

Women's Land and Property Rights in Kenya

by Reem Gaafar

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I. Introduction & Background

Introduction & How to Use This Guide

Introduction

These country-specific guides were developed using two general guides we created in the past: [Women's Land Tenure Framework for Analysis: Land Rights](#) and [Women's Land Tenure Framework for Analysis: Inheritance](#). These country specific guides do not seek to answer every question found in the other two guides; not all of the questions apply to every country. The general guides are intended to raise all possible issues. The country-specific guides use those guides as frameworks for understanding the main issues related to women's land rights in a specific country context.

The country-specific guides not only serve as an example of how one can use the general frameworks for analysis, but they also analyze the women's land rights situation in the particular country. Note that when it comes to analyzing customary law, we have selected one customary system for deeper analysis; however, this

does not mean that all customary systems within this country operate the same way.

How to Use This Guide

In order to make these guides useful and user-friendly, when possible we have uploaded the full-text laws and articles that we cite to into the LandWise library.

The footnotes throughout this guide are all hyperlinked to full-text laws, articles or other citation information. When you hover over a footnote, the citation information will pop up in a bubble. When you click on the footnote, you will be taken to the full-text of the item the footnote is referencing.

Background

Kenya's legal framework is undergoing significant changes following promulgation of a new Constitution in 2010.[1] This is particularly true in the areas of land and property rights and women's rights, which require the development of new legal frameworks that conform with the provisions of the Constitution. Relevant provisions include: a Bill of Rights recognizing the right of women to equal treatment under the law and prohibiting gender-based discrimination;[2] devolution of services, including land-related services to the county level;[3] recognition of traditional dispute resolution mechanisms;[4] a prohibition on the use of traditional dispute resolution mechanisms in a way that contravenes the Bill of Rights;[5] and, requiring legislative implementation of the principle that women make up at least one-third of the members of elected or appointed political bodies.[6] A set of land laws giving effect to the Constitution, the Land Act, Land Registration Act, and National Land Commission Act, were approved in 2012. A new set of marriage laws, the Matrimonial Property Act, 2013, and the Marriage Act, 2014, recently replaced the older framework, which included seven different marriage laws but did not include explicit provisions governing customary marriages. Other legislative reforms, including Community Land and Evictions and Resettlement Bills, are currently under development and debate.

Despite a progressive legal framework, Kenyan women's land rights continue to lag behind those of men. Customary law, which often discriminates against women and limits their land and property rights, governs at least 65% of land in Kenya, and the patriarchal nature of Kenyan society often limits the rights of even those women not living on land governed by custom.[7] Some estimates indicate that as little as 1% of land is titled in the names of women and 5-6% is titled jointly by women and men.[8]

This guide provides an overview of the formal and customary legal framework governing women's land rights in Kenya. Although this guide is not a comprehensive review of the legal and customary framework governing women's land rights in Kenya, it provides the reader with a broad assessment of the status of women's rights and challenges. Section II provides a summary of legal provisions relevant to the governance of land, including the laws on marriage, divorce, and inheritance. Section III describes the customary legal framework governing women's land and property rights, looking broadly at practices common across ethnic groups. Section IV provides a brief assessment of the overall status of women's property rights in Kenya, based on the preceding sections.

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II. Formal Legal Framework for Women's Land and Property Rights

Constitution

The Kenyan Constitution recognizes three broad categories of land – public, private, and community.[9]

Public land includes (among others) government-owned or occupied land:[10]

- The State retains the right to regulate the use of land “in the interest of defense, public safety, public order, public morality, public health, or land use planning.”[11]
- The State has the right to acquire other property for a public purpose or in the public interest provided the acquisition is carried out in accordance with the Constitution, which requires prompt and just compensation for owners as well as good-faith occupants. [12]
- Public land was called Government land in the prior constitution.

Private land consists of registered land under freehold tenure and land held under leasehold tenure:[13]

- Private land owners have absolute proprietorship and the rights of exclusion except in cases of compulsory acquisition by the Government, as outlined in sections 107-120 of the Land Act, 2012.[14]
- The right to acquire and own property is guaranteed to all Kenyans.[15]
- Women's rights to land are legally equal to those of men under Art. 27(1),[16] which provides that, “every person is equal before the law and has the right to equal protection and equal benefit of the law,” but in reality there is a significant gap between men's and women's rights to land.

Community land consists of land legally registered to a group, transferred to a community through a legal process, or declared community land by an act of Parliament, as well as lands traditionally occupied by hunter-gatherer communities, lands held, managed, or used by specific communities as “forests, grazing areas, or shrines”, and land held in trust by a county government for a specific community.[17]

The equality of women and men is enshrined in the Bill of Rights:

- Equal treatment of all persons under the law.[18]
- The right to equal treatment for women and men in the, “political, economic, cultural and social spheres.”[19] It also prohibits discrimination by the state or a person, both direct and indirect, based on a variety of factors, including race, sex, pregnancy, marital status and disability.[20]
- The Government also has a mandate to implement legislation and affirmative action programs to redress disadvantages to individuals and groups as a result of past discrimination.[21]

Any treaty or convention ratified by Kenya shall form part of the laws of Kenya.[22] This is important because the Government of Kenya has ratified a number of international conventions and treaties with non-discrimination provisions, including women's rights conventions that support women's equal rights to land, such as: the Universal Declaration on Human Rights (1948); the International Covenant on Economic, Social and Cultural Rights (ICESCR 1966); the Convention on the Elimination of All Forms of Discrimination

Against Women (CEDAW 1979); and the African Charter on Human and People's Rights (1981).[23]

The Constitution recognizes customary law, but invalidates it to the extent that it conflicts with the provisions of the Constitution, providing Kenyan women with legal protection against discriminatory customary practices:[24]

- Article 159 promotes the use of alternative forms of dispute resolution, including traditional mechanisms, but traditional dispute resolution mechanisms are prohibited from acting in a way that “(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality, or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.”[25]
- The elimination of gender discrimination in customs and practices is an explicit guiding principle in the area of land use and management.[26] Gender equity is also a guiding principle of the National Land Policy.[27]

Formal Laws Relevant to Land

The Kenyan legal framework on land is undergoing a fairly comprehensive overhaul following promulgation of the 2010 Constitution. While some laws have already been enacted, notably the Land Act, Land Registration Act, and National Land Commission Act, others, such as a Law on Community Land, are yet to be finalized. Below is a brief overview of key pieces of legislation related to land.

National Land Policy, 2009: Kenya's National Land Policy, developed through a multi-year consultative process, provides a vision to “guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity.”[28] The policy:

- Recognizes customary rights to land.[29]
- Attempts to improve efficiency in land use and management by streamlining land administration, management, and dispute resolution.[30]
- Addresses issues that require special intervention, including resolving historical injustices around land[31] and improving gender equity in land use, management, and ownership.[32] It specifically cites the need to protect women's right to inherit land,[33] protect the land rights of widows and divorcees,[34] and establish a matrimonial property framework that provides equal rights to land for men and women during marriage and upon dissolution of the marriage.[35]
- Distinguishes between married and unmarried women's inheritance rights, directing the Government to secure the inheritance rights of *unmarried* daughters.[36]

Land Act, 2012: The Land Act provides the overarching legal framework for the governance of land in Kenya, based on principles established in the Constitution. Note that Article 68(a)[37] directs Parliament to revise, consolidate and rationalize existing land laws. The National Land Policy also directs the government to enact a 'Land Act' to govern all categories of land.[38] The Land Act:

- Defines the three categories of land in Kenya (public, private, community), and establishes the framework for managing and administering public and private land.
- Leaves management of community land to a forthcoming Community Land Law.[39]
- Includes protections for the rights of landholders when their land is compulsorily acquired by the

government, and dedicates a chapter to settlement programs.[40] The identification of beneficiaries must be carried out by a sub-county selection committee which must include a women's representative elected by a local women's organization.[41]

- Defines 'marriage' as inclusive of civil, customary, and religious marriages and 'matrimonial home' as 'any property that is owned or leased by one or both spouses and occupied by the spouses as their family home'.[42]
- Requires spousal consent for the execution of any charge on a matrimonial home.[43]

Land Registration Act, 2012: The Land Registration Act provides for a unified land title registration system in Kenya.

- Provides the institutional framework for registration of all categories of land[44] and outlines the legal requirements for the acquisition and transfer of land rights.
- Includes strong protections for the land rights of spouses by allowing for joint tenancy[45] and including a presumption of joint tenancy for any land obtained for co-ownership and use by both spouses,[46] granting spouses a legal interest in land held in one spouse's name where the other has contributed to it through his or her labor,[47] and requiring spousal consent for the disposition of any land or dwelling.[48]

National Land Commission Act, 2012: The National Land Commission Act establishes the NLC, as required by the Constitution (Art. 67).[49]

- Enumerates the functions and powers of the Commission,
- Establishes standards and qualifications for membership.
- Gender equity in appointments is encouraged throughout the Act;[50] First Schedule;[51] per the Constitution, no more than two-thirds of the members of the Commission may be of the same gender.

Environment and Land Court Act, 2011: The Land and Environment Court Act gives effect to Article 162(2)(b)[52] of the Constitution which

- Establishes an Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.
- Makes provisions for the court's jurisdiction, functions and powers.

Other laws affecting land rights include the Matrimonial Property Act, 2013, which governs the ownership of property within a marriage as well as at the dissolution of a marriage, and the Law of Succession Act, which governs inheritance for all Kenyans with the exception of Muslims (discussed below).

Compulsory Acquisition

The Constitution and the Land Act set out strong protections for individual property rights and require prompt, just and full compensation for landholders subjected to compulsory acquisition of land.[53] The Act includes a broad definition of "interested parties" for the purposes of notice and compensation, including any person connected to the parcel in the land registry or occupying the land, as well as the spouses of those persons.[54]

The NLC has been charged with developing criteria and guidelines for compulsory acquisition as well as regulation on compensation.

Family Law

The Kenyan Constitution and laws do not place limits on the categories of land women can own, although customary rules in the vast majority of communities do. Women and men have equal rights in marriage;^[55] the recently enacted Matrimonial Property Act, 2013, explicitly states that married women have the same property rights as married men.^[56] This echoes the Constitution, which states that parties to a marriage are entitled to equal rights at the point of marriage, during the marriage and at dissolution of marriage.^[57] Kenya's inheritance laws do not distinguish between the rights of female and male heirs.^[58]

Shared Tenure

Kenyan law recognizes joint tenancies and tenancies-in-common, with joint tenancy only available between spouses.^[59] Under joint tenancy a surviving spouse is entitled to the entirety of the property; the Land Registration Act^[60] and Land Act^[61] provide that on the death of a joint tenant the deceased's name will simply be stricken from the register if a death certificate is produced.^[62] Property obtained during the marriage for co-ownership and use by both (or all) spouses is presumed to fall under joint tenancy, although the presumption may be rebutted with evidence the property was intended for sole ownership.^[63]

The documentation requirements for shared tenure are not yet established. The Land Registration Act requires the Cabinet Secretary to make regulations giving effect to the Act, including regulations detailing the procedures for registration of land. As of this writing, these regulations do not appear to have been developed.

The Matrimonial Property Act, 2013, establishes that the default property regime is separate property for married couples, although parties have the right to enter into an agreement regarding property rights prior to the marriage that will then apply instead.^[64] Since men are more likely to have property rights in land than women, this default regime makes it difficult for wives to gain property rights within marriage. Marital property, defined as the marital home(s), household effects and goods inside the marital home(s), and "any other immovable and movable property jointly owned and acquired during the subsistence of the marriage",^[65] is considered the property of both spouses. It is unclear if this language will be interpreted to exclude property acquired by one spouse for use by both.

Each spouse retains exclusive rights to property he or she held prior to entering the marriage, and is entitled to marital property according to his or her contribution.^[66] Under the Act, contribution refers both to monetary contributions and non-monetary contributions, including domestic work, child care, companionship, and farm work.^[67] Property acquired during the marriage and owned by and titled in the name of only one spouse would therefore remain the sole property of that spouse and not be considered part of the marital property.

There is a rebuttable presumption that when property is held jointly in the names of both spouses, their interests in the property are equal,^[68] while property held in the name of one spouse is presumed held in trust for the other.^[69] The legal effect of this trusteeship upon the death of the owner-spouse is unclear, as the Law of Succession Act limits the property rights of surviving spouses.

In polygamous marriages, marital property, as defined above, acquired prior to the second marriage is owned

equally by the husband and first wife, while property acquired subsequent to the second marriage is considered owned by the husband and both wives (and so on for subsequent marriages), taking into account each party's contribution.[70]

Importantly, the Act does not explicitly state the categories of land to which its provisions apply. It is possible that community land will be exempted from the category of matrimonial property in the forthcoming Community Land Act.

Divorce and Property Distribution

Divorce is permitted under the Marriage Act, 2014, for all types of marriages.

Kenyan law includes significant gaps when it comes to the distribution of property in cases of divorce which have been only partially filled by the Matrimonial Property Act. As a result Kenyan courts have had wide discretion in determining the appropriate division of property in divorce and succession cases. Case law has historically been conflicted owing to different understandings by judges of customary law, with which they are likely to be less familiar, as well as a range of interpretations of the term "contribution" in the context of determining spouses' proportional rights to contested property.[71]

Under the Matrimonial Property Act, 2013,[72] matrimonial property is to be divided between the spouses upon divorce or the dissolution of the marriages, but "ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition".[73] The term contribution has been clarified to mean both monetary and non-monetary contributions, including domestic work, child care and companionship, making it significantly more inclusive of the types of contributions typically made by women to the household. It remains to be seen how the courts will apply the Act, and its inclusive definition of contribution, in future divorce cases.

Marriage Regimes

Kenya recognizes five different marriage types – civil, customary, Christian, Muslim and Hindu – all of which are now governed by the Marriage Act, 2014.[74] Previously, the legal framework for marriage included seven separate laws.[75] All have been repealed by the Marriage Act, 2014, which consolidates the five marital regimes into a single law with separate Parts establishing the legal framework governing each. The Act does not make provisions for cohabiting couples in consensual unions.[76]

Several provisions of the Marriage Act apply to all marriages. The minimum age of marriage is raised to 18 for both girls and boys, in all marriage.[77] All marriages require the voluntary consent of both parties, as well as their presence at the marriage ceremony.[78]

All marriages are to be registered and have the same legal status.[79] However, while "marriage" is defined as, "the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act",[80] the legal status of unregistered marriage which would otherwise fall under the Act's jurisdiction is unclear.

Civil Marriage:

- Must be monogamous.[81]
- Notice: Parties are required to provide notice of their intention to marry to the Registrar 21 days to three months prior to the marriage.[82]
- Officiating: Celebrated in front of a Registrar, who completes and signs the marriage certificate, acquires

the signatures of the parties, and provides copies to the parties and the Registry.[83]

- **Dissolution:** Either party can petition the court to dissolve the marriage on the grounds of adultery, cruelty, exceptional depravity, desertion or irretrievable breakdown of the marriage, provided at least three years have passed since the celebration of the marriage.[84]

Customary Marriage: Customary marriages were previously recognized as valid but were, for the most part, not governed by formal law but rather by the laws of the specific community, which remain un-codified.[85] The Marriage Act, 2014, brings customary marriages into the formal legal framework, although it preserves their customary nature.

- Presumed to be polygamous or potentially polygamous.[86] Note that polygamy refers to a man having multiple simultaneous wives.[87] No legal limit to the number of wives a man may have.
 - o A polygamous or potentially polygamous marriage may be converted into a monogamous marriage upon the voluntary declaration of both parties in the presence of a marriage officer, provided there are only two parties to the marriage at the time of the declaration.[88]
- **Notice:** Notice of a customary marriage must be provided to the Registrar within three months of the completion of relevant ceremonies and/or steps.[89]
- **Officiating:** Marriages to be celebrated in accordance with the customs of either or both parties.[90]
 - o Where customary practices include payment of dowry, payment of a token amount is sufficient to fulfill the requirement for the purposes of the Act.[91]
- **Registration:** Parties to a customary marriage must apply to the Registrar within six months of their marriage and must both appear before the Registrar in person to be issued a marriage certificate.[92] Existing customary marriages must be registered within three years of the Marriage Act coming into force,[93] an ambitious goal that will require significant effort to achieve.
- Section 8 of the Matrimonial Property Act defines land and property rights within a polygamous marriage, although the Act explicitly excludes Muslim marriages and therefore applies only to customary marriages.[94]
- **Dissolution:** Either party may petition the court to dissolve the marriage on the grounds of adultery, cruelty, desertion, exceptional depravity, irretrievable breakdown of the marriage,[95] or any valid ground for dissolution under the party's customary laws.[96]

Christian Marriage:

- Refers to marriages where a party professes the Christian religion.[97]
- Must be monogamous.[98]
- **Notice:** It is unclear if the notice requirement for civil marriages (21 days to three months in advance) also applies to Christian marriages.[99]
- **Officiating:** Celebrated by a marriage officer – a church minister licensed by the Registrar – who is charged with completing the marriage certificate and issuing copies to the parties and the Registrar.[100]
- **Dissolution:** Either party may petition the court for dissolution of a Christian marriage on the ground of adultery, cruelty, desertion, exceptional depravity, or the irretrievable breakdown of the marriage.[101]

Hindu Marriage:

- Applies only to persons who profess the Hindu faith,^[102] although the interpretations section defines a Hindu as “(a) a Hindu by religion in any form (including...); (b) a Buddhist of Indian origin; or a Jain or Sikh by religion.”^[103]
- Must be monogamous.^[104]
- **Officiating:** Officiated by a person authorized by the Registrar in accordance with the Hindu rituals of a party to the marriage.^[105]
- **Registration:** Parties to an existing but previously unregistered Hindu marriage are directed to register the marriage within three years of the enactment of the Marriage Act.^[106]
- **Dissolution:** Either party may petition the court to dissolve the marriage on the grounds of irretrievable breakdown, desertion, cruelty, exceptional depravity, adultery, or conversion to another religion.^[107]

Muslim Marriage:

- Applies only to persons who profess the Islamic faith.^[108] It is unclear if the provisions of this Part apply when either party is Muslim, or only when both parties profess the Islamic faith.
- Although the Act does not specify a limit to the number of wives a Muslim man may have, it is assumed that the Islamic limit of four wives applies to Muslim marriages in Kenya.
- **Officiating:** Officiated by a kadhi, sheikh, or imam authorized by the Registrar, who is charged with recording the details of the marriage, completing the marriage certificate and delivering the record and certificate to the parties and the Registrar.^[109]
- **Registration:** Parties to an existing but previously unregistered Muslim marriage are directed to apply to the Registry within three years of the enactment of the Marriage Act.^[110]
- Property rights within a polygamous Muslim marriage are governed by Islamic law.^[111]
- Any provisions of the Marriage Act which are inconsistent with Islamic law and practices do not apply to Muslims.^[112] This provision raises questions as to the applicability of the minimum marriage age and other general marriage requirements to Kenyan Muslims.

Succession

Inheritance rights for Muslims are governed by Islamic law.^[113] Kadhis' Courts retain jurisdiction over the estates of deceased Muslims for the purposes of determining issues of Islamic law.^[114] Inheritance for all non-Muslim Kenyans falls under the jurisdiction of the Law of Succession Act (1981).^[115]

The Succession Act exempts agricultural land and livestock in 12 specified districts (now counties) from its rules.^[116] In those areas, located in the Rift Valley, Eastern and Coastal Kenya, succession is determined by the laws and customs of the deceased's community.^[117]

The Law of Succession Act makes provisions for testamentary and intestate succession, and allows certain dependents - including wives, former wives, children of the deceased, and other family members and household members who had been financially maintained by the deceased immediately prior to his death - to apply for an additional portion of the estate if what they receive is unreasonable.^[118] Where the deceased is a woman, her surviving husband is considered a dependent entitled to apply for an additional portion of the estate only if he was financially maintained by her immediately prior to her death.^[119]

Where the deceased leaves a surviving spouse and children, the spouse is entitled to personal and household effects, and retains a life interest in the residual estate.^[120] In the case of a widow, the life interest expires upon

her remarriage,^[121] and devolves to the children in equal shares.^[122] Note that a widower's life interest is not affected by his remarriage. During the existence of the life interest, the surviving spouse may only sell immovable property with the consent of the court.^[123]

Where the deceased leaves a surviving spouse but no children, the spouse is entitled to “(a) the personal and household effects of the deceased absolutely; and (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and (c) a life interest in the whole of the remainder,” although the life interest of a widow terminates upon her remarriage.^[124] During the existence of the life interest, the surviving spouse may only sell immovable property with the consent of the court.^[125]

Where the deceased has surviving children but no surviving spouse the net estate devolves to the children, in equal shares.^[126] Daughters who marry under the age of majority (18 years) receive their portion of the net intestate estate upon their marriage, while sons and unmarried daughters will not receive their share until they reach the age of majority.^[127] Note that under the Marriage Act, marriages prior to age 18 are prohibited.^[128]

Where the deceased had multiple spouses, his estate is to be divided among the wives' households according to the number of children in each.^[129] Each widow is also included in the household count, ensuring that widows without children are left with some portion of the estate.^[130] Succession within each household then follows the rules described above.^[131]

The High Court hears disputes over inheritance unless the amount of the estate is less than one hundred thousand shillings.^[132] Appeals of orders and decrees by resident magistrates or, in the case of Muslims, the Kadhis' Court are heard by the High Court, with the Court of Appeals determining any questions of Islamic law.^[133]

Enforcement of Formal Law

(See Section III for a discussion of women's ability to enforce land and property rights within the customary system.)

The formal courts have jurisdiction to hear divorce cases, as well as property and land rights cases, but the Constitution encourages the settlement of land disputes at the local level to the extent possible.^[134]

Specialized divisions have been established within the High Court, including a family division, which may be a positive development in the promotion of gender-based considerations in family law cases. However, a critical issue is the representation of women on the bench and within other land institutions. The National Land Policy notes that women are insufficiently represented in institutions dealing with land and directs the Kenyan government to ensure the proportionate representation of women in land institutions at all levels.^[135] This issue is also recognized in the 2010 Constitution, which confirms the principle of the elimination of gender discrimination in law, customs and practices related to land^[136] and requires implementation of the principle that no more than two-thirds of the members of elective or appointive public bodies be of the same gender.^[137]

III. Customary Framework for Women's Land and Property Rights in Kenya

Customary Land Tenure in Formal Law

Customary tenure and community rights to land are legally recognized in Kenya, including in the 2010 Constitution,^[138] but the nature and scope of these rights has not yet been defined in formal law. The forthcoming community land legislation is expected to establish the legal framework governing communal land rights. There are also efforts on the part of the Judiciary to document customary laws and rules for individual communities, although these efforts are still in early stages.

Customary rules and laws are recognized in Kenyan legislation, but the Constitution invalidates them to the extent that they are inconsistent with its provisions.^[139] This provision is critical given a history in which Kenyan courts often ruled on matters involving customary law without regard to the principle of gender equality, to the disadvantage of women living under customary law. The Constitution also explicitly states that the elimination of gender discrimination in laws, customs and practices related to land and property in land is a guiding principle of land management.^[140] However, according to some estimates only 5% of land in Kenya is registered jointly in the names of women and men and just 1% is registered solely in the names of women.^[141] Ongoing reforms, including the implementation and enforcement of the Constitution's gender equity provisions and the development of progressive property, marriage, and succession legislation, have the potential to affect change long-term, but at present women's customary rights to property in Kenya remain severely limited.^[142]

There is significant interaction between the formal and customary systems in Kenya, although the relationship remains only vaguely defined in law, including in the recently enacted land legislation.^[143] The gaps between formal and customary law are often where women's rights are undermined.

Formal courts have had, and continue to have, jurisdiction over customary marriages, divorces and succession.^[144] In practice though, few Kenyan women take disputes over their land rights to formal courts.^[145] This may be due to the costly, lengthy and time-consuming legal process involved.

Customary Land Tenure

This section presents an overview of customary land tenure systems in Kenya.

Customary land tenure systems in Kenya fall into three main categories: community, clan- and family-based, and individual.^[146] Land rights are most often acquired by individuals and households through intergenerational succession, even where the individual or household has only a use right to the land.^[147] In family or clan-based systems, there is a central household head or family elder who holds the land on behalf of other family members, who have individual use rights which grant them a significant amount of freedom to use and, in some instances, transfer the land on a seasonal basis, but cannot permanently alienate the land.^[148]

Approximately 65-70% of land in Kenya is estimated to fall under the category of "community land",^[149] defined broadly by the National Land Policy to include a variety of customary tenure rights.^[150] This includes clan land, group ranches, communal grazing lands, and community forests. Each of Kenya's 42 tribes has its own governance structure and customary rules which govern access to and use of these lands. These customary rules and structures often exclude women from rights to land that are available to men and from community-

level decision making on land and property rights. In a report to CEDAW, the government reportedly explained, “the area in which most customary laws disadvantage women is in respect of property rights and inheritance.”^[151]

Women are frequently disadvantaged even where customary land is held by individual households. The man is traditionally considered the head of household and “owner” of the family’s land and women are often excluded from decision-making around the household’s allocation, management, and use of land the proceeds from it.^[152] Given that women’s rights tend to be relationship-based, a woman’s autonomy with regard to land rights improves with the strength of her relationship with her husband, father, or other male relative.

Legitimacy of WLR under Custom

In general, under customary laws in Kenya independent land rights for women are not culturally legitimate. A number of different norms and rules related to marriage and succession show that a woman’s land rights depend on a relationship with a male. For instance, nearly all communities in Kenya are patrilineal,^[153] meaning lineage is determined through the male blood line and women rarely inherit customary land rights from their husbands or fathers. Women’s rights to land are generally considered secondary to those of men, as they rely on a relationship with a male who has the primary rights.

[A]mong various Kenyan communities, women do not traditionally own land or other immovable properties. At best, they have usufruct rights, which are hinged on the nature of the relationship obtaining between them and men either as husbands, fathers, brothers or such other male relatives.^[154]

This is also evident in various customary rules around the land rights of women as wives and daughters. In many communities, if a man dies and leaves behind only daughters his property reverts to his father or other male family members and is essentially treated as if he had no children.^[155] Similarly, a woman who is married is often also not considered part of her husband’s lineage.^[156] This is shown by the practice of some communities of levirate, or wife inheritance, in which a widow must marry the brother or another male relative of her deceased husband to maintain access to her marital home and other resources.^[157] At the same time, once married, women can rarely return to land in the natal community.

Marriage Practices

Customary marriages follow the rules and practices of the specific community; each of Kenya’s forty-two tribes is governed by its own customary laws, although there are significant similarities across communities.^[158]

Most marriage practices are patrilocal, meaning the wife leaves her family and relocates to her husband’s community upon marriage.^[159]

Bride price is commonly paid among almost all ethnic groups and is often a requirement for the formalization of a customary marriage.^[160] The price is usually negotiated by the parents of the bride and groom, often taking the form of livestock or cash paid to the bride or her family. Although recent news reports indicate that the price demanded has climbed higher than most can afford, a 2012 proposal to ban the practice was extremely controversial and ultimately failed.^[161] The Marriage Act, 2014, recognizes the practice of paying bride price, but a token amount is considered sufficient to prove a customary marriage where the custom of the parties

requires a dowry or bride price payment.[162] Many argue that the practice cannot be obliterated, even if outlawed, and the result of doing so may in fact mean doing away with customary marriage completely.

Polygamy is practiced among many Kenyan ethnic groups and there is no universal limit to the number of customary wives a man may legally have.[163]

Woman-to-woman marriages are practiced by some ethnic groups, including the Kalenjin, Kuria, and Kamba, although the practice has been dying out.[164] The non-sexual arrangement typically involves an older woman who has been unable to have children taking on the role of ‘husband’ to a younger woman, who is encouraged to take a male sexual partner from the older woman’s clan and have children who are then regarded as the offspring of the marriage.[165] The practice allows the older woman to propagate her family line and maintain property within the family, and highlights the importance of lineage to the transfer of land rights under customary law in many parts of Kenya.

Divorce under customary law typically involves clan or family elders, in large part because the marriage is seen as a union between clans or families, not just the individual parties. Wives are not usually entitled to maintenance upon separation or divorce, and rarely receive a share of their husband’s property.[166] In addition, the refund of the dowry paid characterizes divorce in many ethnic groups in Kenya and those unable to return the dowry are often forced to stay in their unions despite wanting to dissolve them. This is based in part on a perception of dowry as “buying” a wife, which can reduce her to property in the eyes of the community and her husband.

Widows' Rights

Widows’ land rights are dependent on a variety of factors, including age, number of children, and the widow’s relationship with the deceased’s family, and are often insecure under customary law due to her status as outsider to the family lineage.

Example: Widows are seen as stewards of the land for their sons and are limited in what they can do with inherited land. Because inheritance is meant to secure their sons’ inheritance and ensure that the patrilineage persists, it is not for the widows’ own benefit, since as replicated in the Law of Succession Act noted above, widows receive a life estate and their interest terminates upon death. After a widow dies, land goes to any sons or returns to the patrilineage. In some areas, widows can be seen as holding land in trust for their sons until a designated age. When sons take over, a widow may remain securely on the land, but if there are no boys, her position is tenuous since she lacks a link to the patrilineage.[167] As noted above, many communities practice wife inheritance, which would allow the widow to retain her marital property by marrying a male relative of the deceased. In addition, some communities practice widow cleansing, in which the widow must have sex with a social outcast paid to ‘cleans’ her in order to stay in her marital home.[168] Both practices require women to submit to unwanted sexual relationships to retain property rights to which they should otherwise be entitled.

The likelihood a widow will inherit any part of her deceased husband’s land and other property is influenced by factors that include her age, whether she has borne children and the gender of those children, and her general relationship with the husband’s family, among other variables.

Example: In a study on land rights in western Kenya[169] it was found that individual women’s specific qualities are perceived to be significant to women’s vulnerability to land expropriation. A childless widow, and more specifically a widow who does not have a son or sons, is locally perceived as particularly vulnerable in

retaining a claim to family land under customary law. A woman of 'bad character', which might include accusations of practicing witchcraft, being sexually promiscuous, drinking alcohol or being rude or stubborn, particularly towards in-laws, is also perceived as vulnerable.

A community study in western Kenya^[170] found that young widows are more vulnerable than older widows in terms of land tenure security, probably because young widows had less time to secure their relationships among their in-laws. All these point to a need to closely examine local contexts of customary governance and community dynamics, including the attitudes and roles of specific local leaders, to understand the kinds of opportunities and challenges individuals face in securing their inheritance.^[171]

Children's Inheritance under Custom

As discussed above, daughters are often considered impermanent members of their natal family and are often excluded from inheritance of land and other property as a result.

Just as widows are not considered firm members of a patrilineage, daughters are perceived as transients in natal families, as there is an underlying presumption and expectation that they will eventually marry out of the lineage. Daughters thus have great difficulty accessing land through inheritance, since marriage would transfer their lands outside the natal holdings into their husband's.^[172]

The marital status of a daughter may have an effect on her right to access and use family land; although unlikely to gain ownership or control over land, unmarried daughters are more likely to be granted use rights to land in their natal home. This distinction is recognized in the National Land Policy, which directs the Government to secure the inheritance rights of unmarried daughters.^[173]

Example: Daughters may be treated differently depending on their marital status and circumstances, though these distinctions are not always made. As a result, unmarried daughters are more likely to inherit land than married. In the few cases where it is permitted, formal titles usually remain with a male (brother or father) to ensure land stays fixed to the patrilineage. These daughters can grow crops on the land but cannot sell it. Brothers almost never permit married daughters to inherit land because their inheritance directly diminishes their brothers' access to patrilineal lands for themselves and their sons. Married women are not considered part of their natal family; married daughters may not even bother attempting to return and claim inheritance, since their exclusion is seen as traditional^{||} and impossible to overcome. The only possibility for married daughters to obtain land is when their father specifically wills it to them or gifts it to them before his death, though even here, brothers still often interfere.^[174]

Enforcement of Customary Law

Though the formal courts can resolve land disputes, traditional leaders such as elders and local Government-appointed chiefs are often the first place people go to resolve a dispute over customary land, and these positions are overwhelmingly held by men.^[175] The use of local mechanisms to resolve land-related disputes is strongly encouraged by the Constitution,^[176] which also prohibits gender discrimination in law and customs related to land and property.^[177]

The cost and complexity of filing a formal court case serve as significant deterrents for women whose land rights have been violated, although another, possibly greater, deterrent appears to be the potential for negative, and potentially violent, responses by the person or people violating her rights as well as the community at large.[178] Even a basic succession petition requires significant resources to complete and may lead to significant conflict within the family.

It is often seen as disruptive and disrespectful for a woman to initiate a court proceeding to enforce her rights, and in one report interviewers found many respondents who claimed that communities are often “infuriated” when someone goes to court, particularly when the petitioner is a woman.[179]

To avoid these challenges, and preserve household peace and harmony, most women avoid the courts, choosing instead to deal with violations of their property rights through informal channels. They may first approach family elders to resolve a dispute; a married woman will usually approach her in-laws while an unmarried woman will approach her natal family elders.[180] These elders traditionally bring the disputants and the family together to discuss the dispute before arriving at a resolution to the problem.[181] However, as women’s land disputes are often with other family members (e.g., with brothers who claim their sisters’ inheritance or in-laws who have evicted a widow) women are often unable to secure a resolution in their favor.[182] In some communities, cultural practices that do not allow women to appear before the elders result in a woman’s case being discussed in her absence. They can also suffer harassment and violence for complaining about the violation at all, in addition to losing their family support network. As a result, many women do not bring their grievances to the formal or customary dispute resolution mechanisms, even though they may have a valid claim.[183]

Example: [T]he number of steps and the complexity of the paperwork required to file a succession claim are a substantial procedural impediment. There are a total of 17 different legal steps to complete; at least 13 forms to fill out; numerous affidavits that require a lawyer, a number of which must also include the signatures of sureties to back a claimant who must be identified and brought to the lawyer; and multiple locations to visit. There is also an approximate time frame for succession proceedings of seven months to one year. Obtaining the most basic of documents—for example, a death certificate—can lead to further intrafamily struggles. Intricately related to the number of steps are the significant costs involved, including for filing a case, administration fees, hiring a lawyer, or carrying out an official survey. Respondents noted that only women with the necessary monetary resources can fight a land dispute. A formal succession claim can cost over KSh 60,000 (approximately \$780)—even more if there is another claimant and it becomes adversarial.[184]

IV. Conclusion

Conclusion

Although Kenya’s legal framework is progressive in its support of women’s land rights, patriarchal social and customary norms continue to limit women’s ability to exercise and enforce their rights to land and other property. Significant efforts will be needed to ensure that provisions of the Constitution and other laws guaranteeing gender equality are implemented across the country, including by traditional dispute resolution mechanisms.

Women are particularly vulnerable in cases of divorce, as the legal framework governing property rights upon dissolution of a marriage has historically been vague and contained gaps that made it difficult, if not impossible, for most women to assert their property rights following a divorce. The Matrimonial Property Act provides

some clarity on issues of spousal property rights, in particular by providing a definition of the term “contribution” that includes domestic work and child care, but it remains to be seen how courts will interpret and apply the Act.

Women are also vulnerable in terms of inheritance of land and property. Customary practices generally grant women secondary rights to land that are dependent on their relationships with men, such as their fathers, husbands, or brothers. Under most traditions, women rarely inherit land. This disenfranchisement continues to occur, in spite of the Law of Succession Act’s intestate provisions treating daughters and sons equally. Further, the Succession Act and Matrimonial Property Act allow for the exclusion of inherited customary or ancestral land from matrimonial property, continuing to propagate the trend of male-dominated land ownership. Last minute amendments to the Matrimonial Property Act, requiring spouses to demonstrate contribution to matrimonial property, and the legalization of polygamy without the consent of the first wife in the Marriage Act, indicate that forthcoming laws may be less supportive of women’s land and property rights than intended under the Constitution. However, the legal framework established in the Constitution provides strong support for individuals and organizations seeking to challenge gender-discriminatory aspects of the laws.

V. Endnotes & Citations

Endnotes & Citations

¹ The Constitution of Kenya (2010).

² *Id.* at Art. 27.

³ *Id.* at art. 7.

⁴ *Id.* at art. 67(2)(f) and art. 159 (2)(c).

⁵ *Id.* at art. 159(3)(c).

⁶ *Id.* at art. 27(8).

⁷ FIDA Kenya, Women's Land and Property Rights in Kenya (2009) [hereinafter Women's Land].

⁸ *Id.*

⁹ Const., *supra* note 1, at art. 61(2).

¹⁰ *Id.* at art. 62(1).

¹¹ *Id.* at art. 66(1).

¹² *Id.* at art. 40(3).

¹³ *Id.* at art. 64.

¹⁴ The Land Act (2012)(Kenya) at § 107-120.

¹⁵ Const., *supra* note 1, at art. 40(1).

¹⁶ Id. at art. 27(1).

¹⁷ Id. at art. 63(2).

¹⁸ Const., *supra* note 1 at art. 27(1).

¹⁹ Id. at art. 27(3).

²⁰ Id. at art. 27(4).

²¹ Id. at art. 27(6).

²² Id. at art. 2(6).

²³ Each declaration protects women's property rights to some extent, but language and interpretations vary.

²⁴ Const., *supra* note 1, at art. 2(4).

²⁵ Id. at art. 159(3).

²⁶ Id. at art. 60(1)(f).

²⁷ National Land Policy (2009)(Kenya) at para. 7(c).

²⁸ Id. at ix.

²⁹ Id. at § 63-66.

³⁰ Id. at § 5.

³¹ Id. at § 178-179.

³² Id. at § 223.

³³ Id. at § 223(c).

³⁴ Id. at § 225(c).

³⁵ Id. at § 225(d).

³⁶ Id. at § 223(e).

³⁷ Const., *supra* note 1 at art. 68(a).

³⁸ Land Act, *supra* note 14 at § 58; § 62-63; § 66; § 152; and § 183.

³⁹ *Id.* at § 37.

⁴⁰ *Id.* at § 107-135.

⁴¹ *Id.* at § 134(4).

⁴² *Id.* at § 2.

⁴³ *Id.* at § 79(3).

⁴⁴ Land Registration Act (2012)(Kenya) at § 3.

⁴⁵ *Id.* at § 91(8); § 92.

⁴⁶ *Id.* at § 93(1).

⁴⁷ *Id.* at § 93(2).

⁴⁸ *Id.* at § 93(3).

⁴⁹ Const., *supra* note 1, at art. 67.

⁵⁰ National Land Commission Act (2012)(Kenya) at § 18(6).

⁵¹ *Id.* at § 1(d, g); § 12.

⁵² Const., *supra* note 1, at art. 162 (2)(b)

⁵³ Const., *supra* note 1, at art. 40 and Land Act, *supra* note 14, at § 111.

⁵⁴ Land Act, *supra* note 14, at § 107(7).

⁵⁵ Although as stated above, the National Land Policy distinguishes between the inheritance rights of married and unmarried daughters.

⁵⁶ The Matrimonial Property Act (2013)(Kenya) § 4.

⁵⁷ Const., *supra* note 1, at art. 45(3).

⁵⁸ Law of Succession Act (1981)(Kenya).

⁵⁹ Land Registration Act (2012)(Kenya) at § 91(8).

⁶⁰ *Id.* at § 60; at § 91(4).

⁶¹ Land Act, *supra* note 14, at § 49.

⁶² Land Registration Act, *supra* note 44, at § 60.

⁶³ *Id.* at § 93(1)(a).

⁶⁴ The Matrimonial Property Act *supra* note 56, at § 6(3).

⁶⁵ *Id.* at § 6(1).

⁶⁶ *Id.* at § 6; § 7.

⁶⁷ *Id.* at § 2.

⁶⁸ *Id.* at § 14(b).

⁶⁹ *Id.* at § 14(a).

⁷⁰ Law of Succession Act *supra* note 58, at § 8.

⁷¹ Women's Land, *supra* note 7.

⁷² The Matrimonial Property Act *supra* note 56.

⁷³ *Id.* at § 7.

⁷⁴ Marriage Act (2014) (Kenya).

⁷⁵ Marriage Act, *supra* note 74 at Cap 150; African Christian Marriage and Divorce Act at Cap 151; Matrimonial Causes Act at Cap 152; Subordinate Court (Separation and Maintenance) Act at Cap 153; Marriage and Divorce Registration Act at Cap 155, Mohammedan Marriage Divorce and Succession Act at Cap 156; and Hindu Marriage and Divorce Act at Cap 157.

⁷⁶ Marriage Act *supra* note 74 at § 2.

⁷⁷ *Id.* at § 4.

⁷⁸ *Id.* at § 11(e); § 11(f).

⁷⁹ *Id.* at §3(3).

⁸⁰ *Id.* at § 3(1).

⁸¹ *Id.* at § 6(2).

⁸² *Id.* at § 25.

⁸³ *Id.* at § 35.

⁸⁴ Section 66(6) of the Marriage Act, *supra* note 74, provides a list of conditions under which a marriage may be considered irretrievably broken down.

⁸⁵ UN Habitat, Rights and Realities: Are Women’s Equal Rights to Land, Housing and Property Implemented in East Africa? (2002) [hereinafter *Rights and Realities*]. See section III for a detailed discussion of customary practices.

⁸⁶ Marriage Act, *supra* note 74 at §6(3)

⁸⁷ *Id.* at § 2, “polygamy.”

⁸⁸ *Id.* at § 8.

⁸⁹ *Id.* at § 44-45.

⁹⁰ *Id.* at §43(1).

⁹¹ *Id.* at § 43(2).

⁹² *Id.* at § 55(1).

⁹³ *Id.* at § 96(2-3).

⁹⁴ *Id.* at § 8.

⁹⁵ Section 66(6) of the Marriage Act, *supra* note 74, provides a list of conditions under which a marriage may be considered irretrievably broken down.

⁹⁶ *Id.* at § 69(1).

⁹⁷ *Id.* at § 17.

⁹⁸ *Id.* at § 6(2).

⁹⁹ *Id.* at § 19; §25-26.

¹⁰⁰ *Id.* at § 18; § 21.

¹⁰¹ *Id.* at § 65.

¹⁰² *Id.* at §46.

¹⁰³ *Id.* at § 2.

¹⁰⁴ *Id.* at § 6(2).

¹⁰⁵ *Id.* at § 47(1).

¹⁰⁶ *Id.* at § 96(2).

¹⁰⁷ *Id.* at § 70.

¹⁰⁸ *Id.* at § 48.

¹⁰⁹ Marriage Act, *supra* note 74 at § 49; § 57.

¹¹⁰ *Id.* at § 96(2).

¹¹¹ Matrimonial Property Act, *supra* note 56 at § 3.

¹¹² Marriage Act, *supra* note 74, at sec 49(3).

¹¹³ Law of Succession Act (2010)(Kenya) § 2(3).

¹¹⁴ *Id.* at § 48(2).

¹¹⁵ Law of Succession Act, *supra* note 58.

¹¹⁶ *Id.* at § 32.

¹¹⁷ *Id.* at § 33.

¹¹⁸ *Id.* at § 29.

¹¹⁹ *Id.* at § 29.

¹²⁰ *Id.* at § 35(1).

¹²¹ *Id.* at § 35(1)(b).

¹²² *Id.* at § 35(5).

¹²³ *Id.* at § 37.

¹²⁴ *Id.* at § 36(1).

¹²⁵ *Id.* at § 37.

¹²⁶ *Id.* at § 38.

¹²⁷ *Id.* at § 41.

¹²⁸ Marriage Act, *supra* note 74, at §11(1(a)).

¹²⁹ *Id.* at § 40.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Law of Succession Act, *supra* note 58 at §47; §50.

¹³³ *Id.* at § 50.

¹³⁴ Const., *supra* note 1, at art. 60(1(g))

¹³⁵ Land Policy, *supra* note 27, at para. 223; para. 225(h)

¹³⁶ Const., *supra* note 1, at art.60(1(f)).

¹³⁷ *Id.* at art. 27(8).

¹³⁸ *Id.* at art. 63.

¹³⁹ *Id.* at art. 2(4).

¹⁴⁰ *Id.* art. 60(1(f)).

¹⁴¹ Women's Land, *supra* note 7.

¹⁴² *Id.*

¹⁴³ USAID, Kenya Secure Project: Analysis of Kenya's Land Act, Land Registration Act, and National Land Commission Act. (2012) [hereinafter Secure Project].

¹⁴⁴ Law of Succession Act, *supra* note 58; Matrimonial Property Act, *supra* note 56.

¹⁴⁵ *See* Women's Land, *supra* note 7; C. Harrington and T. Chopra. Arguing Traditions: Denying Kenya's Women Access to Land Rights, Justice for the Poor Research Report- The World Bank (2010) [hereinafter Denying].

¹⁴⁶ C. Harrington. Women's Access to Land and Property Rights: A Review of Literature, Justice for the Poor/Kenya Report-The World Bank (2008) [hereinafter Women's Access].

¹⁴⁷ *Id.*

148 *Id.*

149 USAID Property Rights and Resource Governance Profile: Kenya (2010).

150 National Land Policy, supra note 27, at § 63-64.

151 *See Women's Land, supra note 7.*

152 P. Kameri-Mbote. The Land Has its Owners! Gender Issues in Land Tenure Under Customary Law, UNDP-International Land Coalition Workshop: Land Rights for African Development: From Knowledge to Action (2005) [hereinafter Owners] ; and see Women's Land, supra note 7 and Women's Access, supra note 147

153 *See Denying, supra note 145.*

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155 *See Women's Access, supra note 146.*

156 *Id.*

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167 *Denying, supra note 145.*

168 Double Standards, supra note 157.

¹⁶⁹ Elin Henrysson & Sandra F. Joireman, on the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya., 43 L. & Soc'y Rev.(2009).

¹⁷⁰ Michael Aliber et al., The Impact of HIV/AIDS on Land Rights – Case Studies from Kenya. (Human Sci. Research Council Publisher 2011).

¹⁷¹ Chronic Poverty Research Centre. Challenges and Opportunities in Inheritance Rights in Kenya. (2011) at 5.

¹⁷² *See Denying, supra* note 145 at 7.

¹⁷³ National Land Policy, supra note 27, at § 223(e)

¹⁷⁴ *See Denying, supra* note 145 at 7-8.

¹⁷⁵ *See Double Standards, supra* note 157; *See Denying, supra* note 145.

¹⁷⁶ Const., supra note 1, at art. 60(1(g)).

¹⁷⁷ *Id.* at art. 60(1(f)).

¹⁷⁸ *See Denying, supra* note 145.

¹⁷⁹ *Id.* at 15.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 16.

