritance, especially when it comes to land is often passed to male relatives such as from father or grandfather to son. Customarily, a married woman could only hold land in trust for her sons, but she could not pass any inheritance rights to her daughters and, issues relating to women property rights and inheritance often posed a major threat to their dignity and survival irrespective of their marital status.^{9,10}

Eugene Cotran, who chaired the Commission on the Law of Marriage and Divorce,¹¹ detailed in his report that for a marriage to be validly contracted, certain formalities must accompany. The recommendations in his report listed capacity, consent, dowry, preliminaries to marriage and the celebration of marriage as some of the formalities necessary for a valid marriage. The report was informed by the result of the research into customary laws and other laws of Kenya, documenting the African customary marriage practices as it was practiced among the various ethnic communities in Kenya.

In 2005, the Kenya National Commission for Human Rights and Policy Project – Kenya worked on a joint initiative that led to the publication of a report on women's right to own and inherit a property in Kenya. This project though national, its initial focus was the on Luo community. The research indicated that the existing legal and policy framework though largely protective of women's right to equally own and inherit land; the same was not accessible to the vulnerable women who needed it most. This was mainly due to cultural practices, the cost and procedural technicalities relating to the structures governing the land acquisition and land inheritance rights.¹²

In addition to the above, Professor Kameri-Mbote has argued that in many African countries, land ownership and its associated resources have been deeply rooted in patriarchy. That women, do not traditionally own land among the various communities in Kenya and at best, what they enjoy are usufruct rights in accessing land, which access can be denied as it is dependent on the whims of the benefactor whether fathers, husband or brothers.^{13,14, 15}

⁹ E. N. Kimani and L. W. Maina. *Older Women's Right to Property and Inheritance in Kenya: Culture, Policy and Disenfranchisement*. Available at <https://www.tandfonline.com/doi/abs/10.1080/15313204.2010.523647> accessed 05.02.2019

¹⁰ Kenya Land Alliance. Available at <http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/Women-property-rights.pdf>

¹¹ "Report of the Commission on the Law of Marriage and Divorce" available at <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Commission-on-the-Law-of-Marriage-and-Divorce-1968.pdf> accessed on 10.02.2019

¹² *From Despair to Hope: Women's Right to Own and Inherit Property*. Available at http://www.policyproject.com/pubs/countryreports/KEN_InheritanceRights.pdf accessed on 05.02.2019

¹³ Patricia Kameri-Mbote. *The Land has its Owners! Gender Issues in Land Tenure Under Customary Law*. Available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/191/Gender_customary.pdf?sequence=1&isAllowed=y accessed on 08.08.2018

¹⁴ KELIN Compendium of Cases by the Luo Council of Elders available at <http://www.kelinkenya.org/wp-content/uploads/2017/03/WLPR-Compendium-of-Cases-by-Luo-Council-of-Elders.pdf> accessed on 05.03.2019

¹⁵ KELIN, *Ibid*

Harrington and Chopra have argued that in the past, traditional social structures provided safety nets for women, but these systems have evolved and been eroded thus they no longer protect women as they once did. This is evidenced by the unfortunate current practice where widows are disinherited from land and forced into landlessness and destitution. Without access to land for agriculture, the rural poor widows and daughters are left in abject poverty. Though there exists a multiple of avenues through which they can seek redress, including formal and informal institutions; however, in practice, all avenues can easily be constrained by lack of access to formal courts due to costs or geographic distance¹⁶ or be undermined by more powerful in-laws or brothers and does in fact act to deny women access to land instead of upholding their rights.^{17,18}

Harrington has additionally argued that it is a wrong assumption that customary law is discriminatory and abusive towards women. He asserts that customary law was protective of widows, with several customary practices being put in place to protect and guarantee them access to land. However, it is the misuse of custom by greedy relatives seeking possession of the deceased property to the exclusion of widows that has brought about disinheritance.¹⁹

3.1.2 Kinship and Family Inheritance among the Luos

Among the Luo, seniority took precedence; the elder son received the largest share, each followed in the order of seniority. If it were land that was to be divided, the land where the old grandfather's homestead stood – the senior son would get the middle piece, the second son would get the land to the right-hand side of the homestead, and the third son would get the land on the left-hand side of the homestead. Upon the father's demise, the senior son would take over the responsibilities of family leadership. These groups when considered in terms of genealogy as Jokakwaro. They would share sacrifices under the leadership of the older brother, in his absence due to death, then the next brother in seniority would take the leadership of senior brother. The system of the allocation of land by the father, while he was still alive, was important since it would coincide with the inheritance of the land. In monogamous families, the senior son would take the centre portion of all the land of the homestead up to and beyond the buffer zone; the second son would then divide the remainder of the land with the other brothers. If the land was divided among the elder sons after they married, and had taken to live in their own homesteads; it often happened that the youngest son would remain in the father's homestead to care for him in his old age. His inheritance would then be the last property, known as Mondo and the remaining gardens of his mother.

In the case of a polygamous family, the land would be divided along the same lines as above, except that within the family, each son's claim would be limited to the area contiguous to the houses of their mother. Each wife and her children would be regarded as if the group constituted were under the umbrella of a single wife. This therefore means that the children of the senior wife, Mikayi, were given that portion of the total area which could have been given to the senior son in a monogamous family. The sons of the second wife, Nyachira and the sons of the third wife, Reru would lay claim to those portions which would have fallen to the second and third sons of Mikayi in a monogamous marriage.”²⁰

¹⁶ Dr. Winifred Kamau (Ph. D). *Customary Law and Women's Rights in Kenya* available at <http://theequalityeffect.org/wp-content/uploads/2014/12/CustomaryLawAndWomensRightsInKenya.pdf>

¹⁷ Andrew Harrington and Tanja Chopra, "Arguing Traditions: Denying Kenyan Women Access to Land Rights. Available at <https://landwise.resource-equity.org/record/668> accessed on 06.08.2018

¹⁸ Center for Women's Land Rights, "Women's Land and Property Rights in Kenya," <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> access on 02.08.2018

¹⁹ Andrew Harrington. "Women's Access to Land and Property Rights. Available at <http://documents.worldbank.org/curated/en/880911468245418597/pdf/530010WPOP111010Box345586B01PUBLIC1.pdf> accessed on 04.02.2019

²⁰ A. B. C. Ocholla-Ayayo in "Traditional Ideology and Ethics Among the Southern Luo. Available at <http://nai.diva-portal.org/smash/get/diva2:280191/FULLTEXT01> accessed on 12.02.2019

Dowry Culture in India

Dowry is one of the most ancient practices in India, where it is the bride who gives dowry to her husband's family upon marriage. This practice is so widespread and not limited to the religious background of the parties. One theory being advanced is the giving of dowry by a bride gives her economic and financial security in her marriage.²¹ This dowry is given in the form of movable goods and property.²² This practice acts as an advance or a premortem inheritance by a woman from her father since it is only men who were entitled to inherit the family estate.²³ Thus it is seen as the transfer of parental property from a parent to a daughter as her inheritance upon her marriage.²⁴ This giving of dowry by the woman has seen the occurrence of dowry deaths where the woman is unable to meet the demands of the husband's family. After marriage, the groom's family will often make demands from the bride for the payment of additional money or household goods. When these demands are not met, the bride will often face harassment which may culminate in her murder.²⁵ The woman is sometimes set on fire by her husband or in-laws, a practice referred to as "bride burning."²⁶

Despite the existence of a host of legislations such as the Dowry Prohibition Act of 1961 which prohibits the request, payment or acceptance of a dowry,²⁷ "as consideration for the marriage;" and the Protection of Women from Domestic Violence Act through which, a woman can put a stop to the dowry harassment by approaching a domestic violence protection officer – they have been considered as largely ineffective.²⁸ Dowry deaths and domestic violence continue to occur at a rapid rate²⁹ and most probably because of lack of proper enforcement mechanisms³⁰ and the deeply rooted cultural practices that transcends religion.

Dowry Culture in Malawi

Malawi, like most African countries, is patriarchal except for the Chewa community which practices the matrilineal family system. The Chewa are also the predominant ethnic community in Malawi. Among them, when a valid matrilineal customary marriage had been conducted, it was expected of the husband to go live with his wife's family at her village – a practice known as chimamwini. The husband was thereafter shown where to build their matrimonial home – a matrilocal residence – the couple was also allocated land to cultivate crops for their sustenance. All the rights in respect of the land given to the couple were exercisable with the consent of the wife's clan known as kholo.³¹

²¹ Dalmia, Sonia; Pareena G. Lawrence (2005). "The Institution of Dowry in India: Why It Continues to Prevail". *The Journal of Developing Areas*. 38 (2): 71–93. Project MUSE, doi:10.1353/jda.2005.0018

²² "Dowry in India: Practice or Ill Practice?" Available at <https://qrius.com/dowry-india-practice-ill-practice/> accessed on 09.02.2019

²³ Teays, Wanda (1991). "The Burning Bride: The Dowry Problem in India". *Journal of Feminist Studies in Religion*. 7(2): 29–52.

²⁴ S. Agarwal in "Genocide of Women in Hinduism." Available at <http://dvkperiyar.com/wp-content/uploads/2016/01/genocide-of-women-in-hinduism.pdf> accessed on 09.02.2019

²⁵ Law, Custom, and Crimes against Women: The Problem of Dowry Death in India Author(s): JOHN VAN WILLIGEN and V. C. CHANNA. Available at <https://www.jstor.org/stable/44126922> accessed on 04.02.2019

²⁶ Ibid

²⁷ "Dowry" is defined as a gift demanded or given as a precondition for a marriage.

²⁸ Manchandia, Purna (2005). "Practical Steps towards Eliminating Dowry and Bride-Burning in India". *Tul. J. Int'l & Comp. L.* 13: 305–319

²⁹ "India's Dowry Culture." Available at <https://intpolicydigest.org/2013/07/30/india-s-dowry-culture/> accessed on 07.02.2019

³⁰ Spatz, Melissa (1991). "A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives". *Colum. J. L. & Soc. Probs.* 24: 597, 612 and "21 Lives Lost to Dowry Everyday Across India: Conviction rate less than 35%, available at <https://www.indiatoday.in/mail-today/story/dowry-deaths-national-crime-records-bureau-conviction-rate-972874-2017-04-22> accessed on 06.02.2019

³¹ "Chewa People of Malawi." Available at <https://kwekudee-tripdownmemorylane.blogspot.com/2013/06/chewa-people-great-bantu-people-of.html> accessed on 10.02.2019

3.2 THE INTERNATIONAL FRAMEWORK

Article 2(5) and (6) of the CoK, 2010 provides that any treaty or convention ratified by Kenya forms part of the laws of Kenya. In this instance, the applicable international conventions on property rights that Kenya has ratified are;

*The Universal Declaration of Human Rights (UDHR)*³² prohibits in Article 2 discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth and other status. Article 17 provides that 'Everyone has the right to own property; alone as well as in association with others. No one shall be arbitrarily deprived of this right.

*The International Covenants on Economic, Social, and Cultural Rights (ICESR)*³³ and *International Convention on Civil and Political Rights (ICCPR)*.³⁴ Both of these Conventions in their Articles 2 prohibit discrimination on the same grounds as UDHR that's been mentioned above. They mention gender and property expressly. These three international instruments are collectively referred to as the international bill of rights.

*The Beijing Declaration and Platform for Action*³⁵ was adopted at the 1995 Fourth World Conference on Women. The Beijing Declaration has since its adoption become a defining framework for change in the women's rights movement. The Beijing Declaration has comprehensive commitments under 12 critical areas and it remains a powerful source of guidance and inspiration globally, for gender equality in all dimensions of life. The Declaration in article 15 provides for all governments' commitments to: "Equal rights, opportunities and access to resources, equal sharing of responsibilities for the family by men and women, and a harmonious partnership between them is critical to their well-being and that of their families as well as to the consolidation of democracy".

*The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*³⁶ CEDAW is the main international instrument on gender equality which was adopted in 1979 and entered into force in 1981. By accepting the Convention, Kenya has committed itself to undertake a series of measures to end all forms of discrimination against women, such as; Incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women; Establishing tribunals and other public institutions to ensure the effective protection of women against discrimination; and Ensuring the elimination of all acts of discrimination against women by persons, organizations or enterprises. In particular, Article 16(h) CEDAW requires State Parties to modify or abolish existing laws, regulations, customs, and practices that discriminate against women; and eliminate discrimination against women in all matters relating to marriage and family relations, in particular ensuring that both spouses have the same rights in the ownership, acquisition, management, administration, enjoyment, and disposition of property.

*CEDAW Committee General Recommendations No.29*³⁷ on the 'economic consequences of marriage, family relations and their dissolution' expressly mentions that State parties are required to ensure that disinheritance of the surviving spouse is prohibited. General Recommendation No. 2138 on 'equality in marriage and family relations' notes that State parties are required to give women equal rights to administer property.

³² <http://www.un.org/en/universal-declaration-human-rights/> accessed on 06.12.2018

³³ <https://www.ohchr.org/en/professionalinterest/pages/cesr.aspx> accessed on 06.12.2018

³⁴ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> accessed on 06.12.2018

³⁵ <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> accessed on 06.12.2018

³⁶ <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> accessed on 06.12.2018

³⁷ <https://www.ohchr.org/en/hrbodies/cedaw/pages/recommendations.aspx> accessed on 06.12.2018

³⁸ *Ibid*

3.3 THE REGIONAL FRAMEWORK

*The African Charter on Human and People's Rights*³⁹ (Banjul Charter) provides in Article 14 that, "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or the general interest of the community and per the provisions of appropriate laws". This Article read together with Articles 2 and 3 provide for gender equality in property ownership and economic empowerment. Article 2 provides that, "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status"; whereas Article 3(1) provides that "Every individual shall be equal before the law"; and Article 3(2) provides that "Every individual shall be entitled to equal protection of the law."

*The Protocol to the Africa Charter on Human and People's Rights on the Rights of Women in Africa*⁴⁰ (Maputo Protocol) provides in Article 2 requires states to combat all forms of discrimination against women through appropriate legislative, institutional and other measures. Article 6 (j) provides that during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely. Article 8 provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law; effective access by women to judicial and legal services, including legal aid (a); reform of existing discriminatory laws and practices to promote and protect the rights of women (f). Article 21 expressly provides that a widow has the right to an equitable share in the inheritance of her husband's property; a widow has the right to continue to live in the matrimonial home. If she marries, she retains this right if she owns or has inherited the house; and women and men have the right to inherit in equitable shares, hence protecting the inheritance rights of girl children.

3.4 THE NATIONAL LEGAL FRAMEWORK

The Constitution of Kenya, 2010. Article 2(4) provides that "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." Article 27 (4) prohibits discrimination on any ground including sex and marital status and expressly states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 40 provides that every person has a right either individually and or in association with others, to acquire and own property of any description and in any part of Kenya. Equally, Article 11 of the Constitution "recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation." Lastly, Article 45 on Family provides in part that "parties to a marriage are entitled to equal rights at the time of marriage, during marriage and at the dissolution of the marriage."

The Law of Succession Act CAP 160. This is the key piece of legislation that provides for inheritance rights in Kenya by providing the mechanism in which the property left behind by a deceased owner can be transmitted to his/her rightful dependants or beneficiaries. This law governs succession where a person dies leaving behind a Will (Testate) or without a Will (Intestate).

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." Even though the Law of Succession was intended to protect wives who were married under customary law by husbands already married under statutory law like in the case of **Ruenji and Ogola's Estate**. Section 3(5) of the LSA states that such wives can be said to be wives for purposes of succession.⁴¹

Section 29 of the Act defines who a dependant is, and this includes a wife or wives, or a former wife or wives amongst other categories of persons as defined in the Act. Section 35 provides what a surviving spouse in a monogamous marriage is entitled to inherit where the deceased has left a child or children, a provision which is contrary to most customary laws. Section 36 of the Act provides the entitlement of the surviving spouse where no child or children has been left. Lastly, Section 37 of the Act provides that "a surviving spouse entitled to a life interest under the provisions of section 35 or 36 of this Act, with the consent of all co-trustees and all children of full age, or with the consent of the court shall, during the period of the life interest, sell any of the property subject to that interest if it is necessary for his own maintenance: Provided that, in the case of immovable property, the exercise of that power shall always be subject to the consent of the court."

³⁹ http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf accessed on 03.12.2018

⁴⁰ http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf accessed on 03.12.2018

⁴¹ Kenya Law of Succession. Available at <http://kenyalawsonline.blogspot.com/2013/06/kenya-law-of-succession.html> accessed on 10.02.2019

Matrimonial Property Act, 2013. This Act only defines matrimonial property as that property that is owned or acquired by parties during the subsistence of their marriage. It is silent on property acquired by parties who are living in an arrangement as husband and wife, but are not married as per the definition of marriage under the Marriage Act, 2014. Section 6(2) provides that trust property including held in trust under customary law does not form part of matrimonial property.

In 2017, the Court of Appeal delivered a judgement stating that, even though the Constitution recognizes equality between a man and a woman in marriage, this equality does not guarantee the equal sharing of matrimonial property. That marriage is not a ticket to the equal sharing of matrimonial property, particularly “if one partner invested nothing in marriage, they should not ask for a slice of what was invested by the other partner based on love.”⁴²

In 2016, the Federation of Women Lawyers (FIDA Kenya) filed a Constitutional Petition⁴³ challenging Section 7⁴⁴ of the Matrimonial Properties Act by alleging that it was discriminatory. FIDA Kenya had claimed in their Petition that Section 7 offends Article 45(3) of the Constitution, which provides that parties to a marriage are entitled to equal rights at the time of marriage, during and in the dissolution phase. In dismissing the Petition, Justice Mativo held that Section 7 of the Matrimonial Property Act does not in any way offend, contradict or contravene Article 45(3) of the Constitution as claimed by FIDA Kenya. KELIN was an amicus in the matter and provided the international legal framework and the comparative law and practice with regard to matrimonial property rights titles to give effect to the principles and objects of devolved government in land registration and connected purposes.

Under this Act, a spouse will acquire an interest in his or her spouse’s land if the spouse has contributed to the productivity, upkeep and improvement of the land. The interest of the spouse shall be construed as if it is registered against the title to the land. The Act further provides that any dealings in land or property of one spouse shall require the consent of the other spouse. Therefore, any contract for the sale of land or transfer of ownership shall be void where the written consent of a spouse has not been sought. Likewise, a party acquiring a property is required by law to swear an Affidavit under oath to state whether or not that property forms part of matrimonial property and if they are married or not.

The Marriage Act, 2014. Under the Marriage Act, 2014, there are five types of marriages; namely Christian, Civil, Hindu, Islamic and Customary. The Marriage Act defines a customary marriage as a marriage celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.⁴⁵ Although customary marriage depends on the culture, where it is required, the Act equates dowry to any token of stock, goods, and money or other property given or promised in consideration of an intended marriage⁴⁶ and as proof of marriage.

The Marriage Act, 2014 also provides for the registration of Customary Marriages and it lists the requirements for compliance⁴⁷ such as a party intending to register a customary marriage must not have previously celebrated a Civil or Christian Marriage. This Act defines cohabitation as living in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage, (though what amounts to ‘long term’ is not defined) but does not then provide any rights to couples who cohabit.

However, it is to be noted that even though the Act defines dowry to any form of stock, goods or money; for it to be recognized as dowry among the Luo community, the gift or token has to be in the form of a cow(s) and in some instances goats are accepted in addition to the cows. Even though this conflicts with the provisions of the Marriage Act,⁴⁸ the community still believes in the giving of livestock since it predates hard currency and livestock such as cows were then the most prized possession in a home. There is no limit on the number of cows to be given.

⁴² P N N v Z W N [2017] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/132157/> accessed on 10.02.2019

⁴³ Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/152142/> accessed on 10.02.2019

⁴⁴ “Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

⁴⁵ Section 43(1) of the Marriage Act, 2014

⁴⁶ Section 2 of the Marriage Act 2014 “dowry” means any token of stock, goods, money or other property given or promised in consideration of an intended marriage”

⁴⁷ Section 55

⁴⁸ This is in conflict with the Marriage Act, 2014



4.0 RESEARCH FINDINGS

4.1 THE DEFINITION OF A VALID MARRIAGE

4.1.1 Customary Definition

Amongst the Luo community, a valid marriage is defined as a union between two families where a groom has paid dowry to the bride's family for her hand in marriage. This token of appreciation or consideration has to be in the form of cows. However, additional forms of livestock such as goats are also acceptable, not as an alternative but in addition to cows. Luo customary marriages are also potentially polygamous. Traditionally, customary marriages were never registered. The giving of cows to the bride's family was and still is the evidence needed to signify the presence of a valid marriage among the Luos. Customarily, couples were introduced to each other by matchmakers known as *Jagam*, but this is not a common practice now.

Customarily, before the cows were given to the bride's family, the groom and his friends were expected to have visited the bride's family and gifted the mother what is locally referred to as "*ayie*" Traditionally, *Ayie* was given in the form of gifts such as a lactating cow and its calf, household items since money as a hard currency that we know presently was never in existence. *Ayie* is exclusively given to the bride's mother as a form of appreciation for her role for giving birth to the bride and raising her. The *Ayie* was normally shared among the female members of the bride's family.

However, before *ayie* or *nyombo* can take place, consent must be sought from the bride's father. There also has to be an acceptance of the man's proposal for marriage.

4.1.2 Statutory Definition

Section 3(1) of the Marriage Act, 2014 defines marriage as the "voluntary union of a man and a woman whether in a monogamous or polygamous union and registered under this Act." Thus, a valid marriage under our statutory law is where both parties have given their consent to marry and to have had their union registered either in any of the forms prescribed under the Marriage Act, 2014. Any marriage under Statutory marriage is issued with a Certificate of Marriage and there are requirements that parties intending to get married have to fulfil before their union can be registered.

4.2 DOWRY

Dowry is a form of appreciation or consideration that the groom gives to the bride's family for her hand in marriage. Among the Luo, a union is not recognized as a marriage unless dowry in the form of cows has been given by the man's family to the bride's family. In instances where the groom pays the bride's family money with an agreement that part of it is to be used to buy livestock (cows); unless cows are bought by the bride's family and an indication made that they are dowry, that union will not be considered as a valid marriage under the Luo customary law as it relates to marriage. Thus, the payment of livestock is extremely significant as it not only seals a union between the two parties getting married, it also brings families together.

Secondly, the giving of dowry among the Luos was and is not a one-off event affair. As long as the woman is still alive, her husband is expected to periodically send gifts, money or additional cow(s) to her family from time to time. Dowry negotiations in the cultural setting are considered very significant and the brides, depending on their beauty and family status can fetch a considerable amount of dowry through the negotiations even though there is no set amount.

The Luos have always placed a big emphasis on the giving of cows for dowry and to signify marriage as it is a symbol of a person's wealth, status, seriousness. The cows are also a visible property and the family that was on the receiving end also gained in wealth since cows were seen as a sign of wealth. About 2/3 of dowry negotiated had to be paid before the lady could be allowed to go to the man's home as his wife. The giving of cows is an old age practice since money currency was never in existence then.

From the above, it can be seen that the giving of dowry and the acceptance of the same is central to any union to be regarded as marriage under customary law.

4.3 THE EFFECTS OF NON-PAYMENT OF DOWRY

4. 3. 1 Burial Rights

According to the Luo customary practices on marriage, where dowry has not paid and the woman dies, her family will have the burial rights over her remains.⁴⁹ However, the man's family may be given burial rights if they give dowry before her burial or make a promise to give dowry after the burial. Similarly, where the man dies, the woman is not allowed by her family to bury him as she would be considered to have acquired the status of a widow for a man who never honoured her family through the giving of dowry. However, if the man's family gives dowry before burial, then the woman is entitled to bury him as his wife and thereafter be considered a widow with rights such as the right to inherit his property and ancestral land.

4. 3. 2 Custody of Children

Customarily, any child born out of a union between a man and a woman who are not customarily married is considered as not belonging to the man but the woman alone. The man, therefore, has no right under customary law to claim the children as his since he has never given dowry for the woman's hand in marriage. In the event that such a union breaks up and the woman gets married to another man, this man also acquires her children as his if, in addition to giving of her dowry, he also gives additional cows for the children. However, the biological father of the children can redeem his children by paying compensation to the other man who eventually paid dowry for his children's mother.

4. 3. 3 Marriage of Younger Siblings

Under the Luo customary law, if an older son cohabits with a woman and fails to marry her, then none of his younger siblings can *Nyombo*. However, they can give *Ayie* to their bride's mother. On the other hand, where an older daughter is cohabiting with a man who has failed to give her dowry, dowry can be given for her younger sister's hand in marriage, but the animals will be kept in an Uncle's homestead.

This is due to the customary belief that if a younger daughter gets married before the older sibling, then it will bring a bad omen to the older daughter who may fail to get a suitor. Whereas there is no evidence supporting this myth, it is believed that it was imposed to maintain respect and to somewhat put pressure on older sisters who may have been strong-willed to find a suitor fast before their younger sisters did. The custom of not accepting the dowry of the younger daughter into the father's home before the dowry of the older daughter is paid is still practiced to date.

4. 3. 4 Marriage of the Parties Children

In any union where no *Nyombo* has been done, the man is not permitted to demand dowry for his daughter's hand in marriage. Likewise, he is also not permitted to give dowry for his son to marry. However, the giving of *Ayie* to the bride's mother is accepted, but not *Nyombo*. This custom is still practiced to date. The rationale behind it is in the fact that a man cannot be permitted to engage in a customary practice and enjoy the proceeds when he does not recognize or practice it in his own union.

4. 3. 5 Inheritance Rights

Women property disinheritance is very common among the Luo community whether she is married customarily or not, and worse if she is from another community. Where a woman was not married customarily it becomes very difficult for her to lay claim to her partner's property, especially the ancestral land, upon his demise. This is because she is not regarded as a wife in that home, but a visitor and a visitor cannot, therefore, inherit property, especially if it is ancestral land

⁴⁹ In the High Court of Kenya at Nairobi, Civil Suit 14 of 2017, the family of the deceased was given the right to bury her since it could not be proved that there was in existence customary marriage or long cohabitation. <http://kenyalaw.org/caselaw/cases/view/130875> accessed on 31.08.2018

4.4 MATRIMONIAL PROPERTY UNDER CUSTOMARY LAW

The Luo are a patrilineal community, therefore, all property rights, names belonged to the man and woman's interests and rights are subsumed. This is more so because, in years gone by, couples lived in communal settings within the man's ancestral home where the land is ancestral.

Within the Luo community, customarily women did not have the right to property ownership; if she did, then she was only holding it in trust. In instances where the couple were living in the man's ancestral home, which was often the case in the traditional setting, if the marriage broke down, then the woman would walk away with nothing. Taking into consideration that relations had probably been severed by the time she was going her way and being a patriarchal society, she would not be allowed to pack anything to leave with, except with her children but only if she had not been married.

4.5 WOMEN'S RIGHTS VIOLATIONS

The failure to Nyombo robs off a woman her right to dignity, identity, security and respect within the cultural setup. A woman for whom dowry has not been paid has no voice to air her opinion in family matters. Sometimes she also has no voice to air her opinion in any public setting. This is due to the fact that she loses her respect within the community especially where it is known that she is only cohabiting with the man, but is not married to him. The perception is that she cannot convince the man she is cohabiting with to marry her in the acceptable customary way. She, therefore, has no identity and loses her sense of belonging. It is also felt that where no Nyombo has taken place, the woman will be insecure and will therefore not want to invest with the man or in his ancestral home since she cannot lay claim to that being her home as well.

4.6 GENDER-BASED VIOLENCE

It is believed that in the cultural settings, women's rights violations, particularly gender-based violence or domestic violence was closely associated with whether Nyombo had taken place or not. Where a woman had been married customarily, if she ever left her matrimonial home because of domestic violence, then it would often cost the man to bring her back. He would be forced to pay fines in the form of cows to her family to win her back. This fine was deemed expensive as it was an avoidable fine. The flip side to this is that women who were not married customarily would have their rights violated and would receive little support from the community, simply because they were not considered as a "wife."

4.7 ALTERNATIVES TO DOWRY PAYMENT

Even though the respondents collectively agreed that dowry is costly due to the hard-economic times, one thing remained constant - there can be no alternative to Nyombo in the form of cows. Marriage does not just involve two people; it involves families and clans. Even in an instance where families ignore the giving of cows, they later realise in future that they are restricted by culture on what they can engage in and cannot engage in. Even though we are a modern society, culture still holds us, dear. There can therefore be no alternative form to giving of dowry other than livestock.

4.8 DIVORCE UNDER CUSTOMARY LAW

Divorce rarely happened and if it happened, parties to the marriage could only be recognized as, having had a divorce if the dowry that was given by the man was returned. Where no dowry was returned, the couple would still be considered married and the man who had paid dowry for the woman had every right to claim her and any children born to her even though they might no longer be living together. In returning dowry, consideration would be made to factors such as;

- i. For each girl child that she bore and left with the man, her family would deduct 3 cows from what was given in dowry; and
- ii. For each boy child that she bore and left during divorce, her family would deduct 4 cows from what they were given in dowry.

The above therefore settled it publicly that a divorce had taken place and the woman was free to enter into a new relationship. Even in instances where the woman took her children with her, dowry would never be returned in full. Because, she had been married young and most likely a virgin, and now that she had lived with the man for several years and bore him children, it was not expected of them to demand repayment of dowry in full.

4.9 COHABITATION

Cohabitation never existed under Luo customary law. No man was permitted to take another man's daughter and live with before dowry negotiations and marriage had taken place. It was a complete taboo. Families lived in a communal setting and since marriage was a practice that brought families together, from offer to acceptance and negotiations. Cohabitation was unheard of, it was never practiced and it never had a place under the Luo customary practices.



5.0 AN ANALYSIS OF THE FINDINGS

5.1 INTRODUCTION

There is no doubt that advocacy on women's rights, has seen a significant transformation since Kenya promulgated the CoK, 2010. We now have new legislation on land⁵⁰ towards the implementation of intended land reforms as per the CoK, 2010 and the National Land Policy, 2009. There is also in place new legislation on matrimonial property⁵¹ where previously our courts' determined disputes of matrimonial property on the Married Women's Property Act, 1882. The Law of Succession Act has also seen amendments and repeals to bring it to conformity to the CoK, 2010. More relevant to this research is in the fact that our customary marriages now have a place in statutory law and can also get registered if the parties to the union so wish. The Marriage Act, 2014 under which customary marriages are to be registered under has also recognized the fact that our customary marriages are polygamous in nature, unlike civil or Christian marriages.

5.2 THE SIGNIFICANCE OF DOWRY

From this research, it is clear that marriage is not just for the individuals in it. A Luo customary marriage is a union that brings together families and even the clans together. Because of the elaborate emphasis that is placed on the cultural practices of the giving of *Ayie* and *Dhok*, cumulatively referred to as *Nyombo*, these are elaborate ceremonies involve relatives beyond the immediate family members. The groom received dowry from his father for his bride's hand in marriage. Thus, this whole process customarily was not a cultural aspect to be taken lightly, where one thinks that they can just walk in and walk out and severing such ties involves the community, a relationship that continues well after death or where the marriage breaks down.

On the surface, dowry negotiations might be seen as an everyday affair between two families where a groom and a bride intend to live together as a couple. However, this is a tradition that is deeply rooted and its importance comes out during subsequent marriages of the couple's children or when death occurs. Thus, from the research findings above, it is clear that dowry⁵² positively establishes a woman's position within the family she has joined and it also gives her certain authority over family issues.

5.3 CONSENT

Under the Marriage Act consent refers to the consent of the parties intending to marry, however under Luo customary law, consent included that of the bride's family. Customarily, where a woman's family had refused to give consent, the marriage could not take place at all. Secondly, the family consent that was given in the customary settings signified that the family would also be accepting dowry and support the couple – the practices were intertwined. This is one of the reasons why wherever a man showed interest in a woman, the woman's family would more often than not start their *nonro* to find out the man's family background and status. This background check was meant to confirm that the man was from a good lineage, there was no close degree of consanguinity or that they are not sorcerers or night runners or did not practice witchcraft especially where the woman's family were not involved in any of such vices. This background check would help the woman's family with the decision of giving consent or not for their daughter's hand in marriage.

⁵⁰ There were previously seven land statutes. These were later to be repealed and consolidated to form three main statutes namely; Land Act, 2012; Land Registration Act, 2012; National Land Commission, 2012. These 3 legislations were however amended in 2016 and the Community Land Act also came into effect in 2016

⁵¹ Matrimonial Property Act, 2013

⁵² *Dhako en dhiang'* – a woman's position is equated to the cows given for her dowry

5.4 INCREASE IN FAMILY WEALTH

The payment of dowry by the groom's family to the bride's family was always a welcome customary practice as it also increased a family's wealth. In the olden days, a family's wealth was often determined by the number of livestock (cows) and the size of land that they owned. Since marriage was through the payment of cows, it, therefore, added to the recipient family's stock of wealth. Not only did dowry from a daughter's marriage add to the family's stock of wealth, but it also gave the family livestock to use for dowry payment in the event that a son of the family was to get married. The family could also sell some of their livestock in exchange for other commodities. An increase in wealth also added to a family's standing and respect within their community. Parents would also pride themselves to the number of cows that their daughter(s) had fetched them through marriage.

5.5 DOWRY AS A DEBT

The issue of dowry is central in family relations, the position of a woman and her right to enjoy the matrimonial property. In a most recent decision,⁵³ a Magistrate's Court in Kitale has given Orders that a man (Plaintiff) whose daughter had eloped with a lover while she was in high school to be paid bride price (dowry) by his son-in-law, the Defendant. The Court accepted as evidence an agreement that had been signed by the parties that the Defendant was to pay certain items as bride price (dowry). The court had also accepted both the oral evidence of the Defendant where he admitted to having committed to pay dowry.⁵⁴ The fact that a suit claiming dowry payment was filed in Court by the Plaintiff and a trend-setting verdict delivered, even if by a sub-ordinate court is enough evidence that dowry is a valid debt when left unpaid and that the practice holds a great amount of significance among communities.

5.6 A SHOW OF COMMITMENT

The whole process of a marriage ceremony among the Luo brings with it not only a form of appreciation from the groom's family to the bride's family, but it also shows a form of commitment and appreciation. During the customary marriage ceremony, many members of the bride's family are appreciated through gifting such as her uncles and aunts, siblings, and brothers. This is unlike the modern-day wedding celebrations where everything is centered on the couple getting married and little attention is made to the bride's family. Thus, by paying dowry, the man not only fulfils a cultural practice of honour and appreciation, but he also showed his ability that he is capable of providing for bride within marriage. Such degree of commitment in a man shows that he not only values his bride; but that he is also committed to upholding high regard for her family – the same family that the woman would return to should the marriage break up.

5.7 RIGHT TO MATRIMONIAL PROPERTY

Because property ownership among the Luo is largely patriarchal and accepted, it is key to note that a woman's right to matrimonial property was customarily determined by the dowry aspect – that is to mean, was she married as per the customary practices or was it a come-we-stay union. As earlier defined, marriage among the Luos is a union where dowry had been given to the woman's family for her hand in marriage. Thus, where no dowry has been given, it is inconceivable for the woman to imagine or think that she had a right of entitlement over the man's property such as ancestral land. However, if the property was jointly acquired during the subsistence of the marriage, or the other partner had made a considerable contribution towards it, then its division would be subjected to the provisions of the Matrimonial Property Act after the dissolution of the marriage. There are many reasons and excuses for a man's family who are seeking additional land to chase a woman from the land;⁵⁵ one of them would be "ok en chiwa."⁵⁶ Customarily women never inherited land from their husband's clan, since the land was held communally. Upon marriage, each woman would be given an allocation. This allocation remained hers and it is from this portion that her sons would inherit from, especially in polygamous unions.⁵⁷ Therefore, customarily ancestral land never formed part of matrimonial property in a union. The land remained the man's property and its ownership would be passed to his sons.

⁵³ Though the parties involved in this dispute do not belong to the Luo community, they nevertheless value the customary practice of dowry just as the Luo do.

⁵⁴ <https://nairobi.news.nation.co.ke/news/court-orders-man-to-pay-bride-price-in-landmark-verdict-that-will-shake-marriages/> accessed 13.09.2018

⁵⁵ Ancestral land is closely tied to individual and clan identities

⁵⁶ She is not their wife; they did not marry her (no dowry was paid and families are unknown to each other).

⁵⁷ Paul Hebinck & Nelson in "Land and embedded rights: An analysis of land conflicts in Luoland, Western Kenya" Mango. Available at <https://web.archive.org/web/20131019201253/https://openaccess.leidenuniv.nl/bitstream/handle/1887/13060/ASC-075287668-1014-01.pdf?sequence=2> at page 47 accessed on 12.02.2019

5.8 WOMEN'S RIGHT TO INHERITANCE

5.8.1 Customary Position on Women's Right to Inheritance

Under customary law, women never inherited land from their fathers as it was perceived that their inheritance was with their matrimonial family. It was believed (some families still believe) that a curse would befall her father's family if she were to be given inheritance even though she was now married and had joined another family. There is no known evidence of a family whom a curse had befallen for reason that their married daughter inherited her father's ancestral land alongside her brothers. It is also believed that some of these cultural practices were set by the elders as a means of laying boundaries on how people were to live or share property. It is however to be noted that there was no mention of inheritance rights of women who never got married. Perhaps since marriages were customarily arranged through matchmaking, it was never perceived that a time would come when women would not get married.

5.8.2 Judicial Position on Women's Right to Inheritance

In a case that was decided by High Court of Kenya at Migori⁵⁸, it demonstrated that where customary law conflicts with the statutory law – the Law of Succession and the CoK, 2010 on the right of inheritance by married daughters of a deceased will take precedence over customary law. Brief facts are that the deceased died intestate and was survived by a son and daughter, both of whom were married. The son applied for a grant by listing only himself, his sons and wives as the intended beneficiaries of the deceased estate. His sister challenged the fact that she was not getting any share in the property, that in effect she was being disinherited. Her brother's only contention in refusing her the right to inherit was based on a customary belief that a curse would befall him and his family if she was allowed to inherit their deceased father's land. That the fact that she had gotten married elsewhere, her right therefore to inherit her father's land had ceased and her entitlement now lay with her husband.

The learned Judge who was seized of this matter applied statutory law and confirmed how the estate of the deceased was to be distributed.⁵⁹ Taking cognisance of statutory law that allows women to inherit land or property from their parents, the learned Judge ordered for the equal distribution of the deceased land, save for portions that had been acquired by the GoK and the area forming the homestead of the Applicant, the woman's brother.

The above case exemplifies the existence of conflict between customary law on one hand and statutory law on one hand, where customary law is very patriarchal and biased against women. It is believed that there are many more cases where women have been disinherited by their brothers simply because they did not lodge a dispute in Court

5.9 JURISDICTION OF THE COURT IN CUSTOMARY LAW.

Burial rights (Case Law)

Each of the cases mentioned below has brought in the significance that the payment of dowry gives to a union where there is a burial dispute. One of the cases has also defined what constitutes divorce under Luo customary practices.

In the High Court of Kenya at Kisii, Civil Appeal No. 10 of 2018

B. C. C. vs. J. M. G.

Hon. David Majanja, Kisii High Court

This case involved a burial dispute where a mother, Beatrice Cheluget had refused her late daughter's partner's, Jonathan Gwako decision to bury her daughter. Beatrice refusal was based on the assertion that despite cohabiting with her daughter for close to

7 years, Jonathan had never married as per their customary practices, thus there could be no presumption of marriage under customary law. Jonathan went to the Magistrates Court which awarded him a ruling in his favour, granting him the right to bury the late Lydiana.

Not satisfied with the decision of the lower court, Beatrice appealed against it at the Kisii

⁵⁸ Succession Cause 451 of 2014. <http://kenyalaw.org/caselaw/cases/view/128247> accessed on 02.09.2018

⁵⁹ Section 35(5) and Section 38 of the Laws of Succession

High Court. The matter came before Justice Majanja who in dismissing the appeal, stated that “the fact that there was no customary marriage between the two does not preclude the court from finding that the parties cohabited for some time and conducted themselves in such a manner that a marriage could be presumed.” The above decision by Hon. Justice Majanja made a presumption of marriage based on a long period of cohabitation.

As can be seen from this case, it is a clear departure from customary practice. Even though the parties involved in this suit are not Luos, their cultural practices as relates to the giving of dowry and what constitutes a valid marriage under customary law is similar to those practiced by the Luo. That, for marriage to be considered valid under customary law dowry, must have been given to the lady’s family as a form of appreciation.

Civil Case No. 101/2016

Silvatine Mwai Oinda vs. Gilbert Owuor Ragoti and Consolaa Mwai Akoko

Hon. Lester Simiyu, Senior Resident Magistrate, Homa bay Law Court

The above an unreported case that was before Hon. Lester Simiyu, Senior Resident Magistrate, Homa Bay Law Courts also involved a burial dispute. A lady had previously been married under customary law separated from her husband and presumably contracted another marriage. Children were born out of both relationships. She later on died and her first husband claimed the right to bury her, against her presumed second husband. The first husband filed a suit in Court against the presumed second husband.

What was central in this suit was, “What constitutes a divorce under customary law?” The presumed second husband in his testimony informed the Court that a valid divorce under customary law is one in which dowry has been returned. In this particular instance, no dowry was returned to the Plaintiff by the deceased family. Thus, the Defendant could not have customarily married the deceased. One cannot pay dowry “on top of another dowry.” Thus, the Plaintiff in this instance was granted the rights to bury the deceased since he had married her customarily and though she had walked out of their marriage, his dowry was never returned by her family, thus the separation could not have been termed as divorce under customary law.



CONCLUSION

Customary law plays a significant role among the Luo. The traditional aspect of dowry remains a key pillar in marriage and its payment cements woman's position in her matrimonial home. Where no dowry has been paid, then there is no marriage. The customary practice of dowry payment is therefore important as it defines a woman's identity within the society, the family and her entitlement to matrimonial property.

This research has shown that the customary aspect of *Nyombo* is deeply rooted among the Luo and entwined with a woman's right to property – more, in particular, her husband's ancestral land. Whereas, in modern times a couple might think that it is for them to decide what cultural aspects to engage and which ones to forego. It is evident from the research that should death or divorce occur in the family, or when one of the children in the family is to get married or to marry, then the issue of *Nyombo* will have to be revisited. Where *Nyombo* had been ignored by the couple or by their families, then it will have to be fulfilled at a later date, but it cannot be ignored. This is well demonstrated in the recent case decided by The Chief Magistrate's Court in Kitale.⁶⁰

Hon. Nyang'ata Osoro held that unpaid dowry is recoverable as debt and that a bride's family can sue for its recovery. Even though the parties in this particular case ascribe to Bukusu customary law, this cultural aspect is not far from the Luo customary law on Dowry.

The giving of dowry as a form of appreciation to the woman's family is not a one-off event as the practice never ends during the woman's lifetime. A husband is expected to continuously give an appreciation to his wife's family. It could be directed to the woman's parents if they are still alive such as building them a house, or indirectly such as educating a member of the woman's birth family or taking in some of her relatives to live with the couple. The symbolism that surrounds the giving of cows to signify dowry payment will remain an important feature of marriage among the Luos for generations to come. Marriage was non-existent where dowry had not been paid.

In regards to property rights, despite there being legislative provisions and case law that has pronounced itself on women's rights to property inheritance; there is no doubt that women still face myriad of challenges with regards to property/land ownership. This can be attributed to the fact that land inheritance among the Luo is patriarchal – fathers more often than not, still distribute ancestral land to their sons and not daughters. Apart from ancestral land, women are culturally believed to hold property in trust for their husband or sons. This practice is traditionally widespread and partly acceptable even if it goes against the interest of legislative provisions. It is also believed that some women have intentionally opted not to fight over property rights with their brothers. This is not only because they had married and left their father's home, but that taking such a stand would act as a form of security for them should the marriage not survive as she would then have her brothers' home to go back to for support.

In conclusion, under customary Luo marriages dowry is the outward sign of marriage and without it, the legality of the marriage is questioned leaving the woman without property rights during the marriage and as a widow. The Marriage Act 2013 has cured this lacuna by recognising customary marriages and enabling those who participate in an avenue to register this marriage and obtain a certificate. Women who consent to contract customary marriage need to be sensitized on this and encouraged to do so, to secure their property rights during their marriage and when their husband is deceased.

⁶⁰ In the Chief Magistrate's Court at Kitale, Civil Suit no. 33 of 2017, *Bernard Simiyu Festo v. Patrick Buluma Mukhebi and Isaac Sifuna Mukhebi*. (Unreported)



RECOMMENDATIONS

- i. There is a need for more advocacy and legal awareness to both the community and the widows.
- ii. The continued engagement of the Luo Council of Elders by KELIN by restoring and using them to solve the issues of wife disinheritance and property rights violations.
- iii. There is need to have sections of the Law of Succession revised so that it can be in sync with the Constitutional provision of non-discrimination and to recognize the rights of women who are not considered wives because dowry was never given, but are widowed and they do not, under customary law stand to inherit.



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ANNEXURE 1: LIST OF PARTICIPANTS

KEY INFORMANT INTERVIEWEES

No.	Name	County/Location (sub)
1.	Eliud Odeka	Homa Bay/Kaksingri
2.	Wilson Makori	Homa Bay/Mbita
3.	Pastor Joseph Lussi	Homa Bay
4.	Caroline Oyumbo	Homa Bay/Mbita
5.	Judith Adhiambo Ouko	Homa Bay/ Kanjira
6.	Vincent A. N. Obura	Homa Bay/Wang' Chieng'
7.	Esther Aoko Odhiambo	Homa Bay/Kawuor
8.	Hon. Lester Simiyu	Homa Bay Law Courts
9.	Consolata Adhiambo Otieno	Homa Bay/Boro
10.	Robert Omondi	Homa Bay/Mbita
11.	Syprose Aoko Onyango	Homa Bay/Sindo
12.	Dismas Kamaria	Homa Bay/Kaksingri
13.	Zahra	Homa Bay
14.	Esther Adhiambo	Homa Bay/Kanjira
15.	Chief Tom Ondiro	Homa Bay/Kakello
16.	Apollo Bwana	Homa Bay/Kojwach
17.	Lilian Achieng'	Homa Bay/Kakello
18.	Felix Okal	Homa Bay/Bolo
19.	Robert Ochieng' (Advocate)	Homa Bay
20.	Dan Osano	Homa Bay/North East Kar.
21.	Nelly Ouko	Homa Bay/Mbita
22.	Pamela Kamarage	Homa Bay/Mbita
23.	Teresa Sumba	Homa Bay/Kaksingri
24.	Everline Achieng' Agwaro	Homa Bay/Mbita
25.	Pherez Muga	Homa Bay/Atela
26.	Millicent Adero	Homa Bay/Atela
27.	Emily Onyango	Homa Bay/Kojwang'
28.	Tom Ondiro	Homa Bay/Kakelo
29.	James Owande Magunga	Homa Bay/Dudi
30.	Elly Ojijo	Homa Bay/Kanjira
31.	Joyce Orowe	Kisumu/Kochogo
32.	Kasuku Kalolo	Kisumu/Kakola
33.	Esther Jowi (Advocate)	Kisumu

31.	Joyce Orowe	Kisumu/Kochogo
32.	Kasuku Kalolo	Kisumu/Kakola
33.	Esther Jowi (Advocate)	Kisumu
34.	Rashid Kokonya (Kadhi)	Kisumu Kadhi Courts
35.	Beatrice Ndolo	Kisumu/Upper Nyakach
36.	Tom Minda	Kisumu/Muhoroni
37.	Raymond Oluoch	Kisumu/Kakola
38.	Collins Otieno	Kisumu
39.	Julian Anyango	Kisumu/West Kisumu
40.	Rose Odemba	Kisumu/Kit Mikayi
41.	Caroline Atieno Odek	Kisumu/Kakolo
42.	Rhoda Nafula Wekesa	Kisumu/Kakola
43.	Pascal Odhiambo (Advocate)	Kisumu
44.	Jack Jabungu Omolo	Kisumu/North Central Seme
45.	Gideon Oyugi Anyah	Kisumu/West Seme
46.	Christable Ombok (Chief)	Kisumu/South Central Seme
47.	Hon. Wanjiku Cherere (Judge)	Kisumu High Court
48.	Hon. David Majanja (Judge)	Kisii High Court
49.	Jacob Oliech Agudha	Kisumu/North East Kano
50.	Jared Okach	Kisumu
51.	Eunice Owino	Kisumu/Kano
52.	Hon. Omolo (Magistrate)	Kisumu Law Courts
53.	Vitalis Olewe Onuong'a	Kisumu/Katito

FOCUS GROUP DISCUSSION – WOMEN GROUPS

No.	Name	County
1.	Anne Atieno	Homa Bay
2.	Benter Akelo Obunga	Homa Bay
3.	Jane Onyango	Homa Bay
4.	Hellen Imbo	Homa Bay
5.	Ruth Oyugi	Homa Bay
6.	Sylvia Abiero Milewa	Homa Bay
7.	Sara Ojwang'	Homa Bay
8.	Consolata Atieno Aluoch	Kisumu
9.	Carren Opinya	Kisumu
10.	Addah Akoth	Kisumu
11.	Sophia Anyango	Kisumu
12.	Carren Kiarie	Kisumu
13.	Margaret Omwa	Kisumu
14.	Grace Ojiem	Kisumu

FOCUS GROUP DISCUSSION – COUNCIL OF ELDERS

No.	Name	County
1.	James Matara Owino	Homa Bay
2.	Dockson Oloo Ndeda	Homa Bay
3.	James Oindi	Homa Bay
4.	Joram Okola Lwambe	Homa Bay
5.	James Opere	Homa Bay
6.	Sylphanus Aoko Okello	Homa Bay
7.	Michael Achiando	Homa Bay
8.	Ignatious Ogoch Owuor	Homa Bay
9.	Alfeus Kisia	Kisumu
10.	Nicholas Otieno	Kisumu
11.	Johnson Guya	Kisumu
12.	Hezbon Ogodo	Kisumu
13.	Josiah Ondoro	Kisumu
14.	James Omollo Kavila	Kisumu
15.	Dan Gaya	Kisumu
16.	Paul Odhiambo	Kisumu

ANNEXURE 2: PHOTOS

ANNEXURE 3: QUESTIONNAIRES

KEY INFORMANT INTERVIEWS

1. What is your understanding of a valid marriage?
2. What in your opinion is dowry?
3. What are the implications of non-payment of dowry among the Luos?
4. What is your understanding of women's property rights?
5. How does the non-payment of the dowry affect the wife's right to property:
 - i. In the context of marriage?
 - ii. Where there is separation or divorce?
 - iii. Where the wife dies? and
 - iv. Where the husband dies?
6. Do you think human rights protect women? If yes, how?
7. Which human rights violations are closely connected to non-payment of dowry?
8. Do you think the Luos will still practice the payment of dowry in the next ten years?
9. If you accept the concept of dowry payment, what form should it take at this age and time?
10. Please suggest alternatives to dowry payment that respects women's rights.

FOCUS GROUP DISCUSSIONS

1. What in your opinion constitutes marriage according to the Luo?
2. What is the difference between Ayie and Dowry?
3. Why do you think the giving of dowry is significant to the Luo?
4. Why do you think the emphasis is put on the giving of cows as dowry?
5. How often should dowry be given by the same man for the same woman?
6. What is the status of a woman who is living with a man who has not paid her dowry?
7. What is the challenge in burial where a man has not paid dowry if either of the parties dies?
8. What property rights does a woman have over her partner's ancestral land where no dowry had been paid?

