

## Challenges and opportunities in inheritance rights in Kenya

### Summary

- Several cultural groups in Kenya claim customary inheritance practices that favour males over females and Kenya's Constitution allows customary laws to apply to matters of personal law, including property devolution. There is ongoing debate over removing this recognition in favour of a blanket principle of non-discrimination.
- Kenya's courts have ruled inconsistently on women's rights to inherit as a result of opposing principles in the Constitution's recognition of customary law and the provisions of the Succession Law. In the absence of legal reform, inconsistencies in the application of laws are expected to continue.
- Policy debates regarding the property and inheritance rights of women in cohabiting unions (unregistered and often customary marriages) continue to divide the public, politicians, and religious and other civil society groups.
- Land titles in Kenya are often solely held by men. Legal and administrative reform and oversight is required to protect multiple individuals' interests in land holdings and therefore future inheritance claims.
- Inheritance disputes are commonly arbitrated by local leaders and corruption is a major risk to the assurance of fair hearings. Procedural partnerships with local leaders and close monitoring of decentralised administrative practices are necessary to protect against corrupt and biased practices of inheritance adjudication.

### Introduction

Inheritance is a major means for the transfer, or exclusion from the transfer, of people's accumulated physical capital. The transfer of physical assets from the parent to the child generation can provide the start-up material for the younger generation's more independent future livelihoods and economic productivity (Fafchamps and Quisumbing, 2005). However, exclusion from assets inheritance can exacerbate vulnerability to chronic poverty and the intergenerational transmission of poverty (Bird *et al.*, 2004).

In some countries, inheritance laws and customary practices can exclude individuals, and specifically women and orphaned children, from inheriting the property (including land,

housing and other productive resources) that they had access to while their husbands or fathers were alive (see Cooper, 2008 and 2010). This has been linked to economic decline and poverty traps (Bird *et al.*, 2004; Human Rights Watch, 2003; Strickland, 2004). Reforming statutory and customary systems can address gender discrimination in inheritance practices (Benschop and Sait, 2006; Bird *et al.*, 2004; Davies, 2005; Mutangadura, 2004; Rose, 2006). This is happening in many Sub-Saharan African countries, with several states recently amending their statutory laws, and rights-based organisations taking various initiatives to improve equity in inheritance practice. Nevertheless, much remains to be done to



address the links between inheritance rights and practices and poverty.

This Policy Note presents findings from a five country study commissioned by the Chronic Poverty Research Centre, which explored how inheritance is practised to enhance or prevent socio-economic equity and opportunities. Policy Notes for Uganda, Mozambique, Rwanda and Ghana, a working paper and a policy brief of key cross-cutting themes are available at: <http://www.chronicpoverty.org/publications/details/challenges-and-opportunities-in-african-societies>. Data were collected through

interviews with representatives of governmental and non-governmental agencies working specifically on issues related to inheritance and property rights, as well as a review of research and policy literature.

Who is included and excluded from inheriting particular assets depends on legal property rights, as well as cultural norms concerning social roles and relationships. This Policy Note addresses how Kenyan law currently affects property inheritance, the challenges and opportunities in existing law reform, and the issues surrounding how inheritance is governed and practised in people's lives in Kenya.

### **Box 1: Background on Kenya**

Kenya has a population of over 39 million people, of whom 22 percent live in urban centres. It gained independence from Great Britain in 1963 and was governed as a de facto one-party state until 1992 when multi-party politics was introduced. The most recent national election in 2007 was marred by vote rigging in favour of the incumbent president and post-election violence. While a peace accord and coalition government were brokered, tensions and political divisions remain high as the constitutional review process continues and campaigns ramp up for the 2012 national elections.



Kenya's GDP per capita in 2009 was an estimated USD 1,600, but over half of the Kenyan population live below the national poverty line. Approximately eight percent of the adult population (15-49 years) is infected with HIV, with higher rates in some regional populations. Repeated droughts have affected food security, and emergency food aid was provided to over four million Kenyans in 2009. Official Development Assistance to Kenya has declined since the 1990s mainly due to donors' objecting to endemic corruption.

## **Opportunities and challenges in policy**

Several legislative and judicial systems in Kenya have been widely criticised to contain propensities to gender discrimination. While the Kenyan Law Reform Commission has repeatedly drafted legislation to establish women's equal rights to property, including matrimonial and heritable property, Kenyan parliaments have consistently failed to pass pertinent laws.

The role of customary law within the Kenyan legal system is delineated in the Judicature Act (1967) which states that 'African customary law' shall govern in 'civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law...'. The 'repugnancy' exception to the application of customary law has been the focus of many high profile legal disputes concerning Kenyan women's property and inheritance rights, but the judiciary has been inconsistent in establishing how

customary law is applied, as discussed further below. These inconsistencies reflect the troubling lack of clarity persistent in Kenya's pluralist legal system.

### **Constitution of Kenya**

In Kenya, the Constitution supersedes any other law; however, constitutional reform, which has been promised by national governments since the 1997 elections, has been highly contentious. In 2005, the draft constitution was defeated in a national referendum as a result of a divide between the government and the populace. After post-election violence in 2007-08, a brokered peace accord made constitutional reform a priority. A proposed constitution was approved by a national referendum in August 2010. However, parliamentarians now face the challenges in passing nearly fifty pieces of supporting legislation which address contentious



issues such as land reform and devolution of state powers.

Among the proposed amendments to the current constitution is the removal of Section 82(4), which states that the customary law of an individual's particular race or tribe is to be applied in cases of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. This section has been referred to as a 'claw back clause', as it allows exceptions to the principle of non-discrimination and equality under the law. Among the reasons cited in opposition to the removal of Section 82 is fear that daughters would be allowed to inherit land which may enable their husbands, who may come from other clans or ethnic groups, to control the traditional land of their wife's family or ethnic group.

## Law of Succession Act (1981)

Kenya's Law of Succession outlines equal inheritance rights for women and men, girls and boys. The court can apply this provision if there is a will (testate) but not reasonable support for any dependants. Where there is no will (intestate), the law states that female and male children (married and unmarried) should inherit from their parents equally. If there is one surviving spouse and a child or children, the spouse is entitled to an absolute interest in the deceased's personal and household effects, and a life interest in the rest of the estate (e.g. land and house, business, etc.), although this cannot be disposed of without court permission. When a surviving spouse is a woman, her interest in the property is invalidated if she remarries while a surviving husband maintains his interest upon remarriage. The children inherit the estate when a surviving spouse dies (and in a woman's case, remarries).

If the deceased person did not have a spouse or child, the estate goes first to the father, then to the mother if the father is deceased. If both parents are deceased, it goes to the brothers and sisters if there are any, then to their children. In cases of polygamous marriages, the estate is divided among the households according to the number of children in each house. There is no provision for additional protection of the property rights of spouses who were married for longer periods and contributed more towards accumulated property.

In 1990, an amendment to the Law of Succession Act exempted Muslims from the **substantive** provisions of this law. Hence, the estate of a deceased Muslim is inherited according to Islamic Law, whereby

a widow receives one quarter of a husband's estate and sons receive double portions to daughters of their father's property.

Legal pluralism persists in the equal inheritance provisions of the Succession Act, and in the Constitution's Section 82(4), which recognises customary systems of law to govern inheritance. As a result of this, Kenya's courts have ruled inconsistently on women's rights to inherit, and in the absence of legal reform, inconsistencies in the application of laws are expected to continue. There is, however, some indication of interest in reforming the Succession Act. In 2008, the Kenya Law Reform Commission issued a memorandum to civil society organisations to invite feedback on the existing provisions of the Succession Act.

## Marriage and divorce laws (Proposed)

Marriage and divorce laws contain provisions that are critical to property rights during and upon dissolution of marriages, as well as for eventual inheritance claims. However, there has been much criticism from policy practitioners and analysts (including the Kenyan Court of Appeal) regarding the gaps and inconsistencies in Kenya's marriage and divorce laws. Presently, there are seven Acts of Parliament relating to marriage in Kenya: (1) the *Marriage Act of 1902*, (2) *African Christian Marriage and Divorce Act of 1931*, (3) *Matrimonial Causes Act of 1941*, (4) *Subordinate Courts (Separation and Maintenance Act)*, (5) *Mohammedan Marriage and Divorce Registration Act*, (6) *Mohammedan Marriage Divorce and Succession Act* and (7) the *Hindu Marriage and Divorce Act*. The division of matrimonial property in Kenya may also be interpreted by Kenyan courts in accordance with the *Married Women Property Act of England of 1882* (e.g. the 2007 *Echaria v. Echaria* case).

Reform of Kenya's family laws has failed on attempts to pass one legislation to govern all marriage and divorce. Each attempt since the 1960s has been opposed by claims that groups' customs were under threat and women would be granted too many rights. In 2009, a legislation package by Kenya's Gender Affairs Minister was tabled in cabinet, which comprised of the Marriage Bill, the Matrimonial Property Bill and the Family Protection Bill.

Central to inheritance rights, the proposed legislation broadens the legal definition of spouse' (which is the criterion for legal recognition and rights



to marital property), allows marriage registration of customary marriages, establishes equal rights to marital property and requires consent of a spouse before property transactions. In the draft Marriage Bill, bridewealth or dowry payment is not a requirement for recognition of customary marriages, which may make it easier for customarily wedded wives to assert and defend their married status even when bridewealth has not been paid. Currently, an estimated 60 percent of unions in Kenya are unregistered customary marriages (OECD, n.d.) and so allowing easier registration and legal recognition could enhance the property rights of many Kenyan women.

The draft Marriage Bill allows legal registration of polygamous marriages if the couple states at the time of marriage that the marriage is to be registered as polygamous. However, if a couple weds as a monogamous marriage, this classification cannot be changed later. As well, the draft law allows a couple that has lived together openly as husband and wife for at least two years to obtain a marriage certificate. Christian organisations have opposed the recognition of polygamous marriages, and along with Muslim organisations, they have also opposed legal recognition of cohabiting, unmarried unions.

Other policy recommendations to safeguard women's property and inheritance rights include the legal requirement and enforcement of spousal consent in transactions, such as the sale or mortgage of matrimonial property. Women's rights organisations have also advocated for standardised legal recognition of spouses' rights to property accumulated during marriage that does not depend on evidence of financial contributions. These proposed provisions would redress significant gaps in current legislation, where Kenyan courts have had to interpret the property and inheritance rights of women in customary, cohabiting and polygamous unions with an emergent case law that is inconsistent. However, getting women's equal property rights protected by these laws will be challenging, as it is expected that the proposed marriage and divorce laws will face influential and strong opposition from religious organisations and the patriarchal attitudes of male politicians and local leaders in Kenya.

## Land law

Kenya's statutory land laws include the Constitution's Chapter IX on Trust Land and the Trust Land Act, the Land Adjudication Act, the Land Consolidation Act and the Land Disputes Tribunals Act. These laws provide for the legal status of customary land governance systems as well as providing statutory legal provisions. Combined, they create a very complex land management and administrative system.

To tackle the complexity of land governance, seven years of policy consultation and debate have been invested in the development of a National Land Policy, which was approved in 2009. The National Land Policy provides a framework for a legal reform agenda that will consolidate all land laws and create a National Land Commission to oversee administration of all land in Kenya. The National Land Policy calls for major overhaul of Kenya's body of legislation as well as administrative systems. Under the National Land Policy, the primary rights holder of a piece of land is obligated to obtain written and informed consent from all secondary rights holders before any land transactions. This replaces the existing Registered Land Act's provision, where the first person to register a title to a portion of land retains absolute ownership with all rights and privileges belonging or attached to it, free from any other interest or claim. The provision has excluded many women's property rights from being considered or protected in land transactions. Recommended reforms also address men's and women's equal rights to land and land-based resources during marriage, upon dissolution of marriage and after the death of a spouse.

Some women's rights organisations also advocate for additional legal and administrative protection, including a law that requires spouses to register land and property jointly, the enactment of incentives, such as tax credits and subsidies for joint registration, or enshrinement of women's occupancy and secondary rights to land in law and titles. However, land rights remain a highly contested issue in Kenya and whether there is sufficient political will to pursue the recommended reforms and practices remains to be seen.



## Opportunities and challenges in practice

Central to inheritance protection or violation is how disputes are resolved. Customary systems of governance are significant in resolving family and land disputes throughout Kenya. They are accessible to people and they are also maintained in Kenya's Constitution. However, there are other ways in which people gain ideas and practical assistance on inheritance claims, including through decentralised governmental and non-governmental initiatives. The advantages and disadvantages of these options are discussed below.

### Customary law

The Kenyan government's 2006 report to the Committee on Economic, Social and Cultural Rights states that, 'Under the customary law of most ethnic groups in Kenya a woman cannot inherit land, and must live on the land as a guest of male relatives by blood or marriage' (GOK, 2006: supra note 3). The popular understanding among many different groups is that daughters will marry into other families and therefore gain a home and access to land and property through their membership in the husband's family. This assumes and re-enforces patrilineal inheritance systems (i.e. inheritance through the male line, e.g., from fathers to sons), which confines most Kenyan women to secondary rights or rights of use, rather than direct proprietary rights to land and other property.

The customary laws of various ethnic groups oppose the equal inheritance principles of the Succession Act, and as a result, outcomes in court are often inconsistent and contradictory. Of several examples is a 2005 High Court Case (*Manunzyu v. Musyoka*), where a deceased man's sons and wife sought to invalidate a daughter's inheritance claim through customary law. The judge ruled that the particular customary law was discriminatory as it prevented a married daughter from inheriting her father's estate, as is allowed under the Succession Act. Different rulings have been applied in other cases. There is a need for political will to clarify legal ambiguities in statutory laws, judicial reform to keep pace with contemporary Kenyan society and affirmative action in political, judicial and administrative systems.

There is much debate over whether customary systems of governance provide adequate protection of property rights of women and children. Some

Kenyan women prefer to seek adjudication of their inheritance claims with their local leaders, who use customary, uncodified systems of law, even though these systems are often male-dominated (Kameri-Mbote, 2002). Customary law may be preferred as it may be more flexible in considering extra-legal, personal matters. However, this can cut either way for Kenyan women, depending on their particular local circumstances.

In a study on land rights in western Kenya (Henrysson and Joireman, 2009) 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 practising 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 (Aliber *et al.*, 2004) 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.

Attempts to change social attitudes and behaviours require recognition of competing interests. In community consultations by the Constitution of Kenya Review Commission, more young men than older men were found to object to women having property rights. As an official from the Commission describes, this is attributed to poverty: 'Brothers are competitors, and seeing their sisters inherit is considered part of their deprivation. When there is poverty and a lack of jobs, it looks like daughters are encroaching if they inherit.' Working with fathers to conceptualise women's rights through their own daughters' socioeconomic circumstances may be effective in influencing inheritance practices in the immediate term. However, longer term effects must address the broad spectrum of concerns related to poverty, including diminished land holdings and shortage of non-agricultural economic opportunities.



## Dispute resolution

Customary law persists not only because it is allowed through statutory laws, but because it is the most accessible and perceived as a more socially legitimate system of governance for many people in Kenya. Most Kenyans have faced difficulty in pursuing their land rights through the official court system due to financial costs, corruption and the backlog in court cases. The Land Disputes Tribunal Act of 1990 was supposed to establish more locally accessible land dispute resolution processes. Local elders were chosen to hear and adjudicate cases on land in accordance with recognised customary law. But while local land tribunals offer a better opportunity for Kenyans to pursue land inheritance claims, their establishment has been slow and, in many cases, they have not proven to operate in efficient or transparent manners.

Providing improved access to legal protection of rights was also the impetus for the Family Division of the High Court, sometimes referred to as 'Family Court'. Family courts have jurisdiction over succession, matrimonial property, divorce, child custody and maintenance and other family law matters. The Family Courts are meant to be run with simplified procedures to speed up processes, but this has been found to be insufficient. Reform of procedures and investment in capacity building among the judiciary is recommended.

Islamic Kadhi's courts are also enshrined in the Kenyan Constitution and rule in cases that involve Muslims and that concern personal status, marriage, divorce, and inheritance. The Qur'an includes explicit principles for the proportional division of heritable estates; for example, males are to receive double the property of females of equal kinship category (e.g. sons receive double that of daughters). Clearly, such a formula is not consistent with Kenya's Succession Act, which states equal division among sons and daughters. Recognition of the Kadhi's courts in the Constitution, which leaves the authority of such inheritance divisions in place, causes potential dispute.

Women often find that their only feasible option is to seek dispute resolution concerning land and family disputes through the arbitration of customary leaders, elders or chiefs. This is because of the high financial requirements of other resolution forums such as official land tribunals and courts. Although chiefs and elders do not have official legal authority to resolve disputes, they have local social legitimacy and can

act more quickly and cheaply than the official legal system. However, women have reported that high costs persist among all dispute resolution options (often associated with corruption, i.e. who pays most is favoured), and that these costs are actually more than the official estimates provided (see Figure 1). While the estimated costs required in approaching elders and chiefs for land dispute resolutions may seem lower than those required for the official land tribunal or court processes, they remain a significant barrier for women with limited financial resources.

**Figure 1: Cost estimates for adjudication in US dollars**

|               | Women's estimates | Official estimates |
|---------------|-------------------|--------------------|
| Elders        | \$14              | \$2                |
| Chiefs        | \$35              | \$0                |
| Land Tribunal | \$53              | \$21               |
| Courts        | \$142             | \$142-428          |

Source: Henrysson and Joireman (2009: 53)

The attitudes of individual local leaders (e.g. sub-chiefs) are highly influential in protecting women's and children's property rights. As a study (Aliber *et al.*, 2004) of land disputes in a rural agricultural area of western Kenya reveals, the inconsistencies among outcomes are caused by the specific attitudes and interests of local officials. Capacity building, especially focusing on the attitudes and perspectives of local leaders and enforcement officers to the rights of vulnerable individuals, is critical to realising on-the-ground change.

Women who seek intervention in inheritance disputes between themselves and other family members may fear reprisals from their relatives in the forms of physical violence, intimidation and economic isolation. The mediation of local chiefs can be effective in such sensitive situations if they are able to balance both social peace-making and upholding the law. Enforcement requires community interaction to avoid further alienating or endangering individuals, but must also be able to command the full weight of legal consequences.

## Land titling

Approximately five percent of land in Kenya is jointly registered to married spouses and only one percent is registered to women alone (GOK, 2006), despite that women constitute the vast majority of agricultural labour in Kenya.



Registration of all individuals with interests in land holdings would help recognise rightful heirs in cases of intestate inheritance. Women's and children's rights advocates would like to see a new system that registers all people who have practical interests, including women and children who are contributors and dependants of a shared livelihood. By the registration of all individuals with interests, better checks on ensuring informed consent before

land transactions take place can be enforced. Monitoring and evaluating the endorsement of land transactions by local tribunals could also enhance adherence to this practice. Further, systematised analyses of women's access to land at the provincial level can give important information to monitor and evaluate local land transfer patterns and hold local and national officials and bodies accountable for ensuring women's land access.

## Ways forward

The Constitution's recognition of the pre-eminence of customary laws over matters of personal law, including inheritance, will continue to diversify inheritance practices and outcomes across Kenya on the basis of individuals' cultural membership and local power dynamics. Removal of this provision is vital for achieving equal inheritance rights, especially for women and girls.

Practical engagement at the local level coupled with public campaigning is required to change discriminatory and harmful social attitudes and practices. A constructive approach to this would be to engage with customary leaders and members of cultural groups to publicly determine principles and practices that are equitable, accountable and can be broadly endorsed. This kind of initiative has already

been pursued by the Meru Njuri Njeke elders and is ongoing with the Luo Council of Elders. As well, making such legalistic and administrative processes as getting married, registering the birth of a child, registering interests in land or writing wills that are easily accessible and straightforward for people may prove beneficial in their own future situations. These legalistic and administrative actions will depend on individuals' willingness. As such, encouraging sensitisation of the importance of property holders to proactively consider and take action to protect the future inheritance claims of their family members is worthwhile. This emphasis can be combined with existing outreach campaigns or targeted interventions that include savings and loans and burial groups as well as HIV/AIDS counselling services.

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