



International Environmental  
Law Research Centre

# **Gender Dimension of Law, Colonialism and Inheritance in East Africa: Kenyan Women's Experiences**

Dr Patricia Kameri-Mbote

**IELRC WORKING PAPER**  
2001 - 1

*This paper can be downloaded in PDF format from IELRC's website at  
<http://www.ielrc.org/content/w0101.pdf>*

## Table of Content

---

<b>I. Introduction</b>	<b>1</b>
<b>II. Historical Background</b>	<b>2</b>
1. Africans	2
2. Muslims	2
3. Hindus	2
<b>III. Scope</b>	<b>3</b>
1. Inheritance or Succession?	3
2. Customary Law	4
<b>IV. Analytical Framework</b>	<b>4</b>
1. Legal Pluralism Versus Legal Centralism	5
2. The Women's Law approach	5
<b>V. Effects of Colonialism on Inheritance</b>	<b>6</b>
1. Introduction of Private Property Rights Holding	6
2. Introduction of New Notions of Marriage	8
3. Breakdown of Community Institutions	11
4. Codification of Customary Law	11
5. Emphasis on Cultural Differences	12
6. Women's Rights	12
<b>VI. Women's inheritance Rights in Kenya Today</b>	<b>14</b>
1. Kisumu	14
2. Mombasa	14
3. Kajjado	15
4. Murang'a	15
<b>VII. Rethinking Customary Law</b>	<b>16</b>
<b>VIII. Conclusion</b>	<b>16</b>

## I. Introduction

The ownership, control and management of property in a marriage or in situations akin to marriage has evolved as one of the most critical and controversial areas in gender research and development. In the three East African countries, the institutions, laws and practices of marriage and succession are closely intertwined. The laws and practices comprise of a plurality of norms drawn from English (treated as synonymous with Civil/Christian), religious (mainly Islamic and Hindu) and customary laws.

The Constitutions of the three countries provide for the application of these laws on an equal basis with none being assumed as superior to the other. The emphasis in the three countries has been on western approaches to inheritance and succession premised on the fallacious assumption that African customary laws of succession and inheritance have fallen into desuetude. The striking feature in the application of these laws, however, is the prevalence of customary norms even as unified statutes have been promulgated to regulate inheritance matters. In some instances, statutory laws have bowed to the pressure of prevalent customary legal norms.

Empirical research into inheritance laws and practices in Eastern and Southern Africa has led to the questioning of long-held notions that customary law is bad for women and statutory law (borrowed largely from English law) is good for women. The need to rethink and reconstruct customary laws has become even more urgent with the realisation that most aspects of women's lives pertaining to ownership, management and control of property continue to be governed by these laws.

The construction of customary law by courts during colonialism and within the independence period provides a useful insight into the dynamism and malleability of this law. It represents a scenario of cultures engaging one another with the one (western) seeking to subjugate the other (African customs). The interpretation of laws in the post-colonial era has continued in the same vein. There are stakeholders in the conflict grounds whose relative powers determine the principles that are upheld.

Consequently, it is becoming increasingly clear that what courts decree to be customary law and binding upon them by dint of the doctrine of precedent is not necessarily synonymous with the operative customary law on the ground. The latter governs people's lives on a day-to-day basis and is applied as long as the formal courts are not involved in adjudication of matters. Where traditional structures of social control are still in place the rights of women to inherit property are recognised even under customary law. The acceptance of changes in customary law in this situation involves a negotiated process of social interaction where the stakeholders engage each other requiring the one to give and the other to take as the situation requires. In situations where those structures have disintegrated and hence a mixture of customary and statutory laws apply, the rights of women to inherit are not as readily recognised. The capacity of powerful members of society to mould customary and statutory legal thinking and to influence the development of inheritance laws in such a case cannot be underestimated.

This paper gives an account of the application of inheritance laws in Kenya from colonialism to date highlighting the conflict between introduced English norms with customary norms and the effects of that conflict on the rights of women to inherit property. It also maps the continuum in the application of customary legal principles, dispelling the dichotomy that legislators passing uniform laws of inheritance modelled after the English ones seem to assume. I hope to illustrate the necessity for rethinking and reconceptualising customary laws of succession and inheritance in any meaningful law reform programme that seeks to enhance women's rights to inherit property.

## II. Historical Background

The laws of succession for the different groups in Kenya have developed along different lines. It is necessary to outline briefly at the outset these different paths since they are relevant to the discussion on women's rights.

### 1. Africans

The declaration of protectorate status for Kenya in 1895 paved way for promulgation of the 1897 East Africa Order in Council which at Article 2 provided that African customary law was applicable to natives so long as it was not repugnant to justice and morality. However, an African who had embraced Christianity was deemed to have technically abandoned African customary law and was therefore not subject to it. Article 64 of the Native Courts Regulations, 1898 provided that native Christians were governed by the law that governed native Christians in India. It was unclear whether law this law would be the English law of inheritance or the Indian Succession Act. Further, the 1902 East Africa Marriage Ordinance provided that natives married under the Ordinance divorced themselves from customary law and henceforth adopted the English way of life. Under Section 39 of this ordinance, where a person was married under the ordinance or was a child of such parents, English law applied in case of intestacy. The Section was silent on testate succession and it was assumed that the applicable law was the English law of wills. In 1904, the Native Christians Marriage Ordinance, repealing the 1902 Marriage Ordinance, provided that all Africans, Christians or otherwise, were to apply African succession law.<sup>1</sup> Each of the ethnic communities has its own customary inheritance laws.

### 2. Muslims

While section 87 of the Native Courts Regulations, 1897 gave official recognition to the application of Islamic law as per the Quran, the 1907 Native Courts Ordinance established Islamic courts which applied Islamic law in matters of personal law and succession. In 1920, however, the Mohammedan Marriage, Divorce and Succession Ordinance was passed to, *inter alia*, indicate the classes of people to be governed by Islamic laws of marriage and succession and the particular Islamic law applicable. At Section 4, it applied Islamic law of succession to any person who contracted a Mohammedan marriage or being male contracted such marriages or was an issue of such a marriage. In *Ali Gayuma v. Ali Mohammed* (unreported), it was held that in the case of an African converting to Islam, Section 4 applied to the exclusion of African Customary Law. During the colonial era, the content of Muslim marriage and succession laws was not substantially interfered with through legislation. The legislation passed was meant to indicate the fact that Muslim marriage and succession laws were recognized.<sup>2</sup>

Under Islam, inheritance shares are fixed by the Quran and a Muslim is not allowed to bequeath by will more than one third of all the property that he owns. Testate succession is not meant for the heirs of the deceased but for outsiders.<sup>3</sup>

### 3. Hindus

Three phases are discernible in the development of the Hindu law of succession in Kenya. During the first Phase (1898-1945), the colonial government neglected this law but the Hindu community regulated its succession affairs in accordance with Hindu Customary Law, the Hindu Wills Act and the Probate and Administration Act, 1881. There was no sound legal basis for the application of Hindu succession laws. During the second Phase (1946-1960), the colonial government decided to clarify the position of Hindu succession laws and it passed the Hindu (Marriage, Divorce and Succession) Ordinance. Finally, in the third Phase (beginning in 1960), the Hindu (Marriage, Divorce and Succession) Ordinance was drastically amended so that the provisions dealing with marriages of Hindus were separated from those dealing with succession amongst them. The 1946 Ordinance became the Hindu Succession Act, Cap. 158. The 1981 Law of Succession Act replaced Cap.

158 and it is the statute that regulates succession matters for Hindus in Kenya today. It would be necessary to carry out empirical research<sup>4</sup> on the application of Cap. 160 to Hindus since it is not applicable to Muslims and applying it to Kenyan Africans has also proved problematic.

### **III. Scope**

This paper is based on research findings of a study carried out under the aegis of the Women and law in East Africa Research Project, a multi-disciplinary group carrying out research on laws relating to and affecting women in Kenya, Uganda and Tanzania. The study on inheritance was carried out between 1993 and 1995 and in Kenya it covered Kajiado District in the Rift Valley Province (Maasai community), Mombasa town in the Coast Province (Muslims), Kisumu District in Nyanza Province (Luo community) and Murang'a District in Central Province (Kikuyu community). Nairobi was chosen as a fifth site, but only for purposes of tracing, and identifying the impact of urbanisation on persons originally hailing from the four districts.

The study was inspired by the increasing number of cases reported in the media on disinheritance of widows by their deceased's husband's relatives and the dearth of information on inheritance patterns attributable to both the lapse in law reporting in the three East African countries and the solution of inheritance disputes through traditional customary law and community-based dispute resolution mechanisms. In Kenya, we have no customary law courts and reporting of the findings of traditional dispute resolution panels is problematic owing to the diversity of levels at which such panels are set up namely, from family to clan and village.

Entry into the districts and access to the researched communities and individuals was facilitated by individuals who, and institutions which, had assisted the research teams during the pilot phase of the study which preceded the main study. Data collection was carried out mainly through Focus Group Discussions (FGDs) based on an FGD guide. This was supplemented by data collected from key informants and case studies, and through questionnaires and case study guides. In all the areas, a total of twenty-one FGDs were carried out, a total of forty-eight key informants interviewed and sixteen case studies undertaken.<sup>5</sup>

#### **1. Inheritance or Succession?**

While the terms succession and inheritance have been used interchangeably, our research findings point to the importance to distinguish between the two. The two terms have been defined to mean the devolution of title to property under the law of descent and distribution. They exclude those who take by deed, grant or any form of contract. Succession among many African communities denotes the passage not only of the property of the deceased but also the obligations to which he was subject and the status that he held in society. The heir on the other hand gets a share of the property but is not under a similar obligation.

Most of the communities we studied have different names for the heir and the successor. The former gets a share of the property to sustain himself while the latter steps into the shoes of the deceased assuming the obligations of the deceased and has the duties of a trustee for the property. The successor is in some cases precluded from getting a share of the property to prevent a conflict of interests arising as he looks after it for the potential beneficiaries.<sup>6</sup> The successor is invariably the eldest son of the deceased or the widow or a brother to the deceased depending on the communities. Among the Luo for instance, the eldest son or brother to the deceased is the successor while among the Kikuyu, the widow is the successor.<sup>7</sup>

## 2. Customary Law

Customary law is the law of small scale communities which people living in these communities take for granted as part of their everyday experience but it excludes outsiders who to get any account of it have to either be told about it or read about it.<sup>8</sup> Whether read about or narrated, customary law is once removed from the source. Thus the written accounts there are of customary law are not direct accounts of community practice but the work of informants each of whom, in recounting a particular rule brings to bear on the subject his/her preconceptions and biases. It would be easy to understand the ramifications of customary law if it was only one. However, there are as many customary laws as there are tribal communities and despite the general consensus on certain fundamental principles, there are nuances in each that only one well versed with the community's way of life can identify.<sup>9</sup>

The hallmark of African customary law is the dominance of older male members over property and lives of women and their juniors. Allied to this is the centrality of the family as opposed to the individual and the definition of the family in expansive terms to include ascendants and descendants and more than one wife in polygynous unions. An outsider looking at these societies' structures may aver that women have no rights under customary law. It has, however been contended that women were better off under customary law than they currently are because they were accorded great protection as mothers and assured of a share of and access to resources even where they did not exercise political leadership of the community.<sup>10</sup> The women-unfriendly customary law has gradually developed as African societies have undergone change most of which can be seen arising from colonisation and privatisation. The battle of the sexes at customary law is in one sense therefore a struggle over scarce resources and power as overlords in the form of colonial powers and states in modern African states have assumed control over all aspects of the lives of Africans, prompting the African males to consolidate the one bastion of their authority, namely customary law. In some cases, notions of customary law such as the concern for women have been dropped making women very vulnerable. The removal of protection has not been accompanied with fewer roles for women within the community. Their roles of reproduction and production have remained intact (rural women in Africa contribute substantially to food production).

## IV. Analytical Framework

To understand the gender dimensions of law and colonialism, one has to look at colonialism as a system of subjugating cultures and knowledge that were not familiar to the colonisers. In instances where the cultures and knowledge systems could not be as easily subjugated through law, the colonial masters sought to redefine the institutions of enforcement of customary law such as the chieftaincy, an institution common to many regions of Africa. In redefining and refashioning these institutions, certain sections of the community such as women were left out. The marginalisation of women and customary law is thus symptomatic of global developments towards monolithic trends of thought and intolerance for different systems that did not fit neatly into the so-called modern way of thought.

The independent African states inherited a dual legal system where the general law or state law co-existed with customary laws of the various ethnic groups. In some African countries such as Lesotho and Swaziland, customary law was reduced into codes. This process was geared towards bringing native law at par with the general law which was predictable since it was written. Even where states recognized customary law as valid, there were concerted efforts at bringing all laws at par with the general law.

## 1. Legal Pluralism Versus Legal Centralism

Legal centralism and legal pluralism are markedly different and provide different understandings of the law. While the former denotes a unified system of rules which are enforced through state machinery, the latter describes a system where the tiered and interactive normative systems operate within a system either within or without the formal state legal system. Legal pluralism may be divided into two namely, juristic and diffuse. Juristic legal pluralism arises in situations where the official legal system recognizes several other legal orders and sets out to determine which norms of these legal orders will apply. Thus, the official legal system provides an operating environment for the plural legal orders. For example, a constitution may provide for the operation of certain religious, or customary laws for particular ethnic or religious groups. In juristic legal pluralism, which was common in colonial and post-colonial Africa, state law is the ultimate authority and it dominates other plural legal orders. Diffuse legal pluralism arises where a group has its own rules regulating social behaviour whose operation is neither sanctioned nor emanates from state law.

While the assumption is that Kenya has a unified law of succession, the reality is that plural systems of law are in operation. We have both juristic and diffuse legal pluralism since the law recognises different laws for different people. Different laws apply to different persons and there are other semi-autonomous social fields that generate and enforce rules dealing with inheritance. This is a consequence of colonialism which though seeking to change the laws of marriage, chose to leave those of succession unchanged. There have been attempts to unify these laws but these have failed because the different communities have continued to apply their customary laws. The Law of Succession Act of 1981 was intended to introduce an integrated system of succession. It was lauded as very progressive for it gave women rights that they had not had before. For instance, it did not distinguish between male and female children in allocating inheritance shares and it identified the widow as the successor to her deceased husband's estate. The Muslim community opposed it on the grounds that it embodied secular elements against the Quran and the government exempted them from its provisions in 1990.<sup>11</sup> Despite the promulgation of this law, it is significant that most succession disputes, even when brought by women, are handled under customary law.

## 2. The Women's Law approach

In a country like Kenya where the law is gender neutral in its provisions but gendered in its application, any investigation into the issue of the rights of women has to take the woman as the focal point of attention in seeking to unearth the biases that are to be found within the law. The women's law approach has been found to be very instructive in this regard. This approach which was developed in the Scandinavian countries is associated with grass roots oriented research methodology which aims at exploring and examining the position of women in the society. It also seeks to describe, understand and improve the position of women in law and society. It uses perspectives from 'below' and 'above'. While the latter perspectives seek to analyse statutory laws so as to determine whether they are gender neutral, discriminatory or gender specific, the former use women's experiences as a starting point in analysing the interplay between the law and the realities of women's lives. The two perspectives thus yield a more complete critique of the law.

This approach assumes that there are problems beyond law reform which need to be addressed, and that this can only be done by carrying out field research using women as the starting point. In order to grasp the relationship between law and practice, Scandinavian and African researchers have found it fruitful to collect empirical data about the experiences of women in their interaction with the law (statutory and customary) and other dispute management practices. In order to accomplish this, legal methods have been supplemented with methods from other social sciences and in particular feminist research methodologies.<sup>12</sup>

In studying Kenyan laws and practices on inheritance, the women's law perspective enabled in-depth research to be carried out on the experiences of women with regard to inheritance and the interplay between statutory law and customary laws, dispute resolution processes and women's roles in these settings. In addition, this approach helped the researchers to understand women's experiences in their different roles as mothers, wives, daughters, sisters or aunts. It was also useful in seeking to appreciate the different levels in which women interact with the law, for example in their families, community, courts and churches, and among themselves. The approach thus enabled the researchers to elicit information which would have been unobtainable if the study was based on library research only.

## **V. Effects of Colonialism on Inheritance**

### **1. Introduction of Private Property Rights Holding**

#### *a) Pre-colonial Property rights holding*

For most of the communities in pre-colonial Kenya, ownership of important resources was communal. Even where families and individuals had rights to use a particular piece of land, their rights were not conceived of as absolute in the terms of current private property rights regimes. These resources were used according to collective communal rules. No single source controlled the resources and access to them was limited to an identifiable community with set rules on the way those resources are to be managed. Non-members of the community were excluded from accessing the resource. Collective arrangements usually made at the community level regulated access to and use of such resources.<sup>13</sup>

The organisation of the community revolved around parties linked to each other by kinship or reciprocation. Typically, these would be the clan or the extended family regulating production of resources on cultivated land and the village (consisting of a number of families) controlling territory from which resources were foraged (forests, fishing areas, water holes and grazing lands) by all families.<sup>14</sup> In other cases other forms of kinship groups and lineages existed as forms of organisation. It was the responsibility of the heads of these groups to manage the exclusion of outsiders as agreed to by the community members, ensure access for all members and promulgate new rules and conflict resolution.

All members of the community had separate entitlements to the resources and no one user had the right to abuse or dispose of the property. Any dealing with the property took into account the entitlements of others and was subject to approval by the community. The rights of use of the community members were predicated on the roles played by each member within the group. This was easy to ascertain because of the division of labour on gender lines.

Family life among most of the communities in Kenya was (and still is) organised along patriarchal lines whereby the male is the head of the household. Succession to property was through the male lineage whose duty it was to ensure that all members of the family had access to the property. Studies carried out in eastern and southern Africa have revealed that the basis for the male inheriting property was the fact that men stayed within the family unlike women who, when married, left their domiciles of origin and joined their husbands' families.<sup>15</sup> The desire to keep family wealth within the community dictated that it be held by the man.



### *b) Individualisation of rights to land*

The colonial administrators and agronomists felt that to make the Kenya colony productive, it was necessary to introduce private property rights. For a considerable period of time, only the settlers got private property rights to land while the native Kenyans were placed in reserves, the colonial authorities refusing to concede to the rights that these communities had over land. The lack of individualised property rights led these administrators to assume that the land was openly accessible to anyone who cultivated it.<sup>16</sup> They did not concede to the rules that communities had over who could access their land. The designation of land not in actual occupation of the Africans as wasteland served as the vehicle for the transmission of the communities' property to individuals and to the state.<sup>17</sup> In this process of expropriation of native rights to land, colonial authorities took over productive land from the natives and granted it to incoming settlers while the natives were relocated to marginal areas in reserves whose boundaries changed as more land was taken therefrom and granted to settlers.

With increasing political unrest in the colony in the 1950s, land tenure reform was embarked on with the hope that it would diffuse the rising tensions and the clamouring for land redistribution. The process of consolidation, adjudication and registration was purely administrative at inception but the Native Land Tenure Rules of 1956<sup>18</sup> formalised it into law. The effect of the tenure reform was to remove certain sections of the community from ownership of land - a very vital resource. In most cases families designated one of themselves, mainly the eldest son or the male head of the household, to be registered as the absolute owner without realising the latitude that such person would have to deal with the land once so registered. According to the registration statute, a right of occupation at customary law would only be protected if noted on the register which many families did not bother to do for they saw no possibility of a piece of paper vesting any more rights in the family representative than he would have had at custom.<sup>19</sup> Cases of such family representatives seeking to evict the other family members from the family land escalated.<sup>20</sup> Africans still continued to look upon registered land as family land and perceived the person registered as a trustee for the members of the family.

Women's access to land became very tenuous since it would have to depend on the good will of the male members of their families. A woman's access to land had thus to be through the husband if she was married, the father if she was unmarried and the father was still alive, the brothers if she was unmarried or divorced, and the son if she was widowed.<sup>21</sup>

### *c) Introduction of new types of property*

While traditionally land, crops, poultry and livestock formed the major types of property that would be in issue in any succession claim, the introduction of a cash economy brought with it new kinds of property. In the areas in which research was carried out, the types of property reflected the nature of the community. In Murang'a and Kisumu, the new forms of property included money (bank accounts), business premises and practices, shares, cars, tractors plots and pension benefits. The holding of the property follows the same patterns in all areas with men holding the big or valuable items and women holding the smaller and consumable items.

Individualisation of property has led to a view that even women are property. In instances where male respondents said that the wife had no property, there was an insinuation that the wife is also owned. In Murang'a, the respondents were of the view that the wife is owned by the clan. The issue of ownership seems to flow from payment of bride-wealth by the man's family to that of the bride. Among some communities studied in WLEA Uganda's research, the male respondents asked the question "how can property own property" referring to wives' claim to rights to matrimonial property.

## 2. Introduction of New Notions of Marriage

Colonialism put pressure on customary laws, practices and procedures relating to marriage to modernise or westernise. By promoting western ideas and principles of marriage and not of succession, the colonial state brought a lot of confusion since it was never clear what law of succession would apply to a deceased who was an African and a Christian. Courts were of the view that customary laws of succession should apply to all natives whether Christian or not. In the case of *Jembe V. Nyondo*, for instance, Chief Justice Barth held that although the deceased had married a wife according to the rites of the Anglican church, this did not affect the applicable law of succession to his estate which would be native (that is, traditional African) law and custom.<sup>22</sup>

The inextricable link between succession and marriage ensured that western principles and ideas of marriage and the family were smuggled into tribunals dealing with succession matters. For example, mainstream western jurisprudence defines marriage as monogamous while most Kenyan communities practised polygamy.<sup>23</sup> In the case of *Amkeyo V. The Queen*, the Court stated that African marriages were not marriages as such but a form of wife purchase.<sup>24</sup>

While western marriage laws have been entrenched through legislation, traditional African practices have persisted.<sup>25</sup> Many Kenyans undergo two kinds of marriage, customary and Christian or civil. Each of these kinds of marriages has implications. While most customary marriages are potentially polygamous, civil and Christian ones are monogamous. The one-wife ideology embodied in colonial marriage legislation eventually caught up with women and children who could not claim property unlike the first wives or children of such wives where a man had initially undergone a Christian or civil marriage ceremony and then married other wives under custom.

Kenyan Africans do not perceive themselves as extricated from native customs and laws even after contracting civil and Christian marriages. The laws introduced during colonialism allow only for the conversion of African, Hindu and Muslim marriages to English type ones but not vice versa.<sup>26</sup>

There have been many cases arising to determine who the widow is in particular cases where a man dies and had two wives, one married under custom and the other under statute. The issue arises as to whether the man had capacity to marry especially where he had contracted a Christian or civil marriage before the customary one.<sup>27</sup>

In the case of *Re Ruenji*, the deceased, a member of the Kikuyu tribe, married under the African Christian Marriage and Divorce Act in 1941 and he had thirteen children with his wife. He then purported to marry two other women under Kikuyu customary law and had children with them. He died intestate and the court was faced with the issue of the rights of the two other women to inherit from his estate as lawful wives and children.<sup>28</sup>

It was held that the Christian marriage was monogamous and a spouse cannot marry anybody else as long as the marriage is not dissolved. Consequently, the subsequent marriages were null and void and neither the wife nor their children could inherit as they were not the relatives of the deceased.

In the subsequent and similar case of *Re Ogolla*, Justice Simpson stated that

*an African is not obliged to marry under the Marriage Act or the African Christian Marriage and Divorce Act; but if he chooses to do so, he is choosing the Christian way of life which recognises one wife only and on his death removes the widow and children from the ambit of tribal customs affecting cohabitation and guardianship.*<sup>29</sup>

In instances where the man contracts a second marriage under the statutes after having contracted a customary marriage, the issue is more complex because customary law allows polygamy. In *the Matter of the estate of Samuel Hopwell Gacharamu*, the deceased had married his first wife under Kikuyu customary law. He then married a second wife under Kamba customary laws. He later married the second wife under the Marriage Act. Upon his death, the issue arose as to which of the two was a widow and entitled to inherit. The Court held that the two women were married under Kikuyu and Kamba customary laws and the marriage of the one under the

Marriage Act merely facilitated the registration of that marriage but did not alter the character of the marriage or affect its validity. Consequently, both women were widows and entitled, along with their children, to inherit a share of the deceased's estate.

Instances such as the above led to an amendment to the Law of Succession Act which provided that

*notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act . . . and her children are accordingly children within the meaning of this Act.*<sup>30</sup>

This provision was hailed by many as reflecting the reality of Kenyan life in which many Africans having contracted monogamous marriages, relapse back to traditional African practices or where people contract their civil and Christian marriages along with the performance of customary marriage rites in which case it is difficult to categorise the marriage as either entirely civil/Christian or customary.<sup>31</sup>

On the other hand, it was felt that the amendment denies women security in marriage which they seek by contracting Christian or civil marriages. Such women realise upon the death of their husbands that they have to share matrimonial property with persons they did not know during the lifetime of their spouses. This was the issue in *the Matter of the Estate of Reuben Mutua Nzioka*<sup>32</sup>. The deceased had married one wife under the African Christian Marriage and Divorce Act. Upon his death a second woman claimed to be his wife, allegedly married under Kamba customary law. She also claimed that her three children were Mutua's children and contested the will in this Cause because she and her children had been omitted while they were legally entitled to some part of the deceased's estate. The Court held that Mutua lacked capacity to marry customarily while his marriage to the first wife subsisted. The Judge in this case, Lady Justice Joyce Aluoch, refused to give a literal interpretation to Section 3(5) of the Act which would have allowed the second wife to inherit. She categorically stated that the provision was intended for women married under customary law who were either neglected or abandoned by their husbands during such husband's lifetime. Regarding the words in the section, "previous or subsequent", she said,

*From my reading of the amendment, I would say that the words used in this amendment are meant to make it comprehensive otherwise the meaning of it which is important is what have already given it.*

Not surprisingly, her ruling was overturned on appeal. This provision is significant because of the way matrimonial property is held in Kenya which we will outline below. It also pits women against other women and does not augur well for solidarity in fighting gender-based discrimination in inheritance matters. In the three East African countries, associations of mistresses have been formed with the aim of fostering interests of such women who feel that law does not adequately cater for their needs. Married women are very opposed to such organisations.

Women married under statute view section 3(5) as sanctioning adultery and bigamy while undermining the institution of marriage and encouraging the breach of the marriage contract. The effect of the provision is to operationalise one of the recommendations of the Report of the Commission on the Law of Marriage and Divorce which sought to make all marriages in Kenya potentially polygamous. It however, omits one of the preconditions that was part of the recommendation, namely the wife's consent to her husband's marrying another wife. This Report was rejected thrice by Parliament and none of its recommendations have as yet become law.

#### *a) Link between property rights during marriage and property rights upon spouse's death*

To be able to address the issue of women's property rights in marriage, one has to bear in mind the different categories of married women namely, housewives and employed women. Over and above this distinction, one has to deal with the different laws that apply to marriage each of which describes the rights of women to prop-

erty.<sup>33</sup> Theoretically, married women in Kenya have rights to own property within marriage. All marriages are contracted in separation of property with each party owning what they bring into the marriage and what they, as individuals earn within the marriage. This was not the case under African customary law where the major forms of property, though held by the male members of the community were available for use by all members of the family, the wife included. The view that all property owned by a party to the marriage belongs to both parties still holds and it is only when a marriage relationship turns sour that law comes in to determine what each party to the marriage owns.

In cases where the woman is employed and earns a good salary, which is the exception to the general rule, she is in a position to buy property and register it in her own name. In most cases, however, family property, even when bought with the woman's money is registered in the husband's name. So deeply entrenched is the idea that women should not own property that unmarried daughters who buy property register their property in the names of their male relatives. Owning property is perceived as male and consequently is believed to diminish the chances of marriage for an unmarried woman.

Since most women earn less money than their husbands in Kenya, men normally buy the big things that the family owns while the woman buys food and other groceries for the home. In such cases, a woman seeking to inherit her spouse's property in a situation where there is another woman claiming to have been the man's wife has to show the extent of her monetary contribution to the acquisition of the property to gain priority over the "outside wife". Failing that, she is put in the same category as the other wife and so are her children with those of that other wife. Her indirect contribution to the acquisition her "husband's" property is not recognised. This situation can result in unfairness to the woman in cases where she actually paid for the property but had it registered in the man's name as many women do to avoid conflicts within the home.

Similarly, in situations where the woman is a housewife, her contribution is not taken into account in determining her entitlement to a deceased husband's estate. In this case relatives of the man may even take the property from her and argue that she "just sat at home" while their son or brother acquired the property. Her role in looking after the family is taken for granted and not acknowledged. The relatives in those cases have even been known to support the "outside wife" who in return agrees to share the deceased's property with them and they jointly disinherit the wife and her children.

The duality introduced at colonialism allows men to pick which law to subject themselves to. On the part of women, the fights over property that they put up either as mistresses or as wives illustrate struggles over scarce resources.

### *b) Cohabitation*

There has been a notable increase in male-female relationships where no formal marriage ceremonies have been contracted under the recognised marriage systems. Introduction of the cash economy has led to the commercialisation of bridewealth which is today paid in cash as opposed to kind (livestock, labour and beer). This sometimes makes it difficult for parties to make their relationship known to the parents for fear of exorbitant amounts of bride-wealth being demanded which the man may not be able to raise. In such cases, parties may opt to live together in the hope that they will formalise their relationship at a later date. The desire to get parental blessings coupled with ignorance as to the requirements for a civil or Christian marriage leads many couples to wait until they have performed the customary rites before they perform statutory marriages.

In the event of the death of the man before formalising the marriage, the woman has to prove that she was married to him to be able to claim a share of his estate. Even where a couple has carried out all the formalities of a customary marriage, the woman depends on the good will of her deceased husband's relatives to establish her status because such marriages are not registered. This situation is exacerbated by the fact that marriage in most customary law systems is a process and not an act. This process may continue even after the parties are dead. It is consequently difficult to establish the state of a relationship without taking into account the entire process.<sup>34</sup>

Kenyan law recognises the common law presumption of marriage arising from some form of ceremony or a long period of cohabitation which should be both qualitative and quantitative. In most cases this presumption is not upheld and women lose their rights to inherit in this way.<sup>35</sup>

### 3. Breakdown of Community Institutions

The breakdown of community institutions and the fact that customary law is not written has led to changes in custom and uncertainty as to the customary law norms to be applied. This problem is more pronounced with respect to inheritance and burial laws. Certain institutions have so radically changed that they no longer serve the purposes that they served before. The existence of dual norms allows the powerful parties to choose the law they would like to apply. The courts that are charged with decreeing what custom is are ill equipped to do so and the powerful parties are able to manipulate customary norms to their advantage. Customary laws are dynamic and change with time and the process of change can be influenced by other factors within the communities. For instance, the development towards the rights of women and daughters to inherit in Murang'a seems to have been as a result of the increase of unmarried mothers in that community, the recognition of the capability of the widow to carry on the duties of her deceased husband and the realisation that the male members of the community do not always work in the interest of the members of the deceased's family.

Men as the heads of households hold most positions of authority within communities. When courts are invited to decide on customary law matters, the witnesses and "experts" of customary law are invariably men. This has ensured that the views of customary law that find their way into courts are male-centred and female views are rarely if ever heard. Since courts are bound by the doctrine of precedent, their rulings on such matters binds all subsequent courts perpetuating the dominance of male perceptions of custom.

In instances where a couple belong to different ethnic communities the rights of the widow may be affected by the application of the deceased's customary law even where the man may have indicated a clear intention to divorce himself from his tribal customs and this is discernible from his mode of life.

In the case of *Wambui Otieno V. Omolo Siranga and the Umira Kager Clan*, the issue was where the deceased, a lawyer who had lived in Ngong, in the outskirts of Nairobi for the whole time that he had been married to his wife, should be buried. His wife, the applicant, sought to bury him on the land they occupied in Nairobi while the Kager clan claimed that he should be buried in his ancestral home. The deceased had left a will indicating his wish to be buried in his Ngong home. The Court of Appeal, however, gave the clan permission to bury the deceased in his ancestral home noting that a person had no right to his dead body and could not therefore decide on his place of burial. The implications of the holding were that the widow should go through the rite of *tero buru* or widow inheritance to which she was opposed. Consequently, she opted not to bury her husband and let the clan proceed on their own. Had the property in this case not been registered in the joint names of the widow and her husband, custom would have been invoked to deny her any share of the property on account of her failure to participate in the burial.

The hiatus created by the breakdown of customary institutions has led to increased participation by the state in matters of personal law even where the applicable law is customary law. This explains the increased instances of inheritance and burial disputes filed in courts of law today.<sup>36</sup>

### 4. Codification of Customary Law

As noted above customary law lives within communities. One of the greatest effects of colonialism in Africa was the codification of customary law into codes that courts could look at in determining matters pertaining to Africans. One can appreciate the frustration of the colonisers who felt that their authority over the colonised was threatened by the existence of norms of customary law which they as outsiders could not understand. Given the role of law in ordering societies, the easier thing to do would have been to replace customary law with the coloniser's laws and this was attempted in the quest to modernise the perceived antiquated customary

laws. However, while the change of laws could be effected in areas such as criminal law, it proved difficult in areas such as family law. This led to the need for codification of customary law to enable the colonisers have a handle on it. Even in countries such as Kenya where no formal codes were promulgated, the emphasis on written evidence as opposed to oral accounts through law subjugated the living customary law to written rules.<sup>37</sup> Moreover, in many countries attempts were made at restating rules of customary law. The effects of codification included:

#### *a) Ossification of the Law and removal of element of flexibility*

One of the elements of customary law which made it capable of adapting to changed circumstances and which codification is its flexibility. Codification where it was done, was mainly by male European administrators and missionaries whose view of the accounts given to them, also by mainly male respondents, was blinkered by their own culture. Thus codification which entailed translation ossified customary law making it inflexible. The process of ossification was further perpetuated or augmented where customary law was not codified, by the doctrine of precedent in law. This doctrine dictates that like cases be determined alike. Thus if a case dealing with a right at custom came to court and was decided in a particular manner by a court with jurisdiction over that matter and that decision was not successfully challenged in a more superior court or if it was challenged, a decision was reached, should a similar matter come before any other court, it must be decided as the previous one was.

The flexibility of customary law allowed it to take into account matters that would be extra-legal strictly speaking. Within this flexibility, the rights of women at customary law were recognised. Thus codification and the adherence to formal rules of procedure such those pertaining to giving evidence further removed customary law from the purview of the people and had negative implications for women's rights.

## **5. Emphasis on Cultural Differences**

Colonialism stressed cultural differences and exploited these to restructure the political and social order. This is perhaps best illustrated by apartheid in South Africa. People were made to feel different and those differences were used to justify the promulgation of different rights for different groups. This justified the confinement of Africans into homelands under the authority of traditional leaders who were mainly male. In this culture of differentiation, male and female differences were highlighted along the same lines as race differences.

## **6. Women's Rights**

#### *a) Marginalisation of women*

One cannot look at the effects of colonialism on women's lives without linking it to capitalism for the two operated hand in hand in marginalising and down grading women both in the family and the market place. Both brought for the women a sense of social and economic insecurity which they had previously not encountered under customary institutions without giving concomitant powers to adapt to their new status. The introduction of individualised property rights in colonies was geared towards subjugating the pre-capitalist colonised societies' notions of ownership to those of the colonisers. These developments have influenced the law of marriage and inheritance to a significant extent.<sup>38</sup>

A major effect of capitalism was the movement of male members to urban centres to work leaving women behind in the rural areas where they had to produce for the family and reproduce labour for the economy both by bearing children as well as by giving emotional support to their husbands to enable them to keep working for their masters. The increased burden of women who now had to perform both their roles and those traditionally performed by their husbands did not translate itself into greater rights for women. The façade of male supremacy was, and still is, jealously guarded ensuring that women's work contributes to the family's estate which is owned by the male head and to which the woman can only expect sustenance as long as her marriage lasts.

*b) Rigid codified law out of touch with changes in women's lives*

Under codified customary law in many Southern African countries, women are always subject to the authority of a patriarch. They lack contractual and proprietary capacity and have no *locus standi* and in suits pertaining to seduction damages and guardianship of children, for instance, women appear as a procedural requirement but not to push the substantive claim.<sup>39</sup> They remain minors for all their lives moving from the control of their guardians to that of their husbands. Male heads represent their families and women cannot litigate without the assistance of a male. Husbands control virtually all family property while the authority of a wife is limited to property of a personal nature. Women cannot initiate divorce proceedings without the help of the bride-wealth holder who, invariably male may have a vested interest in the continuation of the marriage (he may not want to give back the bride-wealth). Husbands may however unilaterally repudiate a marriage. Children belong to the husband and remain with him upon the breakdown of a marriage.<sup>40</sup>

Needless to state, this codified customary or court decreed customary no longer represents the way of life of many women yet it still governs their lives. It has been argued that as long as customary law disputes are handled at home, the law applied there is substantially at variance with the codified laws and women have found the uncoded or living customary law more responsive to change than the codified one which even though applied at the lowest levels by traditional leaders of the community, is out of touch with the lived realities of their lives.<sup>41</sup> Besides, should a matter dealing with customary law go to the formal courts, the likelihood of the sitting Judge or Magistrate being versed with the nuances of the local law and thus giving them effect is minimal.

For married women in the Southern African, the situation of women under customary law has been exacerbated (made worse) by some provisions of Roman-Dutch and common law. The major one responsible for Women's disability in family law relates to marital power which buttresses customary legal provisions by placing wives under the tutelage of their husbands in all aspects of life including residence and standard of living. Unless excluded by a pre-nuptial agreement, marital power authorised husbands to deal with their wives' separate property (acquired separately by the wife before and after marriage-could include salaries and wages). For those who married in community of property (joint ownership of matrimonial property), the husband's had absolute powers over the joint property and their wives had neither contractual nor proprietary capacity over the property except for very limited purposes. They also lacked *locus standi*. In cases where the woman has no male guardian, the court assumes that role. Marital power ensured that the father was the natural guardian of the children and it applied to all women in South Africa for instance irrespective of their race.<sup>42</sup>

The issue of marital power has been a source of great conflict between the male and female genders in countries like Swaziland and Lesotho where it still applies especially when women have been *de facto* heads of homes in the absence of husbands who were engaged in mine work outside Lesotho. When the men come back home and want to exercise their powers over the women, the women resist to the chagrin of the men and this has led to many marriages breaking up.

## VI. Women's inheritance Rights in Kenya Today

Many changes have taken place in the area of women's rights to inherit but gender differences still exist. Even in areas where customary law is the operative law, some elements of the statutory provisions apply. In investigating issues pertaining to inheritance in Kenya, it was important to look at both trouble and trouble-less cases because each case informed us of norms that were applied that though not questioned were, in some cases substantively at variance with the law that the parties suggested was being used.<sup>43</sup>

### 1. Kisumu

The predominant applicable law within Kisumu is Luo customary law. This legal and social reality has far reaching implications because the official law is the Law of Succession Act. The latter has been replaced by unofficial customary law which may even be 'non-law', in terms of the Law of Succession Act. Thus there exists in this area of law a clash between state law and peoples' or community derived and inspired law. The community law has hegemony over state law and the state has not sought to directly subvert the application of customary law. Presumably, the state does not consider the application of customary law threatening to its legitimacy and hopes that, as rural people become more involved and incorporated in the modern economic sector, use of customary law will be increasingly de-emphasised. To the extent that rural areas - including our research site - operate partially traditional or pre-capitalist economies, traditional law can be allowed or tolerated by the state.

Although the Law of Succession Act allows daughters - and women in general - to inherit property, daughters do not traditionally inherit land from their fathers. This point is fairly controversial, since while some people do not see any reason why daughters should not inherit from their parents like sons do, others argue that giving property such as land to a daughter staying in the home could bring hatred between her off-spring and those of her siblings. Some also averred that acquisition of property by a woman from her natal family would lead to the woman inheriting twice - from her father and from her husband. The assumption that all women get married still holds sway.

In polygynous situations, wealth is generally divided equally among the households when the husband dies. This is supervised by elders of the community. The norms applicable in matters of inheritance are customary law in an overwhelming number of cases, and statutory law, especially for urbanised and educated persons.

Disputes do arise with respect to inheritance. Some of these concern cases where relatives of a deceased husband attempt to disinherit the widow, where elder brothers attempt to disinherit the siblings or where the owner of the property favours some person(s) during *inter vivos* transfers. The majority of these disputes are resolved by elders or other traditional structures. Others are handled by courts and administrative institutions.

Notable changes in gender roles include: women becoming more independent and maintaining property, home and children, women acquiring wealth independently of inheritance or gift from relatives, women building houses and opting out of the traditional *ter* (union with a relative of the deceased husband).

### 2. Mombasa

There have not been any significant changes in the rules and practices relating to inheritance. This is attributed to the fact that these matters are dealt with precisely in the Quran, which is the word of Allah and hence cannot be changed. However, disputes have become more common than in the past. This was attributed to the casting aside of teachings. These disputes relate mainly to rights to, and shares of, inheritance. Where disputes arise, they are dealt with mainly by elders, Islamic teachers, the Public Trustee, and the courts.

There have been a number of changes in gender roles. These include women assuming the role of bread-winners, being less dependent on men, being able to attend meetings and engage in business, and having less



clothes-cover than in the past. Some of these changes were attributed to economic hardships which were now forcing both men and women to work.

### 3. Kajiado

Property is generally held individually in Kajiado. The men hold and control the main types of property, namely land and livestock.<sup>44</sup> Women generally own household goods, but only have rights of use of land and livestock.

Property is acquired through *inter vivos* transfer, purchase and inheritance. Distribution of property by those who own it is done through *inter vivos* grants, distribution by will, and intestate succession. Intestate distribution is based on households. In some cases, the property is held by the eldest son on behalf of himself and all those belonging to the household. Each household receives an equal share, irrespective of the number of children. As a matter of cultural practice, women do not inherit.

Disputes in relation to distribution of property have been rare in the past, but are increasing. They relate mainly to the inheritance of land and livestock. Most of these are resolved by the elders within the community, although administrative personnel and the courts sometimes handle some of the disputes.

Although it was noted that there are changes taking place in gender roles, especially due to education and general social advancement, these have not significantly affected inheritance practices. While some of the women decried their marginalisation in the control of property, they thought that nothing could be done because of the apparent entrenchment of the practices.

### 4. Murang'a

Women inherit only as trustees on behalf of themselves and their children. They cannot dispose of the property, and they lose their right to hold it on re-marriage. This is a provision of the Law of succession Act but the respondents opined that it was their custom. There were situations where single unmarried daughters were allowed to inherit, but this was objectionable to some of the people. Those who received *inter vivos* gifts were not expected to inherit the rest of the property on the death of the owner.

Disputes regarding inheritance are now more common than they were in the past. This was attributed to an increase in greed, with elder sons often wanting to disinherit siblings, and deceased's relatives wanting to disinherit widows. Land is the most common subject of inheritance disputes. In terms of resolution, clan members have a fairly prominent role, although some disputes are handled by administrative bodies and courts. However, the courts are usually a procedure of last resort. It was also indicated that the use of elders is sometimes held in contempt at times because of their partisan involvement in the disputes. Religious institutions also play a role in resolving disputes.

The most significant change in gender roles is the ability of women to acquire property independently of inheritance - that is, through purchase. This was seen as contributing to the economic empowerment of women.

## VII. Rethinking Customary Law

In seeking to deconstruct, reconstruct and reconceptualise customary law, we need to define our agenda broadly as aiming at diversifying knowledge sources. The trend towards individual rights and away from the community has contributed significantly to the marginalisation of women in a culture where the individual was perceived as a member of a community and not an entity as such. Our agenda should therefore be part of a communitarian trend away from the individual being the centre of all but as a member of a community. This calls for interventions beyond the purview of the law since law may not reflect the experiences of women's lives.

Moreover, most issues of inheritance that affect women are governed by customary law. It is therefore important that women should be able to use this law to improve their position in society. Researchers on women and law in South and East Africa have suggested ways of rethinking and reconstructing customary law to correct the incorrect and gendered versions of law in the light of changed gender roles. They emphasise aspects of customary law that protect and assure women of rights rather than those that deal with male control over women. Examples of such are:

- (a) "widows and their children were taken care of" instead of "women did not inherit";
- (b) "the products of a woman's hands belong to that woman" instead of "marital property belongs to the husband";
- (c) "women are factory workers, farm workers, teachers and lawyers" "women are perpetual minors".<sup>45</sup>

It is also important to recognise and strengthen all the institutions that enforce inheritance laws. These include the family to which many women turn when issues of inheritance arise.

## VIII. Conclusion

Inheritance is about property and colonialism changed the mode of property holding to a significant extent. The introduction of new notions of property rights holding and new types of property changed inheritance patterns significantly. These changes should have opened avenues for women inherit property but have not significantly done so due to the prevalence of notions that preclude such inheritance or ownership of property by women. The rights of most women to property are still premised on their relationship to some individual man, the latter having replaced the community with the individualisation of rights to land and other property. It is thus imperative that changed gender roles are taken into consideration in determining the rights of women to inherit property.

## Endnotes

- <sup>1</sup> PATRICIA KAMERI-MBOTE, *THE LAW OF SUCCESSION IN KENYA: GENDER PERSPECTIVES IN PROPERTY CONTROL AND MANAGEMENT* (1995) at 15.
- <sup>2</sup> *Id.* at 20.
- <sup>3</sup> See Unpublished Research Report On Inheritance Laws And Practices In Kenya, Women And Law In East Africa ((WLEA) Kenya) [on file with the author].
- <sup>4</sup> There is paucity of information on the applicable law of succession for Hindus and attempts by Women and Law in East Africa (WLEA-Kenya) to do so was unsuccessful due to difficulties in accessing the Hindu community
- <sup>5</sup> We chose the FGD as our main research method and ensured as far as possible the participation of both men and women.
- <sup>6</sup> See *e.g.*, the successor at Kikuyu customary law, “mûramati”, could not take a share of the property for himself. This seems to be the position that the widow takes under the Law of Succession Act, Cap. 160 of the Laws of Kenya since she holds as trustee and has only a life interest in the property and has to consult with the court or elder children in any dealing with the property that has consequences likely to persist even after her death.
- <sup>7</sup> The Kikuyu in Murang’a did not always view the wife as the rightful person to succeed to the husband’s property. This is a recent development.
- <sup>8</sup> T. W. BENNETT, *HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION* (1995).
- <sup>9</sup> At about the end of the nineteenth century when colonialism began, it is recorded that Kenya had as many as 64 tribes. See D. T. ARAP MOI, *KENYA AFRICAN NATIONALISM* (1986).
- <sup>10</sup> See Alice Armstrong, *Customary Law in Southern Africa : What Relevance for Action*, Newsletter Vol. 7 No. 1.
- <sup>11</sup> Act No. 21 of 1990 which came into force in 1991.
- <sup>12</sup> See, *e.g.*, *WOMEN & LAW IN SOUTHERN AFRICA, PERSPECTIVES ON RESEARCH METHODOLOGY* (1990).
- <sup>13</sup> JOHN GOWDY, *CO-EVOLUTIONARY ECONOMICS: THE ECONOMY, SOCIETY AND THE ENVIRONMENT* 84 (1994).
- <sup>14</sup> MADHAV GADGIL & PREMA IYER, *ON THE DIVERSIFICATION OF COMMON-PROPERTY RESOURCE USE BY INDIAN SOCIETY* (1989).
- <sup>15</sup> *Women & Law in Southern Africa (WLSA), Working Papers on Inheritance Laws in Southern Africa* (1992) & *Women & Law in East Africa (WLEA), Working Papers on Inheritance Laws in East Africa* (1996).
- <sup>16</sup> Open access situations signify the absence of property rights. The resources here are owned by nobody and access to them is on a first come first served basis. See GOWDY, *supra* note 13.
- <sup>17</sup> Guy-Adjété Kouassigan, *L’homme et la terre - Droits fonciers coutumiers et droit de propriété en Afrique occidentale* (Paris, Office de la recherche scientifique et technique outre-mer, 1966), 235.
- <sup>18</sup> These rules empowered the Minister for African Affairs to set up machinery for the adjudication of areas of “native” lands within which private rights to land were considered to exist.
- <sup>19</sup> Women’s rights of access would have been rights at customary law and these were not noted on the register.
- <sup>20</sup> See Obiero V. Opiyo (1972) East African Law Reports 227; Muguthu V. Muguthu Civil Case No. 377 of 1968 (Unreported) and Esiroyo V. Esiroyo 1973) East African Law Reports 388.

- 21 Where a woman has no son or where the son is still too young to take over the property, her access is through the male members of her husband's family.
- 22 4 Kenya Law Reports 160 (1912).
- 23 See Hyde V. Hyde (1861-73) ALL ENGLAND REPORTS 175 defining the family as consisting of the man, one wife and the children of that marriage. African families would be defined in more expansive terms to include more than one wife and the children of all the wives and the parents siblings of the man.
- 24 This was due to the mistaken notion that payment of bride-wealth by the man's family to the bride's family constituted the purchase of such wife which is not the case.
- 25 The Marriage Act Chapter 150 of the laws of Kenya and the African Christian Marriage and Divorce Act Chapter 151 of the laws of Kenya provide for the contracting of monogamous marriages by Kenyan Africans.
- 26 See Ayoob V. Ayoob (1968) EAST AFRICAN LAW REPORTS 72.
- 27 Here it could be argued that the man had no capacity to contract a marriage and that the second "wife" is not a wife. The first wife could proceed to court and prosecute the man for bigamy.
- 28 High Court Miscellaneous Civil Case No. 136 of 1975.
- 29 (1978) KENYA LAW REPORTS 18 at 26.
- 30 Section 3(5) of Cap. 160, Act No 10 of 1981.
- 31 See Gibson Kamau Kuria, The Law of Succession in Kenya, (Mimeographed Paper Presented at the Proceedings of Kenya's First Law Society Conference held at Professional Centre Nairobi, April 6-8, 197) (On file with the author).
- 32 Probate and Administration Cause Number 843 of 1986 (High Court).
- 33 See Githu Muigai, *Women and Property Rights in Kenya*, in *WOMEN AND LAW IN KENYA: PERSPECTIVES AND EMERGING ISSUES* 113 (Mary O. Mbeo & Oki Ooko-Ombaka, eds., 1989).
- 34 See ALICE ARMSTRONG ET. AL, *UNCOVERING REALITY: UNCOVERING WOMEN'S RIGHTS IN AFRICAN FAMILY LAW* (1992).
- 35 See Case V. Ruguru [1970] E. A. 55; Mary Njoki V. John Kinyanjui Muthuru & Ors Civil Appeal No. 21 of 1984; Kizito Charles V. Rosemary Moraa Miscellaneous Appeal No. 364 of 1981.
- 36 See J. B. Ojwang, "Laying a Basis for Rights: Towards A Jurisprudence of Development", Nairobi University Press (1992).
- 37 See Kimani V. Gikanga [1965] E. AFR. L. REP. where the East African Court of Appeal was called on to determine whether customary law was law and not in need of proof as provided for in Section 60 of the Kenyan Evidence Act, Chapter 280 of the Laws of Kenya, held that any party wishing to rely on customary law had to prove it as a matter of fact.
- 38 The struggles between women in polygynous unions and the fights over marriage property at divorce are an exemplification of the struggle over economic resources by parties to a marriage.  
See
- 39 See T. W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA* (1991).
- 40 Note that in South Africa the Constitution has sought to remove these handicaps in the way of women's enjoyment of their rights by proscribing discrimination on the basis of sex in the same provision as the one proscribing apartheid and also providing for every citizen's right to sue and be sued at section 34. The issue is whether these legal provisions on formal equality will necessarily result in equality in practice and this remains to be seen and examples from other African countries on these same issues are far from encouraging.
- 41 WLSA & WLEA Research findings.

- <sup>42</sup> It was made applicable to women married at customary law and living with their husbands in 1985. The question, however is who is married at customary law since marriage therein is a process and not an act and who lives with her husband when men were in exile or in prison did they live with their wives? Courts only allowed women to argue that they did not live with their husbands when the husbands had deserted them.
- <sup>43</sup> See J. F. Holleman, *Trouble-Cases and Trouble-Less Cases in the Study of Customary Law and Legal Reform*, 7 L. & SOC'Y REV. 585 (1973).
- <sup>44</sup> Note however that the Maasai value land as a life support and not as property to be appropriated.
- <sup>45</sup> Examples drawn from Alice Armstrong, Customary Law in Southern Africa: What Relevance for Action, Newsletter Vol. 7 No. 1.

