



International Environmental
Law Research Centre

The Law of Succession in Kenya:

Gender Perspectives in Property Management and Control

Published in
Nairobi: Women & Law in East Africa, 1995

Dr Patricia Kameri-Mbote

*This paper can be downloaded in PDF format from IELRC's website at
<http://www.ielrc.org/content/b9501.pdf>*

Table of Content

I. INTRODUCTION	1
II. Definition	2
III. A: History of the Laws of Inheritance in Kenya	3
Pre-Colonial Kenya's Laws of Inheritance	3
(a) African Customary Law	3
(b) Islamic Law of Succession	5
(c) Hindu Law of Succession	6
(d) Europeans: Succession at Common Law	7
III. B: Laws of Succession During the Colonial Period and Upto 1981	8
(a) Africans	8
(b) Muslims	11
(c) Hindus	11
(d) Europeans	12
IV. C: The Law of Succession Act (Cap. 160 of the Laws of Kenya)	12
(i) Testate Succession	13
(ii) Intestate Succession	14
(iii) Women in Levirate Unions	17
(iv) Cohabitees	18
VI. Conclusion	18
List of Statutes	20
List of Cases	20
List of Books	21
List of Articles	22

I. INTRODUCTION

The ownership, control and management of property in a marriage situation or under circumstances akin to marriage has evolved as one of the most critical and controversial areas in gender research and development. In Kenya the institutions of marriage and succession are closely intertwined. Indeed until July 1, 1981 when the Law of Succession Act (Cap. 160 of the Laws of Kenya) came into force, the applicable law of succession followed the marriage system in question. Because there are four marriage systems in Kenya, namely; traditional African, Civil or Christian, Mohammedan and Hindu, there have been strong representations that these marriage systems be integrated. However, this has not been done.

Although the Law of Succession Act was intended to introduce an integrated system of succession, a concession made for Muslims in 1990 creates a dual system of successions in theory at least (different ethnicities also use their customary laws to settle matters of succession which means that we have multiple laws of succession despite the promulgation of the Act).

The institution of succession has come to grips with at least three pressures and realities.¹ On the one hand, there are pressures for modernizing (westernizing) the law, practice, and procedures relating to succession. The modernization agenda is as old as colonialism. Despite the fact that the colonial state promoted Western ideals more often through marriage rather than through succession², the inextricable link between the two always ensured that the Western principles and ideas of marriage and the family were smuggled into tribunals concerned with succession. For instance, 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 the man had initially undergone a Christian or civil marriage ceremony (In the Matter of the Estate of Ruenji High Court of Kenya at Nairobi, Miscellaneous Civil Case 136 of 1975 reported in (1977), Law Society Digest Part II and Re Ogollas' Estate (1978) KL.R.18).

The second important pressure on the institution of succession relates closely to the role of the Kenyan state in property management and succession. The state is involved in succession in numerous ways and capacities. Firstly, the state provides administration of a deceased person's estate through the Public Trustee in the Attorney-General's Chambers where no executor or administrator has been appointed under a Will or by the High Court. Secondly, the state provides the forum (courts and relevant state and quasi-state tribunals) in which succession disputes are contested, lost and/or won. Thirdly, the state in certain cases provides welfare services of a proprietary nature to parties in a relationship which faces difficulties. The services are more pronounced with regard to children, especially orphans. Widows and other less advantaged women get more attention from non-governmental organisations than from government.

In light of the foregoing, it is safe to conclude that the institution of succession and property management would, to a large extent, as much depend on the ideological persuasion of the state as it would depend on the quantum and quality of resources available to the state. Kenya belongs to the category of the poorer states in which welfare programmes attract only limited attention.³ This has as much to do with limited resources as it has to do with the belief in and pursuit of capitalism and the attendant development of free market forces as formerly espoused by the colonial government and as pursued by the post-independence rulers.

Moreover, the Kenya state cannot be easily categorized as belonging to the gender sensitive group. There are certainly no laudable policy and legislative programmes, in practical terms, aimed at ensuring gender equity and social justice in the ownership, management and control of property whether within marriage or under conditions closely related to the state of matrimony.⁴ Indeed Section 82 of the Constitution which permits

discrimination on the basis of sex in matters regarding succession, that is, “devolution of property on death or other matters of personal law” (Section 82(4)(b) negates any measures aimed at achieving justice in the distribution of matrimonial property.

A third pressure on succession matters arises from what is regarded as the dichotomy or continuum between traditional African and western approaches to succession. Mainstream western jurisprudence locates matrimonial property within the narrow confines of the family, the family being defined in terms reminiscent of Hyde v. Hyde [1861-73] ALL E.R. 175) to consist of the man, one wife and the children of the marriage. In Kenya, customary law and practice has always defined and regarded the family in more expansive terms.

Matrimonial property in African customary law is managed and controlled in a manner that benefits the extended family. The divergence and dichotomy between African and western approaches is so obvious that it has perhaps attracted excessive emphasis and attention. As a result, traditional African practices on succession are always referred to in terms that suggest that they are desuetude.

It will be noticed that whereas western family and succession laws and practices have been entrenched in practice and through legislation, traditional African practices have persisted in certain areas and in the process given rise to a continuum rather than a dichotomy. While many Kenyans undergo Christian Marriages (under the African Christian Marriage and Divorce Act Cap.151) or Civil Marriage (under the Marriage Act Cap. 150) which are monogamous and in which subsequent women and children begotten outside that marriage would be concubines and illegitimate respectively, the problem has been addressed through legislative intervention. By an amendment introducing section 3(5) to the law of Succession Act, the subsequent women and children under such marriage are now to be regarded as wives and the children as legitimate for purpose of succeeding the man, thanks to traditional African perception of marriage and succession. Moreover, the continuum becomes even clearer on considering the fact that like other jurisdictions, Kenya is coming to grips with issues relating to the wife’s equity in the matrimonial home and the quantification and distribution of the spouse’s contribution (direct or otherwise) to matrimonial property among others (Married Women’s Property Act 1882, of England; Mary Anne Matanu Kivuitu Vs Samuel Mutua Kivuitu (1991/92 - Kenya Appeal Reports: 241). Justice of Appeal Gachuhi remarked in Kivuitu’s case that “The time when an African woman was presumed to own nothing at all, and all she owned belonged to her husband and was regarded as a chattel of her husband has long gone” (p.242).

This booklet addresses the question of succession or inheritance vis-à-vis the Kenya woman. It gives an account of the historical background to the laws of succession in this country, namely; Customary, Moslem, Hindu and Common Law. It also examines the link between marriage and succession and land law and succession.

II. Definition

Succession or inheritance may be defined as “the devolution of title to property under the law of descent and distribution” (Black’s Law Dictionary, 5th Edition). Succession would exclude those who take by deed, grant or any form of purchase contract.

It has been contended by certain scholars that succession, especially in most African customary laws, denotes the passage not only of property of the deceased but also obligations to which he/she was subject and the status he/she held in society. The heir has to step into the shoes of the deceased in so far as duties to his/her dependants are concerned in addition to and as a consequence of being vested with the property. In addition to this, the heir holds on behalf of all entitled to a share of the deceased's estate. He does not take absolutely. This leads to our contention that the term succession is probably more apt than inheritance especially in a discussion on customary inheritance practices. We will, however, use the two terms to mean the same thing in this booklet.

III. A: History of the Laws of Inheritance in Kenya

Kenya has a multiplicity of laws governing inheritance. Despite the fact that all groups recognize inheritance as one way of passing on property or acquiring the same, there is no consensus as to how this is to be done. The fact that law of inheritance serves different purposes in different communities accounts for the diversity of the laws on inheritance. The Kenya Constitution put all these laws of succession at par (Section 70,78 & 82) none can be said to be modern and another archaic. In practice, however, especially during the colonial period, there was a tendency to treat English Law as modern and all others as archaic and needing modernization. The trend continued for sometime after independence (Ibid; See also Re Kibiego [1972] E.A. 179; Madhwa V. City Council of Nairobi [1968] E.A. 406).

It is fallacious to contend that inheritance laws in Kenya began at the point of colonialism. This is because the communities living in Kenya had laws relating to succession on death even before the onset of colonialism. These laws may have been different from those known to the colonialists and the latter may have failed to recognize them as laws due to this difference in character. The attempt to harmonise all laws of succession with English laws is evident throughout the colonial period. The trend continues even after independence in 1963 (Kamau Kuria: 1977). The quest for a uniform law of succession on Kenya has been modelled around the English system. Only in cases where the customary practice overwhelms such English principles does the law provide for them as we will see in the discussion on the Law of Succession Act below. It is hoped that a time will come when we have a relatively homogenous society leading to a generally uniform law of succession paying allegiance primarily to national aspirations rather than to ethnic or religious beliefs.

Pre-Colonial Kenya's Laws of Inheritance

(a) African Customary Law

It has always been assumed that customary law is bad for women and tends to favour men. While certain rights enjoyed by men under customary law were not enjoyed by women, research has shown that there was an explanation for that situation which was tenable (Women and Law in South Africa: 1993). The fact that customary law is fluid, flexible and dynamic makes it capable of gross manipulation by the main actors in it. It is consequently possible to have a court's pronouncement on customary law that is substantially at variance with the law on the ground (ibid).

While we cannot talk of one customary law of inheritance given the fact that we have different laws among different ethnic communities in Kenya, there are striking similarities observable in this respect (Cotran: 1969). One common feature is the belief in equality of human beings hence the communal ownership of major forms of property such as land. Every member of the community was assured equal access to land (see Kamau Kuria: 1978; Mulumba Gwanobi and others Representing the Jibana Tribe V. Abdulrasool Alidina Visram (1913-1914) 5 K. L. R. 141).

Furthermore, Africans believe that the family is a larger unit than its counterparts at common law and it is the best institution of enabling every individual to give meaning to life (Mbiti: 1969). Customary law rarely allows a stranger to inherit (Cotran: 1969). Among Africans in Kenya, heirs are one's family members. In patrilineal societies which are the majority, family refers to the widow of the deceased where the deceased is a man; the children of deceased mother or father; brother and sisters of the deceased; his father, mother and co-wives and children in polygamous households and members of the clan who are to be traced to the same ancestor. Among the Digo and the Duruma who are matrilineal, family refers to members of the woman's family, her brothers and their children, her mother and her uncles and aunts and their children. We will discuss the Gikuyu customary law as representative of patrilineal societies. The Digo and Duruma customary laws which represent matrilineal systems are being gradually changed into patrilineal ones (Cotran: 1969).

Among the Gikuyu who are patrilineal though legend has it that they were formerly matrilineal (Kenyatta: 1961) the institution of "muramati" (one who looks after) was recognised as the agent for the transmission of a deceased's property. He/she was the personal representative of the deceased and was the trustee who acted as the guardian of the deceased's property. He/she assumed control of the property and determined the heirs and their shares in the estate. He distributed the property to the heirs depending on whether the deceased had made a Will nor not.

Wills under Gikuyu customary law were oral and could be made by any man or woman who owned property provided that such man or woman was very old and was on his/her death bed or both. Young persons could not make Wills (Maina: 1992). An insane or senile person was not permitted to make a Will as understanding the nature of one's act was a prerequisite to the validity of a Will. The making of a Will was attended by all the testator's male children, his/her clan, close friends and relatives and elders. The testator would orally declare how his/her property was to devolve item by item. The "muramati" would be appointed at this gathering. Presence of witnesses was a validating condition and the Will always became effective at the testator's death.

Where a person died intestate, the family and elders would appoint a representative for the estate. This was invariably the eldest son of the deceased. In a polygamous home, such representative would be the eldest son of the first wife. It did not matter whether or not daughters preceded him and neither did age. If he was a minor, the elders would assist him in his duties.

The distribution of the estate in intestacy was determined by whether the family was polygamous or monogamous. In a monogamous setting land was divided into shares among the sons. The widow held cultivation rights on a piece of land at marriage. On the death of her husband, the rights were valid till her death. These rights would, however, determine if she remarried or went back to her father's home after the death of her husband. If she entered a levirate union, she would retain her rights of cultivation. When the widow died, her sons inherited the land in equal shares (not the life interest). Livestock was only distributed after all the sons had married when the widow got some unspecified share while the rest was divided among the sons (Cotran: 1969; Maina; 1992).

Daughters could not inherit land or livestock because they remained under their mother until they got married. If they remained unmarried, they would get cultivation rights and a life interest. On death or subsequent marriage, property reverted to their father's sons. If they had children out of wedlock, they would inherit the property (ibid).

In polygamous situations, the household was divided into "nyumba" or houses. A house comprised a wife and her children. The house of each wife got an equal share of property irrespective of the number of children she had. While personal and household effects went to the widow in a monogamous marriage, the senior wife took them in a polygamous union. Crops, whether afield or in the store were equally divided amongst the wives if they belonged to the husband.

Generally, all African communities took into account any distribution to the sons during the father's lifetime. An unmarried man's property would be inherited by his closest relatives starting with his father and including his step relatives on the father's side. A widower inherited all that his deceased wife owned.

(b) Islamic Law of Succession

The law of succession is of great importance amongst Muslims. It has a religious character and indeed "... the laws of inheritance appear as a vital aspect of the religion of Islam" (Coulson: 1971). The Koran enjoins the faithful to learn the laws of inheritance and teach them to the people since they are half of the useful knowledge.

For succession purposes, the estate of the deceased Moslem will comprise all the property that he owns (movable or immovable). There is also no distinction between personal and family property. The criteria for inheriting property in Islam include blood relationship by marriage and that of a slave and master (Pearl: 1973).

The Koran recognizes both testate and intestate succession. Only a third of a deceased's estate can be dealt with by Will. The remaining two-thirds is distributed under intestacy rules laid down in the Koran which fixes shares allocated to persons recognized as heirs. Such persons include the widow or widower, father, mother and children. Grandparents will inherit when the heirs in the nuclear family cannot, for one reason or another, inherit. In general, a male under the Koran, takes double the share of the female.

The effect of these rules of the Koran is that, while a person can dispose of his property as he wills in his/her lifetime, he cannot by a Will reduce or enlarge the shares of those who are entitled by law to inherit (Ranee Khajoorunnissa V Mussamut Roushan Jehan (1876) L.R. 31.A.291). When a man dies leaving a wife and no children, the wife inherits one quarter of the net estate and if there are children, she takes one-eighth. If it is a polygamous family the wives share the quarter or eighth depending on whether there are children.

The disproportionate shares amongst sons and daughters is founded on Sura 4 Verse 11 of the Holy Quran which states that:

“Allah ordains concerning your children that the male shall have a share equivalent to that of two females. If the children are females numbering two or more, their proportion is two thirds of the inheritance.”

Regarding testate succession, the Koran ordains that testamentary power is exercisable by any Muslim who is sane and rational and above the age 15 years. No particular form is provided for making such a Will. It need not be written or signed and if it is signed it need not be attested. To bequeath more than a third of one's estate, the testator needs the consent of the heirs and if such consent is refused, his bequest will only extend to a third of his estate. Such third can only be bequeathed to outsiders and heirs cannot inherit this portion.

In succession, a woman has the right to dispose of her property without interference from her husband. If he interferes, the wife is entitled to a decree of dissolution of the marriage.

(c) Hindu Law of Succession

Hindus believe in human equality. They also believe that the family is the most effective way of leading a full life. Property belongs to the community not the individual and the nexus between religion and life is rife.

Under the Hindu Law of Succession, particularly the Bengal School, all the property which a Hindu dies possessing passes to his/her heir unless he/she has made a valid Will (Durga Nath Pramanik V Chinta Moni Dassi (1903) 31 Calc 214). Ownership of joint family property is rarely distributed. Under the Mitakshara sect, the widow is entitled to maintenance from her husband's estate which passes by survivorship. Regarding the other property of the husband, the widow has no interest and she cannot inherit it as long as there is a male child or a male relative surviving. In cases where no such issue survives, she takes a limited estate in the whole intestate estate to the exclusion of any married daughters

A widow cannot inherit the property of any person other than her husband. No right would, as a consequence of this, accrue to her as a widow to succeed a person to whom her husband would have been an heir had he lived. (Ananda Bibee V. Nowrut Lal (1882) 9 Gale. 315 and Godrnee (Mussumat) V Domrao Kronwer (Mussumat) (1886)1 Agra H. C. 149).

The course of inheritance prescribed by the Hindu law cannot be altered by a private arrangement (Balkristina T. Tendulkar V. Savitribai (1878)3 Born 54) and neither can it be altered by a Will (Juttendromohun Tagore V. Gamendromolun Tagore (1872) I. A. Supp. Vol. 47 at p. 64).

On property descending to a male as heir, he becomes a fresh stock of descent and on his death the property passes to his heir and not to the heir of the previous owner. When property descends to a female, however, she does not become a fresh stock of descent and on her death the person who would have been heir to the last full owner takes and if such person is a male, he becomes a new stock of decent (Khub Lal Singh V. Ajudhya Misser (1915) 43 Cal. 574).

Among certain schools of Hindu law such as Bengal, Benares and Madras, women inherit only by virtue of express texts but in Madras certain female heirs may inherit in default of all male heirs. Another significant fact is that the Crown is entitled to succeed by escheat in preference to women not expressly named in a text (Jogdamba Koer V. Secretary of State (1889) 16 Calc. 367). Rules of exclusion from inheritance among Hindus exclude an unchaste widow from succeeding to the property of her husband where such property has not vested in her before his death (Kery Kolutany V. Moneeran Koluta (1873) 13 B. L. R. 1 pp. 11). According to the Bengal School such exclusion extends to any female heir by virtue of her unchastity antecedent to the vesting.

Hindus can make Wills by virtue of the Hindu Wills Act, 1870 of India. The provisions of this Act are gender-neutral. For a written Will to be valid, it must bear a mark of execution by the testator and must be made before two or more competent witnesses. Under this Act, widows may not be deprived of their rights to maintenance. They have a right to dispose their right of maintenance by Will.

(d) Europeans: Succession at Common Law

At the death of a person, his assets would devolve to other people who had, except for the widow, blood relations with the deceased. There was complete freedom for a person to determine how his property would pass and be distributed when Wills developed at first. Modern legislation in Britain, for example, the Inheritance (Family Provisions) Act of 1938, limited this.

If no Will was made, however, there were rules regulating the mode of devolution of property. These rules of inheritance were fixed by custom and later, partly by courts. According to the rules, inheritance descended lineally. The lineal descendants were entitled to inherit before the ancestors; for example, children would inherit before parents. Males were preferred to females if they were in the same category or degree. Women could only take a share if there were no male lineal descendants of the same degree. And if there were no descendants, then inheritance went to ancestors. In these cases, the paternal side was preferred.

Sections 25-45 of the Indian Succession Act (IS A), a codification of the common law rules, contain the rules of intestate succession which provide that if a man dies and leaves a widow and other descendants, the widow should get one third of the property. The other two thirds go to the lineal descendants. If there is only a widow and no lineal descendants, then the widow would be entitled to one half the property and the other half goes to the close relatives. If there is no widow or lineal descendant, other relatives of the deceased would take the property that had been left. In situations where there was no descendant or ascendant, the property would devolve back to the state by the principle of bona-vacantia.

Where property went to the children, it went in equal shares. The same applied to grandchildren or lineal descendants. Also, all in the same degree of lineal descendants of great grandchildren would take equally. Where there were no descendants, the first priority went to the widow. The second priority went to the father and the third went to the mother of the deceased and his brother and sisters in equal shares. If dead, their children would take their parents shares equally. If brothers and sisters are dead and have no children, the mother would take it all.

Since time immemorial, Wills have existed in England, although in different forms and with different limitations. During the fourteenth century, a person's testamentary power was limited to personal chattels. These

included chattels and leasehold interests in land. In the fourteenth century, it became a general rule that a person was supposed to dispose of realty by Will. There existed restrictions in favour of the widow and children. A dead man's estate was divided into three shares and it was the third share that he could dispose of by Will. These restrictions were removed later on and a person could freely dispose of his property. The situation continued until the nineteenth century when changes were introduced.

The position of women in property law is evinced from the ruling of Bennet J. in Re Brownbridge (1942 193 L.T.Jo. 185):

“By the law of England, no man could be compelled to leave any part of his estate to any person who was a dependant. Still less could he be compelled to make provision for his wife for instance.”

III. B: Laws of Succession During the Colonial Period and Upto 1981

(a) Africans

The 1897 order in Council provided that African customary law was applicable to natives so long as it was not repugnant to justice and morality. For African Christians, Article 64 of the Native Court Regulations 1897 provided that native Christians were governed by the law that governed native Christians in India. It was unclear whether this was the English law of inheritance or the Indian Succession Act.

In addition, in 1902, the East Africa Marriage Ordinance (No. 30 of that year) was passed providing that natives married under the Ordinance divorced themselves from customary law and henceforth adopted the English way of life. Under section 39, where a person was married under the Ordinance or was a child of such parents, in intestate succession, English law was applicable. The section was silent on testate succession.

And in 1924 the Native Christian Marriage Ordinance (No. 9 of 1924 Section 2 thereof) was passed. It repealed Section 39 of the 1902 statute and provided that all Africans, Christians or otherwise, were to apply African succession law. In 1961, the African Wills Act (Cap. 169 of the Laws of Kenya) was enacted and facilitated the making of Wills in English manner by Africans. Clause 4 thereof limited the power of the testator thus:

“A testator will not be able to leave by Will property which he could not have transferred when he was alive, nor to deprive any right to maintenance to which that person might have been entitled by the native law and custom out of the estate of the deceased” (Webb: 1961 :311).

This Act was notably more procedural than substantive. Without giving an individual more power than in customary law in making a disposition of his property, it provided him with an elegant method of doing so.

Another statute applied was the Probate and Administration of Estates Act of India. This Act was not applied to Africans until the case of Re Maangi (1968 E.A. 637) where a husband died intestate and the law then applicable was to be determined between Kamba customary law under which the administrators could be the deceased's brother or his eldest son only and the statute, under which the deceased's wife applied. The court held that she could be an administrator and thus the Act was applicable (Re Kibiego's Case (1972) E.A. 196 followed this ruling). Are there any cases of the tension between customary law and statutes? How are they resolved? Let us briefly consider a few cases.

It was common (and still is) for a man to contract a Christian marriage and then proceed to marry another wife under custom. In such cases, the issue as to who is the widow would arise upon the man's demise. The wife married under the Christian marriage Ordinance could argue that the man had no capacity to contract a second marriage. This was the issue in the case of Re Ruenji (High Court Miscellaneous Civil Case No.136 of 1975). The deceased belonged to the Gikuyu community. He married one Loise under the African Christian Marriage and Divorce Act (hereinafter ACMDA) (Cap. 151 of the Laws of Kenya) in 1941 with whom he had thirteen (13) children. He thereafter purported to marry two other women under Gikuyu customary law and had children with them. He died intestate and the court was faced with the issue as to whether the two women married under custom and their children were entitled to inherit from the deceased as lawful wives and children. It was held that the ACMDA Marriage was monogamous and a spouse cannot marry anybody else for as long as the marriage is not dissolved. Consequently, the subsequent marriages were null and void and neither the wives, nor their children could inherit as they were not the deceased's relatives.

In Re Ogolla (1978) K.L.R. the deceased had married Gladys in 1964 and had four daughters with her. He died in 1974. A lady named Bona claimed to be married to him under customary law and thus sought a share of his estate. It was held that Bona was not a legal wife and neither was her child his legal child. In the words of Simpson J.,

“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 recognizes one wife only and on his death removes the widow and children from the ambit of tribal customs affecting cohabitation and guardianship.”

It is important to point out that Section 4 of ACMDA allows the application of the provisions of the Marriage Act (Cap. 150 of the Laws of Kenya) to marriages conducted under it (ACMDA). Section 37 of the Marriage Act provides that:

“Any person who is married under the Act or whose marriage is declared in this Act to be valid shall be incapable during the continuance of such marriage, of contracting a valid marriage under any native law or custom.”

In the Matter of the Estate of Samuel Hopewell Gacharamu, Deceased, the deceased married his first wife under Gikuyu customary law. He then married a second wife under the Kamba customary laws. He proceeded to marry the second wife under the Marriage Act as commonly happens. The issue arose as to who was a widow and entitled to inherit; what shares should go to the two wives' children if both are declared widows. The court held that two ladies were married under Gikuyu and Kamba customary laws and the marriage of the one under the Marriage Act merely facilitated the registration of that marriage but did not change the character of the marriage or affect its validity. Consequently, both women were widows and they were entitled, together with their children, to a share of the deceased's estate.

What is apparent from the above cases is that Africans do not perceive themselves as extricated from native customs and laws even after contracting marriages under the ACMDA and the Marriage Act. The situation is compounded by the fact that alongside the christian and civil marriages under these statutes, most Africans perform customary rites pertaining to marriage. The quest of the colonizer to Anglicize all marriage laws in a bid to “civilize” the natives allows for conversion of African, Hindu and Islamic family laws to English ones but not vice versa. The case of Ayoob V. Ayoob [1968] E. A. 72) indicated that conversion is always from a potentially polygamous marriage to a monogamous one and not vice versa.

The same confusion pertains to laws relating to land which are closely linked to succession. We pointed above that among many African customary laws, land was held communally. No land was owned by an individual. What everybody had were right of access and use of land not title to it.

Introduction of colonialism’s free enterprise economy changed the ideas on land-holding by superimposing capitalism on pre-capitalist social formations. The process of consolidation, adjudication and registration demanded that a family member be designated to be registered as the owner of the land. Even after such registration, Africans still continued to look upon the land registered as family property. It was inconceivable to most Africans that mere registration should disinherit a whole clan and enrich an individual. They perceived the person registered as a trustee for the members of the family.

In Esiroyo V. Esiroyo [1973] E.A. 388 a father was registered as the proprietor of a piece of land on which he resided with his sons. He sought to eject the sons and an injunction to restrain them from trespassing on his land. His sons resisted the application declaring that as sons of the plaintiff, they were entitled to certain portions of the land to occupy and cultivate with their wives, children, servants and agents. The sons sought protection under Luhya customary law which they said still governed the land they were occupying. The court held that the father’s title was free from any encumbrances and that the rights under custom were not overriding interests that could operate to defeat their father’s interest. Further, the father’s registration was a first registration, protected by section 143 of the Registered Land Act (cap. 300) from rectification even for fraud or mistake. Cap. 300 at section 28 confers upon a registered proprietor a title free from other claims and interests subject to the leases, encumbrances and charges shown on the register and to such overriding interests as designated at section 30 (these do not include customary law rights).

A similar view was held in Obiero V. Opiyo ([1972] E.A. 227); Mary Waniiru v. Ng’ang’a s/o Mary Wanjiru H/CT of Kenya at Nairobi Civil Case No. 2497 of 1976. In Muguthu V. Muguthu Civil Case No. 377 of 1968, however, it was held that despite the fact that the land was registered in the name of one son, the other son had some interests in the land. This case recognized the institution of the “Muramati” under Gikuyu customary law and implied a trust on the part of the title holder.

It is our contention that the introduction of western and property laws has adversely affected women in Kenya. In the case of land, for instance, where one person was to be registered as proprietor, it would be the eldest male relative and not the woman (widow or eldest daughter). Where a family member is registered as an absolute proprietor (under the RLA), he can disinherit his wife/mother and children/sibling. This is not an aspect of customary law whereunder all persons had equal access.

(b) Muslims

Muslims were legally recognized in the 1897 Native Courts Regulations through Section 87 which permitted the application of Islamic law. Islamic courts which applied Islamic law in matters of personal law and succession were established under the 1907 Native Courts Ordinance. Appeals from these courts went to the High Court

The 1907 Native Courts Ordinance established Islamic courts. These courts applied Islamic law in matters of personal law and succession Appeals from these courts went to the High Court.

The High Court, however, would not entertain any matter arising from Muslim succession saying that it had no jurisdiction to do so as no Order in Council had been passed with specific reference to Muslims.

This continued until 1920 when the Mohammedan, Divorce and Succession Ordinance was passed. It recognized existing and future Islamic Marriages and applied pre-colonial Koranic law in personal law and succession.

Section 4 of this Ordinance limited the application of the Islamic Law of Succession to:

- (1) Where the deceased had contracted an Islamic Marriage
or
- (2) If he was a child of such a marriage.

(c) Hindus

Chronologically, the Hindu Law of Succession progressed in three distinct phases:

- (1.) 1895-1945: In this period the colonial government neglected the Hindus providing no legal provision under which they could apply Hindu Customary Law (Derret: 1970). Hindu Customary Law allowed polygamy.
- (2.) 1946-1960: Hindu Marriage, Divorce and Succession Ordinance (Ordinance No. 43 of 1946) was passed. It stated that the Hindu Customary Law of Succession governed succession of property of a Hindu who died domiciled in Kenya. The Ordinance did not distinguish between testate and intestate succession. However, the Hindu Wills Act, 1870, which was applied to Kenya in 1898 provided a legal cushion through which Hindus could make Wills.
- (3.) After 1960: There was an amendment of the 1946 Ordinance in 1961 and provisions dealing with marriages of Hindu were separated from those dealing with succession among the Hindus. There now was a Hindu Succession Act (Cap. 158).

(d) Europeans

They were governed by Indian Acts which were a codification of English inheritance laws. The main laws here were the Indian Succession Act (ISA) and the Probate and Administration of Estates Act, 1881.

The ISA was applied by Article 11 (b) of the East Africa Order in Council. The testator was free to dispose of his property in any way he wished irrespective of family or dependents.

On intestacy, only the immediate family were regarded as heirs or heiresses for purposes of intestacy.

The Act was amended three times:

- (1.) Through Order No. 12 of 1932: This extended the powers of a testator and now, the testator did not need to make a gift to charity at least twelve months before his death for it to be valid as was previously required.
- (2.) Through Order No. 28 of 1941: This sought to provide the various ways by which to prove a Will.
- (3.) Through Order No. 48 1956: It provided that if there was a cause of action during the lifetime of a deceased person or at death, and if such an action had not been determined by a court of law, it would survive the death of the Plaintiff or Defendant and a cause of action would be enforceable against a deceased's estate.

IV. C: The Law of Succession Act (Cap. 160 of the Laws of Kenya)

Cap.160 was an attempt at promulgating a Kenyan inheritance law. It applies to both testate and intestate succession. It does not, however, apply to Muslims (Act No.21 of 1990 which came into effect in January 1991).

Muslims, in making a case for exclusion from the provisions of Act, argued that the Act embodied secular principles and was contrary to Islamic faith. To this extent, they contended, the law was unconstitutional in so far as it compromised their freedom of religion and worship as embodied in Section 78 of the Constitution. In fact, Section 82(4)(b) of the Constitution permits the enactment of discriminatory legislation on matters of "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law".

Critics of the 1990 concessional amendment argued that Islam should not be regarded as special. They concede that the Act also compromised principles that were crucial to Christians, traditional Africans, Hindu and atheists.

What this means is that the system of inheritance of fixed shares under Islam still persists. Muslims apart, the Act “has universal application to all cases of intestate and testamentary of succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estate of those persons” (Section 2 of Cap, 160).

The Act was as a result of the deliberations of a Commission on the Law of Succession whose terms of reference were to:

“1. Consider the existing law on succession to property on death, the making and proving of Wills and the administration of estates; 2. To make recommendations for a new law providing a comprehensive and, so far as may be practicable, a uniform code applicable to all persons in Kenya, which will replace the existing law on the subject comprising customary law, the Indian Applied Act and the relevant Acts of Parliament including those governing Muslim and Hindu Succession; 3. To prepare a draft of the new law in accordance with the Commission’s recommendations”.

The Commission presented its report in 1968 and their draft Bill became (with some amendments) the Law of Succession Act coming into effect on 1st July 1981. The Act sought, in addition to unifying the laws, to correct the defects of the previously applicable regimes. The Commission’s proposals on testate and intestate succession sought to improve the status of women, whether as daughters or widows. They observed that tribal sanctions ingrained in rules of succession no longer obtained and stricter controls of administration procedure were needed (Maina: 1992).

(i) Testate Succession

On testate succession, Section 5ff make detailed provisions relating to capacity to make Wills, construction and formalities among others. The sections are gender-neutral using such terms as “every person” or “any person” Capacity of women to make Wills has been specifically provided for. The fact that women can now own property seems to be the guiding force behind this provision. Section 5(2) ordained that “A female person, whether married or unmarried, has the same capacity to make a Will as does a male person.” Such female person ought to be an adult of sound mind and the Will may be oral or written. She can only make a Will in respect of property that she owns. While this is a step in the right direction, the tendency of family property to be registered in the husband’s name only, even where both parties have contributed to its acquisition, leaves many women at the mercy of the man upon the dissolution of the marriage. Safeguards are needed to ensure joint property is considered as the property of both spouses even where evidence of direct financial contribution is lacking (See Kivuitu V. Kivuitu (1991) 2 K.A.R. 241). It is perhaps not surprising that more men than women make Wills. This may be explained on the basis of the continuum of customary law in which all property was owned by the man. Also notable is the fact that Wills made by men tend to favour male heirs. (See for instance Wanjau Wanyoike and four others V. Ernest Wanyoike Njubi and the Public Trustee in Cotran: 1987: 323). The property dealt with here mostly includes land, houses, cars and other capital goods. This denies women heirs a share or even access in such property. But how can these tendencies be explained?

While such practices may have a lot to do with attitudes and cultural considerations, it is here contended that under customary law, whoever inherited property was enjoined to access it to other members of the family – men and certain categories of women. The reason behind males inheriting was the notion that they remained within the families while daughters got married and left. Since this is not always the case and even where daughters get married, they have been known to maintain close ties with their families, attitudes ought to take

cognisance of the current trends and allow women to inherit their parents' properties.

For any disposition of the deceased's estate under the Act, whether that disposition is effected by Will, gift in contemplation of death or by the law relating to intestacy or by the combination of Will, gift and law, if it is deemed unreasonable by the court, such court could order the reasonable provision for any dependant left out of the deceased's estate (Section 26). The court in making such reasonable provision is vested, with discretion (Section 27) and guidelines for the exercise of that discretion (Section 28) are clearly laid out. A "dependant" is widely defined to include the wife or wives or former wife or wives and the children of the deceased whether or not maintained by him immediately prior to his death; deceased's parents, step-parents, grandparents, grandchildren step-children, children whom the deceased has taken into his family as his own, brothers, sisters, half-brother, half-sisters as were being maintained by the deceased prior to his death (Section 29). This section takes into account the African concept of the extended family. A husband would be the wife's dependant where he was being maintained by her immediately prior to her death. This is a recognition of the capacity of a woman to hold property independently of her spouse and apply it for her maintenance, her spouse's maintenance and that of her children.

(ii) Intestate Succession

Part V of the Act deals with the rules of intestacy. Section 32 exempts certain gazetted areas from application of these rules in respect of agricultural land and livestock. These areas include Wajir, West Pokot, Turkana, Tana river, Kajiado, Garissa, Marsabit, Isiolo, Manderu and Lamu. If a person dies intestate in any of these areas, customary law applies with regard to agricultural land and livestock. The problem here is that the two categories of property excluded may be the only property owned by a deceased person. This means that women in those areas cannot benefit from or seek protection under the provisions on intestacy which if properly implemented could elevate the status of women in property control and management in Kenya.

The Act at Section 35 denominates a surviving spouse in a monogamous union as the most suitable person to take charge of a deceased's property. This is a departure from African customary and Hindu practice of favouring the eldest male issue. It is, however, remarkable that the surviving spouse gets only a life interest in the property and where that is the woman (widow) the interest terminates upon her remarriage.

Indeed women's interests in matrimonial property are clearly provided for under the Act. Under Section 29 the wife ranks high among the dependants of the deceased husband while the husband only becomes a dependant of the wife if he was maintained by her prior to her death. The implication here is that a husband takes a life interest in the net estate like the wife in the event of his death. The man cannot, however, apply to the court under Section 26 unless he satisfies the provision on having been maintained by the wife even if no reasonable provision is made for him.

Section 36 of the Act clarifies the issue on dealing with a surviving spouse who has no children. The spouse here is entitled to the personal and household effects of the deceased absolutely; either the first Kshs. 10,000 or twenty per cent of the residue of the net intestate estate and a life interest in the whole remainder, so long as, in the case of a woman, she does not re-marry.

Succession to the property of a polygamous person who died intestate having married under a system of law

permitting polygamy is to be effected in terms of houses and is dependent on the number of children in those houses (Section 40). Any wife who survives the husband is regarded as an extra unit to the number of children in the household. This is clearly a departure from Gikuyu customary law, for instance, in which the number of children was inconsequential.

The Act talks of “children” without differentiating between male and female children. The spirit behind this provision is to make allowance for all the children, male, female, married or unmarried depending on their means and needs. This is also the case for the grandchildren (See Sections 29,35,36,37,38,39,40,41).

The Law of Succession Act has made big strides in the way of eliminating discrimination of female persons in matters of succession. The practice, however, still seems tilted against women. For instance, in the case of the Estate of Njeru Kamanga (Deceased) Succession Case No. 93 of 1991 (Unreported) Maina: 1992) the daughters of the deceased were disinherited by the magistrate who felt that the daughters, being married, had no right to the father’s property. This was notwithstanding the clear provisions of Cap. 160.

Moreover, in the Matter of the Estate of Richard Martin Kibisu (Deceased) High Court Miscellaneous Application No. 272 of 1985 the deceased had made a Will providing that his land should not be divided into pieces but that it be cultivated by any of his children able to do so. A daughter of the deceased petitioned the court saying that the Will indicated the wish and intention of the deceased that the land should be sub-divided and demarcated equally among all the children of the deceased. The petition was opposed by the sons contending that the provision against sub-division made the Will null and void and the deceased should be considered having died intestate. This would mean that the estate be divided according to the deceased’s customary law, in this case Luhya customary law. Under this law the right of daughters to the estate of their father is to be maintained by the deceased’s estate if they were single or without other support. If such law was applied none of the daughters qualified to inherit. It was held that the deceased’s intention should be followed as closely as possible and the court favoured a construction avoiding intestacy; that the land was intended to go to all the deceased’s children, sons and daughters, and that the condition restricting partition, and not the whole Will, is void as contrary to the law. Such condition, in the court’s view, was made after the gift had vested in all the children and being unenforceable, was void.

It will be noted that many inheritance disputes pertain to land. The 1981 Magistrate’s Jurisdiction (Amendment) Act (Cap. 10 of the Laws of Kenya) removed jurisdiction of certain land disputes from magistrates transferring it to panels of elders. It was not stipulated what law these panels should apply but the implication was that they apply customary law. The position of daughters and widows then would be as at customary law in disputes over land before such panels.

The effect of Section 35 would seem to be that women married to men who had initially transacted a monogamous marriage and the children of such women could not inherit from or succeed the man. This reflects the position in Re Ruenji and Re Ogolla above. The Act was subsequently amended by Act No. 10 1981 and addition of Section 3(5) to the Act which enables subsequent women (wives) and their children to inherit. It provides as follows:

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

This provision has been lauded by many as reflecting the reality of Kenyan life in which as counsel put in Re Ogolla's Estate, many Africans contract Christian or civil marriages but relapse back to traditional African practices or where as we noted above, people contract Christian or civil marriages along with the performance of customary marriage rites. In this latter case, it is difficult to categorize the marriage in dichotomous terms as either Christian/Civil or Customary (Kuria: 1978).

On the other hand, it is felt that the amendment denies women security in marriage which they seek by transacting monogamous marriages. They realize later that matrimonial property has to be shared with persons who have disrupted the monogamous marriage or persons not known to the monogamous marriage wife and her children before the husband/father died.

Consider for a moment the Matter of the Estate of Reuben Mutua Nzioka Probate and Administration Cause No. 843 of 1986 (H/Court), in which the deceased, Mutua, married Theresia in 1961. The marriage was conducted under ACMDA. When Mutua died in 1986, a lady called Josephine claimed to be his wife, allegedly married to him by Kamba Customary Law in 1980. She also claimed that her three children were Mutua's children and contested his Will in this Cause because she and her children had been omitted while they were legally entitled to some part of the estate as dependants. It was held that Mutua lacked the capacity to marry customarily while his marriage with Theresia still subsisted. It was, therefore, not necessary to prove that a subsequent marriage was genuinely customarily undergone as "it is not relevant under these circumstances."

Justice Aluoch refused to give a literal interpretation to the subsection which would have favoured Josephine. She said that the provision was intended for women married under customary law who were either neglected or abandoned by their husbands during their 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 I have already given it" (The case is now on appeal).

Moreover, in the Matter of the Estate of Duncan Kiiru Karuku (Deceased) Succession Case No. 74 of 1987 it was held that for purposes of intestate succession, although the first marriage was conducted under statute, the other wives and their children were wives and children of the deceased and were entitled to inherit {reference made to Section 29 of Cap. 160 and direction given that Sections 40 - 42 of the Act be referred to for guidance on the mode of distribution). This appears to be a literal interpretation of Section 3(5).

Section 3 (5) sanctions adultery and bigamy while undermining the institution of marriage and encouraging the breach of the marriage contract. It also redefines marriage making nonsense of specification of a marriage as a monogamous one since such a union can be adulterated and the parties of adulteration covered by this curious provision (Maina 1992).

The section also undermines the widow's property rights. In Karanja V. Karanja [1976] K.L.R. 356 the court recognized the fact that a wife could help her husband acquire property through direct financial contribution. The contribution of a wife as a housekeeper is no less important. Her duties of taking care of the husband and children is a significant contribution that should not be overlooked (See also Kivuitu V. Kivuitu). In Hawa Mohammed V. Ally Sefu [1977] LRN 7 N 55 (a Tanzanian case) it was held that domestic efforts of the wife

should be considered in the division of matrimonial property. While we appreciate the needs of women and children anticipated at Section 3(5), we think that if the practice of contracting customary marriages when a monogamous marriage subsists is to be discouraged, the provision should be abrogated. Other ways of supporting such women and children without disrupting the marriage institution should be sought. An Affiliation Act may be one way of providing this support. Such an Act ought to be well thought out to avoid its being thrown out again as happened to Cap. 142 in 1969. To ensure self-censorship on the part of men, adultery should be made both an actionable civil wrong (apart from divorce) and a crime. There have arisen many disputes over a deceased person's estate owing to this provision which clearly makes a case for resisting it. (See also In the Matter of the Estate of John Nyagado Okach (Deceased) High Court Probate and Administration Cause No. 787 of 1988; In the Matter of Patrick Thoithi Kirogoi (Deceased) High Court Succession Cause No. 701 of 1984 which deal with administration of estates where the deceased was polygamous and had died intestate).

In certain cases where a woman seeks to bring herself within the protection of Section 3(5) the court considers whether the formalities of a customary marriage were satisfied. In the Matter of the Estate of Evanson Gikamu Karania alias Ngario Muthemba alias Evanson Karanja (Deceased) High Court Probate and Administration Cause No. 644 of 1987 the court held that the non-performance of all rites set out for a complete customary marriage (Gikuyu) does not necessarily invalidate a marriage especially where the society considers the marriage a marriage and where there has been long cohabitation between the objector and the deceased. The implication here is that performance of some of the rites coupled with cohabitation is enough for the court to hold that a marriage has taken place. This case has been lodged for appeal.

In both testate and intestate succession where the question of who is a widow is not debatable, that is, where there is one widow only or where co-wives accept each other and their children, there has been no discrimination in granting letters of administration. It is not insisted that male eldest children get the letters; the wives have gotten them. For instance, in the Matter of the Estate of Nemchand Kanji Lalji Shah (Deceased) High Court Succession Cause No. 1298 of 1992, the deceased had made a Will in which he bequeathed all his real and personal estate whatsoever to his wife absolutely and also appointed her the executor of his Will. The grant was made and later confirmed by the court.

Where there is a dispute as to who is a widow, on resolution of the dispute, the courts have not discriminated against women as grantees of letters of administration (See In the Matter of the Estate of Duncan Kiiru Karuku (Deceased) where the third wife was enjoined to the sons of the first two wives in the grant of letters of administration). Courts have gone even further to hold that where a woman is married under customary law and brings issue of a previous customary marriage (where the first husband has died) to the new matrimonial home, such wife and her child are heirs notwithstanding the fact that the husband has subsequently married another wife under statute (See In the Matter of the Estate of Warui Muriithi (Deceased) High Court Succession Cause No. 1250 of 1989). As far as the son is concerned it does not matter that he has inherited a share of his late father's estate.

(iii) Women in Levirate Unions

Where a woman gets married to her deceased husband's brother/ relative the issue as to whether she can inherit from the latter may arise. Is she a wife for purposes of inheritance? Section 3(5) and 29 would seem to imply that she is a wife. In the Matter of the Estate of Meshack Kangi Karemi (Deceased) High Court Probate and Administration Cause No. 112 of 1987 seems to imply that such a union ought to be solemnized say by payment of dowry to qualify the woman as a wife of her deceased husband's brother and to distinguish his duties as those of a husband other than performance of the obligations of one's brother. If children are born of such a

union, then proof of paternity is vital to their claim to inherit.

(iv) Cohabitees

Many man-woman unions are contracted in Kenya without undergoing a formal marriage ceremony under any of the four recognized marriage systems. Cohabitees many times acquire property together or accumulate property acquired severally before the cohabitation. The management and control of their property closely relates to that under the system they would have transacted their marriages. Should the man die in such a relationship, the woman is hard put to prove that she was married. Kenyan law recognizes the presumption of marriage arising from some form of ceremony or a long period of cohabitation (has to be qualitative and quantitative). In many cases' such a presumption is not upheld (See Case V. Ruguru [1970] E.A. 55, Mary Njoki V. John Kinyanjui Mutheru and Others Civil Appeal No. 21 of 1984; Kisito Charles V Rosemary Moraa Miscellaneous Civil Case No. 364 of 1981). The woman could lose all her property to the deceased husband's relatives who will seek to show that no marriage existed between their son or brother and the woman now claiming to be his wife. (Mary Njoki V John Kinyanjui Mutheru and Others Civil Appeal No. 21 of 1984).

VI. Conclusion

In spite of the existence of a Law of Succession Act, we still have no homogeneity in dealing with succession matters. The concession given to Muslims and the provision at Section 3(5) of the Act make the operation of uniform inheritance law and practices a mirage. The continuum of customary property management and control systems is all too evident even as the quest to Anglicize the law is discernible. The implications of this for women are less than optimal achievements in the area of property rights. This, as we have pointed out above, is not to say that customary law property rights systems are averse to women's acquisition of such rights. They were predicated on the premise that women got married and left their parent's homes while men remained. Consequently, it was desirable that men hold the property but for the benefit of all who had a stake in it – women included. The situation has 'now changed and the above premise ought to be reconsidered.

Customary law is flexible and fluid and capable of gross manipulations by those in power. It falls prey to abuse by persons who would have control and powers of management over property. The Law of Succession Act has sought to redress the balance by giving women rights to property alongside the men folk. Cultural practices and customary law practices have been used to dilute the content of this well meaning legislation. Indeed, the Act has given way to those practices in respect of certain properties and in respect of certain categories of persons (See Section 2(3) and (4) and 3(5) for example). The fact that the customary law sanctions guarding against abuse have broken down underscores a need for new sanctions to protect women.

An interesting feature outside the Law of Succession Act and the African customary, Hindu, and Muslim practices is to be seen where a deceased person was employed or a member of a cooperative or other welfare society. It is not uncommon to have pension forms require an employee to designate who should receive the employee's entitlement in the event of such employee's demise. Cooperative societies and other welfare groups also require one to designate their next of kin. This practice is evolving into a semi-autonomous social sphere in which a person is able to pass on their property (shares or money) outside the Law of Succession Act or custom. It is a practice worth investigating to the extent that many persons in employment or subscribing to

societies will fill out such forms.

It is all very well to accept the Muslims argument for exclusion from the operation of the LSA especially since it garners strength from the Constitution. Whether such exclusion is desirable or not for Muslim women is a matter worth investigating by way of research.

The operation of the LSA should be closely studied with a view to finding out whether it has achieved its aim of improving women's status in the area of property management and control. Obstacles in the way of achieving this aim should be identified and ways of eliminating them sought. The interplay between the provisions of the LSA and customary law should be studied bearing in mind the observation made above that many disputes arise out of conflicts in different marriage laws and different succession laws. Only after such a study can a widow be clearly defined and persons entitled to inherit identified easily before and after the death of the person whose estate is in issue.

A study of customary practices operative on the ground is also clearly imperative if we are to unearth the supposed biases in customary law. An in-depth study of such practices will help us to understand the rationale behind customary legal principles and to see whether such rationale is tenable in the present circumstances. Only then can we determine whether customary law is good or bad for women. And only then, can alternative paths be evolved.

List of Statutes

1. Law of Succession Act Cap. 160.
2. The Constitution.
3. Marriage Act Cap. 150.
4. African Christian Marriage and Divorce Act Cap. 151.
5. Hindu Succession Act Cap. 158.
6. Registered Land Act Cap. 300.
7. African Wills Act Cap. 169.
8. Magistrates' Jurisdiction (Amendment) Act Cap. 10
9. Affiliation Act Cap. 142.
10. Indian Succession Act 1865.
11. Inheritance (Family Provisions) Act 1938 (English)
12. Married Women's Property Act 1882 (English)
13. 1897 Order-in-Council
14. East Africa Marriage Ordinance, 1902.
15. Native Christian Marriage Ordinance, 1924.
16. Native Courts Ordinance, 1907.
17. Hindu Marriage, Divorce and Succession Ordinance, 1946 Cap. 43
18. Probate and Administration of Estates Act, 1881 (Indian).

List of Cases

1. Re Ruenji (1977) Law Society Digest Part II
2. Re Ogolla's (1978) Kenya Law Reports 18.
3. Kivuitu V. Kivuitu (1991) Kenya Appeal Reports 241 .
4. Re Kibiego (1972) E.A. 179.
5. Madhwa V. City Council of Nairobi (1968) E.A. 406.
6. Mulumba Gwanobi and Others Representing the Jibana Tribe V. Abdulrasool Alidina Visram (1913-1914) 5 Kenya Law Reports 141.
7. Hyde V. Hyde (1861-73) All England Reports 175.
8. Ranee Khajoorunnissa V. Mussamat Roushan Jehan (1876) L.R. 31. A. 291.
9. Durga Nath Pramanik V. Chinta Moni Dassi 1903 31 Calc. 214.
10. Ananda Bibee V. Nowrut Lal (1882) 9 Calc. 315.
11. Godrnee (Mussumat) V. Dornrao, Kronwer (Mussumat) (1886) 1 Agra. H.C. 149.
12. Balkristina T. Tendulkar V. Savitribai (1878) 3 Bom. 54.
13. Tuttendromohun Tagore V. Gemendromalun Tagore (1878) 3 Bom. 54.
14. Khub Lal Singh V. Ajodhya Misser (1915) 43 Cal. 574.
15. Jogdamba Koer V. Secretary of State (1889) 16 Calc. 367
16. Kery Kolutany V Moneeran Koluta (1873) 13 B.L.R. 1 II.
17. Re Brownbridge 1942 193 LT. Jo. 185.
18. Re Maangi (1968) E.A. 637.
19. Re Gacharamu.
20. Ayoob V. Ayoob (1968) E.A. 72.
21. Esiroyo V. Esiroyo [1973] E.A. 388.
22. Obiero V. Opiyo (1972) E.A. 227.
23. Mary Wanjiru V. N g'ang'a S/o Mary Wanjiru High Court Civil Case No. 2497 of 1976.
24. Muguthu V. Muguthu Civil Case No. 377 of 1968.
25. Wanjau Wanyoike V. Ernest Wanyoike Njubi and the Public Trustee High Court at Nairobi Civil Suit No. 147 of 1980.
26. Jembe V Nyondo (1912) 4 Kenya Law Reports 160.
27. In the Matter of the Estate of Meshack Kangi Karemi (Deceased) High Court Probate and

- Administration Cause No. 112 of 1987.
28. In the Matter of the Estate of Duncan Kiiru Karuku (Deceased) Succession Cause No. 701 of 1984.
 29. In the Matter of Patrick Thoiti Kirogoi (Deceased) High Court Succession Cause No. 701 of 1984.
 30. In the Matter of the Estate of Evanson Gikamu Karanja alias Ngario Muthemba alias Evanson Karanja (Deceased) High Court Probate and Administration Cause No. 644 of 1987.
 31. Sepporah Wairimu V. Paul Muchemi High Court Civil Case No. 1280 of 1970.
 32. Case V Ruguru (1970) E.A. 55.
 33. In the Matter of the Estate of Warui Mureithi (Deceased) High Court Succession Cause No. 1250 of 1989.
 34. In the Matter of the Estate of John Nyagado Okach (Deceased) High Court Probate and Administration Cause No. 787 of 1988.
 35. In the Matter of the Estate of Richard Martin Kibisu (Deceased) High Court Miscellaneous Application No. 272 of 1985.
 36. In the Matter of the Estate of Nemchand Kalji Lalji Shah (Deceased) High Court Succession Cause No. 1298 of 1992.
 37. In the Matter of the Estate of Reuben Mutua Nzioka High Court Probate and Administration Cause No. 843 of 1986.
 38. Estate of Njeru Kamanga (Deceased) Succession Case No. 93 of 1991 at the Resident Magistrate's Court in Embu (Unreported).
 39. Hawa Mohammed V. Ali Sefu (1977) L.R.N. 7 N 55.
 40. R.V. Hassan Abdi (1906) E.A. 56.
 41. Karanja V Karanja (1975) K.L.R. 307.
 42. Mary Njoki V John Kinyanjui Mutheru Civil Appeal No. 210f1984.
 43. Kisito Charles V Rosemary Moraa Miscellaneous Civil Case No. 364 of 19

List of Books

- Abdulla, Y.A., *The Holy Quran*, Foundation Books, 1965.
- Anderson, J.N.D., *Probate and Administration in Kenya*, London, Sweet and Maxwell, 1968.
- Coulson, N.J., *Succession in the Muslim Family*, Oxford University Press 1957.
- Cotran, E., *Restatement of African Law*, Volumes 1 and 2, Sweet and Maxwell, 1969.
- Cotran, E., *Casebook on Kenya Customary Law*, Professional Books Ltd. and Nairobi University Press 1987.
- Black's Law Dictionary*, 5th Edition.
- Derret, D.M., *Introduction to Modern Hindu Law*, Oxford University Press India, 1968.
- Fyzee, A.A.A., *Outlines of Mahammedan Law*, 3rd Edn. Oxford University Press, London, 1970.
- Garreth, M., *The Machinery of Succession*, 5th Edn. London Butterworths 1972.
- Ghai Y.P. and Mc Auslan, *Public Law and Political Change in Kenya*, Oxford University Press, Nairobi, 1970.
- Kenyatta, J., *Facing Mount Kenya*, Heinemann Books 1970.
- Mbeo, M.A. and Ooko-Ombaka O., *Women and Law in Kenya*, Public Law Institute, Nairobi, 1989.
- Ojwang J.B. and Mugambi J.N.K., *The S.M. Otieno Case: Death and Burial in Modern Kenya*, Nairobi

University Press 1989.

Pearl, D., *Principles of Mohammedan Law*, Cambridge University Press, 1973.

Webb, C., *Sociology in Context*, MacMillan Education Trust, London.

List of Articles

Kuria, G.K., "Cohabitation Outside Marriage in Some English Speaking Countries". Mimeo.

Kuria, G.K., "Muslims and the Law of Succession Act Cap 160 of the Law of Kenya". Mimeo.

Kuria, G.K., "Trends in Marriage and Succession in Kenya (1886-1977)". Paper presented at the Annual Conference of the Historical Association of Kenya, 1977 (Mimeo).

Kuria, G.K., "The Law of Succession In Kenya". Paper presented at the Law Society Conference in 1978 (Mimeo).

Maina, R., Mucai, V.W., and Gutto S.B.O., "Law and the Status of Women In Kenya" in Law and the Status of Women An International Symposium, Centre for Social Development and Humanitarian Affairs, New York, 1977.

Paliwala, A., "Family Transformation and Family Law: Some African Development in Financial Support on Relationship Breakdown". In Adelman, S., and Paliwala, A. (eds) (forthcoming) *Law and Crisis in the Third World*.

Patel, L.R., "Notes on the Law of Succession in Three Kenyan Coastal Tribes: Wadigo, Waduruma and Wagiriama" Vol. 1 E.A.L.J. (1975).

Maina, W.M., Marriage and Succession: A Conflict Precipitated by the Inclusion of Section 3(5) into the Law of Succession Act Cap. 160. Laws of Kenya. LLB. Dissertation University of Nairobi, 1992.

Endnotes

- ¹ The theoretical perspective and analytical framework adopted by Dr. Abdul Palwala (forthcoming) in studying the institution of property in marriage and similar relationships in Nigeria, Tanzania, Zimbabwe and Mozambique is largely applicable to this study. Like Nigeria, Tanzania and Zimbabwe, Kenya belongs to the common law world and generously borrows or adopts English principles and procedures. Like Nigeria, Kenya has a strong Islamic; Christian, secular and traditional African customary influence.
- ² For instance, in Jembe V. Nyondo (1912) 4 K. L. R. 160 Barth J. 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 (i.e. traditional African) law and custom.
- ³ In the 1993 Human Development Report of the United Nations Development Programme (UNDP) Kenya occupies a precarious position globally in the field of wealth, poverty and social investment (p. 171).
- ⁴ Policy blueprints like the Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya and the Nairobi Forward Looking Strategies for the Advancement of Women (adopted by the Government after the 1985 Women's Decade) which embody important guidelines on gender equity, have suffered credibility in implementation.

